



# TOWN OF WAYNESVILLE

## Zoning Board of Adjustments

9 South Main Street  
Waynesville, NC 28786  
Phone (828) 456-8647 • Fax (828) 452-1492  
[www.waynesvillenc.gov](http://www.waynesvillenc.gov)

Stephanie Strickland  
Henry Kidder  
Jack Suddath  
Neil Ensley  
David Felmet  
Charles John Gisler

Development Services  
Director  
Elizabeth Teague

### Regular Meeting

Town Hall – 9 South Main Street, Waynesville, NC 28786  
**Tuesday, November 3, 2015, 5:30 PM**

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#### A. CALL TO ORDER

1. Welcome/Calendar/Announcements
2. Adoption of Minutes

**Motion:** *To approve the minutes of December 3, 2013 as presented (or as corrected)*

#### B. NEW BUSINESS

1. Training session
2. Election of Chairman and Vice Chairman

#### C. ADJOURN

MINUTES OF THE TOWN OF WAYNESVILLE BOARD OF ADJUSTMENT  
REGULAR MEETING  
December 3, 2013

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**THE WAYNESVILLE BOARD OF ADJUSTMENT** held a regular meeting on Tuesday December 3, 2013 at 5:30 p.m. in the board room of the Town Hall, 9 South Main Street, Waynesville, NC.

**A. CALL TO ORDER**

**1. Welcome/Calendar/Announcements**

Chairman Mack Noland welcomed everyone and called the meeting to order at 5:30 p.m. with the following members present:

Stephanie Welch-Strickland  
Ken Stahl  
David Felmet, Jr  
Chairman Mack Noland

The following staff members were present:

Paul Benson, Planning Director  
Eddie Ward, Deputy Clerk  
Jason Rogers, Codes Administrator

**2. Minutes of October 1, 2013**

***Board Member David Felmet, Jr made a motion, seconded by Board Member Stephanie Welch Strickland to approve the minutes of October 1, 2012 as presented. The motion passed unanimously.***

**B. NEW BUSINESS**

**3. Board of Adjustment Workshop presented by Virginia Faust, Senior Planner with NC Department of Commerce, Western Region Office**

Chairman Noland introduced Ms. Faust, and thanked her for coming to do the workshop for the Board of Adjustment

Ms. Faust said there had been several changes to the Board of Adjustment Statutes and gave a slide show presentation explaining the changes. The major changes included

- Variances
- Voting
- Appeals of staff decisions
- Quasi-judicial hearing procedures

## **Variances**

With a variance request, Four Items must be shown:

1. Unnecessary hardship
2. Hardship must be peculiar to property (location, size, topography)
3. Circumstances not a result of actions taken by applicant/property owner (i.e. self-created)
4. Consistent with spirit, purpose, intent of ordinance: safely secured; substantial justice achieved

## **Voting**

1. 4/5 supermajority now required solely for granting a variance (Only consider Board members eligible to vote to compute supermajority)
2. Simple majority required for condition/special use permit, appeal/interpretation

## **Appeals of Staff Decisions**

1. Staff makes official determination (final, written, binding) – not advisory, not theoretical
2. Official gives written notice to owner of property that is subject of staff decision, and to party who sought decision, if different from owner
3. Three options to deliver written notice:
  - Personal delivery
  - Electronic mail
  - First-class mail
4. Only people with standing under G.S. 160A-393(d), or the local government, may appeal staff decision to Board of Adjustment
5. Appeal taken by filing notice with City Clerk
6. Notice of appeal shall state grounds for appeal
7. Owner or other party had 30 days from receipt of written notice to file and appeal
8. Any other person with standing to appeal shall have 30 days from receipt from any source of actual or constructive notice of decision to file an appeal
9. Conclusively presumed all persons with standing to appeal have constructive notice of decision by way of a sign on property
  - Sign states “Zoning Decision” or Subdivision Decision”
  - Letters at least six inches high
  - Phone number to contact official for information
  - Sign remains on the property for at least 10 days
10. Posting sign not only form of constructive notice
11. Posting is responsibility of landowner or applicant (unless ordinance specifies otherwise)
12. Verification of posting provided to official who made decision
13. Posting signs not required unless stated in local ordinance

14. Zoning official transmits to Board all documents, exhibits constituting the record prior to hearing
15. Copy of record also provided to appellant and property owner if appellant is not Owner

#### **Quasi-judicial Hearing Notices**

1. Uniform mail and posted notice for all quasi-judicial hearings
  - Mail to owner and abutting owners 10 – 25 days prior to hearing
  - Prominently post site (or adjacent street or highway right-of-way
  - Within same time frame as above
  - No published notice required
  - Place verification of notice provided in file
2. Oaths can be administered by Chair, anyone acting as Chair, or Clerk to Board
3. Standards laid out for subpoenas
4. Must determine/resolve contested facts
5. Apply facts to applicable standards
6. Every quasi-judicial decision shall be based upon competent material, and substantial evidence in record
7. Decision states what Board concluded regarding contested facts
8. Must be in writing, signed by the Chair or other official specified by Ordinance
9. Made in reasonable time
10. Decision becomes effective when filed with Clerk to Board, or whomever ordinance specifies
11. Delivery of decision to applicant, owner, anyone who submitted written request for copy prior to effective decision date; can also request copy at hearing
12. Person required to provide notice certifies proper notice made
13. Every decision subject to review by superior court in nature of certiorari pursuant to G.S. 160A-393
14. 30 days to file for review by superior court
15. Slight change in wording G.S. 160A-388 (e)(2)

After the presentation, Ms. Faust answered questions from the Board concerning procedures that should be followed by the Board. Also, the Board posed a question to Mr. Rogers concerning the Board being indemnified of liability for decisions made by the Board. Mr. Rogers stated he would contact the Town Attorney, Woodrow Griffin, for clarification.

#### **C. ADJOURN**

***With no further business, a motion was made by Ken Stahl, seconded by Stephanie Welch Strickland, to adjourn at 6:40 p.m. The motion passed unanimously.***

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Mack Noland, Chairman

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Eddie Ward, Deputy Clerk

## **Town of Waynesville Code of Ordinances: 14.4 – Board of Adjustment.**

### **14.4.1 Powers and Duties.**

The Board of Adjustment of Waynesville shall have the following powers and duties to be carried out in accordance with the terms of this ordinance:

- A. To hear and decide appeals from any order, requirement, permit, decision or determination issued by an administrative officer of the town in enforcing any provision of the Town of Waynesville Minimum Housing Codes.
- B. LDS Decisions: The Board of Adjustment shall render final decisions regarding the following permits types (see also Chapter 15):
  - 1. Appeal of any Administrative decisions (15.6-7, 15.8.1, 15.9.1,3, 15.12)
  - 2. Appeals of Planning Board Decision regarding Subdivision (Major) - Preliminary Plats (15.11.1)
  - 3. Appeals of Historic Preservation Commission Decision regarding Certificate of Appropriateness (Major) (15.11.3)
  - 4. Variances (15.13)
- C. The Board of Adjustment shall also have any additional powers and duties as may be set forth for in other laws and regulations or at the direction of the Board of Alderman.

### **14.4.2 Membership and Quorum.**

- A. The Waynesville Board of Adjustment shall consist of the number of members referenced and indicated in the most current version of the Town of Waynesville Boards and Commissions Manual which may from time to time be updated or amended. A quorum of four-fifths (4/5) of the membership shall be necessary to transact business.
- B. The Board shall not pass upon any question relating to an appeal from a decision, order, requirement or determination of town officials or an application for a variance or conditional use permit when there are less than four-fifths (4/5) of the board members with jurisdictional authority present.
- C. The Waynesville Board of Aldermen shall appoint members from within the Town limits and, if the Town is exercising Extraterritorial Jurisdiction, one (1) or more members shall be appointed by the Haywood County Commissioners as set forth in G.S. 160A-362 to provide for proportional representation of residents within the Extraterritorial Jurisdiction. As vacancies occur the Administrator shall advise the appropriate governing board to make appointments or reappointments as necessary to maintain this proportional representation based on best available estimates of current population of the Town and the Extraterritorial Jurisdiction. The representatives of the Extraterritorial Jurisdiction shall have equal rights, privileges and duties with the other members of the Board of Adjustment.
- D. All members shall serve three (3) year terms and may succeed themselves.
- E. Officers shall be elected in accordance with the adopted rules of procedure.
- F. Meetings shall be held on the date and time as referenced in the Town of Waynesville Boards and Commission Manual and may from time to time be updated or amended.

## **15.5 - General Requirements for Quasi-Judicial Hearings and Decisions.**

A quasi-judicial decision is a process that involves the finding of facts regarding a specific application of an ordinance and the exercise of discretion when applying the standards of the ordinance. Quasi-judicial decisions include decisions involving variances, special use permits, and appeals of administrative determinations. In accordance with G.S. 160A-393, decisions on the approval of site plans and subdivisions and are quasi-judicial in nature if the ordinance authorizes a decision-making board to approve or deny the application based not only upon whether the application complies with the specific requirements set forth in the ordinance, but also on whether the application complies with one or more generally stated standards requiring a discretionary decision on the findings of fact to be made by the decision-making board. As a result the following standard procedures shall be incorporated as appropriate.

### **15.5.1 Standards for Conduct of Quasi-judicial Hearings.**

- A. **Contact with Decision-Making Board Members:** Contact with any members of a decision-making board prior to the public hearing by any individual regarding the matter is prohibited.
- B. **All Participants to be Sworn In:** All participants in the public hearing shall be duly sworn in prior to the submission of any testimony by the Chair or Clerk to the Board/Commission.
- C. **Competent Evidence Required:** All decisions shall be based on competent evidence entered in as part of the record. The term "competent evidence," as used in this subsection, shall not preclude reliance by the decision-making board on evidence that would not be admissible under the rules of evidence as applied in the trial division of the General Court of Justice if (i) the evidence was admitted without objection, or (ii) the evidence appears to be sufficiently trustworthy and was admitted under such circumstances that it was reasonable for the decision-making board to rely upon it. The term "competent evidence," as used in this subsection, shall not be deemed to include the opinion testimony of lay witnesses as to any of the following:
  - 1. The use of property in a particular way would affect the value of other property.
  - 2. The increase in vehicular traffic resulting from a proposed development would pose a danger to the public safety.
  - 3. Matters about which only expert testimony would generally be admissible under the rules of evidence.
- D. **Cross-Examination Permitted:** The cross-examination of witnesses submitting testimony shall be permitted upon request.

### **15.5.2 Standards for Decisions.**

Each decision-making board under the provisions of this section shall ensure that the rights of petitioners have not been prejudiced because the decision-making body's findings, inferences, conclusions, or decisions were:

- A. In violation of constitutional provisions, including those protecting procedural due process rights.
- B. In excess of the statutory authority conferred upon the city or the authority conferred upon the decision-making board by ordinance.
- C. Inconsistent with applicable procedures specified by statute or ordinance.
- D. Affected by other error of law.
- E. Unsupported by substantial competent evidence in view of the entire record.



F. Arbitrary or capricious.

### 15.5.3 Record of Decision.

- A. The following shall become part of the official record of decision:
- Documents and exhibits submitted to the decision-making board.
  - Meeting minutes.
- B. **Transcript of Audio/Video of Meetings:** Any party may request, at their expense, a transcript of the proceedings from any recorded audio/video.
- C. The Board shall determine contested facts and make its decision within a reasonable time. Every quasi-judicial decision shall be based on competent, material, and substantial evidence in the record. Each quasi-judicial decision shall be reduced to writing and reflect the board's determination of contested facts and their application to the applicable standards. The written decision shall be signed by the Chair or other duly authorized member of the Board. A quasi-judicial decision is effective upon filing the written decision with the Clerk to the Board. The decision of the Board shall be delivered by personal delivery, electronic mail, or by first-class mail to the applicant, property owner, and to any person who has submitted a written request for a copy, prior to the date the decision become effective. The Administrator shall certify that proper notice has been made.

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#### *Notes:*

1. The ZBA of Waynesville has 5 members, plus 1 alternate, therefore 4 members must be present for the Board to make decisions.
2. Decisions require a **finding of facts**, based on “**competent, material and substantial evidence.**”

The general rule is (Boards) can only rely on opinions offered by qualified experts and even then a proper foundation must be established for the testimony. For example, a real estate expert testifying about property value impacts needs to carefully lay out the comparable sales considered and other facts supporting the analysis leading to the opinion on property value impacts. . . . The testimony of a lay witness offering only opinions or conclusions is characterized by the courts as “speculative assertions,” “mere expression of opinion,” or “generalized fears” — not the substantial evidence needed by the decision-making board to reach its conclusions.

Legislation adopted in 2009 confirms this distinction about the testimony of lay witnesses. S.L. 2009-421 created G.S. 160A-393(k)(3) to expressly address the opinion testimony of lay witnesses in quasi-judicial land use hearings, such as those for special and conditional use permits and variances. This law, effective January 1, 2010, provides that lay opinions may not be used to establish impacts on property value or the impacts of vehicular traffic on public safety.

The answer to this question is altogether different when the governing board is considering a legislative matter, such as a proposed rezoning. In those hearings, public opinion is vitally important and can be fully considered. It is only in a quasi-judicial setting, where quality evidence is required to support findings of fact, that the opinion testimony of lay witnesses may not be considered.

### 3. What is Arbitrary or Capricious?

**Arbitrary:** a decision based on random choice or personal whim. "Willful and unreasoning action, without consideration and regard for facts and circumstances presented . . . bad faith or failure to exercise honest judgment."

**Capricious:** subject to whim; impulsive and unpredictable.

**Arbitrary and Capricious:** "A willful and unreasonable action without consideration or in disregard of facts or law or without determining principle."

- *Black's Law Dictionary*

### 4. Standing: Who Can Appeal?

Unlike a court proceeding, a quasi-judicial case coming to the board of adjustment does not have formal plaintiffs and defendants. The person who initiates the action (an applicant for a special or conditional use permit, a person appealing the zoning officer's determination or requesting a variance) is a "party" to the proceeding. To qualify to become a party, a person must be directly affected by the decision in a way different from the public at large.

A definition of standing has been written into the zoning statutes. G.S. 160A-393(d) defines who has standing to appeal a zoning decision to the courts. As of October 2013, G.S. 160A-388(b1)(1) applies this same definition to determine who has standing to make an appeal TO the board of adjustment (prior to the 2013 amendments to this statute, the standard was that "persons aggrieved" by the decision could appeal to the board).

Who qualifies for standing under this definition? The statute sets out four groups who qualify:

1. The owner of the property, someone with an option to purchase the property, and the applicant for a development approval.
2. Any other person who will suffer "special damages" as a result of the decision being appealed. A number of court cases have addressed what is necessary to establish "special damages." While physical proximity in and of itself is not sufficient, that is an important factor. An allegation that the action would diminish the property value of the person is not necessary, but it is the "damage" that is most frequently alleged. The court in *Mangum v. Raleigh Board of Adjustment*, 362 N.C. 640, 669 S.E.2d 279 (2008), held that allegations of parking, stormwater runoff, and crime problems, as well as property value impacts, could establish "special damages."
3. An association of neighborhood property owners that would be affected, provided that at least one of the association members would have standing as an individual and that the association was not formed in response to the particular application being appealed.
4. The unit of local government that has made the decision being appealed.

Members of the general public are not "parties" for the purpose s of an appeal to the board of adjustment. A person who is interested in the matter but who does not have a personal stake in the outcome may attend and observe the hearing, but they have no legal right to initiate an appeal.

- *Coates Canons, David Owens*



GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2013

SESSION LAW 2013-126

HOUSE BILL 276

AN ACT TO CLARIFY AND MODERNIZE STATUTES REGARDING ZONING BOARDS OF ADJUSTMENT.

The General Assembly of North Carolina enacts:

**SECTION 1.** G.S. 160A-388 reads as rewritten:

**"§ 160A-388. Board of adjustment.**

(a) Composition and Duties. - ~~The city council zoning or unified development ordinance may provide for the appointment and compensation of a board of adjustment consisting of five or more members, each to be appointed for three years. In appointing the original members of such board, members or in the filling of vacancies caused by the expiration of the terms of existing members, the city council may appoint certain members for less than three years to the end so that thereafter the terms of all members shall not expire at the same time. The council may, in its discretion, may appoint and provide compensation for alternate members to serve on the board in the absence or temporary disqualification of any regular member or to fill a vacancy pending appointment of a member. Alternate members shall be appointed for the same term, at the same time, and in the same manner as regular members. Each alternate member, while attending any regular or special meeting of the board and member serving on behalf of any regular member, shall have and may exercise member has all the powers and duties of a regular member. A city~~ The ordinance may designate a planning board or governing board to perform any or all of the duties of a board of adjustment in addition to its other duties. duties and may create and designate specialized boards to hear technical appeals.

(a1) Provisions of Ordinance. - The zoning or unified development ordinance may provide that the board of adjustment hear and decide special and conditional use permits, requests for variances, and appeals of decisions of administrative officials charged with enforcement of the ordinance. As used in this section, the term "decision" includes any final and binding order, requirement, or determination. The board of adjustment shall follow quasi-judicial procedures when deciding appeals and requests for variances and special and conditional use permits. The board shall hear and decide all matters upon which it is required to pass under any statute or ordinance that regulates land use or development.

(a2) Notice of Hearing. - Notice of hearings conducted pursuant to this section shall be mailed to the person or entity whose appeal, application, or request is the subject of the hearing; to the owner of the property that is the subject of the hearing if the owner did not initiate the hearing; to the owners of all parcels of land abutting the parcel of land that is the subject of the hearing; and to any other persons entitled to receive notice as provided by the zoning or unified development ordinance. In the absence of evidence to the contrary, the city may rely on the county tax listing to determine owners of property entitled to mailed notice. The notice must be deposited in the mail at least 10 days, but not more than 25 days, prior to the date of the hearing. Within that same time period, the city shall also prominently post a notice of the hearing on the site that is the subject of the hearing or on an adjacent street or highway right-of-way.

~~(b) A zoning ordinance or those provisions of a unified development ordinance adopted pursuant to the authority granted in this Part shall provide that the board of adjustment shall hear and decide appeals from and review any order, requirement, decision, or determination made by an administrative official charged with the enforcement of that ordinance. An appeal may be taken by any person aggrieved or by an officer, department, board, or bureau of the city. Appeals shall be taken within times prescribed by the board of adjustment by general rule, by filing with the officer from whom the appeal is taken and with the board of adjustment a notice of appeal, specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken. An appeal stays all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board of adjustment, after notice of appeal has been filed with him, that because of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property or that because the violation charged is transitory in nature a stay would seriously interfere with enforcement of the ordinance. In that case proceedings shall not be stayed except by a restraining order, which may be granted by the board of adjustment or by a court of record on application, on notice to the officer from whom the appeal is taken and on due cause shown. The board of adjustment shall fix a reasonable time for the hearing of the appeal, give due notice thereof to the parties, and decide it within a reasonable time. The board of adjustment may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination appealed from, and shall make any order, requirement, decision, or determination that in its opinion ought to be made in the premises. To this end the board shall have all the powers of the officer from whom the appeal is taken.~~

(b1) Appeals. - The board of adjustment shall hear and decide appeals decisions of administrative officials charged with enforcement of the zoning or unified development ordinance and may hear appeals arising out of any other ordinance that regulates land use or development, pursuant to all of the following:

- (1) Any person who has standing under G.S. 160A-393(d) or the city may appeal a decision to the board of adjustment. An appeal is taken by filing a notice of appeal with the city clerk. The notice of appeal shall state the grounds for the appeal.
- (2) The official who made the decision shall give written notice to the owner of the property that is the subject of the decision and to the party who sought the decision, if different from the owner. The written notice shall be delivered by personal delivery, electronic mail, or by first-class mail.
- (3) The owner or other party shall have 30 days from receipt of the written notice within which to file an appeal. Any other person with standing to appeal shall have 30 days from receipt from any source of actual or constructive notice of the decision within which to file an appeal.
- (4) It shall be conclusively presumed that all persons with standing to appeal have constructive notice of the decision from the date a sign containing the words "Zoning Decision" or "Subdivision Decision" in letters at least six inches high and identifying the means to contact an official for information about the decision is prominently posted on the property that is the subject of the decision, provided the sign remains on the property for at least 10 days. Posting of signs is not the only form of constructive notice. Any such posting shall be the responsibility of the landowner or applicant. Verification of the

posting shall be provided to the official who made the decision. Absent an ordinance provision to the contrary, posting of signs shall not be required.

- (5) The official who made the decision shall transmit to the board all documents and exhibits constituting the record upon which the action appealed from is taken. The official shall also provide a copy of the record to the appellant and to the owner of the property that is the subject of the appeal if the appellant is not the owner.
- (6) An appeal of a notice of violation or other enforcement order stays enforcement of the action appealed from unless the official who made the decision certifies to the board of adjustment after notice of appeal has been filed that because of the facts stated in an affidavit, a stay would cause imminent peril to life or property or because the violation is transitory in nature, a stay would seriously interfere with enforcement of the ordinance. In that case, enforcement proceedings shall not be stayed except by a restraining order, which may be granted by a court. If enforcement proceedings are not stayed, the appellant may file with the official a request for an expedited hearing of the appeal, and the board of adjustment shall meet to hear the appeal within 15 days after such a request is filed. Notwithstanding the foregoing, appeals of decisions granting a permit or otherwise affirming that a proposed use of property is consistent with the ordinance shall not stay the further review of an application for permits or permissions to use such property; in these situations the appellant may request and the board may grant a stay of a final decision of permit applications or building permits affected by the issue being appealed.
- (7) Subject to the provisions of subdivision (6) of this subsection, the board of adjustment shall hear and decide the appeal within a reasonable time.
- (8) The official who made the decision shall be present at the hearing as a witness. The appellant shall not be limited at the hearing to matters stated in the notice of appeal. If any party or the city would be unduly prejudiced by the presentation of matters not presented in the notice of appeal, the board shall continue the hearing. The board of adjustment may reverse or affirm, wholly or partly, or may modify the decision appealed from and shall make any order, requirement, decision, or determination that ought to be made. The board shall have all the powers of the official who made the decision.
- (9) When hearing an appeal pursuant to G.S. 160A-400.9(e) or any other appeal in the nature of certiorari, the hearing shall be based on the record below and the scope of review shall be as provided in G.S. 160A-393(k).
- (10) The parties to an appeal that has been made under this subsection may agree to mediation or other forms of alternative dispute resolution. The ordinance may set standards and procedures to facilitate and manage such voluntary alternative dispute resolution.

(c) Special and Conditional Use Permits. - The zoning ordinance may provide that the board of adjustment may permit special exceptions to the zoning regulations in specified classes of cases or situations as provided in subsection (d) of this section, not including variances in permitted uses, and that the board may use hear and decide special and conditional use permits, all to be permits in accordance with the principles, conditions, safeguards, standards and procedures specified in the ordinance. Reasonable and appropriate conditions may be imposed

~~upon these permits. The ordinance may also authorize the board to interpret zoning maps and pass upon disputed questions of lot lines or district boundary lines and similar questions as they arise in the administration of the ordinance. The board shall hear and decide all matters referred to it or upon which it is required to pass under any zoning ordinance.~~

(d) Variances. - When ~~practical difficulties or unnecessary hardships~~ hardships would result from carrying out the strict letter of a zoning ordinance, the board of adjustment shall ~~have the power to vary or modify any of the regulations or provisions of the ordinance so that provisions of the ordinance upon a showing of all of the following:~~

- (1) Unnecessary hardship would result from the strict application of the ordinance. It shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property.
- (2) The hardship results from conditions that are peculiar to the property, such as location, size, or topography. Hardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the neighborhood or the general public, may not be the basis for granting a variance.
- (3) The hardship did not result from actions taken by the applicant or the property owner. The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship.
- (4) The requested variance is consistent with the spirit-spirit, purpose, and intent of the ordinance-shall be observed, ordinance, such that public safety and welfare secured, safety is secured, and substantial justice done-is achieved.

~~No change in permitted uses may be authorized by variance. Appropriate conditions, which must be reasonably related to the condition or circumstance that gives rise to the need for a variance, may be imposed on any approval issued by the board. Appropriate conditions may be imposed on any variance, provided that the conditions are reasonably related to the variance. Any other ordinance that regulates land use or development may provide for variances consistent with the provisions of this subsection.~~

(e) Voting. -

- (1) The concurring vote of four-fifths of the members of the board shall be necessary to reverse any order, requirement, decision, or determination of any administrative official charged with the enforcement of an ordinance adopted pursuant to this Part, or to decide in favor of the applicant any matter upon which it is required to pass under any ordinance, or to grant a variance from the provisions of the ordinance. grant a variance. A majority of the members shall be required to decide any other quasi-judicial matter or to determine an appeal made in the nature of certiorari. For the purposes of this subsection, vacant positions on the board and members who are disqualified from voting on a quasi-judicial matter shall not be considered "members of the board"members of the board for calculation of the requisite supermajority majority if there are no qualified alternates available to take the place of such members.

(e1) A member of the board or any other body exercising quasi-judicial functions pursuant to this Article shall not participate in or vote on any quasi-judicial matter in a manner that would violate affected persons' constitutional rights to an impartial decision maker. Impermissible



conflicts include, but are not limited to, a member having a fixed opinion prior to hearing the matter that is not susceptible to change, undisclosed ex parte communications, a close familial, business, or other associational relationship with an affected person, or a financial interest in the outcome of the matter. If an objection is raised to a member's participation and that member does not recuse himself or herself, the remaining members shall by majority vote rule on the objection.

(e2) Quasi-Judicial Decisions and Judicial Review. -

(1) The board shall determine contested facts and make its decision within a reasonable time. Every quasi-judicial decision shall be based upon competent, material, and substantial evidence in the record. Each quasi-judicial decision shall be reduced to writing and reflect the board's determination of contested facts and their application to the applicable standards. The written decision shall be signed by the chair or other duly authorized member of the board. A quasi-judicial decision is effective upon filing the written decision with the clerk to the board or such other office or official as the ordinance specifies. The decision of the board shall be delivered by personal delivery, electronic mail, or by first-class mail to the applicant, property owner, and to any person who has submitted a written request for a copy, prior to the date the decision becomes effective. The person required to provide notice shall certify that proper notice has been made.

(2) Every quasi-judicial decision of the board shall be subject to review by the superior court by proceedings in the nature of certiorari. Any certiorari pursuant to G.S. 160A-393. A petition for review by the superior court shall be filed with the clerk of superior court within by the later of 30 days after the decision of the board is filed in such office as the ordinance specifies, is effective or after a written copy thereof is given in accordance with subdivision (1) of this subsection. When first-class mail is used to deliver notice, three days shall be added to the time to file the petition delivered to every aggrieved party who has filed a written request for such copy with the secretary or chairman of the board at the time of its hearing of the case, whichever is later. The decision of the board may be delivered to the aggrieved party either by personal service or by registered mail or certified mail return receipt requested.

(f) Oaths. - The chairman-chair of the board of adjustment or any member temporarily acting as chairman, chair and the clerk to the board are is authorized in his official capacity to administer oaths to witnesses in any matter coming before the board. Any person who, while under oath during a proceeding before the board of adjustment, willfully swears falsely is guilty of a Class 1 misdemeanor.

(g) Subpoenas. - The board of adjustment-adjustment through the chair, or in the chair's absence anyone acting as chair, may subpoena witnesses and compel the production of evidence. To request issuance of a subpoena, persons with standing under G.S. 160A-393(d) may make a written request to the chair explaining why it is necessary for certain witnesses or evidence to be compelled. The chair shall issue requested subpoenas he or she determines to be relevant, reasonable in nature and scope, and not oppressive. The chair shall rule on any motion to quash or modify a subpoena. Decisions regarding subpoenas made by the chair may be appealed to the full board of adjustment. If a person fails or refuses to obey a subpoena issued pursuant to this



subsection, the board of adjustment or the party seeking the subpoena may apply to the General Court of Justice for an order requiring that its ~~order subpoena~~ be obeyed, and the court shall have jurisdiction to issue these orders after notice to all proper parties. ~~No testimony of any witness before the board of adjustment pursuant to a subpoena issued in exercise of the power conferred by this subsection may be used against the witness in the trial of any civil or criminal action other than a prosecution for false swearing committed on the examination. Any person who, while under oath during a proceeding before the board of adjustment, willfully swears falsely, is guilty of a Class 1 misdemeanor."~~

**SECTION 2.(a)** G.S. 160A-388(e1) is recodified as G.S. 160A-388(e)(2).

**SECTION 2.(b)** G.S. 160A-388(e)(2), as recodified by Section 2(a) of this act, reads as rewritten:

"(2) A member of ~~the any~~ board ~~or any other body~~ exercising quasi-judicial functions pursuant to this Article shall not participate in or vote on any quasi-judicial matter in a manner that would violate affected persons' constitutional rights to an impartial decision maker. Impermissible ~~conflicts~~ violations of due process include, but are not limited to, a member having a fixed opinion prior to hearing the matter that is not susceptible to change, undisclosed ex parte communications, a close familial, business, or other associational relationship with an affected person, or a financial interest in the outcome of the matter. If an objection is raised to a member's participation and that member does not recuse himself or herself, the remaining members shall by majority vote rule on the objection."

**SECTION 3.(a)** G.S. 153A-345 is repealed except that any local modification to that section in effect on September 30, 2013, shall be treated as a local modification to G.S. 160A-388 from October 1, 2013, through June 30, 2015.

**SECTION 3.(b)** Article 18 of Chapter 153A of the General Statutes is amended by adding a new section to read:

**"§ 153A-345.1. Board of adjustment.**

(a) The provisions of G.S. 160A-388 are applicable to counties.

(b) For the purposes of this section, as used in G.S. 160A-388, the term "city council" is deemed to refer to the board of county commissioners, and the terms "city" or "municipality" are deemed to refer to the county.

(c) If a board of county commissioners does not zone the entire territorial jurisdiction of the county, each designated zoning area shall, if practicable, have at least one resident as a member of the board of adjustment; otherwise, the provisions of G.S. 153A-25 regarding qualifications for appointive office shall apply to board of adjustment appointments."

**SECTION 4.** G.S. 160A-381(c) reads as rewritten:

"(c) The regulations may also provide that the board of adjustment, the planning board, or the city council may issue special use permits or conditional use permits in the classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified therein and may impose reasonable and appropriate conditions and safeguards upon these permits. When deciding special use permits or conditional use permits, the city council or planning board shall follow quasi-judicial procedures. Notice of hearings on special or conditional use permit applications shall be as provided in G.S. 160A-388(a2). No vote greater than a majority vote shall be required for the city council or planning board to issue such permits. For the purposes of this section, vacant positions on the board and members who are disqualified from voting on a quasi-judicial matter shall not be considered "members of the board" for

calculation of the requisite majority. Every such decision of the city council or planning board shall be subject to review of the superior court in the nature of certiorari in accordance with G.S. 160A-388.

Where appropriate, such conditions may include requirements that street and utility rights-of-way be dedicated to the public and that provision be made of recreational space and facilities."

**SECTION 5.** G.S. 153A-340(c1) reads as rewritten:

"(c1) The regulations may also provide that the board of adjustment, the planning board, or the board of commissioners may issue special use permits or conditional use permits in the classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified therein and may impose reasonable and appropriate conditions and safeguards upon these permits. Where appropriate, the conditions may include requirements that street and utility rights-of-way be dedicated to the public and that recreational space be provided. When deciding special use permits or conditional use permits, the board of county commissioners or planning board shall follow quasi-judicial procedures. Notice of hearings on special or conditional use permit applications shall be as provided in G.S. 160A-388(a2). No vote greater than a majority vote shall be required for the board of county commissioners or planning board to issue such permits. For the purposes of this section, vacant positions on the board and members who are disqualified from voting on a quasi-judicial matter shall not be considered "members of the board" for calculation of the requisite majority. Every such decision of the board of county commissioners or planning board shall be subject to review of the superior court in the nature of certiorari consistent with G.S. 153A-345."

**SECTION 6.** G.S. 153A-44 reads as rewritten:

**"§ 153A-44. Members excused from voting.**

The board may excuse a member from voting, but only upon questions involving the member's own financial interest or official conduct or on matters on which the member is prohibited from voting under G.S. 14-234, 153A-340(g), or ~~153A-345(e1)~~-160A-388(e)(2). For purposes of this section, the question of the compensation and allowances of members of the board does not involve a member's own financial interest or official conduct."

**SECTION 7.** G.S. 153A-336(a) reads as rewritten:

"(a) When a subdivision ordinance adopted under this Part provides that the decision whether to approve or deny a preliminary or final subdivision plat is to be made by a board of commissioners or a planning board, other than a planning board comprised solely of members of a county planning staff, and the ordinance authorizes the board of commissioners or planning board to make a quasi-judicial decision in deciding whether to approve the subdivision plat, then that quasi-judicial decision of the board of commissioners or planning board shall be subject to review by the superior court by proceedings in the nature of certiorari. The provisions of G.S. 153A-340(f), ~~153A-345(e2)~~,160A-388(e)(2), and 153A-349 shall apply to those appeals."

**SECTION 8.** G.S. 153A-340(c1) reads as rewritten:

"(c1) The regulations may also provide that the board of adjustment, the planning board, or the board of commissioners may issue special use permits or conditional use permits in the classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified therein and may impose reasonable and appropriate conditions and safeguards upon these permits. Where appropriate, the conditions may include requirements that street and utility rights-of-way be dedicated to the public and that recreational space be provided. When deciding special use permits or conditional use permits, the board of county commissioners or planning board shall follow quasi-judicial procedures. No vote greater than a majority vote shall be required for the board of county commissioners or planning board to issue

such permits. For the purposes of this section, vacant positions on the board and members who are disqualified from voting on a quasi-judicial matter shall not be considered "members of the board" for calculation of the requisite majority. Every such decision of the board of county commissioners or planning board shall be subject to review of the superior court in the nature of certiorari consistent with ~~G.S. 153A-345~~, G.S. 160A-388."

**SECTION 9.** G.S. 153A-349(c) is repealed.

**SECTION 10.** G.S. 153A-349.8(c) reads as rewritten:

"(c) If the developer fails to cure the material breach within the time given, then the local government unilaterally may terminate or modify the development agreement; provided, the notice of termination or modification may be appealed to the board of adjustment in the manner provided by ~~G.S. 153A-345(b)~~, G.S. 160A-388(b1)."

**SECTION 11.** G.S. 160A-75 reads as rewritten:

**"§ 160A-75. Voting.**

No member shall be excused from voting except upon matters involving the consideration of the member's own financial interest or official conduct or on matters on which the member is prohibited from voting under G.S. 14-234, 160A-381(d), or ~~160A-388(e1)~~, 160A-388(e)(2). In all other cases, a failure to vote by a member who is physically present in the council chamber, or who has withdrawn without being excused by a majority vote of the remaining members present, shall be recorded as an affirmative vote. The question of the compensation and allowances of members of the council is not a matter involving a member's own financial interest or official conduct.

An affirmative vote equal to a majority of all the members of the council not excused from voting on the question in issue, including the mayor's vote in case of an equal division, shall be required to adopt an ordinance, take any action having the effect of an ordinance, authorize or commit the expenditure of public funds, or make, ratify, or authorize any contract on behalf of the city. In addition, no ordinance nor any action having the effect of any ordinance may be finally adopted on the date on which it is introduced except by an affirmative vote equal to or greater than two thirds of all the actual membership of the council, excluding vacant seats and not including the mayor unless the mayor has the right to vote on all questions before the council. For purposes of this section, an ordinance shall be deemed to have been introduced on the date the subject matter is first voted on by the council."

**SECTION 12.** G.S. 160A-377(a) reads as rewritten:

"(a) When a subdivision ordinance adopted under this Part provides that the decision whether to approve or deny a preliminary or final subdivision plat is to be made by a city council or a planning board, other than a planning board comprised solely of members of a city planning staff, and the ordinance authorizes the council or planning board to make a quasi-judicial decision in deciding whether to approve the subdivision plat, then that quasi-judicial decision of the council or planning board shall be subject to review by the superior court by proceedings in the nature of certiorari. The provisions of G.S. 160A-381(c), ~~160A-388(e2)~~, 160A-388(e2)(2), and 160A-393 shall apply to those appeals."

**SECTION 13.** G.S. 160A-393(c)(3) reads as rewritten:

"(3) Set forth with particularity the allegations and facts, if any, in support of allegations that, as the result of impermissible conflict as described in ~~G.S. 160A-388(e1)~~, G.S. 160A-388(e)(2), or locally adopted conflict rules, the decision-making body was not sufficiently impartial to comply with due process principles."

**SECTION 14.** G.S. 160A-393(j)(2) reads as rewritten:

"(2) Whether, as a result of impermissible conflict as described in ~~G.S. 160A-388(e1)~~, G.S. 160A-388(e)(2), or locally adopted conflict rules, the decision-making body was not sufficiently impartial to comply with due process principles."

**SECTION 15.** This act becomes effective October 1, 2013, and applies to actions taken on or after that date by any board of adjustment.

In the General Assembly read three times and ratified this the 10<sup>th</sup> day of June, 2013.

s/ Daniel J. Forest

President of the Senate

s/ Thom Tillis

Speaker of the House of Representatives

s/ Pat McCrory

Governor

Approved 4:20 p.m. this 19<sup>th</sup> day of June, 2013