

County of Hawai'i

Board of Appeals

Rules of Practice and Procedures

Effective Date: 12-30-2023

- The Board of Appeals passed a motion to initiate rule amendment proceedings at its hearing on April 9, 2021, in accordance with Hawaii County Board of Appeals Rules of Practice and Procedure, Rule 5 Rulemaking Procedures.
- In accordance with Hawaii Revised Statutes 92-2.5, the Board created a Permitted Interaction Group at its May 12, 2023, hearing to review the rules and make amendment recommendations to the Board.
- The Permitted Interaction Group provided a summary report of its findings at the September 14, 2023, hearing.
- Draft rule amendments were publicly posted on September 13, 2023.
- The Board of Appeals reviewed the amendments and made edits at its October 13, 2023, hearing.
- Draft rule amendments in Ramseyer format were posted on November 8, 2023.
- The Board reviewed and deliberated the recommended draft rule amendments with the final adoption at its December 8, 2023, hearing.

COUNTY OF HAWAII
BOARD OF APPEALS

RULES OF PRACTICE AND PROCEDURE

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RULES OF PRACTICE AND PROCEDURE

PART 1. GENERAL RULES

1-1 Purpose.

These rules govern the practice and procedure before the Board of Appeals of the County of Hawaii in accordance with Chapter 91 of Hawaii Revised Statutes. If any conflicts may arise between these Rules of Practice and Procedure and State or County regulations, then State Statute, County Charter, and County Code shall prevail.

1-2 Construction of Rules.

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

1-3 Definitions.

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

- (1) “Agency” means any agency, board, commission, department, or officer of the County or State government, including the Board.
- (2) “Appellant” means the person or party that filed the petition to appeal the Director’s decision.
- (3) “Appellee” means the Director of the Planning Department or the Director of the Department of Public Works or a duly authorized representative.
- (4) “Board” means the Board of Appeals of the County of Hawaii.
- (5) “Chairperson” means the chairperson of the Board of Appeals of the County of Hawaii.
- (6) “Charter” means the current Hawaii County Charter.
- (7) “Code” means the current Hawaii County Code.
- (8) “Copy or Copies” means both physical or electronic media.

- (9) “Director” means the Director of the Planning Department or the Director of the Department of Public Works or a duly authorized representative. Also known as the “Appellee.”
- (10) “Document” means a form, letter, or other method of written communication and includes electronic communication such as email, etc.
- (11) “Hearing Officer” means a person who is duly appointed and designated to run a hearing for the Board when either the chairperson of the Board, or one (1) of its members is unable to fill the role as presiding officer.
- (12) “Intervenor” means a person who petitions to intervene in a contested case proceeding and is admitted as a party.
- (13) “Landowner” means the person or party who legally owns the property subject to the appeal or variance, who may also be the appellant or petitioner. If the appellant or petitioner is not the landowner, then the landowner is an automatic party.
- (14) “Meeting” means the convening of the Board for which a quorum is required in order to make a decision or to deliberate toward a decision upon a matter over which the Board has supervision, control, jurisdiction, or advisory power. Meetings may also be referred to as “hearings.”
- (15) “Party” means any person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party in a proceeding. If the appellant or petitioner is not the landowner, then the landowner is an automatic party.
- (16) “Person” means any individual, partnership, firm, association, trust, estate, corporation, or other legal entity, whether or not incorporated, including governmental agencies.
- (17) “Personal Service” means hand delivering a copy of the subject document(s) to the recipient and may be done at any place within the State of Hawai’i by either a sheriff or deputy sheriff or by any other person who is not a party and is not less than eighteen (18) years of age.
- (18) “Petitioner” means a person or party filing a petition for rule making, declaratory ruling, or a variance from the building, electrical, or plumbing codes. (See Appellee above for appeals.)
- (19) “Presiding Officer” means a person who runs the hearings for the Board and is typically the chairperson (or designee) or a hearing officer.
- (20) “Proceeding” means any matter that is brought before the Board in which it has jurisdiction, including but not limited to:
 - (A) Appeals from final decision of the Director of Planning regarding matters within the jurisdiction of the Department of Planning, including as it relates to statutes, codes, rules, and other regulations under its purview, including zoning and subdivision provisions of the code.

- (B) Appeals from final decisions of the Director of the Department of Public Works regarding matters within the jurisdiction of the Department of Public Works, including the construction, building, electrical, plumbing, sign, erosion and sedimentation control, and County streets provisions of the code.
- (C) Variances from the housing, building, plumbing, and electrical chapters of the Code.
- (D) Adoption, amendment, or repeal of any rule of the Board.
- (21) “Record on Appeal” means a compilation of public records from the department that are directly related to the Director’s decision for the appeal in question.
- (22) “Signature” means either an original signature scanned into a format prescribed by the Board or an electronic signature.

1-4 The Board.

- (a) Office. The office of the Board is located at 101 Pauahi Street, Suite 3, Hilo, Hawaii, 96720.
- (b) Communications. Any communication to the Board shall be addressed to the Chairperson, Board of Appeals of the County of Hawaii.
- (c) Chairperson; Vice-chairperson. A chairperson and a vice-chairperson shall be elected annually by the members of the Board at its December meeting. The vice-chairperson shall perform all the duties of the chairperson during the absence of the chairperson.

1-5 Meetings.

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

- (a) Regular Meetings. Regular meetings shall be held in the Hawaii County Council Chambers, Hawaii County Building, on the second Friday of each month, unless otherwise specified by the Board.
- (b) Special Meetings. Special meetings of the Board for the transaction of its business may be held at any time and place as scheduled by the Board.
- (c) Notice of Regular and Special Meetings.
 - (1) The Board shall give written public notice of any regular or special meeting. The notice shall include an agenda which lists all of the items to be considered at the forthcoming meeting, the date, time, and place of the meeting.
 - (2) Notice of any regular meeting shall be published on an electronic calendar on a website maintained by the County of Hawaii, filed with the Office of the

County Clerk, and a notice shall be posted in the Board's office for public inspection at least six (6) calendar days before the meeting. The notice shall also be posted at the site of the meeting whenever feasible. The Board shall not add items to the agenda, once filed, without two thirds (2/3) recorded vote of all members to which the Board is entitled; provided that no item shall be added to the agenda in the manner provided herein, if it is of reasonably major importance and action thereof by the Board will affect a significant number of persons.

- (3) The Board shall maintain a list of names and contact information of persons who request notification of meetings and shall notify such persons at their last recorded contact information no later than the time the agenda is filed under subsection (2) above.
 - (4) Notice of any special meeting shall be published on an electronic calendar on a website maintained by the County of Hawaii and a notice shall be posted in the Board's office for public inspection at least twenty-four (24) hours in advance of the meeting.
- (d) Emergency Meetings; Notice. An emergency meeting is a meeting in which the six (6) calendar days' notice requirement cannot be met. Such a meeting can only be held if there is a written finding that there is imminent peril to the public health, safety, or welfare and provided the following procedures are met:
- (1) The Board states in writing the reasons for its findings;
 - (2) Two-thirds (2/3) of the members to which the Board is entitled agree that the findings are correct and that an emergency exists;
 - (3) An emergency agenda and the findings are filed with the Office of the County Clerk and in the Board's office;
 - (4) Persons requesting notification pursuant to Rule 1-5(c)(3) are contacted by mail, electronic mail, or telephone as soon as practicable; and
 - (5) A notice of the meeting shall be published on an electronic calendar on a website maintained by the County of Hawaii and post a notice in the board's office for public inspection as soon as practicable and at least twenty-four (24) hours prior to the meeting.
- (e) Executive Meetings. The Board may hold an executive meeting, closed to the public, upon an affirmative vote, taken at an open meeting, of two-thirds (2/3) of the members present; provided the affirmative vote constitutes a majority of the members to which the board is entitled. The vote of each member on the question of holding a meeting closed to the public and the reason for holding such a meeting shall be recorded and entered into the minutes of the meeting. A meeting closed to the public may be held only for one (1) or more of the following purposes:
- (1) To consult with the Board's attorney pursuant to Section 92-5(a)(4), Hawaii Revised Statutes;
 - (2) For any other specific purpose authorized by law.

- (f) Chance Meetings. The rules governing meetings shall not apply to any chance meeting, as defined by Section 92-2, Hawaii Revised Statutes, at which matters relating to official business are not discussed. No chance meeting or electronic communication shall be used to circumvent the spirit or requirements of the meeting provisions to make a decision or to deliberate toward a decision upon a matter over which the Board has supervision, control, jurisdiction, or advisory power.
- (g) Quorum and Number of Votes Necessary to Validate Acts. A majority of all members to which the Board is entitled shall constitute a quorum to transact business, and the concurrence of a majority of all members to which the Board is entitled shall be necessary to make valid any action of the Board. All votes for attending Board members who are not recused shall be an affirmation or dissent. Silent votes are prohibited.
- (h) Minutes. The Board shall keep written minutes of all meetings. Unless otherwise required by law, neither a full transcript nor a recording of the meeting is required, but the written minutes shall give a true reflection of the matters discussed and the views of the participants. The minutes shall include, but need not be limited to:
 - (1) The date, time, and place of the meeting;
 - (2) The members of the Board recorded as either present or absent;
 - (3) The substance of all matters proposed, discussed, or decided; and a record, by individual member, of any votes taken; and
 - (4) Any other information that any member of the Board requests be included or reflected in the minutes.

The minutes shall be public records and shall be available within forty (40) days after the meeting. Exceptions include where such disclosure would be inconsistent with Section 92-5 of Hawaii Revised Statutes; Section 13-20 of the County Charter; or minutes of executive meetings for as long as their publication would defeat the lawful purpose of the executive meeting, but no longer.

- (i) Procedure for Public Testimony at Hearings. The following procedures shall be followed when members of the public desire to testify on matters before the Board and on the current agenda:
 - (1) The person desiring to testify shall indicate their name and district of residence.
 - (2) The person testifying shall only represent themselves unless otherwise authorized in writing and provided to the Board.
 - (3) Any written testimony shall be submitted to the Office of the Board not less than ten (10) days prior to the hearing date. The written testimony shall then be transmitted to the Board not less than two (2) days prior to the hearing date.
 - (4) The chairperson or vice-chairperson may require any person desiring to submit testimony, oral or written, to submit such testimony under oath. The oath shall be administered by the chairperson or vice-chairperson.

- (5) The chairperson or vice-chairperson may limit testimony to three (3) minutes and interrupt testimony which is irrelevant or unduly repetitious.
 - (j) Removal of Person from Meeting. The chairperson may remove any person or persons who willfully disrupts a meeting to prevent or compromise the conduct of the meeting.
- 1-6 Findings of Facts, Conclusions of Law, Decisions and Orders or Other Final Orders. All decisions and orders shall be signed by the chairperson or in the chairperson's absence, the vice chairperson, or by any other member of the Board as may be authorized by the Board.
 - (a) Decision Effective Date. The effective date of the Board's decision shall be the date of the oral decision by the Board. The Board shall not reconsider its decision once it has been rendered.
 - (b) Order Effective Date. For purposes of Hawai'i Revised Statutes Section 91-14, as amended and, unless otherwise indicated in the order, the effective date of a Findings of Facts, Conclusions of Law, Decision and Order or other final order shall be the date of the presiding officer's signature.
 - (c) Official Copies. Official copies of decisions and orders and other Board actions shall be promulgated under the signature of the chairperson, or by such other person as may be authorized by the Board.
- 1-7 Public Records. All records of the Board are held and provided by the Board pursuant to Chapter 92, Hawaii Revised Statutes, but shall not include records which invade the right of privacy of an individual.
 - (a) Inspection of Public Records. All public records shall be available for inspection by any person during established office hours unless public inspection of such records is in violation of any other Federal, State, or County law; provided that, except where such records are open under any rule of court, the Corporation Counsel or Prosecuting Attorney may determine which records may be withheld from public inspection when such records pertain to the preparation of the prosecution or defense of any action or proceeding to which the County of Hawaii is or may be a party, or when such records do not relate to a matter in violation of law and are deemed necessary for the protection of the character or reputation of any person.
 - (b) Copies of Public Records. Copies of records printed or reproduced or electronically produced for persons other than governmental agencies shall be provided to any person, provided that the fees or costs prescribed by the department are paid.
 - (c) Denial of Inspection; Application to Circuit Court. Any person aggrieved by the person having custody of any public record of the right to inspect the records or to obtain copies, electronic copies of extracts thereof may apply to the Circuit Court for an order directing the person having custody of the record to permit the inspection of or to furnish copies or extracts of the public record. The court shall grant the order after hearing, upon a finding that the denial was not for just and proper cause.

1-8 Computation of Time.

In computing any period of time under these rules, by notice, or by any order or rule of the Board, the time begins with the day following the act, event, or default, and includes the last day of the period unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next business day which is not a Saturday, Sunday, or holiday.

PART 2. PROCEEDINGS BEFORE THE BOARD; GENERAL REQUIREMENTS

2-1 Waiver or Suspension of Rules.

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

2-2 Appearance Before the Board.

(a) **Who May Appear.** The appellant, petitioner, or authorized representative shall appear at all meetings held by the Board regarding its request. Any other party to a proceeding before the Board may appear in their own behalf or as an authorized representative of a partnership, corporation, trust, or association, and an officer or employee of a department or agency of the State or County may represent that department or agency in any proceeding before the Board. A party may be represented by an attorney or by any other person to whom the party has given written authority for the Board's records or verbal authority at a hearing. If a party is to be represented by an attorney, any attorney who appears before the Board shall be in good standing before the Hawaii Supreme Court.

(b) **Code of Ethics.**

(1) Any person who signs a pleading or brief, enters an appearance at a hearing, or transacts business with the Board, by such act represents that that person is legally authorized to do so and shall comply with the State and County laws and the rules of this Board, and further, that that person shall maintain the respect due to the Board and shall never deceive or knowingly present any false statement of fact or law to the Board. The Board may at any time require any person appearing before the Board in a representative capacity to prove that person's authority and qualification to act in such capacity.

(2) No person who has been associated with the Board as a member, officer, employee, or counsel shall be permitted to appear before the Board on behalf of or to represent in any manner any party in connection with any proceeding or matter that such person has handled or passed upon while associated in any capacity with the Board.

(3) No person who has been associated with any matter which becomes a proceeding before the Board shall advise the Board in the proceeding.

2-3 Disqualification of Board Member.

Any party to a proceeding may, up to ten (10) days before the proceeding, file an affidavit that one (1) or more of the Board members has a personal bias or prejudice. The Board member against whom the affidavit is so filed may answer the affidavit or may file a disqualifying certificate with the Board. Unless the Board member chooses to disqualify themselves after receipt of the affidavit, the remaining Board members shall decide by a majority of all the members to which the Board is entitled whether that member should be disqualified from proceeding therein. Every such affidavit shall state the facts and reasons for the belief that bias or prejudice exists and shall be filed at least ten (10) days before the proceeding, or good cause shall be shown for the failure to file it within such time. Any

Board member may disqualify themselves by advising the chairperson that the Board member deems themselves unable for any reason to preside with impartiality in the pending proceeding.

2-4 Formal Requirements for Filing of Documents.

- (a) Time and Place. All requests, appeals, pleadings, submittals, petitions, reports, maps, objections, briefs, memoranda, and other documents required to be filed with the Board in any proceeding shall be filed at the office of the Board within the time limits prescribed by statute, ordinance, rule, or by order of the Board. The date on which documents are received, shall be regarded as the date of filing, unless it is a Saturday, Sunday, or legal holiday, in which event the date on which documents are received shall be the next business day which is not a Saturday, Sunday, or holiday.
- (b) Method of Filing. Filings shall be delivered through the County's electronic portal (called EPIC at the time of this rule amendment) or other Board directed electronic methods. If the appellant or petitioner is unable to use the electronic portal, the Board will accept filings via mail, email, or otherwise allowed by this rule or law.
- (c) Format.
 - (1) Form and Size. Any paper or document filed with the Board shall be electronically submitted and formatted to 8-1/2" x 11" in size, except that maps, charts, tables, and other similar documents may be larger.
 - (2) Title and Identification. Any document shall show the title of the proceeding before the Board and the name and address of the party or the party's representative.
 - (3) Signature. The document must be signed by the party or the party's duly authorized representative. The signature of the person signing the document constitutes a certification that that person has read the document; that to the best of that person's knowledge, information, and belief, every statement contained in the document is true and no such statement is misleading; and that it is not interposed for delay.
- (d) Copies. Unless otherwise specifically provided by these rules, an electronic copy of each document shall be filed.
- (e) Defective Petition Filing. If any document filed in a proceeding does not comply with the applicable rules of the Board as to the contents thereof, the Board's staff or designated representative shall notify the petitioner of the deficiency and require correction within thirty (30) days of the date of the notification. Upon receipt of the corrected petition, the Board shall, within not more than one hundred twenty (120) days, conduct a hearing on the petition unless otherwise agreed to by the parties or as ordered by the presiding officer. If a corrected petition is not received within thirty (30) days, the original petition will be scheduled for the next available hearing for consideration by the Board.
- (f) Amended Document. An amendment to documents or pleadings shall be submitted not less than seven (7) days prior to hearing, shall be served on all parties, and filed with the Board. All parties shall have the opportunity to answer and be heard on an

amendment filed, and the chairperson or presiding officer shall decide whether such amendment will be allowed.

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

2-5 Continuance or Extension of Time.

Whenever a person or agency has a right or is required to take action within a period prescribed or allowed by these rules, other than the filing of documents, the Board may, upon motion and the concurrence of a majority of all the members to which the Board is entitled, permit the act to be done after expiration of the specified period if the Board determines that there is good cause for an extension of time or that the delinquency is clearly shown to have been the result of excusable neglect. This section shall apply to an act properly before the Board except as authorized by the presiding officer under Section 3.1 of these Rules.

2-6 Service of Process.

- (a) By Whom Served. The Board shall cause to be served any order, notice, or other document it issues as required by law. All other documents shall be served by the party filing the document.
- (b) Upon Whom Served. Any document served by either the Board or any party shall be served upon all parties. Any counsel or representative entering an appearance subsequent to the proceeding shall notify all other counsel or representatives and all parties not represented by counsel.
- (c) Service Upon Parties. The final order, and any other document required to be served by the Board upon a party, shall be served upon the party or when a party has a representative, service upon such representative or counsel shall be deemed to be service upon the party.
- (d) Method of Service. Unless otherwise prescribed in these rules, service of papers or documents shall be made personally, by first-class mail, electronically, or by other means authorized by law. For service of subpoenas, see Section 3-9 of these Rules.
- (e) When Service is Complete. Service upon parties, other than the Board, shall be regarded as complete when the document is properly stamped and properly addressed to the parties involved and deposited in the United States mail, served electronically, or by other means authorized by law.

2-7 Intervention.

- (a) **Petition to Intervene; Filing.** In any proceeding, a petition to intervene, which is a request to become a party, shall conform to Sections 2-2, 2-4, and 2-6 of these Rules and shall be filed with the Board. The petition to intervene shall be filed at least twenty (20) days prior to the date of the scheduled hearing. The petition filing shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00) payable to the County Director of Finance. The Board shall waive this fee on any petition submitted by a County department or agency.
- (b) **Who May Intervene.**
 - (1) Any department or agency of the State or the County shall be admitted as a party upon timely application for intervention.
 - (2) Any person who has property interest in the land, who lawfully resides on the land, or who can demonstrate that such person will be so directly and immediately affected by the Board's decision that such person's interest in the proceeding is clearly distinguishable from that of the general public shall be admitted as a party upon timely application for intervention.
- (c) **Contents of Petition.** The petition shall include the following points:
 - (1) The nature of petitioner's statutory or other right.
 - (2) The nature and extent of petitioner's interest and if an abutting property owner, the Tax Map Key description of the property.
 - (3) The effect of the director's decision in the proceeding or petitioner's interest.If applicable, the petition shall also include the following points:
 - (4) The extent that petitioner's interest in the proceeding differs from that of the other parties.
 - (5) The extent that petitioner's interest in the proceeding can assist in development of a complete record.
- (d) **Opposition to Intervention.** If any party opposes the petition for intervention, the party shall file written objections to the petition within ten (10) days after being served.
- (e) **Hearing.** Each petition to intervene shall be heard at the next available board hearing date or within one hundred twenty (120) days of filing whichever is sooner, unless otherwise agreed to by the parties or as ordered by the presiding officer, and prior to the Board rendering a decision on the original petition.
- (f) **Appeal from Denial.** Any person whose petition to intervene has been denied may appeal such denial to the Circuit Court pursuant to Section 91-14, Hawaii Revised Statutes, as amended.

PART 3. CONTESTED CASE PROCEDURE

3-1 Presiding Officer.

- (a) Person Presiding. In all hearings before the Board, the chairperson of the Board, one (1) of its members, or a hearing officer duly appointed and designated, shall preside at the hearing.
- (b) Powers. The presiding officer controls the course of hearings, administers oaths, receives and rules on questions of evidence, holds appropriate conferences before or during hearings, rules upon all objections or motions which do not involve a final determination of the proceeding, receives offers of proof, fixes the time for the filing of briefs, disposes of any other matter that normally and properly arises in the course of a hearing, and takes all other actions authorized by law that are deemed necessary for the orderly and just conduct of a hearing.
- (c) Continuance. The presiding officer may, in the presiding officer's discretion, postpone or continue any hearing.

3-2 Notice of Hearing.

Unless otherwise provided by law, the notice of hearing will be served on all parties and persons on the meeting notification list for this purpose at their last recorded contact information within a reasonable time after the hearing date has been set. The notice shall be published on an electronic calendar on a website maintained by the County of Hawaii and post a notice in the board's office for public inspection at least twenty (20) days prior to the hearing and shall also be filed at least six (6) calendar days prior to the hearing with the Office of the County Clerk.

3-3 Prehearing Conference.

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

3-4 Limiting Testimony.

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

3-5 Removal from Proceeding.

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

3-6 Order of Procedure.

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

3-7 Co-Counsel.

Where a party is represented by more than one (1) counsel or representative, only one (1) counsel shall be permitted to cross-examine a witness, state any objections, or make opening or closing arguments.

3-8 Cross-Examination.

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

3-9 Requests for Subpoenas. The forms for the request and blank subpoena can be found on the Board's website or requested from the Board's staff.

- (a) Subpoena of a Witness. Any request for the issuance of a subpoena, requiring the attendance of a witness for the purpose of taking oral testimony before the Board, shall be in writing and shall state the reasons why the testimony of the witness is believed to be material and relevant to the issues involved. Only a party or a member of the Board may request the issuance of a subpoena. The name and address of the witness shall be inserted in the subpoena, and it shall show at whose request the subpoena is issued.
- (b) Subpoena of Documents. Any request for the issuance of a subpoena for the production of documents or records shall be in writing; shall specify the particular document or record, or part thereof, desired to be produced; and shall state the reasons why the production thereof is believed to be material and relevant to the issues involved. The name and address of the person or agency with requested documents shall be inserted in the subpoena, and it shall show at whose request the subpoena is issued.
- (c) Who May Authorize a Subpoena. A subpoena may be approved by the presiding officer, who may authorize the Board secretary or staff to sign on their behalf. No subpoena shall be issued unless the party requesting the subpoena has complied with Section 3-9 of these Rules and gives the name and address of the desired witness.
- (d) Issuance of Subpoena. The Request for Issuance of Subpoena shall be filed with the Board as required in the Scheduling Order. For matters with no Scheduling Order, the Request for Issuance of Subpoena shall be filed with the Board no less than fourteen (14) calendar days before the hearing. Attached to the Request for Issuance of Subpoena shall be a completed Subpoena Form with all the required information about the witness and/or agency with documents. Requests for Issuance of Subpoena may be submitted electronically. Once authorized, the subpoena will be electronically delivered to the requesting party. The requesting party shall then arrange to have the approved subpoena personally served on the witness pursuant to (e) below.
- (e) Service of Process. The return of service shall be completed certifying personal service of the witness by someone other than the requesting party who is eighteen (18) years of age or older. The requesting party shall return the completed proof of service to the Board which may be done electronically.

- (f) Fees and Mileage. Any witness summoned shall be paid the same fees and mileage as are paid to witnesses in the Circuit Court of the State of Hawai'i, and such fees and mileage shall be paid by the requesting party.
- (g) Oath. Each witness shall be placed under oath or affirmation prior to testifying.

3-10 Consolidation.

The Board, upon its own initiative or upon motion, may consolidate for hearing or for other purposes, or may contemporaneously consider, two (2) or more proceedings which involve substantially the same parties or issues which are the same or closely related if the Board finds that such consolidation or contemporaneous consideration will be conducive to the proper dispatch of its business and to the ends of justice and will not unduly delay the proceedings.

3-11 Substitution of Parties.

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

3-12 Motions.

- (a) Timing. Motions may be made before, during, or after a hearing.
- (b) Form and Contents. Any motion, other than one made during a hearing, shall be made in writing to the Board and shall state the relief sought and shall be accompanied by an affidavit or legal memorandum setting forth the grounds upon which the motion is based.
- (c) Service of Motions. The moving party shall serve a copy of all motion documents on all other parties and shall file them with the Board with proof of service.
- (d) Memorandum in Opposition. A memorandum in opposition or counter affidavit shall be served on all parties and the memorandum and proof of service shall be filed with the Board as required by the Scheduling Order or for matters with no Scheduling Order, within ten (10) days after being served with the motion. The presiding officer may order the memorandum in opposition to be filed at a time other than the ten (10) day period.
- (e) Waiver. Failure to serve or file a memorandum in opposition to a motion or failure to appear at the hearing may be deemed a waiver of objection to the granting or denial of the motion. A party who does not oppose the motion shall promptly notify the presiding officer and opposing counsel or party.
- (f) Ruling. All motions that involve a final determination of the proceeding shall be voted and ruled on by the Board. The presiding officer may rule on non-dispositive motions in accordance with Section 3-1(b) of these Rules.

3-13 Evidence.

- (a) Form and Admissibility. The Board shall not be bound by the rules relating to the admission or rejection of evidence, but it may exercise its own discretion in such matters with a view to doing substantial justice.
- (b) Ruling. The presiding officer shall rule on the admissibility of all evidence. Such rulings may be reviewed by the Board in determining the matter of the merits.
- (c) Objections and Exceptions. When objections are made to the admission or exclusion of evidence, the grounds relied upon shall be stated briefly.
- (d) Offer of Proof. An offer of proof for the record shall consist of a statement of the substance of the evidence to which objection has been sustained.
- (e) Prepared Testimony. With the approval of the presiding officer, a witness may read into the record their testimony on direct examination. Before any prepared testimony is read, unless excused by the presiding officer, the witness shall provide copies thereof to the presiding officer, all Board members, and all counsel or parties. Admissibility shall be subject to the rules governing oral testimony. If the presiding officer deems that substantial saving in time will result, a copy of the prepared testimony may be received in evidence without reading, provided that copies thereof shall have been served upon all parties and the Board fifteen (15) days before the hearing or such prior service is waived, to permit proper cross examination of the witness on matters contained in the prepared testimony.
- (f) Documentary Evidence. If relevant and material matter offered in evidence is embraced in a document containing other matters, the party offering it shall designate specifically the matter so offered. If other matters in the document would unnecessarily encumber the record, the presiding officer may decide not to receive the document or parts thereof into evidence. However, the relevant and material matter may be read into the record or copies thereof received as an exhibit. Other parties shall be afforded an opportunity to examine the document and to offer in evidence other portions thereof believed material and relevant.
- (g) Exhibits.
 - (1) Form; Size. Exhibit documents shall be legible and be prepared not exceeding 8-1/2" x 11" in size. Wherever practicable, sheets of each exhibit shall be numbered, and data and other figures shall be set forth in tabular form. (Also refer to Section 2-4 of these Rules.) If personal information relating to persons who are not parties to the proceedings is contained in exhibits or documentary evidence, such personal information shall be redacted prior to submittal to the Board. Personal information that shall be redacted includes personal phone numbers, emails, addresses, account numbers, and any other private information.
 - (2) Delivery of Exhibits. When exhibits are offered in evidence, they shall be furnished to the presiding officer, the Board, and each party to the proceeding, unless previously furnished, or the presiding officer directs otherwise. (Also refer to Section 2-4 of these Rules.)

- (3) Time for submission. No later than thirty (30) days following the filing of the appeal, appellant shall submit all its exhibits to be used in the hearing, unless afforded additional time by a Scheduling Order.
- (4) Responding parties shall have the opportunity to provide exhibits in response to those submitted by the appellant, ten (10) days after the exhibits are filed by appellant, unless afforded additional time by a Scheduling Order.
- (5) Upon request, the chairperson may allow filings of exhibits beyond the deadlines set herein for good cause shown.
- (h) Record on Appeal. In all appeals of Director decisions before the Board, the entire record or file from the Director shall be submitted to the Board and other parties within twenty (20) days after receipt of a notice of appeal. Any information or document contained in the record on appeal as offered in evidence, unless directed otherwise by the chairperson or presiding officer, need not be reproduced by the opposing party as an exhibit, and may be received in evidence by reference, provided that the particular portions of such document are specifically identified and otherwise competent, relevant, and material.
- (i) Official Notice of Facts. Official notice may be taken of such matters as may be judicially noticed by the courts of the State of Hawaii. Official notice may also be taken of generally recognized technical or scientific facts within the Board's specialized knowledge when parties are given notice either before or during the hearing of the material so noticed and afforded the opportunity to contest the facts so noticed.
- (j) Additional Evidence. At the hearing, the presiding officer may require the production of further evidence upon any issue. Upon agreement of the parties, the presiding officer may authorize the filing of specific documentary evidence as a part of the record within a fixed time after submission, reserving an exhibit number therefor.

3-14 Briefs.

The presiding officer may fix the time for the filing of briefs. Exhibits can be referenced in a brief and shall not be reproduced in an appendix to a brief. A brief shall not be more than twenty (20) single-sided pages with one-inch margins, double spaced, and 12-point font (as provided in Rules of the Circuit Court, Rule 3(a)). Requests for extension of time to file briefs must be made to the Board in writing, and a copy thereof served upon, electronically mailed, or mailed to the other parties to the proceeding.

3-15 Opening Statements and Closing Arguments.

The Board or the presiding officer may direct or permit the presentation of opening statements and concluding arguments for not more than ten (10) minutes on each side. If more than one (1) party is participating on a side of the proceeding, the parties shall divide the time for that side.

3-16 Presentation of Evidence.

The appellant or petitioner will first present their position including reference to exhibits and the examination of witnesses, followed by the appellee who will be afforded the same

opportunity. Not more than one (1) hour for each side of the proceeding will be allowed for presentations including examination of witnesses, unless otherwise directed by the presiding officer. If more than one (1) party is participating on a side of the proceeding, the parties so concerned shall divide the time for that side.

3-17 Close of Hearing.

At the end of the presentation of the evidence, submission of briefs and closing arguments, if any, the presiding officer shall close the hearing and proceed with Board deliberation and vote as appropriate.

3-18 Time Limit for Board's Decision.

The Board shall render its decision, order, or ruling within a period of not more than ninety (90) days after the close of the hearing, unless a longer period of time is agreed upon by all parties.

3-19 Reconsideration of Decision.

The Board shall not reconsider its action in any contested case hearing after the date of the Board's oral decision, also referred to as the Decision Effective Date.

3-20 Issuance of Findings of Facts, Conclusions of Law, Decisions and Orders or Other Final Orders.

A proceeding shall stand submitted for decision by the Board after the taking of evidence, and the filing of such briefs or the presentation of such oral argument as may have been prescribed by the presiding officer or hearing officer. Each party to the proceeding will submit a proposed findings of facts, conclusions of law, decision and order, unless specifically waived by the Board or the presiding officer, in which case the prevailing party may provide the draft. The proposed findings of fact, conclusions of law, decision and order shall be served on each party to the proceeding, and each party shall have fifteen (15) days from the date of service thereof to submit written comments or objections to the Board. The Board shall render a written decision and order in every contested case, which shall include separate findings of fact and conclusions of law. For purposes of Hawai'i Revised Statutes Section 91-14, as amended and unless otherwise indicated in the order, the effective date of a findings of facts, conclusions of law, decision and order shall be the date of the presiding officer's signature.

3-21 Service of Decisions and Orders.

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

3-22 Appeal from the Board's Decision.

Any party may obtain judicial review of the Board's final decision with the Circuit Court pursuant to Section 91-14 of the Hawaii Revised Statutes, as amended.

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

4-1 Recommendations of Hearing Officer.

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

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

- (a) File; Form; Copies; Time; Service. Within fifteen (15) days after service of the report and recommendations by the hearing officer, a party may file with the Board any objections to the report and a brief or statement in support thereof with the Board. A copy of the objections and brief or statement shall be served upon each party to the proceeding.
- (b) Contents of Objections. The objections shall include:
 - (1) The specific questions of procedure, fact, law, or policy to which objections are taken.
 - (2) That part of the hearing officer's report and recommended order to which objections are made.
 - (3) All the grounds for objections to a ruling, finding, conclusion or recommendation.
- (c) Waiver of Objections. Any objections not specifically raised in writing by a party are waived.

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

- (a) File; Form; Copies; Time; Service. Within ten (10) days after service of the objections to the hearing officer's report, a party may file with the Board a brief or statement in support of the hearing officer's recommendations. A copy of the brief or statement in support shall be served upon each party to the proceeding.
- (b) Contents of Support Brief or Statement. The supporting brief or statement shall include:

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

4-4 Oral Argument Before the Board.

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

4-5 Board Action.

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

PART 5. RULEMAKING PROCEDURES

5-1 Initiation of Rulemaking Proceedings.

- (a) Motion by Board. The Board may, at any time on its own motion, initiate proceedings for the adoption, amendment, or repeal of any rule of the Board. Procedures to be followed in rulemaking shall be as set forth in these rules and the applicable statutes.
- (b) Petition by Person or Agency. Any interested person or agency may petition the Board for the adoption, amendment, or repeal of any rule of the Board. Petitions for rulemaking filed with the Board will become matters of public record.
 - (1) Form and Content. Petitions for rulemaking shall conform to the requirements of Section 2-4 of these Rules and shall contain the name, address, and telephone number of each petitioner; the signature of each petitioner; a draft or the substance of the proposed rule or amendment or a designation of the provisions, the repeal of which is desired; a statement of the petitioner's interest in the subject matter; and a statement of the reasons in support of the proposed rule, amendment, or repeal.
 - (2) Board Action. Within one hundred twenty (120) days after the filing of a petition for rulemaking unless otherwise agreed to by the parties or as ordered by the presiding officer, the Board shall either deny the petition or initiate public rulemaking proceedings.
 - (3) Denial of Petition. Any petition that fails in material respect to comply with the requirements of this section or that fails to disclose sufficient reasons to justify the institution of rulemaking proceedings will not be considered by the Board. The Board shall notify the petitioner in writing of such denial, stating the reasons therefor. Denial of a petition shall not operate to prevent the Board from acting on its own motion on any matter disclosed in the petition. The non-prevailing party may seek a review of the denial through the Circuit Court pursuant to Chapter 91, Hawaii Revised Statutes, as amended.
 - (4) Acceptance of Petition. If the Board determines that the petition is in order and that it discloses sufficient reasons in support of the proposed rulemaking to justify the institution of rulemaking proceedings, the Board shall conduct the rulemaking proceedings in accordance with Sections 5-2 through 5-4 of these Rules and the applicable statutes.

5-2 Notice of Public Hearing.

Unless otherwise provided by law, the notice of hearing will be served on all parties and persons on the meeting notification list for this purpose at their last recorded contact information within a reasonable time after the hearing date has been set. The notice shall be published on an electronic calendar on a website maintained by the County and post a notice in the board's office for public inspection at least thirty (30) days prior to the hearing and shall also be filed at least six (6) calendar days prior to the hearing with the Office of the County Clerk.

5-3 Hearing.

Public hearings for rulemaking shall follow procedures set forth pursuant to Parts 1 and 2 of these Rules.

- (a) **Presiding Officer.** The public hearing for the adoption, amendment, or repeal of any rule shall be heard before the Board and presided over by the chairperson or vice-chairperson of the Board or, in their absence, by another member designated by the Board. The hearing shall be conducted in such a way as to afford interested persons and agencies a reasonable opportunity to offer testimony with respect to the matters specified in the notice of hearing and so as to obtain a clear and orderly record. The presiding officer shall have authority to administer oaths or affirmations and to take all other actions necessary for the orderly conduct of the hearing.
- (b) **Continuance of Hearing.** Each hearing shall be held at the time and place set in the notice of hearing but may at such time and place be continued by the presiding officer from day to day without notice other than the announcement thereof at the hearing or to a later date in accordance with Section 5-2 of these Rules.
- (c) **Order of Proceeding.** At the commencement of the hearing, the presiding officer shall read the notice of hearing and shall then briefly outline the procedure to be followed. Testimony shall then be received with respect to the matters specified in the notice of hearing in such order as the presiding officer shall prescribe.
- (d) **Submission and Testimony.** Each testifier shall provide their name and district of residence, and if they represent an organization. The presiding officer shall confine the testimony to the matters for which the hearing has been called but shall not apply the technical rules of evidence. Every testifier may be subject to questioning by the Board. The chairperson or presiding officer may limit testimony to three (3) minutes and interrupt testimony which is irrelevant or unduly repetitious. Any interested person or agency will be afforded an opportunity to submit data, views, or arguments, orally or in writing, that are relevant to the matters specified in the notice of hearing. The period for filing written comments or recommendations may be extended beyond the hearing date by the presiding officer for good cause. Any written comments, recommendations, or replies shall be submitted electronically, or other means provided by law.

5-4 Decision.

The Board will consider all relevant comments and material of record before taking final action in a rulemaking proceeding. Final action shall be taken within sixty (60) days after the final public hearing, unless otherwise ordered by the Board or presiding officer.

5-5 Emergency Rulemaking.

If the Board finds that an imminent peril to public health or safety requires adoption, amendment, or repeal of a rule upon less than twenty (20) days' notice of hearing and states in writing its reasons for such finding, it may proceed without prior notice or hearing or upon such abbreviated notice and hearing as it finds practicable to adopt an emergency rule. A notice of the hearing shall be published on an electronic calendar on a website maintained by the County of Hawaii and post a notice in the board's office for public inspection as soon as practicable and at least twenty-four (24) hours prior to the meeting.

5-6 Filing of Rules.

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

5-7 Taking Effect of Rules.

Each rule adopted, amended, or repealed shall become effective ten (10) days after filing with the County Clerk. If a later effective date is required by statute or specified in the rule, the later date shall be the effective date; provided that no rule shall specify an effective date in excess of thirty (30) days after the filing of the rule with the County Clerk. An emergency rule shall become effective upon filing with the County Clerk for a period not exceeding one hundred twenty (120) days without renewal unless extended in compliance with Section 91-3(a), Hawaii Revised Statutes.

5-8 Publication of Rules.

The Board shall, as soon as practicable, compile, index, and publish all rules adopted by the Board and remain in effect. Compilations shall be supplemented as often as necessary and shall be reviewed at least once every ten (10) years.

PART 6. DECLARATORY RULINGS

6-1 Petitions for Declaratory Rulings.

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

- (a) **Form and Contents.** The petition shall conform to the requirements of Section 2-4 of these Rules and shall contain the name, address, and telephone number of each petitioner; the signature of each petitioner; a designation of the specific provision, rule, or order in question, together with a statement of the controversy or uncertainty involved; a statement of the petitioner's interest in the subject matter, including the reasons for submission of the petition; a statement of the petitioner's position or contention; and a memorandum of authorities, containing a full discussion of reasons and legal authorities in support of such position or contention.
- (b) **Board Action.** Within one hundred twenty (120) days after the submission of a petition for declaratory ruling unless otherwise agreed to by the parties or as ordered by the presiding officer, the Board shall either deny the petition in writing, stating the reasons for such denial or issue a declaratory order on the matters contained in the petition, or set the matter for hearing, as provided in Section 6-2 of these Rules; provided, that if the matter is set for hearing, the Board shall render its findings and decisions within ninety (90) days after the close of the hearing. The effective date of the decision shall be the date of the oral decision by the Board.
- (c) **Dismissal of Petition.** The Board may, without notice or hearing, dismiss a petition for declaratory ruling that fails in material respect to comply with the requirements of Part 6 of these Rules.

6-2 Request for Hearing.

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

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

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

6-4 Refusal to Issue Declaratory Order.

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

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

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

6-5 Status of Orders.

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

PART 7. VARIANCES

7-1 Scope.

This part governs the general procedure relating to variances from the Building, Electrical, and Plumbing chapters of the Code and only pertains to the decision by the Director of the Public Works Department.

7-2 Standing to Initiate a Variance.

If strict application of any provision of the Hawaii County Code, Chapter 5, the construction administrative code; Chapter 5A, the building code; Chapter 5B, the residential building code; Chapter 5C, the existing building code; Chapter 5D, the electrical code; Chapter 5E, the energy conservation code; Chapter 5F, the plumbing code, or any administrative rules adopted pursuant to the chapters listed above, except for the provisions relating to materials, methods of construction, equipment, fixtures, devices, or appliances would result in practical difficulty or unnecessary hardship that would deprive the landowner of the reasonable use of the land or building involved, the landowner or representative may petition the Board for a variance from the provision.

7-3 Petition; Form and Contents.

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

- (1) The name, address, and telephone number of the owner of the land or building and the name, title, and address of the owner's representative.
- (2) A description of the subject property and the tax map key number of the property.
- (3) Identification of the provision of the Code for which a variance is being sought and a description of the type of variance being requested.
- (4) A statement explaining:
 - (A) The special circumstances or conditions applying to the land or building for which a variance is sought, which circumstances or conditions are peculiar to such land or building and do not apply generally to lands or buildings in the neighborhood or surrounding property.
 - (B) How the strict application of the provision(s) of the Code to the special circumstances or conditions would deprive the owner of the reasonable use of the land or building.
 - (C) How the granting of a variance is necessary for the reasonable use of the land or building.
 - (D) The effects, if any, that the variance will have on other persons or property and specifically, whether the variance will be injurious to persons or property, create additional fire hazards, or be detrimental to the public welfare.

- (E) The facts indicating that the proposed variance is consistent with the intent and purpose of the applicable chapter of the Code.

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

7-4 Filing.

The petition shall be electronically filed with the Board.

7-5 Fees.

A petition for a variance shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00) payable to the County Director of Finance. The Board shall waive this fee on any petition submitted by a County department or agency.

7-6 Service of Petition and Correspondence.

A copy of the variance petition shall be served by the petitioner on the Director and the landowner if the petitioner is not the landowner or landowner's representative pursuant to Section 2-6 of these Rules. All correspondence shall be sent to all parties or their respective representatives. When a party has a representative, service upon such representative or counsel shall be deemed to be service upon the party.

7-7 Parties to a Variance Proceeding.

The petitioner, the Director, and the landowner if the landowner is not the petitioner shall be parties to every variance proceeding.

7-8 Standards for Granting a Variance.

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

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

7-9 Hearing.

- (a) Time Limit for Hearing. Upon proper filing of a petition for a variance, the Board shall, within not more than one hundred twenty (120) days, conduct a hearing on the petition unless otherwise agreed to by the parties or as ordered by the presiding officer.
- (b) Conduct of Hearing. Except as otherwise provided in this part, the procedure for hearing a variance petition shall be governed by Parts 3 and 4 of these Rules.
- (c) Notice of Hearing. The procedures for providing notice of the hearing are as outlined in Section 3-2 of these Rules.
- (d) Notice to Surrounding Property Owners. Promptly after the Board's fixing a date for the hearing but not less than twenty (20) days prior to the hearing, the petitioner shall send a notice of the hearing either by mail or electronic means to all property owners within three hundred (300) feet of the affected property; unless the affected property is in the State Land Use Agriculture District in which case the distance shall be within five hundred (500) feet of the affected property. Prior to the date of the hearing, the petitioner shall file with the Board proof of service or of good faith efforts to serve notice of the hearing on the designated property owners. Such proof may consist of certified mail receipts, affidavits, or the like. A notice to surrounding property owners is required in the event of a continuance of the initial hearing.
- (e) View of the Property. The Board may, on its own motion or on motion of any party, view the land or building for which a variance is sought as a portion of the hearing.
- (f) Impartial Expert. The Board may retain or secure an impartial expert to investigate a variance petition and to testify at the hearing regarding the proposed variance.
- (g) Burden of Proof. The petitioner has the burden of proving the standards prescribed under Section 7-8 of these Rules.

7-10 Withdrawal of Petition.

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

7-11 Decision.

Within a period of not more than ninety (90) days after the close of the hearing, unless a longer period of time is agreed upon by all the parties, the Board shall render its decision on a variance petition, by either granting the variance or denying the variance. A variance shall only be granted upon four (4) affirmative votes of the Board. If fewer than seven (7) members of the Board vote upon a variance petition and there are fewer than four (4) affirmative votes for the variance petition, the chairperson may defer the petition until a future meeting of the Board for a second and final vote to be taken on the petition. The effective date of a decision shall be the date of the oral decision by the Board.

7-12 Proposed Findings of Fact.

Each party to a variance proceeding shall, within thirty (30) days after the close of the hearing, submit a proposed finding of facts, conclusions of law, decision and order to the

Board, unless specifically waived by the Board or the presiding officer, in which case the prevailing party may provide the draft. The proposed finding of facts, conclusions of law, decision and order shall also be served on each party to the proceeding, and each party shall have fifteen (15) days from the date of service thereof to submit written comments or objections to the Board. The proposed findings of facts, conclusions of law, decision and order and comments and objections will then be heard at the next available hearing for Board vote.

7-13 Conditions of Variances.

- (a) Imposition of Conditions. In approving a petition for a variance, the Board may impose conditions necessary to uphold the purposes of the Code and this part of these rules and to assure substantial compliance with representations made by the petitioner in seeking the variance. The conditions shall be a part of the Board's decision and shall be filed in accordance with Section 7-14 of these Rules.
- (b) Monitoring. The Board may require a petitioner to submit periodic reports indicating what progress has been made in complying with any conditions the Board imposes.
- (c) Failure to Comply. The approval granted by the Board on a petition for a variance may be reversed if the parties bound by the conditions attached to the approval fail to comply with the conditions.
- (d) Applicability. Conditions, if any, imposed by the Board shall run with the land and shall be binding upon the petitioner and each and every subsequent owner, lessee, sub-lessee, transferee, grantee, assignee, or developer.
- (e) Modification or Deletion. On good cause shown by the petitioner or upon the Board's own motion, the Board may act to modify or delete any of the conditions imposed.

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

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

- (1) The document listing the conditions shall be submitted to the Board for its approval prior to filing with the Bureau of Conveyances or the Assistant Registrar of the Land Court.
- (2) The owner of the property shall record the conditions at the Bureau of Conveyances or with the Assistant Registrar of the Land Court, as the case may be, within thirty (30) days after the receipt of the decision and order requiring same.
- (3) Evidence or recordation shall be by certified copy under the signature of the Assistant Registrar of the Land Court or by the Registrar of Conveyances, as the case may be. The owner of the property shall forward a certified copy to the Board.
- (4) Description of the land shall be sufficiently accurate to identify the land intended to be affected. Registered land shall be identified by lot number, map number, land court application number, and the transfer certificate of title number to be affected.

7-15 Enforcement of Conditions.

- (a) Issuance of Show Cause Order. Whenever the Board receives a written complaint from the Director alleging that there has been a failure to perform according to the conditions imposed in a variance permit, the Board shall issue and serve upon the party bound by the conditions an order to show cause why the variance permit should not be withdrawn or modified.
 - (1) Method of Service: The order to show cause shall be given in writing by registered or certified mail with return receipt requested, electronic service, personal service, or other service as provided by these rules at least forty (40) days before the hearing. When a party has a representative, service upon such representative or counsel shall be deemed to be service upon the party.
 - (2) Contents: The order to show cause shall include:
 - (A) A statement of the date, time, place, and nature of the hearing;
 - (B) A description and tax map key number of the property to be affected;
 - (C) A statement of the legal authority under which the hearing is to be held;
 - (D) The specific sections of the Code or rules involved; and
 - (E) A statement that any party may retain counsel if the party so desires.
- (b) Conduct of Hearing. A hearing on an order to show cause shall be conducted in accordance with the Parts 3 and 4 of these Rules, and the Director shall be a party to the hearing. Any procedure in an order to show cause hearing may be modified or waived by stipulation of the parties and informal disposition may be made in any case by stipulation, agreed settlement, consent order, or default.

7-16 Appeal.

Any party to a variance proceeding may obtain judicial review of the proceeding to the Circuit Court pursuant to Section 91-14, Hawaii Revised Statutes, as amended.

7-17 Reapplication by Petitioner.

The Board shall not consider any petition for a variance covering substantially the same request for substantially the same land or building as had been previously denied by the Board or withdrawn by the petitioner within one (1) year of the date of such denial or withdrawal unless the petitioner submits significant new data or additional reasons which substantially strengthen the petitioner's position; provided that in no event shall any such new petition be accepted within six (6) months of the date of a previous denial or withdrawal.

PART 8. APPEALS

8-1 Scope.

This part governs the general procedure relating to appeals from the final Director's decisions of the Planning Department or the Department of Public Works regarding matters within their respective jurisdictions, which include: (a) Hawaii County Code, Chapter 23, Subdivisions; Chapter 25, Zoning; and any other statute, rule, or regulation within the Planning Department's jurisdiction; and (b) Chapter 3, Signs; Chapter 5, the Construction Administrative Code; Chapter 10, Erosion and Sedimentation Control; Chapter 22, County Streets, and any other statute, rule, or regulation within the Department of Public Works's jurisdiction.

8-2 Standing to Appeal.

Any person aggrieved by the final decision of the Director regarding matters within their jurisdiction, including the administration or application of the County Codes under their authority may appeal the decision to the Board.

A person is aggrieved by a decision of the Director if: (1) The person has an interest in the subject matter of the decision and is so directly and immediately affected, that the person's interest is clearly distinguishable from that of the general public; and (2) The person is or will be adversely affected by the decision.

8-3 Time Limit for Filing Appeal.

An appeal from the decision of the Director shall be filed as follows:

- (a) When the Code, Board Rule, or Order requires no direct notification or service of the decision (i.e., certified or dated receipt), the appeal shall be filed within thirty (30) days of the date of the Director's written decision, unless otherwise stated in the applicable Code.
- (b) When the Code, Board Rule, or Order requires that a written decision be provided directly to an applicant (i.e., certified or dated receipt), or that an applicant must serve notice to affected parties, an appeal shall be filed within thirty (30) days of receipt of that decision or notice.
- (c) Any petition filed after the thirty (30) day filing requirement, the Director may file an appropriate motion with the board within ten (10) days from the date of the petition filing. All filing deadlines shall thereafter be suspended until the motion is heard and decided upon by the board or unless otherwise agreed by the parties and presiding officer.

8-4 General Petition; Form and Contents.

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

- (1) The name, address, email, and telephone number of the appellant and, if applicable, the name, title, email, and address of the appellant's representative.

- (2) A description of the property involved in the appeal, including the tax map key number of the property, and the appellant's interest in the property.
- (3) A plain statement of the nature of the appeal and the relief requested.
- (4) A statement explaining:
 - (A) How the decision appealed from violates the law; or
 - (B) How the decision appealed from is clearly erroneous; or
 - (C) How the decision appealed from was arbitrary or capricious, or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.
- (5) A clear and concise statement of any other relevant facts.
- (6) A copy of the Director's decision being appealed.

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

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

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

8-6 Filing.

The petition shall be electronically filed with the Board.

8-7 Fees.

A petition for an appeal shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00) payable to the County Director of Finance. The Board shall waive this fee on any petition submitted by a County department or agency.

8-8 Service of Petition and Correspondence.

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

- (1) The Director in an appeal from the Director's decision.
- (2) All owners of the affected property, as reflected in County Real Property Tax Division records, if the owners are not the appellants.
- (3) Interveners, if or when the petition to intervene is approved by the board, the intervenor shall then be a party to the petition.

All correspondence shall be sent to all parties or their respective representatives. When a party has a representative, service upon such representative or counsel shall be deemed to be service upon the party.

8-9 Parties to an Appeal.

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

- (1) The Director in an appeal from the Director's decision.
- (2) All owners of the affected property, as reflected in County Real Property Tax Division records, if the owners are not the appellants.
- (3) Interveners if and when a petition to intervene is approved by the board.

8-10 Tests.

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

8-11 Hearing.

- (a) Time Limit for Hearing. Upon proper filing of a petition for appeal, the Board shall, within not more than one hundred twenty (120) days, conduct a hearing on the appeal unless otherwise agreed to by the parties or as ordered by the presiding officer.
- (b) Conduct of Hearing. The Board shall hold a full hearing on the appeal in accordance with Chapter 91, Hawaii Revised Statutes, and except as otherwise provided in this part, the procedure for hearing an appeal shall be governed by Parts 3 and 4 of these Rules.
- (c) Notice of Hearing. The procedures for providing notice of the hearing are as outlined in Section 3-2 of these Rules.
- (d) Notice to Surrounding Property Owners. Promptly after the Board's fixing a date for the hearing but not less than twenty (20) days prior to the hearing, if applicable, the appellant shall send a notice of the hearing either by mail or electronic means to all property owners within a distance of three hundred (300) feet of the affected property; unless the affected property is in the State Land Use Agriculture District in

which case the distance shall be within five hundred (500) feet of the affected property. Prior to the date of the hearing, the appellant shall file with the Board proof of service or of good faith efforts to serve notice of the hearing on the designated property owners. Such proof may consist of certified receipts, affidavits, or the like. A notice to surrounding property owners is required in the event of a continuance of the initial hearing.

- (e) View of the Property. Where applicable, the Board may, on its own motion or on motion of any party, conduct a site visit and view the land or building involved in the appeal as a portion of the hearing.
- (f) Impartial Expert. The Board may retain or secure an impartial expert to investigate an appeal and to testify at the hearing regarding the appeal.
- (g) Burden of Proof. The appellant has the burden of proof based on the standards prescribed under Section 8-15 of these Rules.

8-12 Withdrawal of Appeal.

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

8-13 Decision.

Within a period of not more than ninety (90) days after the close of the hearing, unless a longer period of time is agreed upon by the parties, the Board shall render its decision in an appeal proceeding, by either affirming the decision appealed from, or reversing or modifying the decision, or remanding the case to the Director for further proceedings and action. A decision appealed may only be reversed, modified, or remanded upon four (4) affirmative votes of the Board. If fewer than seven (7) members of the Board vote upon an appeal and there are fewer than four (4) affirmative votes to reverse, modify or remand the decision appealed, the chairperson may defer the petition until a future meeting of the Board for a second and final vote to be taken on the appeal. The effective date of a decision shall be the date of the oral decision by the Board.

8-14 Proposed Findings of Fact.

Each party to an appeal proceeding shall, within thirty (30) days after the close of the hearing, submit a proposed finding of facts, conclusions of law, decision and order to the Board, unless specifically waived by the Board or the presiding officer, in which case the prevailing party may provide the draft. The proposed findings of facts, conclusions of law, decision and order shall also be served on each party to the proceeding, and each party shall have fifteen (15) days from the date of service thereof to submit written comments or objections to the Board. The proposed findings of facts, conclusions of law, decision and order, comments and objections will then be heard at the next available hearing for Board vote.

8-15 General Standards for Appeals

In appeals of Director's decisions, the Board of Appeals may affirm the decision of the director; or it may reverse or modify the decision; or remand the decision with appropriate instructions if, based upon the preponderance of evidence, the board finds that:

- (1) The director erred in its decision or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (2) The decision violated the Code or other applicable law; or
- (3) The decision was arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

If the Appellant fails to establish the above, the Board shall affirm/uphold the Director's decision.

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

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

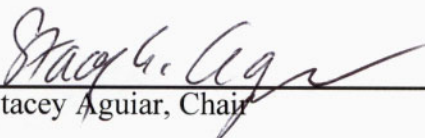
- (1) The new or alternate materials, design, methods of construction, equipment, fixtures, devices, or appliances meet the standards established by the Code; and
- (2) That permitting the requested use will not jeopardize the safety of persons or property; and
- (3) That the requested use will not be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

8-17 Judicial Review.

Any party to an appeal proceeding may obtain judicial review by the Circuit Court of the proceeding pursuant to Section 91-14, Hawaii Revised Statutes, as amended.

APPROVALS & EFFECTIVE DATE

BOARD OF APPEALS



Stacey Aguiar, Chair

12/8/2023

Date

Notice of Public Hearing:
Hawai'i Tribune Herald: November 8, 2023
West Hawai'i Today: November 8, 2023

Date and Place of Public Hearing:
Date: December 8, 2023
Location: West Hawai'i Civic Center Council Chambers, Building A
74-5044 Ane Keohokālole Highway
Kailua-Kona, HI 96740

APPROVED AS TO FORM:

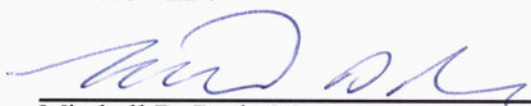


Sherilyn Tavares, Deputy Corporation Counsel

12.18.23

Date

APPROVED:



Mitchell D. Roth, Mayor

12-20-23

Date

FILING WITH THE HAWAII COUNTY CLERK:

I hereby certify that the foregoing amendments and revisions to the Hawai'i County Board of Appeals Rules of Practice and Procedure was received and filed in my office this 20th day of December, 2023.



County Clerk

EFFECTIVE DATE:

In accordance with applicable rules, codes, and statutes, these rules are effective as of this 30th day of December, 2023. (10 days after the County Clerk signature)