

## The Comprehensive Planning Process

The comprehensive plan is the essential first step of the planning process. The 1994 Act expanded the scope and substance of the comprehensive plan's contents. The changes should foster the development of an expanded comprehensive planning process across the state. The planning process for each comprehensive plan element must include, but is not limited to the following items:

1. **Inventory of existing conditions.**
2. **A statement of needs and goals.**
3. **Implementation strategies with time frames.**

There should be broad-based citizen participation when developing the comprehensive plan elements. An element must address all relevant factors listed in the 1994 Act; however, the Act does not dictate how extensively they need to be covered. The extent of detail in an element should be based on community needs. The local comprehensive plan must include at least the following nine elements. S.C. Code § 6-29-510(D).

1. **Population element.** The population element includes information related to historic trends and projections; number, size, and characteristics of households; educational levels and trends; income characteristics and trends; race; sex; age; and other information.
2. **Economic element.** The economic element includes historic trends and projections of the labor force, employment characteristics and trends, an economic base analysis, and any other matters affecting the local economy.
3. **Natural resources element.** This element could include information on coastal resources, slope characteristics, prime agricultural and forest lands, plant and animal habitats, unique park and recreation areas, unique scenic views and sites, wetlands, air quality and soil types.
4. **Cultural resources element.** This element could include historic buildings and structures, unique commercial or residential areas, unique natural or scenic resources, archeological sites, educational, religious, or entertainment areas or institutions, and any other feature or facility relating to the cultural aspects of the community.
5. **Community facilities element.** This element includes many activities essential to the community's growth, development, or redevelopment. The community facilities element must include plans for public safety and emergency preparedness. Preparing the community facilities element may require involving special purpose district boards, governmental and quasi-governmental entities such as the library board, school board, historic preservation society, and public utilities board.

6. **Housing element.** This element includes an analysis of existing housing by age and condition, owner and renter occupancy, location, type, and affordability. It also contains projections about housing needs to accommodate the existing and future populations as identified in the population and economic elements.
7. **Land use element.** This element deals with the development characteristics of the land, and considers existing and future land use by categories including residential, commercial, industrial, agricultural, forestry, mining, public and quasi-public, recreation, parks, open space, and vacant or undeveloped land.
8. **Transportation element.** This element requires a comprehensive examination of the county's transportation facilities, including major road improvements, new road construction, transit projects, and pedestrian and bicycle projects.
9. **Priority Investment Element.** This element requires an analysis of likely sources of federal and state funding for public infrastructure that may be available, and a recommendation of projects for expenditure of those funds over the next 10 years. This element requires that the prioritization of projects must be done through coordination with adjacent and relevant jurisdictions and agencies.

The nine planning elements plus any other locally determined elements make up the local comprehensive plan. All planning elements represent the planning commission's recommendations to the local governing body. The elements must be an expression of the planning commission recommendations to the appropriate governing bodies with regard to the wise and efficient use of public funds, future growth, development, and redevelopment of its area of jurisdiction. Also, the elements must be an expression of the commission's consideration of the fiscal impact on property owners. S.C. Code § 6-29-510(E).

# The Zoning Process

## Purpose of Zoning

A zoning ordinance ensures that development fits in with existing and future needs of the community while promoting the public health, safety, morals, convenience, order, prosperity, and general welfare of the community. These purposes are similar to those for all police power regulations passed by a government to protect its citizens. S.C. Code § 6-29-710. Zoning is the most effective way to control the location and size of landfills or adult-oriented businesses, for example.

When preparing the zoning ordinance, a local government must reasonably consider the following purposes where applicable:

1. Provide for adequate light, air, and open space;
2. Prevent land overcrowding, avoid undue concentration of population and lessen street congestion;
3. Help create a convenient, attractive and harmonious community;
4. Protect and preserve scenic, historic or ecologically sensitive areas;
5. Regulate population density and distribution;
6. Regulate building, structure and land uses;
7. Help provide adequate transportation, police and fire protection, water, sewage, schools, recreational facilities, affordable housing, disaster evacuation, and other public services and requirements. If the local governing body intends to address "other public requirements" with a particular ordinance or action, it must specify the "other requirements" in the preamble or some other part of the ordinance or action;
8. Secure safety from fire, flood, and other dangers; and
9. Further the public welfare in any other way specified by a local governing body.

## Legislative Function

The authority of a local governing body to enact zoning ordinances is a local government police power. Exercising that authority is a legislative function of the governing body. *Bob Jones University, Inc. v. City of Greenville*, 243 S.C. 351, 133 S.E.2d 843 (1963). The local governing body cannot delegate its power to adopt zoning regulations to a board or commission. A court has no power to zone property and cannot prohibit a local government from adopting zoning ordinances. *Rush v. City of Greenville*, 246 S.C. 268, 143 S.E.2d 527 (1965); *Patton v. Richland County Council*, 303 S.C. 47, 398 S.E.2d 497 (1990).

# The Zoning Ordinance

## Zoning Ordinance Elements

In general, a zoning ordinance can be divided into two parts: a text and a map. The text includes the regulations and permitted uses that will apply in each zoning district. Also, the text sets out the requirements and procedures governing the administration, enforcement, and future amendments to the text and the map.

The role of the map is to set out graphically the location and boundaries of the zoning districts. The combination of the text and the map divides the land within the planning jurisdiction of the local government into zoning districts. Individual community needs determine the number, size, and shape of the zoning districts.

Zoning ordinance regulations must follow the comprehensive plan. The courts will not overturn a "fairly debatable" decision by the governing body if the zoning regulation or amendment is consistent with the comprehensive plan. *Knowles v. City of Aiken*, 305 S.C. 219, 407 S.E.2d 639 (1991). However, the S.C. Supreme Court recently invalidated a county's rezoning ordinance that rezoned an area, but allowed the permitted uses to remain the same as under the previous zoning classification. The Court held that the ordinance did not meet the parameters of a planned development, and that it merely allowed the owners to reduce the lot sizes for the property, thus avoiding the restrictions required in the previous classification. See *Sinkler v. Charleston County*, 387 S.C. 67, 690 S.E.2d 777 (2010).

The same regulations must apply for each class or kind of building, structure, or use throughout each zoning district. The requirements in one zoning district may differ from the requirements for the same use in a different district. S.C. Code § 6-29-720. The term "district" means the zoning district where a use is located. It does not mean the neighborhood or surrounding districts. *Niggel v. City of Columbia*, 254 S.C. 19, 173 S.E.2d 136 (1970).

### **Factors Regulated by Zoning**

Within each zoning district, the local governing body may use the zoning ordinance to regulate the following:

1. The use of buildings, structures, and land;
2. The size, location, height, bulk, orientation, number of stories, erection, construction, reconstruction, alteration, demolition, or removal in whole or in part of buildings and other structures, including signage;
3. The density of development, use, or occupancy of buildings, structures, or land;
4. The areas and dimensions of land, water, and air space to be occupied by buildings and structures, and the size of yards, courts, and other open spaces;
5. The amount of off-street parking and loading that must be provided, and the restrictions or requirements related to the entry or use of motor vehicles on the land;
6. Other aspects of the site plan including, but not limited to, tree preservation, landscaping, buffers, lighting, and curb cuts; and
7. Other aspects of the development and use of land or structures necessary to accomplish the purposes set forth throughout the enabling legislation.

### **Zoning Techniques**

The 1994 Act specifically authorizes several zoning techniques not explicitly allowed in previous legislation. The following seven techniques are listed and defined in S.C. Code § 6-29-720(C). The eighth is common practice in the state.

1. A **cluster development** groups residential, commercial, or industrial uses within a subdivision or development site. It allows for the reduction of an otherwise applicable lot size while preserving substantial open space on the remainder of the parcel. This technique could be used to promote developing a site subject to flooding or classified as "wetland." Cluster zoning gives the flexibility to design a variety of neighborhoods that consider aesthetics, economic construction of streets and utilities, parks and recreational uses, and a pattern not complying with restrictions in traditional zoning regulations. This technique allows higher density uses such as town houses. Local governments allow cluster zoning either through zoning ordinance provisions for a permit process or by using a floating zone.
2. A **floating zone** is described in the zoning ordinance text but is unmapped. A property owner may petition the local government to designate a particular parcel meeting the minimum zoning district area requirements as a floating zone. A floating zone could be used for a planned shopping center commercial district in areas where development has not reached the point where a specific tract can be singled out for commercial zoning. This technique makes land use regulations more flexible. It is commonly used to create cluster and planned developments. To establish a floating zone, the local governing body usually adopts a zoning map amendment for the particular piece of property. The text of the zoning ordinance must provide standards for a floating zone.
3. **Performance zoning** specifies a minimum requirement or maximum limit on the effects of a land use. This is done instead of or in addition to specifying the use itself. It assures the development is compatible with surrounding development and increases a developer's flexibility. The text of the zoning ordinance should provide detailed standards for the various land uses. Performance zoning usually applies to commercial, industrial, or manufacturing uses; however, some jurisdictions have used performance standards for residential districts. Performance standards can dictate permitted levels of smoke, noise, explosive hazard, and other factors. The standards should state the limits in measurable quantities and qualities.
4. **Planned development district** mixes different types of housing with compatible commercial uses, shopping centers, office parks, and other mixed use developments. Rezoning establishes a planned development district prior to development. It is characterized by a unified site design for a mixed use development. Historically, local governments have called these projects "planned unit developments" (PUDs). The planned development district technique is discussed further in the next section.
5. An **overlay zone** places a set of requirements or relaxes a set of requirements imposed by the underlying zoning district. An area is given an overlay designation if it has a special public interest but does not coincide with the underlying zone boundaries. An overlay designation is not a separate district classification. It is attached to an existing district designation and identifies an area subject to supplemental regulations. This technique is used to regulate areas needing special consideration. These include flood plains, design preservation or conservation areas, significant highway corridors, and airport height restriction areas. Sign regulation is sometimes accomplished through an overlay designation.

6. **Conditional uses** must meet conditions, restrictions, or limitations on a permitted use. These are in addition to those restrictions that apply to all land in the zoning district. The zoning ordinance text must describe the conditions, restrictions, or limitations. This technique is used to allow uses compatible with the district, but which may have an adverse impact on an adjacent district unless conditions are imposed to protect the adjacent district. Existing ordinances have used the term "conditional use" to describe a variety of techniques. According to the 1994 Act, "conditional use" applies to uses specified in district regulations and are allowed only when specified conditions or standards are met. S.C. Code § 6-29-720(C). If the conditions or standards are met, the zoning administrator may issue a permit for the use without review by the board of zoning appeals. If the board reviews the case and imposes additional conditions, the use is listed as a permitted special exception not as a conditional use. Only the board of zoning appeals can grant special exceptions after a public hearing. District regulations must contain a list of permitted uses, uses permitted by special exception, and conditional uses.
7. **Priority investment zones** encourage counties to adopt market-based incentives or relax or eliminate unnecessary nonessential housing regulatory requirements to encourage private development in the priority investment zone. The use of the priority investment zone in an ordinance is optional. This section further encourages the county to provide that "traditional neighborhood design" and "affordable housing" must be permitted within the priority investment zone.

### **Additional Zoning Techniques**

The law does not limit local governments to these techniques to accomplish the zoning goals. One common zoning technique gaining popularity is **Form-based zoning**. This allows planners to place more focus on characteristics such as building setbacks, building heights, sidewalk space, parking, and landscaping. An example of form-based zoning is classification of zones such as commercial streets, urban avenues, residential streets, and rear alleys. The form-based standards for building in a commercial street zone could include, for example, greater allowed heights, decreased setbacks, and certain types of window frontage. Traditional zoning would typically prohibit residences in such an area altogether, but with form-based zoning, retail businesses could be located on street level while residences could be located above street level.

### **Planned Development District**

The 1994 Act provides specific procedures and explanations for using the planned development district technique. S.C. Code § 6-29-740. Traditionally, this technique was called Planned Unit Development or PUD. Planned development districts give developments greater flexibility to improve design, character, and quality, and to preserve natural and scenic features or open spaces. The courts of this state have approved the planned development district concept. See *Smith v. Georgetown County Council*, 292 S.C. 235, 355 S.E.2d 864 (Ct.App. 1987); *Turner v. Barber*, 298 S.C. 321, 380 S.E.2d 811 (1989).

### **Cash or Dedication In Lieu of Parking**

The 1994 Act allows waiving or reducing parking requirements in return for cash payments or dedicating land earmarked for public parking or public transit. S.C. Code § 6-29-750.

These payments or dedications may not be used for any other purpose. To exercise this provision, the zoning ordinance must designate a special development district showing a parking facility plan and program. The plan and program must include guidelines for preferred parking locations and designate prohibited parking areas. To use this provision, the planning commission should recommend and the local government should adopt an additional comprehensive plan element relating to parking in special development districts. The cash contributions or the dedicated land value may not exceed the approximate cost of the required spaces or providing public transit service had the reduction or waiver not been granted.

## Nonconforming Uses

As the permitted uses in each zoning district are listed and the zoning district boundaries are drawn on the zoning district map, it is almost certain that some zoning districts will contain uses that would not be permitted if they did not already exist. Those uses are called nonconforming uses. S.C. Code § 6-29-730 authorizes zoning regulations that provide uses that are lawful at the time of adoption or amendment of zoning regulations may be continued although they are nonconforming. The zoning ordinance may contain regulations for continuing, restoring, reconstructing, extending, or substituting nonconformities. The following issues arise frequently with nonconforming uses:

**Discouraged.** The general rule is that nonconforming uses and structures are to be discouraged and eliminated whenever possible. Most zoning ordinances provide strict standards for continuing or reconstructing nonconformities.

**Repair.** It is common for zoning ordinances to provide that a nonconforming structure may be repaired or rebuilt if it is not more than 50% (some necessitate 75%) destroyed. It is important that the ordinance set the standard upon which the percentage of destruction is determined (e.g., replacement cost, market value, cost to repair, physical destruction). A decision by the zoning administrator or board of zoning appeals that is not based upon evidence related to the standard in the ordinance will not be upheld. *National Advertising Co., Inc. v. Mount Pleasant*, 440 S.E.2d 875 (1994).

**Substitution.** Some zoning ordinances allow the substitution of one nonconforming use for another, if the new use is more in character with the neighborhood, lower in density or has less objectionable features.

**Amortization.** Termination of a nonconformity may be required within a specified time. Usually the time is based upon a formula for recovery or amortization of investment in the nonconformity. Amortization schedules have been upheld where the period of removal was not so unreasonable to be considered a taking of property. *Major Media of the Southeast v. City of Raleigh*, 792 F.2d 1269 (4th Cir. 1986). However, when the time period is so short that it denies the owner of an economically viable use of an appropriate unit of property, the time period may be declared unreasonable and may give rise to a taking claim for which the owner must be paid just compensation. *Naegele Outdoor Advertising, Inc. v. City of Durham*, 844 F.2d 172 (4th Cir. 1988); *Naegele Outdoor Advertising, Inc. v. City of Durham*, 803 F.Supp. 1068 (M.D.N.C. 1992).

## Takings

Under the Fifth Amendment to the United States Constitution, a government may not take private property for public use unless there is payment of just compensation to the landowner. The South Carolina Constitution Article I, Section 13, provides that just compensation must be paid for a taking.

There are generally two types of takings. One is a physical taking, where the government physically occupies private land for its own use. The second is a regulatory taking, which occurs when a law or regulation burdens the property to the point that there is no economically viable use of the land.

Even if there is some economically beneficial use to land that has been regulated, a taking may have occurred. *Denene v. Charleston*, 359 S.C. 85, 596 S.E.2d 917 (2004). And even a regulation that is temporary may constitute a taking. *First English Evangelical Lutheran Church v. County of Los Angeles*, 462 U.S. 304 (1987). Takings claims can center on local government regulations requiring the dedication of land, the completion of public improvements, the payment of impact fees, building permits and condemnation orders, and ordinances declaring specific property a nuisance.

The South Carolina Supreme Court recently held that a city ordinance prohibiting bars from being open between 2 a.m. and 6 a.m. was not a regulatory taking, as this was a reasonable exercise of the state's police powers. Other examples where the Court has found no taking include:

- Where county mistakenly told owner and potential buyers the wrong zoning classification of a property and that the property was not in conformity with zoning ordinances, costing the owner the sale. *Richland County v. Carolina Chloride*, 382 S.C. 634, 677 S.E.2d 892 (2009).
- Where ordinance prevented homeowner from parking commercial vehicle on a residential lot. *Whaley v. Dorchester Board of Zoning Appeals*, 337 S.C. 568, 524 S.E.2d 40 (1999).



## Procedure for Adopting Zoning Ordinances

Adopting a zoning ordinance is a legislative function. The procedural requirements are described in S.C. Code § 6-29-760. They may vary slightly, depending on ordinance notice provisions and whether the council or the planning commission is designated to hold public hearings. The governing body must adopt amendments to the ordinance text or zoning maps in the same manner it adopted the original ordinance. In general, the following procedural steps are required.

1. **Public hearing.** The governing body may conduct public hearings, or it may authorize the planning commission to conduct them. The governing body should state its choice in the ordinance. There is no law prohibiting a joint public hearing. The public hearing on an amendment may be held, as prescribed by ordinance, either before or after the required planning commission review and recommendation. If the hearing is held before the planning commission, the planning commission recommendation to the governing body should contain a summary of any significant issues or concerns presented at the hearing. If a planning commission does not hold the public hearing, it may allow a property owner affected by a proposed amendment to present oral or written comments. If oral or written comments are taken, the commission must give other interested members of the public ten days' notice and allow them the opportunity to comment in the same fashion. S.C. Code § 6-29-760(B).
2. **Notice.**
  - a. **Newspaper notice.** An ordinance may establish notice provisions. If not, the 1994 Act requires notice be placed in a newspaper of general circulation in the community at least fifteen days prior to the hearing. The notice must list the hearing time and place. Some ordinances require a thirty-day notice.
  - b. **Posting property.** In rezoning cases, the governing body or commission must post conspicuous notices on or adjacent to the property. One notice must be visible from each public street that borders the property.
  - c. **Mail notice.** If the local government maintains a list of groups requesting notice, it must mail meeting notices to such groups. Some ordinances also require notice by mail to adjacent property owners. This is not required by the 1994 Act.
3. **Planning commission review.** Any change in the original text and any amendment to the ordinance or maps must be submitted to the planning commission for review and recommendation. If the planning commission fails to make a recommendation within the time prescribed by ordinance, it is considered to have approved the change.
4. **Adoption of ordinance.** After the required public hearing and planning commission review, the original ordinance or amendment must be adopted by an ordinance. Counties may adopt ordinances on three readings on separate days with a minimum of seven days between second and third readings. S.C. Code § 4-9-120 (1976).

## **Public Property Subject to Zoning**

The following public entities, while using real property as owner or tenant, are subject to the local zoning ordinance requirements. S. C. Code §§ 6-29-770(A), (B), and (C).

1. Agencies, departments, and subdivisions of the State of South Carolina.
2. Counties and any agency, department or subdivision of the county are subject to the zoning ordinance of any municipality within whose limits it uses property.
3. Municipalities and any agency, department, or subdivision of the municipality is subject to the county zoning ordinance if it uses property within the county but outside the municipal limits.

A state agency, department, or subdivision occupying a facility on June 18, 1976, does not have to move regardless of whether or not their location is in violation of municipal or county zoning ordinances.

## **Exemptions, Homes for Handicapped**

A home serving nine or fewer mentally or physically handicapped persons if it provides 24-hour care and is approved or licensed by a state agency, department or under contract with the agency or department for that purpose, is exempt from 24-hour requirements of the local zoning ordinance. Residents of such a home are treated as a natural family as if related by blood or marriage. S.C. Code § 6-29-770.

## **Fair Housing Act**

The Fair Housing Act of 1988 was adopted by Congress to strengthen Title VIII of the 1968 Civil Rights Act. The amendments to 42 U.S.C. § 3604 extend the principle of equal housing opportunities to handicapped persons and families with children. The provisions in § 3604 prohibiting a regulation that otherwise makes unavailable or denies housing to the handicapped was intended, according to the House Committee Report, to prohibit land-use regulations, restrictive covenants and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice within the community.

## Zoning Administration

The zoning ordinance must designate an administrative official to administer and enforce the zoning ordinance. The official is usually called the zoning administrator. S.C. Code § 6-29-800. It is not unusual for small jurisdictions to give the building official the job of zoning administrator. One employee may administer several codes. The official's title is specified in the zoning ordinance.

### Powers and Duties

The zoning ordinance should specify the duties of the zoning administrator. The following are examples of duties.

1. Interpreting zoning ordinance provisions.
2. Administering permits and certificates, including fee collection.
3. Processing applications for variances and special exceptions.
4. Processing appeals to the board of zoning appeals and preparing the record for appeal to the circuit court.
5. Maintaining the current zoning map.
6. Maintaining public records related to zoning.
7. Investigating and resolving complaints.
8. Enforcing the zoning ordinance.
9. Other duties assigned by ordinance, manager, or council.

### Estoppel

Administering the zoning ordinance often requires interpreting terms and provisions that are not always clearly defined. Once an authorized local official makes an interpretation, the local governing body may be estopped (prohibited) from changing the official's interpretation or from enforcing the ordinance differently from past enforcement when a landowner has relied upon the interpretation. See *Landing Development Corp. v. City of Myrtle Beach*, 285 S.C. 216, 329 S.E.2d 423 (1985); *County of Charleston v. National Advertising Co.*, 292 S.C. 416, 357 S.E.2d 9 (1987). In South Carolina, estoppel may apply to public figures, but only when acting in the scope of their official duty. *McCrowey v. BOZA Rock Hill*, 360 S.C. 301, 599 S.E.2d 617 (2004).

A landowner must show the following estoppel elements against the government: (1) lack of knowledge and lack of means to gain knowledge of the truth in the matter, (2) justifiable reliance on the conduct of the officials, and (3) a prejudicial change in the position of the party claiming estoppel. *Daniels v. City of Goose Creek*, 431 S.E.2d 256 (Ct.App. (1993)). However, the public cannot be estopped by the actions of an official who acts outside of the scope of his authority. *DeStephano v. City of Charleston*, 304 S.C. 250, 403 S.E.2d 648 (1991). A person is presumed to know the limits of the authority of a public official.

A zoning permit may be revoked if the zoning official acted on a permit application that contained incorrect or false information. Estoppel would not apply. See *Christy v. Harleston*, 266 S.C. 439, 223 S.E.2d 861 (1976).

It is important for the zoning administrator to consistently interpret and enforce the zoning ordinance. When a change in practices or interpretations is necessary, making the appropriate changes to the ordinance by amendment will avoid estoppel claims for future applications.

## **Board of Zoning Appeals**

As part of the zoning enforcement and administrative structure of the zoning ordinance, the governing body may create in the zoning ordinance a board of zoning appeals. Previous legislation referred to this board as a zoning board of adjustment. Under the 1994 Act, the term "board of adjustment" is inappropriate. S.C. Code § 6-29-780. Local governing bodies with a joint planning commission and a common zoning ordinance may create a joint board of zoning appeals.

### **Creation of Board**

The zoning ordinance section creating a board of zoning appeals should include the following:

1. The board's size is limited to three to nine members.
2. A majority of the membership makes up a quorum.
3. The governing authority appoints members.
4. Members' terms are overlapping.
5. The terms range from three to five years.
6. The number of terms a member may serve.
7. Members continue to serve until their successors are appointed.
8. Vacancies are filled for unexpired terms in the same manner as the initial appointments.
9. The appointing governing body can remove a member for cause.
10. How much, if anything, board members are compensated.
11. Members cannot hold any other public office or position in the appointing local government.

### **Organization and Operation**

It is very important for the board of zoning appeals to organize it and operate in compliance with the 1994 Act and the section of the zoning ordinance creating the board. S.C. Code § 6-29-790. The essential elements of the organizational structure of the board include the following.

1. **Chairperson.** The board must elect one of its members as chairperson. The chairperson serves for one year or until a successor is elected and qualified. The chairperson may be reelected.
2. **Secretary.** The board must appoint a secretary. The secretary may be an officer of the governing authority or the zoning board. It is customary for the zoning board to appoint the zoning administrator as secretary.

3. **Rules of Procedure.** The board must adopt rules of procedure complying with both the 1994 Act and the zoning ordinance. The rules of procedure should address the following elements at a minimum.
  - a. Election of a chairperson and his duties.
  - b. Procedure for electing an acting chairperson.
  - c. Appointment of a secretary and his duties.
  - d. Procedures for calling meetings.
  - e. Time and place for meetings.
  - f. Posting meeting notices to comply with the Freedom of Information Act and S.C. Code § 6-29-70 for variances and special exceptions.
  - g. Setting the agenda.
  - h. Quorum and attendance requirements.
  - i. Rules of procedure for conducting meetings.
  - j. Time for appeal from decision of zoning official.
  - k. Time and procedure for hearing appeals, variances, and special exceptions.
  - l. Time and procedure for rendering and serving decisions.
  - m. Procedure for making and keeping records of actions.
  - n. Procedure for granting rehearings.
  - o. The oath administered to witnesses.
4. **Meetings.** The board meets at the call of the chairperson and other times as determined by the board.
5. **Notice.** The board must give a public notice of all meetings in a general circulation newspaper in the community.
6. **Posting property.** In cases involving variances or special exceptions, the board must post conspicuous notices on or next to the affected property. At least one notice must be visible from each street that borders the property.
7. **Witnesses.** The chairperson or acting chairperson may administer oaths and subpoena witnesses.
8. **Minutes.** The board must provide for minutes of its proceedings to be taken. The minutes must be kept as a public record on file in the office of the board. Minutes must record the vote of each member on each question.

## **Powers of the Board of Zoning Appeals**

The planning enabling legislation lists—explicitly in many instances—the powers and required findings of the board of appeals. S.C. Code § 6-29-800. It may be useful to include this section in the board rules of procedure. The power of the board is limited to three specific areas: administrative review, variances, and special exceptions. The local governing body should include these provisions in the zoning ordinance and make them consistent with the language of the 1994 Act.

### **Administrative Review**

The board can hear and decide appeals where it is alleged the zoning administrator erred in an order, requirement, decision, or determination. In such cases, the board may reverse or affirm, wholly or in part, the zoning administrator's actions. The board has all the powers of the zoning administrator in such cases and may direct the issuance of a permit. The board may remand a matter to an administrative official if it determines the record is insufficient for review. The board may deny a party's motion to remand if it determines the record is sufficient. The board must set a rehearing within sixty days unless the parties agree to another time.

### **Variances**

The board has the power to hear and decide appeals for variances when strict application of the zoning ordinance would cause an unnecessary hardship. S.C. Code § 6-29-800(A)(2). When deciding whether to grant a variance or not, the board is not free to make a determination based on whatever appeals to its sense of justice. The board must follow the local ordinance and 1994 Act. The courts will not uphold a variance decision where the board acted arbitrarily, unreasonably or in a discriminatory manner, or abused its discretion.

The board may grant a variance for an unnecessary hardship if it makes and explains in writing the following findings.

1. **Extraordinary conditions.** There are extraordinary and exceptional conditions pertaining to the particular piece of property.
2. **Other property.** These conditions do not generally apply to other property in the vicinity.
3. **Utilization.** the application of the ordinance to a particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property.
4. **Detriment.** The authorization of a variance will not be of substantial detriment to adjacent property or the public good, and the character of the district will not be harmed by granting of the variance.

Other issues affecting the findings of a board in a variance application are found in S.C. Code § 6-29-800(A)(2).

1. **Profitability.** The fact that property may be used more profitably if a variance is granted is not grounds for a variance. See *Groves v. Charleston*, 226 S.C. 459, 85 S.E.2d 708 (1955).
2. **Conditions.** In granting a variance, the board may attach conditions to it. These conditions may address the location, character or other features of a proposed building, structure, or use. The board sets the conditions to protect established property values in the surrounding area or to promote the public health, safety, or general welfare.
3. **Use variance.** Under the general rule, the board may not grant use variances. A "use variance" involves the establishment of a use not otherwise permitted in a zoning district, extends physically a nonconforming land use, or changes the zoning district boundaries shown on the official zoning map. The 1994 Act allows a local governing body to authorize the board of zoning appeals to grant "use variances," and the governing body can attach conditions to this authorization. S.C. Code § 6-29-800(A) contains specific procedures for granting use variances, which may be incorporated into a local zoning ordinance. Granting use variances is not good zoning practice and is not recommended. A use variance may be subject to attack as an unlawful delegation of legislative authority. Zoning is a legislative power in this state.

## **Special Exceptions**

The board of zoning appeals can permit uses by special exception if the terms and conditions described in the zoning ordinance are met. S.C. Code § 6-29-800(A)(3). The zoning ordinance must include the standards and conditions for the board to follow when considering such appeals. In some zoning ordinances, conditional uses granted after review should now be designated as special exceptions.

## **Appeals to Board**

Appeals to the board and appeals from decisions of the board to circuit court must follow set procedures. Appeals from administrative actions and decisions of zoning officials are taken to the board of zoning appeals then to Circuit Court and finally to the Supreme Court. An appeal on a zoning matter is never taken to the governing body. It has only a legislative function in zoning.

## **Time Limits for Appeals**

1. **Appeal to Board.** The zoning ordinance or rules of the board of zoning appeals may set the time for appeal of an administrative action or decision. If no time is set, S.C. Code § 6-29-800(A)(4) requires the party to make an appeal within 30 days of receiving actual notice of the action from which he is appealing.

2. **Appeal to Circuit Court.** A party appealing a board decision to circuit court must file the appeal with the clerk of court within thirty days after the decision of the board is mailed. S.C. Code § 6-29-820. Failure to file an appeal within the time limit deprives the court of jurisdiction to hear the matter. *Botany Bay Marina, Inc. v. Townsend*, 296 S.C. 330, 372 S.E.2d 584 (1988).
3. **Appeal to Supreme Court.** A party may appeal a circuit court decision to the South Carolina Supreme Court in the same manner as other circuit court judgments. S.C. Code § 6-29-850. *Bishop v. Hightower*, 292 S.C. 358, 356 S.E.2d 420 (Ct.App. 1987). Rule 203, South Carolina Appellate Court Rules, requires a party to service notice of appeal to the Supreme Court within thirty days of receiving written notice of entry of the circuit court order.

### **Procedure for Appeals to Board**

1. **Notice of appeal.** Any person displeased with an officer's action may appeal it to the board of zoning appeals. The person must file a notice of appeal specifying the grounds with the officer and the board. The applicant and parties to the permitting process are parties in interest and are entitled to notice of the appeal. Citizens and residents who are not parties to the permitting process are not entitled to notice.
2. **Stay of proceedings.** Filing an appeal to the board stays all legal proceedings to enforce the appealed action unless the appealed officer certifies that a stay would cause imminent peril to life and property. In such cases, a board or court restraining order may stay the action. S.C. Code § 6-29-800(B).
3. **Time and notice of hearing.** The board must set a reasonable time for hearing the appeal. It must publish a 15-days' notice in a general circulation newspaper and give notice to parties in interest, preferably by mail. S.C. Code § 6-29-800(D). The zoning ordinance may require other notice forms to inform persons whose property interests might be affected by the variance or other action.
4. **Conduct of hearing.** Any party may appear at the hearing in person, by agent, or by attorney. At the start of the hearing, the chairperson should explain the procedures for presenting and examining witnesses, receiving evidence, the role of attorneys, and how the board will make and serve a decision. The board may subpoena witnesses and certify contempt to the circuit court.
5. **Rehearing.** The board may provide in its rules of procedure for a rehearing. A rehearing may be justified by reason of newly discovered evidence, fraud, surprise, mistake, inadvertence, or change in conditions.
6. **Board decisions.** The board has the same powers as the zoning official. It can affirm, reverse, or modify the zoning official's actions. Board members cannot vote by absentee ballots.



# Zoning Enforcement Procedures

As with any law, the zoning ordinance will only be as effective as its level of enforcement. Enforcement is normally the zoning administrator's day-to-day responsibility. The 1994 Act makes it unlawful, after the adoption of a zoning ordinance, to construct, reconstruct, alter, demolish, change the use of, or occupy any land, building, or other structure without first obtaining the appropriate permit. It is likewise unlawful for any other local government official to issue any permit without the zoning administrator's approval. A zoning ordinance violation is a misdemeanor.

The 1994 Act sets the following four enforcement procedures for dealing with zoning ordinance violations. S.C. Code § 6-29-950.

## 1. Stop Orders

A stop order is a useful tool when the offending party is operating under some mistake and will voluntarily comply with the order. The zoning ordinance may authorize stop orders against any work undertaken without a proper building or zoning permit. S.C. Code § 6-29-950(A). This requires all activities violating the zoning ordinance to cease. The zoning ordinance should state that failure to comply with a stop order is unlawful.

The zoning ordinance should set procedures for serving stop orders, including hard-to-locate property owners and persons working on the property. The ordinance should also establish procedures for posting the order on the property.

## 2. Injunction and Mandamus

The zoning administrator, other local government officer, a local government attorney, or a neighboring property owner specifically damaged by a zoning ordinance violation can start an action for injunction in circuit court. An injunction prohibits property uses contrary to the zoning ordinance. In some cases, it can require the removal of unauthorized structures. The local government should consult its attorney when an injunction is deemed necessary.

Mandamus is the highest writ known to the law. It is an order issued to compel a public official to perform his ministerial duty. S.C. Code § 6-29-950(A) gives a citizen the right to seek a writ of mandamus in circuit court to require a zoning official to enforce the zoning ordinance.

## 3. Ordinance Summons

Under S.C. Code § 56-7-80, local governments can adopt an ordinance allowing them to use an ordinance summons for local ordinance violations. Violation of any ordinance adopted pursuant to the 1994 Act is a misdemeanor. S.C. Code § 6-29-950(A).

The ordinance summons is a very useful enforcement tool. Any authorized code enforcement officer, including a zoning official, can issue an ordinance summons.

No arrest is made, and no bond is collected by the issuing officer. The summons gives a magistrate or municipal judge jurisdiction to try the case. The summons provides a procedure for posting bonds. The court may impose a monetary fine and/or confinement in jail upon conviction, plus an assessment of state mandated costs.

#### **4. Warrant**

An arrest warrant may be obtained for a zoning ordinance violation, just as for any other ordinance violation. A magistrate, municipal judge, or ministerial recorder can issue an arrest warrant. The person making the charge must sign an affidavit giving facts sufficient to constitute probable cause that a violation has occurred. Any person with knowledge of the facts may file an affidavit for a warrant. The judge determines from the affidavit whether probable cause exists. If so, he issues the warrant, which must be served by a law enforcement officer. Because of the unpopular arrest feature associated with a warrant, this is a seldom used enforcement tool. The ordinance summons procedure is generally preferred over a warrant. The municipal or county attorney should be consulted before a warrant is sought.

## **Official Map**

### **Definition**

"Official map" means "a map or maps showing the location of existing or proposed public streets, highways, public utility rights-of-way, public building sites, and public open spaces." S.C. Code § 6-7-1210. A public building site is defined as "one on which a public building will be constructed using public funds." S.C. Code § 6-7-1210.

### **Official Map Prerequisites**

A map becomes official upon adoption by the local governing body. Before adopting the map recommended by the planning commission, the governing authority must hold an advertised public hearing conducted according to procedures prescribed by law. If no established procedure exists, the governing body must publish at least fifteen days' notice of the hearing time and place in a general circulation newspaper in the community. S.C. Code § 6-7-1250. The governing authority may add or change the official maps. Before making any changes, it must give the local planning commission thirty days to submit a report and recommendation on the proposed changes. The governing body must hold a public hearing before adopting the maps. If the planning commission fails to submit a report within the thirty-day period, it is considered to have approved the proposed changes. S.C. Code § 6-7-1260.

Once adopted, the official map governs the designation of property, and constitutes a matter of law. Parties seeking approval to develop land should confirm the designation of such land against the official map, and not rely upon information informally provided by Planning Department staff. See *Quail Hill LLC v. Richland County*, 387 S.C. 223, 692 S.E.2d 499 (2010).

## **Enforcement and Appeal Procedure**

Permits cannot be issued for constructing, improving, repairing, or moving any building or structure on property reserved by the official map. Permits cannot be issued for any change in a land use for property reserved by an official map.

Denying a permit triggers the following appeal procedure for the affected property owner.

1. The owner must present the appeal to the local planning commission.
2. The planning commission must evaluate the appeal. It must make a report within thirty days to the local governing body and to any other appropriate public agency. If no report is made within thirty days, the planning commission is considered to have recommended the appeal be granted.
3. The planning commission report must recommend one of the following outcomes.
  - a. The governing body takes official action to exempt the affected land from the official map's restrictions.
  - b. The governing body takes official action to authorize the desired permits subject to specified conditions.
  - c. The governing body initiates appropriate action to acquire the property.
4. After receiving the planning commission report, the governing body must do one of the following within 100 days.
  - a. Take official action exempting the affected land from the official map's restrictions.
  - b. Take official action authorizing the denied permits subject to specified conditions accepted by the owner.
  - c. Either enter into an agreement to acquire or institute condemnation proceedings to acquire the affected property. The governing body or other appropriate public agency can take action to acquire the property. For example, if the affected property is a school site, the school board may acquire the site; if it is a highway right-of-way, the Department of Transportation may acquire the site.

If the governing body fails to act within 100 days of receiving the planning commission report, it is considered to have approved the proposed appeal. In such case, denied permits are issued upon demand. Any applicable zoning provision pertaining to the property must be followed. S.C. Code § 6-7-1270.

## **Property Exemption Procedure**

Any property owner whose property is included on an official map may ask the planning commission for an exemption from the official map restrictions. In such cases, the following procedure must be followed.

1. The local planning commission must evaluate the application. It must make a report within thirty days to the local governing body and any other appropriate public agency. If no report is made within thirty days, the planning commission is considered to have recommended granting the application.
2. The planning commission report must recommend one of the following:
  - a. The local governing body takes official action exempting the affected property from the official map restrictions.
  - b. The governing body initiates action to acquire the property.
3. After receiving the planning commission report, the governing body has seventy-five days to do one of the following:
  - a. Take official action exempting the affected property from the official map restrictions.
  - b. Enter into an agreement to acquire or institute condemnation proceedings to acquire the affected property. The governing body or other public agency can take the action to acquire the property.

If the governing body fails to act within seventy-five days of receiving the planning commission report, it is considered to have granted the application. Exempting property from the official map does not affect the zoning restrictions applicable to the property. S.C. Code § 6-7-1280.