

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2009

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SENATE BILL 44
PROPOSED COMMITTEE SUBSTITUTE S44-PCS35307-RC-13

Short Title: Appeals of Quasi-Judicial Land-Use Decisions.

(Public)

Sponsors:

Referred to:

February 4, 2009

1 A BILL TO BE ENTITLED
2 AN ACT TO CLARIFY THE LAW REGARDING APPEALS OF QUASI-JUDICIAL
3 DECISIONS MADE UNDER ARTICLE 19 OF CHAPTER 160A AND ARTICLE 18 OF
4 CHAPTER 153A OF THE GENERAL STATUTES.

5 The General Assembly of North Carolina enacts:

6 SECTION 1.(a) Part 3 of Article 19 of Chapter 160A of the General Statutes is
7 amended by adding a new section to read:

8 "**§ 160A-393. Appeals in the nature of certiorari.**

9 (a) Applicability. – This section applies to appeals of quasi-judicial decisions of
10 decision-making boards when that appeal is to superior court and in the nature of certiorari as
11 required by this Article.

12 (b) For purposes of this section, the following terms mean:

13 (1) Decision-making board. – A city council, planning board, board of
14 adjustment, or other board making quasi-judicial decisions appointed by the
15 city council under this Article or under comparable provisions of any local
16 act or any interlocal agreement authorized by law.

17 (2) Person. – Any legal entity authorized to bring suit in the legal entity's name.

18 (3) Quasi-judicial decision. – A decision involving the finding of facts regarding
19 a specific application of an ordinance and the exercise of discretion when
20 applying the standards of the ordinance. Quasi-judicial decisions include
21 decisions involving variances, special and conditional use permits, and
22 appeals of administrative determinations. Decisions on the approval of site
23 plans are quasi-judicial in nature if the ordinance authorizes a
24 decision-making board to approve or deny the site plan based not only upon
25 whether the application complies with the specific requirements set forth in
26 the ordinance, but also on whether the application complies with one or
27 more generally stated standards requiring a discretionary decision on the
28 findings of fact to be made by the decision-making board.

29 (c) Filing the Petition. – An appeal in the nature of certiorari shall be initiated by filing
30 with the superior court a petition for writ of certiorari. The petition shall:

31 (1) State the facts that demonstrate that the petitioner has standing to seek
32 review.

33 (2) Set forth the grounds upon which the petitioner contends that an error was
34 made.



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

5 (4) Set forth the relief the petitioner seeks.

6 (d) Standing. – A petition may be filed under this section only by a petitioner who has
7 standing to challenge the decision being appealed. The following persons shall have standing to
8 file a petition under this section:

9 (1) Any person meeting any of the following criteria:

10 a. Has an ownership interest, leasehold interest, or other interest created
11 by easement, restriction, or covenant in the property that is the
12 subject of the decision being appealed.

13 b. Has an option or contract to purchase the property that is the subject
14 of the decision being appealed.

15 c. Was an applicant before the decision-making board whose decision
16 is being appealed.

17 (2) Any other person who will suffer special damages as the result of the
18 decision being appealed.

19 (3) An incorporated or unincorporated association to which owners or lessees of
20 property in a designated area belong by virtue of their owning or leasing
21 property in that area, or an association otherwise organized to protect and
22 foster the interest of the particular neighborhood or local area, so long as at
23 least one of the members of the association would have standing as an
24 individual to challenge the decision being appealed, and the association was
25 not created in response to the particular development or issue that is the
26 subject of the appeal.

27 (4) A city whose decision-making board has made a decision that the council
28 believes improperly grants a variance from or is otherwise inconsistent with
29 the proper interpretation of an ordinance adopted by that council.

30 (e) Respondent. – The respondent named in the petition shall be the city whose
31 decision-making board made the decision that is being appealed, except that if the petitioner is
32 a city that has filed a petition pursuant to subdivision (d)(4) of this section, then the respondent
33 shall be the decision-making board. If the petitioner is not the applicant before the
34 decision-making board whose decision is being appealed, the petitioner shall also name that
35 applicant as a respondent. Any petitioner may name as a respondent any person with an
36 ownership or leasehold interest in the property that is the subject of the decision being appealed
37 who participated in the hearing, or was an applicant, before the decision-making board.

38 (f) Writ of Certiorari. – Upon filing the petition, the petitioner shall present the petition
39 and a proposed writ of certiorari to the clerk of court of the county in which the matter arose.
40 The writ shall direct the respondent city, or the respondent decision-making board if the
41 petitioner is a city that has filed a petition pursuant to subdivision (d)(4) of this section, to
42 prepare and certify to the court the record of proceedings below within a specified date. The
43 writ shall also direct that the petitioner shall serve the petition and the writ upon each
44 respondent named therein in the manner provided for service of a complaint under Rule 4(j)
45 of the Rules of Civil Procedure, except that, if the respondent is a decision-making board, the
46 petition and the writ shall be served upon the chair of that decision-making board. Rule
47 4(j)(5)d. of the Rules of Civil Procedure shall apply in the event the chair of a decision-making
48 board cannot be found. No summons shall be issued. The clerk shall issue the writ without
49 notice to the respondent or respondents if the petition has been properly filed and the writ is in
50 proper form. A copy of the executed writ shall be filed with the court.

1 (g) Answer to the Petition. – The respondent may, but need not, file an answer to the
2 petition, except that, if the respondent contends that any petitioner lacks standing to bring the
3 appeal, that contention must be set forth in an answer served on all petitioners at least 30 days
4 prior to the hearing on the petition.

5 (h) Intervention. – Rule 24 of the Rules of Civil Procedure shall govern motions to
6 intervene as a petitioner or respondent in an action initiated under this section with the
7 following exceptions:

8 (1) Any person described in subdivision (d)(1) of this section shall have
9 standing to intervene and shall be allowed to intervene as a matter of right.

10 (2) Any person, other than one described in subdivision (d)(1) of this section,
11 who seeks to intervene as a petitioner must demonstrate that the person
12 would have had standing to challenge the decision being appealed in
13 accordance with subdivisions (d)(2) through (d)(4) of this section.

14 (3) Any person, other than one described in subdivision (d)(1) of this section,
15 who seeks to intervene as a respondent must demonstrate that the person
16 would have had standing to file a petition in accordance with subdivisions
17 (d)(2) through (d)(4) of this section if the decision-making board had made a
18 decision that is consistent with the relief sought by the petitioner.

19 (i) The Record. – The record shall consist of all documents and exhibits submitted to
20 the decision-making board whose decision is being appealed, together with the minutes of the
21 meeting or meetings at which the decision being appealed was considered. Upon request of any
22 party, the record shall also contain an audio or videotape of the meeting or meetings at which
23 the decision being appealed was considered if such a recording was made. Any party may also
24 include in the record a transcript of the proceedings, which shall be prepared at the cost of the
25 party choosing to include it. The parties may agree, or the court may direct, that matters
26 unnecessary to the court's decision be deleted from the record or that matters other than those
27 specified herein be included. The record shall be bound and paginated or otherwise organized
28 for the convenience of the parties and the court. A copy of the record shall be served by the
29 municipal respondent, or the respondent decision-making board, upon all petitioners within
30 three days after it is filed with the court.

31 (j) Hearing on the Record. – The court shall hear and decide all issues raised by the
32 petition by reviewing the record submitted in accordance with subsection (h) of this section.
33 Except that the court may, in its discretion, allow the record to be supplemented with affidavits,
34 testimony of witnesses, or documentary or other evidence if, and to the extent that, the record is
35 not adequate to allow an appropriate determination of the following issues:

36 (1) Whether a petitioner or intervenor has standing.

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

40 (3) Whether the decision-making body erred for the reasons set forth in
41 sub-subdivisions a. and b. of subdivision (1) of subsection (k) of this section.

42 (k) Scope of Review. –

43 (1) When reviewing the decision of a decision-making board under the
44 provisions of this section, the court shall ensure that the rights of petitioners
45 have not been prejudiced because the decision-making body's findings,
46 inferences, conclusions, or decisions were:

47 a. In violation of constitutional provisions, including those protecting
48 procedural due process rights.

49 b. In excess of the statutory authority conferred upon the city or the
50 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.

(2) When the issue before the court is whether the decision-making board erred in interpreting an ordinance, the court shall review that issue de novo and freely substitute its judgment for that of the decision-making board.

(3) 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:

- a. The use of property in a particular way would affect the value of other property.
- b. The increase in vehicular traffic resulting from a proposed development would pose a danger to the public safety.
- c. Matters about which only expert testimony would generally be admissible under the rules of evidence.

(l) Decision of the Court. – Following its review of the decision-making board in accordance with subsection (k) of this section, the court may affirm the decision, reverse the decision and remand the case with appropriate instructions, or remand the case for further proceedings. If the court does not affirm the decision below in its entirety, then the court shall be guided by the following in determining what relief should be granted to the petitioners:

(1) If the court concludes that the error committed by the decision-making board is procedural only, the court may remand the case for further proceedings to correct the procedural error.

(2) If the court concludes that the decision-making board has erred by failing to make findings of fact such that the court cannot properly perform its function, then the court may remand the case with appropriate instructions so long as the record contains substantial competent evidence that could support the decision below with appropriate findings of fact. However, findings of fact are not necessary when the record sufficiently reveals the basis for the decision below or when the material facts are undisputed and the case presents only an issue of law.

(3) If the court concludes that the decision by the decision-making board is not supported by substantial competent evidence in the record or is based upon an error of law, then the court may remand the case with an order that directs the decision-making board to take whatever action should have been taken had the error not been committed or to take such other action as is necessary to correct the error. Specifically:

- a. If the court concludes that a permit was wrongfully denied because the denial was not based on substantial competent evidence or was otherwise based on an error of law, the court may remand with instructions that the permit be issued, subject to reasonable and appropriate conditions.

1 b. If the court concludes that a permit was wrongfully issued because
2 the issuance was not based on substantial competent evidence or was
3 otherwise based on an error of law, the court may remand with
4 instructions that the permit be revoked.

5 (m) Ancillary Injunctive Relief. – Upon motion of a party to a proceeding under this
6 section, and under appropriate circumstances, the court may issue an injunctive order requiring
7 any other party to that proceeding to take certain action or refrain from taking action that is
8 consistent with the court's decision on the merits of the appeal."

9 **SECTION 1.(b)** Article 18 of Chapter 153A of the General Statutes is amended by
10 adding a new section to read:

11 **"§ 153A-349. Appeals in the nature of certiorari.**

12 (a) Whenever appeals of quasi-judicial decisions of decision-making boards are to
13 superior court and in the nature of certiorari as required by this Article, the provisions of
14 G.S. 160A-393 shall be applicable to those appeals.

15 (b) For purposes of this section, as used in G.S. 160A-393, the term "city council" shall
16 be deemed to refer to the "board of commissioners," and the term "city" or "municipal" shall be
17 deemed to refer to the "county."

18 (c) For purposes of this section, the "impermissible conflict as described in
19 G.S. 160A-388(e1)" shall mean "impermissible conflict as described in G.S. 153A-345(e1)."

20 **SECTION 2.(a)** Part 2 of Article 19 of Chapter 160A of the General Statutes is
21 amended by adding a new section to read:

22 **"§ 160A-377. Appeals of decisions on subdivision plats.**

23 (a) When a subdivision ordinance adopted under this Part provides that the decision
24 whether to approve or deny a preliminary or final subdivision plat is to be made by a city
25 council or a planning board, other than a planning board comprised solely of members of a city
26 planning staff, and the ordinance authorizes the council or planning board to make a
27 quasi-judicial decision in deciding whether to approve the subdivision plat, then that
28 quasi-judicial decision of the council or planning board shall be subject to review by the
29 superior court by proceedings in the nature of certiorari. The provisions of G.S. 160A-381(c),
30 160A-388(e2), and 160A-393 shall apply to those appeals.

31 (b) When a subdivision ordinance adopted under this Part provides that a city council,
32 planning board, or staff member is authorized to make only an administrative or ministerial
33 decision in deciding whether to approve a preliminary or final subdivision plat, then any party
34 aggrieved by that administrative or ministerial decision may seek to have the decision reviewed
35 by filing an action in superior court seeking appropriate declaratory or equitable relief. Such an
36 action must be filed within the time frame specified in G.S. 160A-381(c) for petitions in the
37 nature of certiorari.

38 (c) For purposes of this section, an ordinance shall be deemed to authorize a
39 quasi-judicial decision if the city council or planning board is authorized to decide whether to
40 approve or deny the plat based not only upon whether the application complies with the
41 specific requirements set forth in the ordinance, but also on whether the application complies
42 with one or more generally stated standards requiring a discretionary decision to be made by
43 the city council or planning board."

44 **SECTION 2.(b)** Part 2 of Article 18 of Chapter 153A of the General Statutes is
45 amended by adding a new section to read:

46 **"§ 153A-336. Appeals of decisions on subdivision plats.**

47 (a) When a subdivision ordinance adopted under this Part provides that the decision
48 whether to approve or deny a preliminary or final subdivision plat is to be made by a board of
49 commissioners or a planning board, other than a planning board comprised solely of members
50 of a county planning staff, and the ordinance authorizes the board of commissioners or
51 planning board to make a quasi-judicial decision in deciding whether to approve the

1 subdivision plat, then that quasi-judicial decision of the board of commissioners or planning
2 board shall be subject to review by the superior court by proceedings in the nature of certiorari.
3 The provisions of G.S. 153A-340(f), 153A-345(e2), and 153A-349 shall apply to those appeals.

4 (b) When a subdivision ordinance adopted under this Part provides that a board of
5 commissioners, planning board, or staff member is authorized to make only an administrative
6 or ministerial decision in deciding whether to approve a preliminary or final subdivision plat,
7 then any party aggrieved by that administrative or ministerial decision may seek to have the
8 decision reviewed by filing an action in superior court seeking appropriate declaratory or
9 equitable relief. Such an action must be filed within the time frame specified in
10 G.S. 153A-340(f) for petitions in the nature of certiorari.

11 (c) For purposes of this section, an ordinance shall be deemed to authorize a
12 quasi-judicial decision if the board of commissioners or planning board is authorized to decide
13 whether to approve or deny the plat based not only upon whether the application complies with
14 the specific requirements set forth in the ordinance, but also on whether the application
15 complies with one or more generally stated standards requiring a discretionary decision to be
16 made by the board of commissioners or planning board."

17 **SECTION 3.** G.S. 63-34 reads as rewritten:

18 "**§ 63-34. Judicial review.**

19 (a) Any person aggrieved by any decision of the board of appeals, or any taxpayer, or
20 any officer, department, board, or bureau of the political subdivision, may present to the
21 superior court a verified petition setting forth that the decision is illegal, in whole or in part, and
22 specifying the grounds of the illegality. Such petition shall be presented to the court within 30
23 days after the decision is filed in the office of the board. Such petition shall comply with the
24 provisions of G.S. 160A-393.

25 (b) ~~Upon presentation of such petition the court may allow a writ of certiorari directed~~
26 ~~to the board of appeals to review such decision of the board.~~ The allowance of the writ shall not
27 stay proceedings upon the decision appealed from, but the court may, on application, on notice
28 to the board and on due cause shown, grant a restraining order.

29 (c) The board of appeals shall not be required to return the original papers acted upon
30 by it, but it shall be sufficient to return certified or sworn copies thereof or of such portions
31 thereof as may be called for by the writ. The return shall concisely set forth such other facts as
32 may be pertinent and material to show the grounds of the decision appealed from and shall be
33 verified.

34 (d) ~~The court shall have exclusive jurisdiction to affirm, modify, or set aside the~~
35 ~~decision brought up for review, in whole or in part, and if need be, to order further proceedings~~
36 ~~by the board of appeals. The findings of fact by the board, if supported by substantial evidence,~~
37 ~~shall be accepted by the court as conclusive, and no objection to a decision of the board shall be~~
38 ~~considered by the court unless such objection shall have been urged before the board, or if it~~
39 ~~was not so urged, unless there were reasonable grounds for failure to do so.~~

40 (e) Costs shall not be allowed against the board of appeals unless it appears to the court
41 that it acted with gross negligence, in bad faith, or with malice, in making the decision appealed
42 from."

43 **SECTION 4.** G.S. 162A-93(b) reads as rewritten:

44 "(b) The provisions of subsection (a) shall not apply if the city council adopts an
45 annexation ordinance including an area served by a district and finds, after a public hearing,
46 that adequate fire protection cannot be provided in the area because of the level of available
47 water service. Notice of the public hearing shall be provided by first class mail to each affected
48 customer and by publication in a newspaper having general circulation in the area, each not less
49 than 10 days before the hearing. The clerk's certification of the mailing shall be deemed
50 conclusive in the absence of fraud. Any resident of the annexed area aggrieved by such a
51 finding of the council may file a petition for review in the superior court in the nature of

1 ~~certiorari~~certiorari, within 30 days after the finding. The petition for review in the nature of
2 certiorari shall comply with G.S. 160A-393."

3 **SECTION 5.** G.S. 160A-388(e1) reads as rewritten:

4 "(e1) A member of the board or any other body exercising ~~the functions of a board of~~
5 ~~adjustment~~quasi-judicial functions pursuant to this Article shall not participate in or vote on
6 any quasi-judicial matter in a manner that would violate affected persons' constitutional rights
7 to an impartial decision maker. Impermissible conflicts include, but are not limited to, a
8 member having a fixed opinion prior to hearing the matter that is not susceptible to change,
9 undisclosed ex parte communications, a close familial, business, or other associational
10 relationship with an affected person, or a financial interest in the outcome of the matter. If an
11 objection is raised to a member's participation and that member does not recuse himself or
12 herself, the remaining members shall by majority vote rule on the objection."

13 **SECTION 6.** G.S. 153A-345(e1) reads as rewritten:

14 "(e1) A member of the board or any other body exercising ~~the functions of a board of~~
15 ~~adjustment~~quasi-judicial functions pursuant to this Article shall not participate in or vote on
16 any quasi-judicial matter in a manner that would violate affected persons' constitutional rights
17 to an impartial decision maker. Impermissible conflicts include, but are not limited to, a
18 member having a fixed opinion prior to hearing the matter that is not susceptible to change,
19 undisclosed ex parte communications, a close familial, business, or other associational
20 relationship with an affected person, or a financial interest in the outcome of the matter. If an
21 objection is raised to a member's participation and that member does not recuse himself or
22 herself, the remaining members shall by majority vote rule on the objection."

23 **SECTION 7.** This act becomes effective January 1, 2010, and applies to
24 quasi-judicial decisions rendered on or after that date.