

1 does not fully comply with the conditions, the civil penalty is automatically
2 reinstated in its entirety without further Board action.

3 **PART III. VARIANCE**

4 **3.01. Initiating a Variance on Appeal.** Subject to Sec. 24-2 of the Code, any
5 person may appeal to the Board for a variance from the terms of any
6 ordinance enforced by the Department, including any rules and
7 regulations adopted pursuant thereto. An appeal for a variance is
8 initiated by filing a Petition for variance with the nonrefundable filing fee.
9 The filing fee for a variance is \$25.

10 **3.02. Petition for Variance on Appeal.**

11 **(a) Content.** All petitions, briefs, and other papers must be written or typed,
12 and if any of these papers are illegible, the Manager may refuse to
13 accept the filing. No particular form of Petition is required, provided it
14 includes:

15 **(i)** Petitioner's name, mailing address, and telephone number.

16 **(ii)** The name, mailing address, and telephone number of Petitioner's
17 legal representative, if any.

18 **(iii)** The Code provision(s) and, if any, the rule and regulation from which
19 the variance is requested and the time period for which it is sought.

20 **(iv)** Any exhibits (including any drawings, floor plans, or pictures)
21 supporting Petitioner's position, if appropriate.

22 **(v)** An explanation of how:

23 **(A)** The Petitioner will suffer undue hardship if the variance is not
24 granted;

25 **(B)** A variance, if granted, would not adversely affect public health;
26 and

27 **(C)** The variance, if granted, would be in harmony with the spirit and
28 purposes of the ordinance, rule, or regulation being appealed.

29 **(vi)** Petitioner's signature or that of Petitioner's legal representative.

30 **3.03. Sufficiency.**

1 If a legible Petition is timely filed with the filing fee and substantially
2 provides the information described in Rule 3.02, the Manager shall accept
3 the Petition. If the Petition is illegible or does not substantially provide the
4 information described in Rule 3.02, the Manager may refuse to accept the
5 filing, but must provide written notice to the Petitioner describing the
6 deficiency. If the Petition and filing fee were refused, Petitioner may
7 submit an amended Petition.

8 **3.04. Parties; Representation; and Service of Documents.**

9 (a) The parties to a hearing are the person or entity appealing for a variance,
10 as the Petitioner, and the Department of Environmental Health on behalf
11 of City as the Respondent.

12 (b) A natural person may represent himself-or herself or be represented by an
13 attorney admitted to practice in any of the United States. If the Petitioner
14 is not a natural person or a sole proprietor, it must be represented by an
15 attorney admitted to practice in any of the United States unless the Board
16 allows a shareholder, member, partner, board member, or officer to
17 represent the business entity. In this case, the representative of the
18 business entity must submit a properly executed power of attorney at or
19 before the hearing.

20 (c) Upon filing any document with the Board, the party filing the document
21 shall provide a copy of all documents filed to the other party.

22 **3.05. Board Responsibilities.**

23 (a) **Determination of Variance on Appeal.** The Board shall conduct a hearing
24 on each accepted Petition, including those submitted for determination
25 based on written argument and written statement of facts and figures, all
26 examination of these documents.

27 (b) **Necessary and Incidental Duties and Functions.** The Board shall perform
28 the duties and functions necessary and incidental to determining the
29 variance, hearing all evidence, examining all documents, ruling on
30 evidentiary questions, and generally conducting a quasi-judicial
31 proceeding in conformance with the Code, these Rules, and other
32 applicable rules and regulations.

33 (c) **Subpoenas.** Upon request, any Board member may issue a subpoena. The
34 party requesting the subpoena shall, serve it upon the person whose
35 attendance is required and provide notice to all other parties and
36 interested persons in accordance with Rule 45 of the Colorado Rules of
37 Civil Procedure. All costs related to the subpoena, including witness and

1 mileage fees, must be paid by the requesting party in accordance with
2 Rule 45.

3 **(d) Setting and Notice Hearing.**

4 **(i) Setting a Hearing.** Generally, hearings will be scheduled in the order
5 petitions are filed, but may set out of order as the Board secretary
6 determines is appropriate. Hearings and cases submitted for
7 consideration based on written argument and written statement of
8 facts may be set at any regularly scheduled Board meeting or at
9 other times as requested by the Chair. If requested, the Board
10 secretary may grant each party one rescheduling request. At the
11 request of either party, the Board may grant continuances for good
12 cause shown.

13 **(ii) Notice.** No later than ten (10) days before the hearing, the Board
14 secretary shall provide written notice of the date, time and place of
15 all hearings to the parties. Written notice must be sent to the
16 Petitioner via first class mail at the address specified in the Petition
17 and to the director of the appropriate department division.

18 **3.06. Ex Parte Communications.**

19 All oral and written communications between any party with any Board
20 member or the Hearing Officer that are not on the record, concern the subject
21 matter of the appeal, and are made without the other party present or copied
22 on written correspondence are prohibited.

23 **3.07. The Hearing.**

24 The following rules apply to all hearings on petitions for a variance. The Board, as
25 that term is used in this Rule 3.07, includes an appointed Hearing Officer.

26 **(a) Department Response.**

27 **(i)** The Department may file a response to the Petition or provide
28 information to the Board that it believes will assist the Board to decide
29 the matter. The response is due within 14 days of the Department's
30 receipt of the Petition.

31 **(ii)** For variance requests that the Department opposes, the Department
32 must inform the Board and the Petitioner of its opposition at least ten
33 (10) days before the scheduled hearing.

34 **(b) Petitioner's Appearance / Failure to Appear.**

- 1 (i) A Petitioner seeking a variance opposed by the Department who
2 fails to appear at a scheduled hearing waives the right to a hearing
3 and adjudication of issues related to the hearing, provided that
4 notice of the hearing was mailed in the time and manner set forth in
5 Rule 3.05 (d)(ii) above. Failure to appear at a hearing that is noticed
6 in accordance with those requirements may result in denial of the
7 variance request or dismissal. Petitioner may re-file, and at the
8 Board's discretion, the fee for the re-filing may be waived, in whole or
9 part.
- 10 (ii) If the Department supports the Petition and request for variance, the
11 Petitioner may appear at the hearing before the Board and present
12 evidence and arguments, or may allow the Department to present
13 the matter to the Board. However, the Board is not bound to accept
14 the Department's recommendation, and the Petitioner's failure to
15 appear is a final waiver of the right to appear and present evidence
16 and arguments on its own behalf.
- 17 (c) **Order of Proceedings.** The order of proceedings will be:
- 18 (i) Docket call by the Board.
- 19 (ii) Administration of oath.
- 20 (iii) Presentation of testimony and other evidence by Petitioner, allowing
21 cross-examination by the Department (exhibits shall be lettered for
22 identification).
- 23 (iv) Presentation of testimony and other evidence by Department with
24 cross-examination by Petitioner (exhibits shall be numbered for
25 identification).
- 26 (v) Rebuttal testimony and evidence, if any.
- 27 (vi) Sur-rebuttal testimony and evidence, if the Board chooses.
- 28 (vii) Testimony from members of the public must be allowed, with persons
29 supporting the Petition followed by those opposing the Petition.
- 30 (viii) Argument, if desired by the Board.
- 31 (A) Closing argument by Petitioner summarizing the evidence, legal
32 basis and argument in support of its position. If the Petitioner does
33 present a closing argument, the Department may not either.

1 (B) Closing argument by Department summarizing the evidence,
2 legal basis and argument in support of its position.

3 (ix) Petitioner's Reply to Department's closing argument.

4 (x) Instead of or in addition to argument, the Board may request the
5 submission of written briefs.

6 **3.08. Testimony under Oath.**

7 All oral testimony must be given under oath administered by the Board or
8 the Hearing Officer in substantially the following form: "Do you solemnly
9 swear or affirm that the testimony you are about to give is the truth, the
10 whole truth, and nothing but the truth?" with a required affirmative
11 response.

12 **3.09. Rules of Procedure and Rules of Evidence.**

13 The hearings shall be conducted generally in accordance with these
14 Rules regardless of whether it conforms to common law or statutory rules
15 of procedure or rules of evidence. The Board may receive and consider
16 evidence not admissible under the Colorado Rules of Evidence if it
17 possesses probative value commonly accepted by reasonable and
18 prudent persons in the conduct of their affairs. The Board may utilize the
19 experience, technical competence, and specialized knowledge of any of
20 its members in the evaluation of evidence presented.

21 **3.10. Burden of Proof.** Petitioner has the burden to show by clear and
22 convincing evidence that:

23 (a) Petitioner will suffer undue hardship if the variance is not granted;

24 (b) A variance, if granted, would not adversely affect public health; and

25 (c) The variance, if granted, would be in harmony with the spirit and purposes
26 of the ordinance, rule, or regulation being appealed.

27 **3.11. Expert Witnesses.**

28 A witness intending to give opinion testimony must first be qualified by the
29 Board as an expert.

30 **3.12. Recordings and Transcripts.**

31 All hearings must be recorded or transcribed. A copy of the recording or
32 transcript of a recording will be provided at the expense of the party who

1 requests it. The Petitioner, however, may employ a certified stenographer
2 at its expense.

3 **3.13. Presentation of Case at Hearing.**

4 **(a) Time Allowed.**

5 **(i)** The Petitioner and the Department will each have fifteen minutes to
6 present their respective cases (opening statement, presentation of
7 evidence, rebuttal evidence, and closing statement) to the Board,
8 unless the Board grants more time. Cross-examination time is not
9 included in the fifteen-minute time limit. A request for additional time
10 must be made in the prehearing statement, if one is required.
11 Otherwise, the request must be made in writing at least two (2)
12 business days before the hearing. In determining whether and how
13 much additional time to allow, the Board considers the complexity of
14 the case, the needs of due process, and fairness to the Parties.

15 **(ii)** The Board shall allow a public comment period. Members of the
16 public wishing to comment during this time, should sign up to speak in
17 accordance with the procedure the Board secretary establishes.
18 Each member may have up to three (3) minutes. The Board,
19 however, may facilitate the public comment period by limiting
20 repetitive comments.

21 **(b) Copies.** Copies made by printers and by duplicating and facsimile
22 machines may be admitted into evidence or substituted in evidence in
23 place of original documents.

24 **(c) Electronic Documents.** An electronic document, a paper copy of an
25 electronic document, or a paper copy of a document bearing an
26 electronic signature may be admitted into evidence or substituted in
27 evidence in place of original documents.

28 **3.14. Submission on Written Briefs.**

29 **(a)** A Petitioner may choose to submit the case on written briefs, supporting
30 data, affidavits, or stipulated facts rather than through oral testimony at a
31 hearing. If the Petitioner chooses to submit a case on written briefs:

32 **(b)** He or she must provide written notice of this election to the Manager
33 within five (5) days of filing the Petition;

34 **(c)** The Department is limited to submitting its position in writing.

35 **(d)** The Board will establish a briefing schedule.

1 **3.15. Final Decision.**

2 (a) The decision of the Board, after hearing or determining an appeal for a
3 variance, is the final action for purposes of any further appeal.

4 (b) A variance granted by the Board expires upon a change of
5 circumstances from those upon which the variance was granted, or upon
6 a change of ownership of the establishment or entity receiving the
7 variance, unless the Board determines and states in writing that the
8 variance granted is assignable to a new owner.

9 (c) The administrative record includes all filings and documents submitted to
10 the Board before and during the hearing. The Board secretary shall
11 provide the index of the administrative record to the parties when the
12 record is provided to the Board.

13 **PART IV. RULEMAKING HEARINGS AND PROCEDURES**

14 **4.01. Rulemaking Petition.**

15 (a) All rulemaking matters before the Board are subject to Chapter 24, Article
16 VIII of the Code. The provisions set forth below supplement that authority.

17 (b) The Department may Petition the Board in writing to adopt, amend, or
18 repeal a rule or regulation ("regulation"). The Board has the discretion
19 whether to accept a rulemaking Petition. If the Board denies a rulemaking
20 request, it shall provide a brief written explain for its reasons.

21 (c) A Petition for rulemaking must include the language of the proposed
22 regulation and a statement of the Board's authority to promulgate the
23 regulation.

24 **4.02. Rule-Making Notice.**

25 Notice of the public hearing must be provided as set forth in Rule-making
26 Notice. Notice of the public hearing must be provided as set forth in

27 **4.03. Public Participation.**

28 Any person who wishes to comment on proposed rules may do so in
29 writing delivered to the Board before the hearing date or in person at the
30 hearing, subject to any requirements for participation set out in the notice
31 of hearing. Additionally, persons wishing to comment must sign up on the
32 sign-in sheets provided by the Board secretary. Minutes may be prepared
33 by the Board to memorialize oral comments or presentations at the
34 hearing as part of the rulemaking record. If minutes are not prepared, the

