

## ARTICLE IV

### BOARD OF ADJUSTMENT

*(amended 4 August 2014)*

#### **Section 400. Appointment and Terms of Board of Adjustment**

- (a) There shall be a Board of Adjustment consisting of eleven (11) members. Five (5) members shall reside within the Town and six (6) members shall reside within the Town's extraterritorial jurisdiction (ETJ). There shall be three (3) alternates. Alternates shall serve on the Board in the absence or temporary disqualification of any regular member or to fill a vacancy pending appointment of a member. Each alternate, while attending any regular or special meeting of the Board and serving on behalf of any regular member, shall have and may exercise all the powers and duties of a regular member.
- (b) Board of Adjustment regular members and alternates shall be appointed for three (3) year staggered terms, but both regular members and alternates may continue to serve until their successors have been appointed. Vacancies may be filled for the unexpired terms only.
- (c) Members may be reappointed to successive terms without limitation.
- (d) Unless the Board of Alderman takes specific action to excuse the absences and reappoints a member after being informed by the Administrator of the member's failure to attend, regular Board of Adjustment members shall be automatically removed for failure to attend three (3) consecutive meetings or for failure to attend fifty percent (50%) of the regular meetings in any twelve month period. Absence due to sickness, death, or other emergencies of like nature shall be recognized as excused absences, and shall not affect the member's status on the Board, except that in the event of a long illness or other such cause for prolonged absence, the member shall be replaced. Alternate members shall likewise be removed for failure to attend or participate in three (3) consecutive meetings for which the member's attendance is requested. The Administrator shall notify in writing any member for whom one more absence will trigger removal. In addition, the Administrator or a member of the Board of Alderman may propose removal of a member for any other good cause related to the performance of Board duties, but before removal on that basis, the member shall be given an opportunity to appear before the Board of Alderman to address the issues involved.

- (e) If a regular or alternate member moves outside the Town or its extraterritorial planning jurisdiction that shall constitute a resignation from the Board.

#### **Section 401. Meetings of the Board of Adjustment.**

- (a) The Board of Adjustment shall meet frequently enough so that it can take action as expeditiously as reasonably as possible.
- (b) The Board shall conduct its meetings in accordance with the quasi-judicial procedures.
- (c) All meetings of the Board shall be open to the public, and whenever feasible the agenda for each Board meeting shall be made available in advance of the meeting.

#### **Section 402. Quorum.**

A quorum shall consist of seven (7) members of the Board for all quasi-judicial matters, and a quorum of nine (9) members of the Board shall be necessary to grant a variance.

#### **Section 403. Voting.**

- (a) The concurring vote of four-fifths of the Board members shall be necessary to grant a variance, but a majority vote of the Board members shall be required to reverse any order, requirement, decision, or determination of the Administrator, or to grant a conditional use permit, (i.e. for a variance occurring within the Town, a minimum of four votes of the Town members; for a variance occurring in the ETJ, a minimum of 9 votes). All other actions of the Board shall be taken by majority vote.
- (b) Once a member is physically present at a Board meeting, any subsequent failure to vote shall be recorded as an affirmative vote unless the member has been excused in accordance with Subsection 403 (c) or has been allowed to withdraw from the meeting in accordance with Subsection 403 (e).
- (c) A member shall not participate in or vote on any quasi-judicial matter in a manner that would violate an affected persons' constitutional rights to an impartial decision maker. Impermissible conflicts include, but are not limited to:
  - (1) A member having a fixed opinion prior to hearing the matter that is not susceptible to change.
  - (2) A member having undisclosed ex parte communications.

- (3) A member having a close familial, business, or other associational relationship with an affected person.
- (4) A member having a financial interest in the outcome of the matter.
- (d) 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.
- (e) A member may be allowed to withdraw from the entire remainder of a meeting by majority vote of the remaining members present for any good and sufficient reason other than the member's desire to avoid voting on matters to be considered at that meeting.
- (f) A motion to allow a member to be excused from voting or excused from the remainder of the meeting is in order only if made by or at the initiative of the member directly affected.
- (g) A roll call vote shall be taken upon the request of any member.
- (h) ETJ members shall only vote on matters affecting the Town's extraterritorial jurisdiction area.

**Section 404. Board of Adjustment Officers.**

- (a) At its first regular meeting, the Board of Adjustment shall, by majority vote of its membership (excluding vacant seats) elect one (1) of its members to serve as chairman and preside over the Board's meetings and one (1) member to serve as vice-chairman. The persons so designated shall serve in these capacities for terms of one (1) year. Vacancies may be filled for the unexpired terms only by majority vote of the Board membership (excluding vacant seats).
- (b) The chairman or any member temporarily acting as chairman may administer oaths to witnesses coming before the Board.
- (c) The chairman and vice-chairman may take part in all deliberations and vote on all issues. The chairman or vice-chairman may make or second any motion.

#### **Section 405. Powers and Duties of Board of Adjustment.**

- (a) The Board of Adjustment shall hear and decide:
  - (1) Appeals from any order, decision, requirement, or determination made by the Zoning Administrator.
  - (2) Applications for conditional use permits.
  - (3) Applications for variances.
  - (4) Questions involving interpretations of the zoning map, including disputed district boundary lines and lot lines.
  - (5) Any matter the Board is required to act upon by any Town ordinance.
- (b) The Board may adopt rules and regulations governing its procedures and operations not inconsistent with the provisions of this ordinance.
- (c) The Board may subpoena witnesses and compel the production of evidence.

#### **Section 406. Appeals to the Board of Adjustment.**

- (a) An appeal from any final order, requirement, decision or determination made by the Zoning Administrator may be taken to the Board of Adjustment by any person aggrieved. 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 and payment of the applicable Fee.
- (b) An appeal must be taken within thirty (30) days after the date of the receipt of any final order, requirement, decision or determination appealed from. Unless established by a return receipt for a certified mail notice, the date of receipt shall be conclusively presumed as three days after the notice of the decision or order appealed from has been deposited in the United States mail with proper postage affixed, and addressed to the aggrieved party. 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.
- (c) 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.

- (d) 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.
- (e) An appeal stays all actions, including the assessment of a civil penalty, by the Zoning Administrator seeking enforcement of or compliance with the order, requirement, decision or determination appealed from, except for the following situations:
  - (i) the appeal does not stay the assessment of a civil penalty when the violator has erected a sign without a sign permit in violation of Section 1102.
  - (ii) the appeal does not stay the assessment of a civil penalty when the Zoning Administrator *certifies to the board of adjustment after notice of appeal has been filed that because of facts stated in an affidavit*, a stay would cause imminent peril to life or property, or that because the situation appealed from is transitory in nature, a stay would seriously interfere with enforcement of this 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 Zoning Administrator 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.
  - (iii) *Subject to the provisions of subdivision (ii) of this subsection, the Board of Adjustment shall hear and decide the appeal within a reasonable time.*

- (iv) 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.
- (v) 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).
- (vi) 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.

#### **Section 407. Special and Conditional Use Permits.**

- (a) The ordinance may provide that the Board of Adjustment may hear and decide special and conditional use permits in accordance with standards and procedures specified in the ordinance. Reasonable and appropriate conditions may be imposed upon these permits.

#### **Section 408. Variances.**

- (a) **Application.** An application for a variance shall be submitted to the Board of Adjustment by filing a properly filled out and signed Application form with the Administrator and payment of the applicable fee.
- (b) **Findings of Fact.** When unnecessary hardships would result from carrying out the strict letter of a zoning decision, the Board of Adjustment shall vary any of the provisions upon showing of all of the following:
  - (i) Unnecessary hardship would result from strict application of the ordinance. It shall not be necessary to demonstrate that, in the absence of a variance, no reasonable use can be made of the property.
  - (ii) 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.

- (iii) 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 granting a variance shall not be regarded as a self-created hardship.
- (iv) The requested variance is consistent with the spirit, purpose, and intent of the ordinance, such that public safety is secured, and substantial justice is achieved.
- (c) No change in permitted uses may be authorized by variance. 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.
- (d) **Conditions.** In granting variances, the Board of Adjustment may impose such reasonable conditions as will ensure that the use of the property to which the variance applies will be as compatible as practicable with the surrounding properties. In its consideration of applications for a variance, the Board shall not use the existence of nonconformities in the vicinity as justification for the granting of variances.
- (e) A variance may be issued for an indefinite duration or for a specified duration only.
- (f) The nature of the variance and any conditions attached to it shall be entered on the face of the zoning permit, or the zoning permit may simply note the issuance of the variance and refer to the written record of the variance for further information. All such conditions are enforceable in the same manner as any other applicable requirement of this ordinance.

#### **Section 409. Interpretations.**

- (a) The Board is authorized to interpret the zoning map and to pass upon disputed questions of lot lines or district boundary lines and similar questions.
- (b) An application for a map interpretation shall be submitted by filing the application with the Administrator. The application shall contain sufficient information to enable the Board to make the necessary interpretation.

- (c) Where uncertainty exists as to the boundaries of districts as shown on the Official Zoning Map, the following rules shall apply:
- (1) Boundaries indicated as approximately following the center lines of alleys, streets, highways, streams or railroads shall be construed to follow such center lines;
  - (2) Boundaries indicated as approximately following lot lines, corporate limits, or extraterritorial boundary lines, shall be construed as following such lines, limits or boundaries;
  - (3) Boundaries indicated as following shorelines or the center lines of streams, rivers, lakes, or other bodies of water shall be construed to follow such shorelines or center lines, and in the event of change in the shoreline or centerline, the boundary shall be construed as moving with the actual shoreline or centerline;
  - (4) Boundaries indicated as approximately following designated limits of areas of special flood hazard shall be construed as following such limits;
  - (5) Where a district boundary divides a lot or where distances are not specifically indicated on the Official Zoning Map, the boundary shall be determined by measurement, using the scale of the Official Zoning Map;
  - (6) Where any street or alley is hereafter officially vacated or abandoned, the regulations applicable to each parcel of abutting property shall apply to that portion of such street or alley added thereto by virtue of such vacation or abandonment.

**Section 410. Burden of Proof.**

- (a) When an appeal is taken to the Board of Adjustment, the burden of proof and burden of persuasion shall be on the party appealing the order, requirement, decision or determination. The Administrator or his or her designee shall be present to participate in the hearing and to answer such questions as may be directed to him or her by members of the Board of Adjustment, or by any party duly participating in the hearing, in compliance with the duly adopted Rules of Procedure of the Board of Adjustment.



- (b) The burden of presenting evidence sufficient to allow the Board of Adjustment to make its necessary findings on the criteria set forth in Subsection 408 (b), as well as the burden of persuasion on those issues, remains with the applicant seeking the variance.

**Section 411. Board Action.**

- (a) The Board of Adjustment shall decide any appeal before it in compliance with the procedures set out in its duly adopted Rules of Procedure.
- (b) A motion to deny a variance may be made on the basis that any criteria set forth in Subsection 408 (b) are not satisfied or that the application is incomplete. Insofar as practicable, such a motion shall include a statement of the specific reasons or findings of fact that support it. This motion is adopted as the Board's decision if supported by more than one fifth of the Board's membership (i.e. two or more Board members).
- (c) Before granting a variance, the Board must take a separate vote and vote affirmatively by a four fifths majority on each of the seven required findings set forth in Subsection 408 (b). Insofar as practicable, a motion to make an affirmative finding on each of the requirements set forth in Subsection 408 (b) shall include a statement of the specific reasons or findings of fact supporting such motion.

**Section 412. Action Subsequent to Decision.**

- (a) The decision of the Board shall be reduced to writing and served upon the aggrieved party and all other persons who make a written request for a copy.
- (b) If a variance is granted, the nature of the variance and any conditions attached thereto shall be entered on the face of the zoning permit.
- (c) If a conditional use permit is granted, the terms and conditions of the conditional use permit shall be entered on the face of the zoning permit.

**Section 413. Appeals from Board Decision.**

Every decision of the Board shall be subject to review by the Superior Court by proceedings in the nature of certiorari *pursuant to G.S. 160A-393*. Any petition for review by the Superior Court shall be filed with the Clerk of Superior Court by the later of 30 days after the decision is effective or after a written copy thereof is given to every aggrieved party who has filed a written request for such copy prior to the date the decision becomes effective. The decision of the Board may be delivered to the aggrieved party either by personal service, 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. When first-class mail is used to deliver notice, three days shall be added to the time to file the petition.