

**AGENDA ITEM:** 11

**CASE NUMBER:** N/A

**B.O.A. MEETING:** September 22, 2021

**APPLICANT:** Josh Whitehead, Secretary

**REQUEST:** Amend Articles VI and XI of the Board's Rules of Procedure to explicitly spell out the process by which Board-initiated reconsiderations are processed and amend Article XII to state that Robert's Rules of Order governs in instances where the Board's Rules are silent

For several decades, the Board's Rules of Procedure has contained a process by which any party aggrieved by a decision of the Board may file a petition for rehearing. This process is outlined in Article VI of the Board's Rules (see attached). The Rules do not explicitly allow for a Board member to move that a matter be reconsidered during the reading of the minutes of the previous meeting, nor does it contain any reference to Robert's Rules of Order, which does allow for reconsiderations.

The amendments proposed and highlighted in **yellow** on the attached Rules would specifically allow any Board member to move to reconsider an item from the immediately previous meeting during the reading of the minutes. This follows Section 37 of *Robert's Rules of Order, 10<sup>th</sup> Edition* (Gen. Herbert M. Robert, Perseus Publishing, 2000), which allows any member of a body who voted on the prevailing side of a matter to move for its reconsideration. This proposal will involve amending Article VI, Sec. 7 and Article XI, Sec. 3. This proposal would also allow any item to be immediately reconsidered, provided the applicant and all other interested parties are still at the meeting.

In addition, a new Sec. 1 is proposed for Article XII that would state that, for any instance where the Board's Rules are silent, Robert's Rules of Order governs. Such a reference to Robert's Rules of Order is common in many boards' and bodies' rules of procedure and is arguably what the Board of Adjustment follows during its regular course of business. This would provide explicit direction for future instances, such as the current case when making motions to reconsider, where the Board's rules are silent but are covered in what is considered the nation's foremost guide on parliamentary procedure.

**RECOMMENDATION:**

*Approval*

**RULES OF PROCEDURE**  
**MEMPHIS AND SHELBY COUNTY BOARD OF ADJUSTMENT**

*Adopted by the Board, June 18, 1925.*

*Reflecting amendments approved by the Board as of ~~January 23, 2019~~ September 22, 2021.*

**ARTICLE I**  
**MEETINGS**

1. Regular Meetings of the Board of Adjustment shall be held not less than once a month, at a time and place designated by the Board. The time and place of the regular monthly meeting may be changed by affirmative vote of five (5) members.
2. Special Meetings shall be called only by the joint action of the Chairman and Vice-Chairman, or in the absence or disability of either, at the instance of the active officer and a member appointed by the legislative agency other than that which appointed the active officer.

**ARTICLE II**  
**CASES**

1. Each appeal from a decision of an administrative official or application for variation, conditional use permit, Section 2.4.5 zoning district extension, change in nonconforming use permit or correspondence case shall be made on the official form prescribed by the Board.
2. All information called for by the official form shall be furnished by the applicant in the manner therein prescribed, unless waived by the Secretary because in his or her opinion such information is not necessary in a particular case.
3. All appeals or applications shall be accompanied by a typewritten statement, specifying the grounds upon which said appeal or application is based. Said statement shall contain a brief and concise statement of all facts on which the applicant relies or desires to present proof of at the hearing.
4. The Secretary shall reject and return to the applicant all appeals and applications if:
  - (a) The proper form is not used.
  - (b) The information required by the form is, in his or her opinion, incorrect, incomplete, illegible or in any way inadequate to insure complete understanding of the case.
  - (c) The nature of the unnecessary hardship or practical difficulty is not clearly set forth, in cases where the jurisdiction of the Board is contingent upon the existence

of such a hardship or difficulty.

- (d) Any of the maps or drawings are, in his or her opinion, improperly drawn, or in any way inadequate to insure complete understanding of the case.
  - (e) Any additional information requested is not supplied which, in his or her opinion, is necessary to insure complete understanding of the case.
5. Any applicant, aggrieved by a ruling of the Secretary under Paragraph 4 above may submit his or her application and attached data to the Board at any regular meeting. If the Board finds that the ruling of the Secretary is in error, the application shall be placed on the docket of the next regular meeting or a special meeting called for this purpose.
  6. Every application shall be made within five (5) days from the date of refusal of a permit by, or date of order, ruling, decision or determination of the Building Official.

### **ARTICLE III** **THE DOCKET AND CALENDAR**

1. Each application filed in proper form with the required data shall be numbered serially, docketed and shall be placed upon the calendar of the Board by the Secretary thereof. The docket numbers shall begin anew on January 1 of each year, and shall be hyphenated with the number of the year in which the said appeal or application is filed, but in no case shall it be placed on the docket until it has been inspected and found to be correct and in proper form as set forth in Article II, Paragraph 4 above.
2.
  - (a) All cases docketed prior to the deadline date for the next regular meeting day shall be automatically set for hearing on the succeeding regular meeting day. Cases docketed within twenty (20) days, or less of after the deadline date for the next regular meeting day shall be set for hearing on the second meeting day after docket of the appeal or application.
  - (b) Cases which have been set for a special public hearing or meeting of the Board shall have been docketed at least ten (10) days prior to such special meeting.
3. Applications shall be heard in the order in which they appear on the calendar, except that an appeal or application may be advanced for hearing by order of the Chairman upon good cause shown. Where all applications cannot be disposed of on the day set, the Board may adjourn from day to day, or until the next regular meeting, as may be ordered by the Chairman.
4. The calendar of cases to be heard shall be posted in the Office of Planning and Development three (3) days before each regular meeting. Other appropriate adequate public notice shall be provided in conformance with the State of Tennessee requirements

for public meetings and other requirements of the Memphis and Shelby County Unified Development Code.

5. Consent Calendar. The Board may, at its discretion, create a consent calendar for any case docketed on its regular calendar. The Board may place such a case on the consent calendar when there is no objection to do so from a Board member, staff, the applicant, those opposing the case or any other individual present at the meeting. When voting upon matters placed on the consent calendar, the Board shall affirmatively state that it is making all the necessary findings for the approval of the case, as conditioned by staff. If, for any reason, an applicant wishes that a case that was approved on the consent calendar be reconsidered for any reason after the meeting has adjourned, he or she shall notify the Secretary no later than seven (7) days prior to the next meeting of the Board. The Secretary shall then docket the case on the next calendar as a request for reconsideration.

#### **ARTICLE IV** **HEARINGS**

1. Hearings shall be held by the Board at its regular or special meetings.
2. A quorum for hearing by the Board shall consist of five (5) members.
3. Hearings shall be open to the public.
4. The applicant may appear in his or her own behalf, or be represented by agent at said hearing. In the absence of any personal appearance on behalf of the applicant the Board will proceed to dispose of the matter on the record before it.
5. At a hearing, the order shall be as follows:
  - (a) Report or comments from Board of Adjustment staff, and, if applicable, the Office of Construction Code Enforcement.
  - (b) Public hearing begins. During the public hearing, any member of the Board may question a speaker during his or her presentation.
  - (c) Presentation of appeal or application by applicant (time limit: 5 minutes).\*
  - (d) Presentation of statements by interested property owners in favor of the case (time limit: 5 minutes). If there are no interested property owners to speak in favor of the case, the applicant may utilize this time period.\*
  - (e) Presentation of statements by interested property owners in opposition of the case (time limit: 10 minutes).\*

- (f) Rebuttal by applicant (time limit: any unused time from its 5 minutes of presentation time, plus 2 additional minutes).\*
- (g) Public hearing ends.
- (h) Discussion by the Board. Discussion by the Board shall not involve requesting further testimony from the applicant or any interested property owner. Such a request will involve a public re-hearing and require a 2/3 affirmative vote by the Board. Once a public re-hearing begins, both sides (applicant and opposition) shall be given the opportunity to respond to each question by the Board. Once the public re-hearing ends, Discussion by the Board resumes.

\*These time limits are cumulative and not effected by the number of speakers per category. Additional time may be provided at the discretion of the Chair, so long as both sides (applicant/support and opposition) are given an equal amount of additional time.

## **ARTICLE V** **FINAL DISPOSITION OF CASES**

1. The final disposition of any application shall be in the form of a resolution which shall affirm, modify, or reverse the refusal of a permit by or any order or decision of the Building Official. In any case involving an application for variation, conditional use permit, or change in nonconforming use permit, the resolution shall set forth:
  - (a) The Board's findings of fact, as articulated in the pertinent section of the Memphis and Shelby County Unified Development Code.
  - (b) The decision, rejecting or granting the petition, wholly or in part, with or without conditions.Said resolution shall specifically set forth what variations are granted and what conditions, if any, shall be complied with, or in the case of conditional use permits and change in nonconforming use permits, what uses are permitted and what conditions, if any, shall be complied with.
2. Every application shall be disallowed unless the concurring vote of five (5) members of the Board shall favor the appeal or application. The vote of each member present on each resolution shall be recorded with the resolution.
3. Any applicant may withdraw his or her application at any time prior to the decision by the Board of Adjustment.
4. When a permit authorized through an appeal to the Board of Adjustment is granted

overruling, in whole or in part, the decision of any officer, department, board or bureau of the County of Shelby, or the City of Memphis, the successful party shall, in all cases, obtain such permit within the time limit set by the Board. Unless otherwise expressly authorized by the Board in its resolution granting the permit, said limit shall expire two (2) years after the time of the decision of the Board granting same unless certiorari is applied for and the case removed to a court, in which instance the two (2) years period would not commence until after such time as a final judicial determination had been reached. Extensions may be granted by the Board pursuant to Article VIII. Construction shall begin within six (6) months of an applicant obtaining a building permit or such permit expires.

4. Any construction initiated by the applicant that does not adhere to the decision of the Board shall be removed within sixty (60) days from the date of the decision of the Board, unless otherwise conditioned by the Board.
5. The Secretary shall send a notice of final disposition of applications to the applicant within thirty (30) days of the date of decision of the Board, said notice to be made on the official form provided for that purpose and to state thereupon any conditions which may be imposed in connection with the grant or refusal of any appeal or application.

#### **ARTICLE VI** **REHEARINGS**

1. Rehearings may be applied for by any person, board or by any bureau or department of the County of Shelby, or the City of Memphis aggrieved by any decision of the Board of Adjustment. A petition for rehearing shall be in writing and shall be filed no later than seven (7) days prior to the next regular meeting of the Board of Adjustment held after the decision complained of. It shall specify the grounds upon which the rehearing is sought, pointing out specifically the error in or illegality of the action of the Board with apt reference to the law and facts relied upon. All such applications for rehearing shall be filed with the Secretary and addressed to the Board.

No oral arguments on petitions for rehearings will be heard unless invited by the Board.

2. If the Board, after considering the petition, shall determine that it should be granted, it may order the case to be redocketed for rehearing and shall designate the time at which such rehearing will be held.

All persons who appeared, or were notified, at the hearing at which the original ruling, action or determination of the Board was made, shall be notified by the Secretary that a rehearing has been granted, and the time at which the rehearing will be held.

3. In the event a petition for rehearing is filed on the grounds of newly discovered evidence, it shall be accompanied by an affidavit setting forth facts showing that due diligence was

exercised to fully present the case at the former hearing, and the reasons why such evidence was not presented. Said affidavit shall further set forth the nature of the evidence sought to be introduced together with the names of the witnesses, or identification of the documents through whom or by which it is sought to establish the facts.

4. Not more than one (1) petition for rehearing may be filed in any case.
5. Requests for rehearings shall be considered to include requests that the Board reconsider a decision, review evidence, or concern itself in any way whatever with a case upon which the Board has already made a decision.
6. Requests for Rehearing shall be accompanied by an affidavit certifying that a copy of the petition requesting such rehearing has been delivered to the attorney, spokesman or representative of those appearing at the hearing and taking a position opposite that of said petitioner. In the event no single spokesman represented a group, a copy shall be delivered to each property owner, or interested person who testified for the opposing side. Service by certified mail will be accepted as evidence of compliance with this requirement. If no one appeared in opposition at the original hearing, the Board Secretary may certify said petition to that effect.

Likewise a copy of any answer to the petition for rehearing, filed by those in opposition to the granting of such rehearing, shall be delivered to the filer of said petition and certified as hereinabove provided.

7. **Reconsiderations**

- (a) **Applicant-initiated reconsiderations.** Reconsiderations of items approved on the consent calendar of the immediately a previous meeting shall not be required to follow the provisions of this Article provided the provisions of Article III, Section 5 are met.
- (b) **Board-initiated reconsiderations.** Reconsiderations of items approved on the consent or regular calendar of the immediately previous meeting initiated by a member of the Board shall not be required to follow the provisions of this Article provided the provisions of Article XI, Section 3 are met. Any such reconsideration shall be made prior to the approval of the minutes reflecting the action in question and no oral arguments will be heard unless invited by the Board.
- (c) **Same day reconsiderations.** Reconsiderations may be made during the meeting in which the decision is, provided that the applicant and all parties who testified are still present at the meeting. A motion for reconsideration may be made by any member of the Board who voted on the prevailing side of the action being

reconsidered. If, upon a second and an affirmative vote of not less than five (5) members of the Board, the motion for reconsideration passes and the matter may then be acted upon or held in abeyance until a future meeting.

## **ARTICLE VII** **RE-APPLICATIONS**

1. A re-application is any application which relates to all or a part of the same property involved in a former application, including appeals.
2. No re-application shall be accepted, docketed by the Secretary or considered by the Board within six (6) months of the decision of the Board on the former application, unless the Board at a regular or special meeting by the affirmative vote of at least five (5) members waives this rule subsequent to a written petition filed by the applicant. No oral arguments on such petitions shall be hearing unless invited by the Board. If the Board, after considering the petition, shall determine that it should be granted, it may order that the rule be waived and permit the filing of an application in accordance with these rules governing all applications.

## **ARTICLE VIII** **EXTENSIONS**

1. Extensions of previously approved requests may be granted by the Board. Extensions may be requested for matters where a permit was not obtained within the allotted time or for matters where the sunset provision of the original approval is approaching.
2. Requests for extensions must be filed with the Board in writing prior to the expiration of the two- (2) year time limit described in Article V, Section 4, or any previous Board extension thereof, and must state the reason, or reasons, for such requested extension.
3. If the two- (2) year time limit described in Article V, Section 4, or a sunset provision of the original approval has lapsed, an extension may not be granted by the Board.
4. The Board shall make the following findings in its approval, approval with conditions or rejection of an extension:
  - a. Changed conditions of the neighborhood and area in which the time extension is being made, as compared to conditions present during the original approval;
  - b. Changed conditions of the site in which the request is being made, as compared to conditions present during the original approval;
  - c. Any administrative or legislative policy, ordinance, regulation or comprehensive or neighborhood plan that has been adopted since the time of the original



approval; and

- d. The scope of construction, such as the size of the site or building, involved with the original approval.
5. Notice shall be mailed to adjacent property owners for time extension requests in the same manner in which notice was provided for the original request.

## **ARTICLE IX** **OFFICERS**

### 1. CHAIRMAN

- (a) The Chairman shall preside at all meetings and hearings of the Board. In the event of the absence or disability of the Chairman, the Vice- Chairman shall preside.
- (b) The Chairman, subject to these rules, shall decide all points of procedure unless otherwise directed by a majority of the members of the Board in session at the time.
- (c) The Chairman may designate members of the Board to make personal inspections when necessary from time to time, and unless directed by a majority of the Board, shall appoint such committees as may be found necessary.
- (d) The Chairman shall report at each meeting on all official transactions that have not otherwise come to the attention of the Board.
- (e) The Chairman, subject to the Joint Ordinance Resolution #722, these rules and further instructions from the Board, shall transact the official business of the Board, and supervise the work of the Secretary.

### 2. SECRETARY

- (a) The Secretary, subject to the provisions of the Joint Ordinance/Resolution #722, these rules, the direction of the Board and its Chairman, shall conduct all correspondence of the Board, send out all notices required by these rules and the order of the Board; shall attend all meetings and all hearings of the Board; shall scrutinize all applications to see that these rules are complied with; shall keep the dockets and minutes of the Board's proceedings; shall compile all required records; shall maintain the necessary files and indexes, and generally direct the work of all subordinates and exercise general disciplinary powers.
- (b) Before the docket of any appeal or application, the Secretary shall see that all

maps, plats, and other papers accompanying the appeal or application are properly prepared. He shall demand from the applicant such additional information and data as may be required to fully advise the Board with reference to the application, whether such information and data is called for by the official form or not. Any failure or refusal on the part of the applicant to furnish such additional information or data shall be grounds for dismissal of the application by the Board.

- (c) The Secretary shall send a letter of notice to all owners of property, from a list supplied by the applicant, in accordance with Section 9.3.4 of the Memphis and Shelby County Unified Development Code. Said notices to be addressed to such persons at their last known addresses, or places of residence, and to state the time and place of hearing, and the nature of the appeal or application before the Board.
- (d) The Secretary shall, prior to the hearing on any application, make a personal inspection of the premises affected and be prepared to report to the Board on the existing physical condition of the subject property and the adjacent and surrounding properties.

#### **ARTICLE X** **FORMS**

- 1. The forms referred to in these Rules of Procedure shall be any forms which the Board deems necessary for the proper performance of its functions. These forms may be changed, added to, or deleted by the vote of five (5) members at any regular or special meeting of the Board.

#### **ARTICLE XI** **DOCKET AND MINUTE BOOK**

- 1. The Secretary shall be provided with a docket and minute book which shall be kept posted to date. The docket shall be a well-bound book, in which shall be entered the number of the application and address. Complete materials on each case, including the staff report, application, and its final disposition, shall be kept on file at the Office of Planning and Development. All continuances, postponements, dates of sending notices and other steps taken and acts done shall be noted on the docket.
- 2. The minute book shall be a well-bound book, in which shall be recorded the resolution relating to each case acted on, together with a vote of each member of the Board, those absent being so marked, together with all other actions of the Board. Electronic files may substitute for a well-bound minute book.
- 3. Prior to the approval of the minutes, any member of the Board who voted on the prevailing side of any matter may make a motion for reconsideration. If, upon a second and an affirmative vote of not less than five (5) members of the Board, the motion for

reconsideration passes and the matter in question shall be placed on the docket of the next regular Board meeting. Notice by mail shall be made to the applicant and all individuals who provided testimony on the matter no later than 10 days prior to the next regular Board meeting, at which time the matter shall be reconsidered.

**ARTICLE XII**  
**CONSTRUCTION AND AMENDMENTS**

1. In the event these rules are silent on a particular procedure, Robert's Rules of Order shall govern.
2. These rules may be amended or modified by affirmative vote of not less than five (5) members of the Board; provided that such amendment be presented in writing at a regular meeting and action taken thereon at a subsequent regular meeting.

**ARTICLE XIII**  
**RESOLUTIONS**

1. Every resolution not otherwise provided for shall require a majority vote of the members present at a legally constituted meeting.

**ARTICLE XIV**  
**ADVICE**

1. No informal requests for advice or moot questions will be considered by the Board.

**ARTICLE XV**  
**ORDER OF BUSINESS AT REGULAR MEETINGS**

1. The order of business at all regular meetings of the Board shall be as follows:
  - (a) Roll Call
  - (b) Reading of minutes of previous meeting
  - (c) Hearings
  - (d) Unfinished business
  - (e) Communications
  - (f) New Business

**ARTICLE XVI**  
**SHOW CAUSE HEARINGS**

1. All applicants whose requests are approved by the Board are expected to comply with the Code of Ordinances of the City of Memphis and/or the County of Shelby, including the Memphis and Shelby County Unified Development Code. Furthermore, applicants are expected to honor and abide by representations and guarantees made before the Board, as well as any conditions placed upon their approval by the Board.
2. If the Secretary determines that there have been three (3) or more infractions to the zoning ordinance or any other city or county ordinance, or to any of the conditions approved by the Board, at a property within any twelve (12) month period, he or she may place a show cause hearing on the next available docket of the Board, in accordance with the notice requirements of the Memphis and Shelby County Unified Development Code.
3. Show case hearings shall be limited to those citations related to the following purported violations: noise, litter, hours of operation, outdoor storage, unpermitted principal and/or accessory uses and any other similar violations unrelated to permanent structures and improvements placed on or made to the property.
4. During a show cause hearing, the Secretary shall provide, and the Board shall consider, a complete record of any and all zoning and other code enforcement actions made on the property and the facts and circumstances that the Secretary deems to be inconsistent with representations and guarantees made by the applicant before the Board, or any conditions placed upon the approval by the Board. After the Board has conducted a public hearing on the matter, it may then revoke or modify its original approval, but only as it relates to the violations listed in Paragraph 3 above and only if a finding of fact is made that such a revocation or modification will ameliorate the activities related to the purported code violations.
5. Notice for a show cause hearing shall be consistent with the notice requirements for appeals as provided by the Memphis and Shelby County Unified Development Code. If an applicant fails to attend a show cause hearing, the Board shall hold the hearing in abeyance until its next regular meeting to allow the Secretary to send notice of the meeting through certified mail. If the applicant fails to attend the second meeting, the Board may take any action it deems appropriate in the applicant's absence.