

Department of
Public Health &
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RULES AND REGULATIONS
GOVERNING HEARINGS BEFORE THE BOARD OF
PUBLIC HEALTH & ENVIRONMENT



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RULES GOVERNING HEARINGS

BEFORE THE BOARD OF PUBLIC HEALTH & ENVIRONMENT

PART I. INTRODUCTION

1.01. Authority.

Pursuant to §§ 24-3 and 24-19 of the Denver Revised Municipal Code (“DRMC”), the Manager of the Department of Public Health & Environment (“Executive Director”) has authority to retain persons necessary to carry out the duties under DRMC Chapter 24, Division 1 and to appoint assistants to carry into effect any rule adopted by the Department of Public Health & Environment (“Department”) or city ordinance as set forth § 24-19. To this end, the Executive Director has retained and appointed Hearing Officers to serve at the Board of Public Health & Environment’s (“Board”) pleasure and hearing clerks to perform all administrative functions necessary and incidental to any appeal of a Notice or Order. The Executive Director has also appointed personnel to assist the Board with any appeal for a variance and rulemaking matter.

1.02. General.

- (a) These Rules Governing Hearings Before the Board of Public Health & Environment (“Hearing Rules”) are adopted by the Board and are promulgated by the Executive Director in accordance with the authority in Article II of the Charter of the City and County of Denver and in Article VIII of Chapter 24 of the DRMC. These Hearing Rules pertain to hearings on Appeals (Part II), Variance Petitions (Part III), and Rulemaking proceedings (Part IV). They govern all proceedings initiated after their effective date and supersede and replace the *Rules and Regulations Governing Hearings Before and Variances by the Board of Environmental Health (as amended March 8, 2001)*, *Sections 7 through 11 of the Rules and Regulations Governing Administrative Citations for Violations of the Animal Code, Housing Code, and Noise Control Ordinance (August 31, 2009 as amended through July 14, 2011)*, and the *Rules Governing Hearings Before the Board of Environmental Health (March 13, 2014)*.

All documents to be filed with the Board must be delivered to the Board of Public Health & Environment at 101 W. Colfax Avenue, Suite 800, Denver, CO 80202 or other address as directed on its website.

As used in these rules, the following terms have the following meanings:

- (b) “Administrative Citation” means a citation for a violation of the DRMC, the rules and regulations adopted by the Board and promulgated by the Executive Director,

or noncompliance with a Notice or Order issued by the Executive Director by which a civil penalty for the violation or noncompliance is assessed.

- (c) “Board” means the Board of Public Health & Environment created under section 2.12.13 of the Charter of the City and County of Denver.
- (d) “City” means the City and County of Denver, State of Colorado.
- (e) “Day” means calendar day unless expressly stated otherwise.
- (f) “Department” means the Denver Department of Public Health & Environment.
- (g) “DRMC” means the Denver Revised Municipal Code.
- (h) “Executive Director” means the Manager of the Department of Public Health & Environment created under section 2.12.2 of the Charter of the City and County of Denver or the Manager’s designee.
- (i) “Final Decision” for an appeal of a Notice or Order means the Board's decision arrived at after review of the Recommended Decision or its decision after hearing the matter or review of written briefs in the first instance or a Recommended Decision for which Board review is not timely filed. For a variance, it means the decision of the Board, after hearing or determining an appeal for a variance.
- (j) “Hearing Officer” means the person the Board delegates pursuant to the DRMC to conduct a hearing or review a case that has been submitted for determination based on written argument and written statement of facts.
- (k) “Hearing Rules” means these Rules Governing Hearings Before the Board of Public Health & Environment.
- (l) “Notice or Order” means any notice or order, civil penalty assessment, or administrative citation issued pursuant to the Executive Director's authority under the DRMC.
- (m) “Petition” as used in Part II means a Petition for review of a Notice or Order; as used in Part III means a Petition for a variance; and as used in Part IV means a Petition for rulemaking.
- (n) “Petitioner” means any person who has filed a Petition with the Board to appeal a Notice or Order issued by the department, an appeal for a variance, or a Petition for adoption, amendment, or repeal of a regulation or rule.
- (o) “Recommended Decision” means a Hearing Officer's findings of fact, conclusions of law, and the decision he or she recommends to the Board following a hearing or review of written briefs.

PART II. APPEALS

2.01. Initiating an Appeal.

- (a) Any person aggrieved by a Notice or Order issued by the Department, who believes the same to be factually or legally contrary to the ordinances of the City, or the policies and regulations of the Department, may appeal the Notice or Order to the Board in the manner set forth in Part II of these Hearing Rules.
- (b) An appeal is initiated by filing a Petition for Review of a Notice or Order. The Petition, together with a nonrefundable filing fee, must be filed within thirty (30) days from the date of service of the Notice or Order being appealed.
- (c) The filing fee for an appeal of a Notice or Order is \$25.00. Payments by check must be payable to the Manager of Finance.
- (d) Timely filing of the Petition and payment of the filing fee are jurisdictional prerequisites to an appeal.

2.02. Petition for Review.

- (a) **Content.** All petitions, briefs, and other papers must be written or typed, and if any of these papers are illegible, the Executive Director may refuse to accept the filing. No particular form of Petition is required, provided the information set forth below is included:
 - (i) Petitioner's name, mailing address, and telephone number.
 - (ii) If Petitioner has legal representation, the name, mailing address, and telephone number of that representative.
 - (iii) The DRMC provision(s) and, if any, the rule and regulation at issue; the dollar amount in controversy; and the time during which the matter at issue accrued or occurred.
 - (iv) A copy of the Notice or Order being appealed.
 - (v) The reason(s) Petitioner believes the Notice or Order is factually or legally contrary to the ordinances of the City, or the policies and regulations of the Department.
 - (vi) A statement of the relief requested (e.g., outcome desired).
 - (vii) If appropriate, any exhibits (including any drawings, floor plans, or pictures) supporting Petitioner's position.

(viii) The signature of the Petitioner or Petitioner's legal representative.

2.03. Sufficiency. If a legible Petition is timely filed with the filing fee and substantially complies with Rule 2.02(a), the Board Secretary shall accept the Petition. If the Petition is illegible, or does not substantially comply with Rule 2.02(a), the Board Secretary may refuse to accept the filing, but must provide written notice to the Petitioner describing the deficiency.

2.04. Parties; Representation; and Service of Documents.

(a) **Parties.** The parties to a hearing are the Petitioner (the person or entity, to whom the appealed Notice or Order was issued) and the Department on behalf of the City as the Respondent.

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

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

2.05. Responsibilities of the Board and Hearing Officer.

(a) **Determination of Each Appeal.** The Board shall conduct a hearing on each accepted Petition, including those submitted for determination based on written argument and written statement of facts.

(b) **Assignment of Hearing Officer.** The Board, at its sole discretion, may delegate the conduct of the hearing or the review of a matter submitted for determination based on written argument and written statement of facts to a Hearing Officer.

(c) **Necessary and Incidental Duties and Functions.** The Board shall perform the duties and functions necessary and incidental to determining the matter, hearing all evidence, examining all documents, ruling on evidentiary questions, and generally conducting a quasi-judicial proceeding in conformance with the DRMC, these Hearing Rules, and other applicable rules and regulations.

(d) **Subpoena.** Upon request by any party, any Board member may issue a subpoena. The party requesting the subpoena shall serve it upon the person whose

attendance is required and provide notice to all other parties and interested persons in accordance with Rule 45 of the Colorado Rules of Civil Procedure. All costs related to the subpoena, including witness and mileage fees, must be paid by the requesting party in accordance with Rule 45 of the Colorado Rules of Civil Procedure.

(e) Hearing Date.

(i) Hearings will generally be scheduled in the order petitions are filed but may be scheduled out of order as the Board Secretary deems appropriate. Hearings and cases submitted for consideration based on written argument and written statement of facts may be scheduled at any regularly scheduled Board meeting or at other times as requested by the Board Chair. If requested, the Board Secretary may grant each party one rescheduling request. At the request of either party, the Board may grant continuances for good cause shown.

(ii) No later than ten (10) days before the hearing, the Board Secretary shall provide written notice of the date, time and place of all hearings to the parties. Written notice must be sent to the Petitioner via first class mail at the address specified in the Petition and to the Executive Director.

(f) Ex Parte Communications. The Board and Hearing Officers shall not initiate, permit, or consider communications concerning the subject matter of a pending appeal that are made outside the presence of all parties or their legal counsel.

2.06. The Hearing. The following rules apply to all hearings on petitions for review of a Notice or Order. The Board, as that term is used in this Part II, includes an appointed Hearing Officer.

(a) Department Response. The Department may file a response to the Petition and provide other information to the Board that it believes will assist the Board in deciding the matter. The response is due within fourteen (14) days of the Department's receipt of the Petition.

(b) Petitioner's Appearance/Failure to Appear. Any Petitioner who fails to appear at a scheduled hearing waives the right to a hearing and adjudication of issues related to the hearing, provided that the notice of the hearing was mailed in the time and manner set forth in Section 2.05(e)(ii) of these Hearing Rules. Failure to appear at a hearing that is noticed in accordance with those requirements, may result in dismissal of the Petition and affirmation of the Notice or Order.

(c) Prehearing Statement. At the request of the Board or upon a motion from a party, the Board may require the parties to file a prehearing statement. The purpose of a prehearing statement is to define the issues to be presented; identify the witnesses and exhibits to be presented, the time required for the hearing; and,

disclose generally the nature of the testimony to be presented to allow a fair hearing of the issues. The prehearing statement must be filed at least five (5) business days before the hearing date, or as otherwise ordered by the Board. The prehearing statement must present the issues raised by the Petition, agreed and disputed facts, copies of the exhibits not included with the Petition, names of witnesses with a brief statement summarizing their testimony, and if either party expects that more than 15 minutes will be needed to present its case, a request for a specific amount of time. Petitioner's exhibits must be numbered and the Department's exhibits must be lettered. If a prehearing statement is required and a party fails to list witnesses or to provide copies of exhibits to the prejudice of the other party or the Board's consideration of the issues, the Board may disallow testimony by unlisted witnesses and may refuse to admit unlisted exhibits into evidence, except for purposes of rebuttal.

- (d) Order of proceedings.** The order of proceedings will be:
- (i)** Docket call by the Board.
 - (ii)** Administration of Oath.
 - (iii)** Opening statement by Petitioner, unless waived.
 - (iv)** Opening statement by a representative of the Department, unless waived or reserved until the opening of the Department's case.
 - (v)** Presentation of testimony and other evidence by Petitioner, allowing cross-examination by the Department (exhibits shall be numbered for identification).
 - (vi)** Presentation of testimony and other evidence by the Department with cross-examination by Petitioner (exhibits shall be lettered for identification).
 - (vii)** Rebuttal testimony and evidence, if any.
 - (viii)** Sur-rebuttal testimony and evidence, if the Board chooses.
 - (ix)** Argument, if desired by the Board:
 - (A)** Closing argument by Petitioner summarizing the evidence, legal basis and argument in support of its position. If the Petitioner chooses not to present a closing argument, none shall be allowed by the Department.
 - (B)** Closing argument by the Department summarizing the evidence, legal basis and argument in support of its position.
 - (x)** Instead of or in addition to argument, the Board may request the submission

of written briefs.

- (e) **Testimony under Oath.** All oral testimony must be given under oath administered by the Board or the Hearing Officer in substantially the following form: “Do you solemnly swear or affirm that the testimony you are about to give is the truth, the whole truth, and nothing but the truth?” with a required affirmative response.
- (f) **Rules of Procedure and Rules of Evidence.** The hearings shall be conducted generally in accordance with these Hearing Rules regardless of whether it conforms to common law or statutory rules of procedure or rules of evidence. The Board may receive and consider evidence not admissible under the Colorado Rules of Evidence if it possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs. The Board may use the experience, technical competence, and specialized knowledge of any of its members in the evaluation of evidence presented.
- (g) **Burden of Proof.**
 - (i) Notices and Orders of the Executive Director are presumed to be correct. The Notice or Order serves as *prima facie* evidence of the existence of the violation.
 - (ii) The Petitioner must prove by a preponderance of the evidence (presented at the hearing or submitted by written brief and supporting material) that the Notice or Order is legally contrary to the applicable ordinances or rules and regulations or that the facts presented do not show a violation of the applicable ordinance or rules and regulations.
 - (iii) For procedural efficiency, the order of proceedings may be altered to require the Department to present its case in support of the Notice or Order first. The burden of persuasion, however, remains with the Petitioner to show the correctness of its position by a preponderance of the evidence.
- (h) **Expert Witnesses.** A witness intending to give opinion testimony must first be qualified as an expert witness.
- (i) **Recordings and Transcripts.** All hearings must be recorded or transcribed. A copy of the recording or transcript of a recording will be provided at the expense of the requesting party. The Petitioner, however, may employ a certified stenographer at its expense.

2.07. Presentation of Case at Hearing.

- (a) **Time Allowed.** The Petitioner and the Department will each have fifteen (15) minutes to present their respective cases (opening statement, presentation of

evidence, rebuttal evidence, and closing statement) to the Board unless one of the parties has requested more time to present its case. Cross-examination time is not included in the fifteen-minute time limit. A request for additional time must be made in the prehearing statement, if one is required. Otherwise, the request must be made in writing at least seven (7) days before the hearing. In determining whether and how much additional time to allow, the Board shall consider the complexity of the case, the needs of due process, and fairness to the Parties. This Rule is intended to afford a full and fair hearing of each Petition in an orderly and expeditious manner that will allow for prompt hearing of Petitions.

- (b) **Copies.** Copies made by printers and by duplicating and facsimile machines may be admitted into evidence or substituted in evidence in place of original machines.
- (c) **Electronic Documents.** An electronic document, a paper copy of an electronic document, or a paper copy of a document bearing an electronic signature may be admitted into evidence or substituted in evidence in place of original documents.

2.08. Submission on Written Briefs.

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

- (a) The Petitioner must provide written notice of this election to the Executive Director at least seven (7) days before the hearing;
- (b) The Department is limited to submitting its position in writing; and
- (c) The Board shall establish a briefing schedule and provide written notice of it to the parties.

2.09. Recommended Decision.

- (a) **Timing.** If the Board has delegated review of an appeal to a Hearing Officer, the Hearing Officer shall issue a written Recommended Decision, which must be sent to the parties by first class mail, postage prepaid (unless waived by a party) within thirty (30) days of the date of the hearing.
- (b) **Outcome.**
 - (i) If Petitioner does not meet its burden of proof, the Hearing Officer may: uphold the Order or Notice; uphold, suspend, or reduce the civil penalty; and/or require payment of any outstanding assessed civil penalties and costs by a specified date.

- (ii) If Petitioner meets its burden of proof, the Hearing Officer must dismiss the Order or Notice and overturn the assessment of civil penalties.
- (c) **Effect.** Unless a party timely requests the Board to review a Hearing Officer's Recommended Decision in accordance with Rule 2.10(a) of these Hearing Rules, the Recommended Decision becomes the Decision of the Board on the date it is served upon Petitioner by personal service, or if served via U.S. Postal Services, ten (10) days after it is sent first class mail, postage prepaid.

2.10. Petition for Board Review of Recommended Decision.

- (a) Any party may file a Petition for Board Review of the Hearing Officer's Recommended Decision. The Petition must be filed with the Board within ten (10) days of mailing of the decision. For the purpose of this filing requirement, for a Petition sent via first class mail, postage prepaid, or via overnight delivery service, the date of filing will be at the date postmarked or delivered to the City, respectively.
- (b) No particular form of Petition for Board Review of the Hearing Officer's Recommended Decision is required, provided that the following information is set forth in writing:
 - (i) The case number;
 - (ii) A summary of the party's objections to the Hearing Officer's findings of fact, conclusions of law, and Recommended Decision;
 - (iii) A statement of the relief requested;
 - (iv) The name, address and telephone number of the party seeking Board review of the Recommended Decision, and the name, address, and telephone number of that party's legal representative, if any, authorized to represent them in that matter; and
 - (v) The signature of the party seeking Board review of the Recommended Decision or of that party's legal representative.
- (c) If a legible Petition is timely filed and substantially complies with Rule 2.10(b), the Board Secretary shall accept the Petition. If the Petition is illegible, or does not substantially comply with Rule 2.10(b), the Board Secretary may refuse to accept the filing, but must provide written notice to the Petitioner describing the deficiency.
- (d) The Board is not bound by a Hearing Officer's Recommended Decision; the Board's review of Recommended Decisions, however, is limited to the administrative record established at the underlying hearing before the Hearing Officer.

- (e) The administrative record includes all filings and documents provided to the Hearing Officer before and during the hearing. If the matter was submitted for determination on written briefs, the administrative record includes the Recommended Decision, filings and documents submitted. An index of the administrative record shall be provided to the parties at the time the record is provided to the Board. The administrative record should be provided to the Board at least seven (7) days before the Board meeting at which it is scheduled for Board review.
- (g) The Board shall not initiate, permit, or consider communications concerning the subject matter of a pending appeal that are made outside the presence of all parties or their legal counsel.

2.11. Board Hearing for Review of a Recommended Decision.

- (a) The parties to a hearing for review of a Recommended Decision are the person or entity seeking review as the Petitioner and the other party as the Respondent.
- (b) Hearings will generally be scheduled in the order petitions are filed but may be scheduled out of order as the Board Secretary deems appropriate. If requested, the Board Secretary may grant each party one rescheduling request. At the request of either party, the Board may grant continuances for good cause shown.
- (b) No later than ten (10) days before the hearing, the Board Secretary shall provide written notice of the date, time, and place of the hearing to the parties. Written notice must be sent to the Petitioner via first class mail at the address specified in the Petition and to the Respondent.
- (c) Any Petitioner who fails to appear at a scheduled hearing waives the right to the hearing and adjudication of issues related to the hearing, provided that the notice of the hearing was mailed in the time and manner set forth in Section 2.11(b) of these Hearing Rules. Failure to appear at the hearing noticed in accordance with those requirements may result in dismissal of the Petition and affirmation of the Recommended Decision.
- (d) The Petitioner and the Respondent will each have fifteen (15) minutes to present oral argument to the Board in support of their respective positions unless one of the parties has requested more time to present its argument. A request for additional time must be made in writing at least seven (7) days before the hearing. In determining whether and how much additional time to allow, the Board shall consider the complexity of the case, the needs of due process, and fairness to the Parties.

2.12 Final Decision; Compliance.

- (a) When the Board issues a decision either after hearing or determining an appeal

in the first instance, or after the Board reviews a Recommended Decision, its decision becomes the Final Decision subject to review under Colorado Rule of Civil Procedure 106(a)(4).

- (b) If a Petition for Board review of a Recommended Decision is not filed within ten (10) days, the Recommended Decision becomes the Board's Final Decision.
- (c) If a Final Decision includes a conditional waiver or any civil penalty, in whole or in part, and Petitioner does not fully comply with the conditions, the civil penalty is automatically reinstated in its entirety without further Board action.

PART III. VARIANCE

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

3.02. Petition for Variance on Appeal.

- (a) **Content.** All petitions, briefs, and other papers must be written or typed, and if any of these papers are illegible, the Executive Director may refuse to accept the filing. No particular form of Petition is required, provided it includes:
 - (i) Petitioner's name, mailing address, and telephone number.
 - (ii) The name, mailing address, and telephone number of Petitioner's legal representative, if any.
 - (iii) The DRMC provision(s) and, if any, the rule and regulation from which the variance is requested and the time period for which it is sought.
 - (iv) Any exhibits (including any drawings, floor plans, or pictures) supporting Petitioner's position, if appropriate.
 - (v) An explanation of how:
 - (A) The Petitioner will suffer undue hardship if the variance is not granted;
 - (B) A variance, if granted, would not adversely affect public health; and
 - (C) The variance, if granted, would be in harmony with the spirit and purposes of the ordinance, rule, or regulation being appealed.

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

3.03. Sufficiency.

If a legible Petition is timely filed with the filing fee and substantially provides the information described in Rule 3.02 of these Hearing Rules, the Board Secretary shall accept the Petition. If the Petition is illegible or does not substantially provide the information described in Rule 3.02 of these Hearing Rules, the Board Secretary may refuse to accept the filing, but must provide written notice to the Petitioner describing the deficiency. If the Petition and filing fee were refused, Petitioner may submit an amended Petition.

3.04. Parties; Representation; and Service of Documents.

- (a) The parties to a hearing are the person or entity appealing for a variance, as the Petitioner, and the Department on behalf of City, as the Respondent.
- (b) A natural person may represent himself or herself or be represented by an attorney admitted to practice in any of the United States. If the Petitioner is not a natural person or a sole proprietor, it must be represented by an attorney admitted to practice in any of the United States unless the Board allows a shareholder, member, partner, board member, or officer to represent the business entity. In this case, the representative of the business entity must submit a properly executed power of attorney at or before the hearing.
- (c) Upon filing any document with the Board, the party filing the document shall provide a copy of all documents filed to the other party.

3.05. Board Responsibilities.

- (a) **Determination of Variance on Appeal.** The Board shall conduct a hearing on each accepted Petition, including those submitted for determination based on written argument and written statement of facts and figures, all examination of these documents.
- (b) **Necessary and Incidental Duties and Functions.** The Board shall perform the duties and functions necessary and incidental to determining the variance, hearing all evidence, examining all documents, ruling on evidentiary questions, and generally conducting a quasi-judicial proceeding in conformance with the DRMC, these Hearing Rules, and other applicable rules and regulations.
- (c) **Subpoenas.** Upon request, any Board member may issue a subpoena. The party requesting the subpoena shall serve it upon the person whose attendance is required and provide notice to all other parties and interested persons in

accordance with Rule 45 of the Colorado Rules of Civil Procedure. All costs related to the subpoena, including witness and mileage fees, must be paid by the requesting party in accordance with Rule 45 of the Colorado Rules of Civil Procedure.

(d) Setting and Notice Hearing.

- (i) Setting a Hearing. Hearings will generally be scheduled in the order petitions are filed but may be set out of order as the Board Secretary deems appropriate. Hearings and cases submitted for consideration based on written argument and written statement of facts may be set at any regularly scheduled Board meeting or at other times as requested by the Chair. If requested, the Board Secretary may grant each party one rescheduling request. At the request of either party, the Board may grant continuances for good cause shown.
- (ii) Notice. No later than ten (10) days before the hearing, the Board secretary shall provide written notice of the date, time and place of all hearings to the parties. Written notice must be sent to the Petitioner via first class mail at the address specified in the Petition and to the Executive Director.

3.06. Ex Parte Communications.

The Board shall not initiate, permit, or consider communications concerning the subject matter of a pending petition for variance made outside the presence of all parties or their legal counsel.

3.07. The Hearing.

The following rules apply to all hearings on petitions for variance.

(a) Department Response.

- (i) The Department may file a response to the Petition or provide information to the Board that it believes will assist the Board to decide the matter. The response is due within fourteen (14) days of the Department's receipt of the Petition.
- (ii) For variance requests that the Department opposes, the Department must inform the Board and the Petitioner of its opposition at least ten (10) days before the scheduled hearing.

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

- (i)** A Petitioner seeking a variance opposed by the Department who fails to appear at a scheduled hearing waives the right to a hearing and adjudication of issues related to the hearing, provided that notice of the hearing was mailed in the time and manner set forth in Section 3.05(d)(ii) above. Failure to appear at a hearing that is noticed in accordance with those requirements may result in denial of the variance request or dismissal. Petitioner may re-file, and at the Board's discretion, the fee for the re-filing may be waived, in whole or in part.
- (ii)** If the Department supports the Petition and request for variance, the Petitioner may appear at the hearing before the Board and present evidence and arguments, or may allow the Department to present the matter to the Board. However, the Board is not bound to accept the Department's recommendation, and the Petitioner's failure to appear is a final waiver of the right to appear and present evidence and arguments on its own behalf.

(c) Order of Proceedings. The order of proceedings will be:

- (i)** Docket call by the Board.
- (ii)** Administration of oath.
- (iii)** Presentation of testimony and other evidence by Petitioner, allowing cross-examination by the Department (exhibits shall be lettered for identification).
- (iv)** Presentation of testimony and other evidence by Department, allowing cross-examination by Petitioner (exhibits shall be numbered for identification).
- (v)** Rebuttal testimony and evidence, if any.
- (vi)** Sur-rebuttal testimony and evidence, if the Board chooses.
- (vii)** Testimony from members of the public must be allowed, with persons supporting the Petition followed by those opposing the Petition.
- (viii)** Argument, if desired by the Board.
 - (A)** Closing argument by Petitioner summarizing evidence, legal basis and argument in support of its position. If the Petitioner does not present a closing argument, the Department may not either.
 - (B)** Closing argument by Department summarizing the evidence, legal basis and argument in support of its position.

- (ix) Petitioner’s Reply to Department’s closing argument.
- (x) Instead of or in addition to argument, the Board may request the submission of written briefs.

3.08. Testimony under Oath.

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

3.09. Rules of Procedure and Rules of Evidence.

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

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

- (a) Petitioner will suffer undue hardship if the variance is not granted;
- (b) A variance, if granted, would not adversely affect public health; and
- (c) The variance, if granted, would be in harmony with the spirit and purposes of the ordinance, rule, or regulation being appealed.

3.11. Expert Witnesses.

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

3.12. Recordings and Transcripts.

All hearings must be recorded or transcribed. A copy of the recording or transcript of a recording will be provided at the expense of the party who requests it. The Petitioner, however, may employ a certified stenographer at its expense.

3.13. Presentation of Case at Hearing.

(a) Time Allowed.

- (i) The Petitioner and the Department will each have fifteen (15) minutes to present their respective cases (opening statement, presentation of evidence, rebuttal evidence, and closing statement) to the Board, unless the Board grants more time. Cross-examination time is not included in the fifteen-minute time limit. A request for additional time must be made in writing at least two (2) business days before the hearing. In determining whether and how much additional time to allow, the Board considers the complexity of the request, the needs of due process, and fairness to the Parties.
- (ii) The Board shall allow a public comment period. Members of the public wishing to comment during this time, should sign up to speak in accordance with the procedure the Board secretary establishes. Each member may have up to three (3) minutes. The Board, however, may facilitate the public comment period by limiting repetitive comments.

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

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

3.14. Submission on Written Briefs.

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

(b) He or she must provide written notice of this election to the Executive Director within seven (7) days of filing the Petition;

(c) The Department is limited to submitting its position in writing; and

(d) The Board will establish a briefing schedule.

3.15. Final Decision.

(a) The decision of the Board, after hearing or determining an appeal for a variance, is the final decision subject to appeal under Colorado Rule of Civil Procedure 106(a)(4).

- (b) A variance granted by the Board expires upon a change of circumstances from those upon which the variance was granted, or upon a change of ownership of the establishment or entity receiving the variance, unless the Board determines and states in writing that the variance granted is assignable to a new owner.
- (c) The administrative record includes all filings and documents submitted to the Board before and during the hearing. The Board secretary shall provide the index of the administrative record to the parties when the record is provided to the Board.

PART IV. RULEMAKING HEARINGS AND PROCEDURES.

4.01. Rulemaking Petition.

- (a) All rulemaking matters before the Board are subject to Chapter 24, Article VIII of the DRMC. The provisions set forth below supplement that authority.
- (b) The Department may petition the Board in writing to adopt, amend, or repeal a rule or regulation. The Board has the discretion whether to accept a rulemaking Petition. If the Board denies a rulemaking request, it shall provide a brief written explanation of its rationale.
- (c) A Petition for rulemaking must include the language of the proposed regulation and a statement of the Board's authority to promulgate the regulation.

4.02 Rulemaking Notice.

If the Board accepts a Rulemaking Petition, the Board Secretary shall provide a Notice of Proposed Rulemaking in accordance with the requirements of Chapter 24, Article VIII of the DRMC.

4.03 Public Participation.

Any person who wishes to comment on proposed rules may do so in writing delivered to the Board before the hearing date or in person at the hearing, subject to any requirements for participation set out in the notice of hearing. Additionally, persons wishing to comment must sign up on the sign-in sheets provided by the Board Secretary. Minutes may be prepared by the Board to memorialize oral comments or presentations at the hearing as part of the rulemaking record. If minutes are not prepared, the Board shall preserve the proceedings at the hearing on audio-recording media so that the proceedings may be transcribed at a later date at the expense of any person requesting a transcript of the hearing.

4.04. Board Responsibilities.

- (a) Public Rulemaking Hearing.** The Board shall conduct a public hearing. The Board shall allow the Department and any person who wishes an opportunity to submit oral or written data, views, or arguments.
- (b) Necessary and Incidental Duties and Functions.** The Board shall perform the duties and functions necessary and incidental to conducting a rulemaking proceeding in conformance with the DRMC, these Hearing Rules, and other applicable rules and regulations.
- (c) Subpoenas.** Upon request, any Board member may issue a subpoena. The party requesting the subpoena shall serve it upon the person whose attendance is required and provide notice to all other parties and interested persons in accordance with Rule 45 of the Colorado Rules of Civil Procedure. All costs related to the subpoena, including witness and mileage fees, must be paid by the requesting party in accordance with Rule 45 of the Colorado Rules of Civil Procedure.
- (d) Hearing Date.** The Board secretary will generally schedule hearings in the order that petitions are filed but may schedule hearings out of order as the Board secretary deems appropriate at any regularly scheduled Board meeting or at other times as requested by the Chair. The Board secretary may grant continuances for good cause shown.

4.05. The Hearing.

- (a) Order of the proceeding.** The order of the proceeding will be:
 - (i)** Docket call by the Board.
 - (ii)** Administration of oath.
 - (iii)** Opening statement by the proponent.
 - (iv)** Presentation of testimony and other evidence by the proponent, providing a summary, explanation, and rationale for the proposed regulation. (Exhibits must be numbered for identification). Unless the Board states otherwise in the Notice of Proposed Rulemaking, the proponent will have fifteen (15) minutes to present the proposed regulation to the Board. Response rebuttal and surrebuttal time is not included in this time limit.
 - (v)** Presentation of comments by any person supporting the proposed regulation followed by those opposing the proposed regulation. Each commenter may have three (3) minutes to comment on the proposed regulation, unless the Board has granted additional time. The Chair may limit presentations that are repetitive in nature. Unless the requirements for

participation set out in notice of hearing provide otherwise, in considering a request for additional time, the Board will consider the complexity of the proposed rule or regulation and fairness to interested persons.

(vi) Proponent's response to testimony and evidence, in response to the supporters and opponents, if any.

(vii) Summations. After the receipt of evidence, at the Board's sole discretion it may allow or require interested persons or parties to present oral or written summaries of the facts and the law either at the hearing or afterwards.

(b) **Ex Parte Communications.** The Board shall not initiate, permit, or consider communications concerning the subject matter of a proposed rule made outside the presence of all parties or their legal counsel.

4.06. Administrative Functions.

(a) The Board Secretary, on behalf of the Board, is responsible for performing administrative functions necessary and incidental to any petition for rulemaking, including, without limitation, acceptance and refusal of petitions and setting of hearings.

(b) Petition for rulemaking will be available from the Board Secretary, or if posted online, downloaded from the board's webpage <https://www.denvergov.org/Government/Agencies-Departments-Offices/Public-Health-Environment/About-Us/Board-of-Public-Health-Environment>. Any person who submits written comments must provide the original and one copy to the Board. Any person who wishes to obtain a copy of any writing submitted in the rulemaking matter must request the copies in writing. The cost of copies is \$0.25 per page.

PART V. SEVERABILITY.

If a court of competent jurisdiction finds any provision of these Hearing Rules, including any portion of it, or the application of it, to be invalid, the invalidity of the remaining provisions, and portions of them, will not be affected. Each provision of these Hearing Rules, including any portion of them, is severable.

PART VI. OTHER REQUIREMENTS.

Mailings, notices, computations of time, time limitations, service and filings must conform to the requirements of the particular law or rule or regulation involved, and in any instance where these Hearing Rules are inconsistent or allegedly

inconsistent with the provisions in such law, rule or regulation, the Board's determination about which requirement applies controls.

PART VII. SUSPENSION OF HEARING RULES.

For good cause shown, the Board may suspend the application of any of these Hearing Rules except those that are designated as jurisdictional.