

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2013

H.B. 276
Mar 12, 2013
HOUSE PRINCIPAL CLERK

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HOUSE DRH80084-LR-50B (02/06)

Short Title: Zoning/Board of Adjustment Changes.

(Public)

Sponsors: Representatives G. Graham and Stam (Primary Sponsors).

Referred to:

1 A BILL TO BE ENTITLED
2 AN ACT TO CLARIFY AND MODERNIZE STATUTES REGARDING ZONING BOARDS
3 OF ADJUSTMENT.

4 The General Assembly of North Carolina enacts:

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

6 "§ 160A-388. Board of adjustment.

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

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

30 (a2) Notice of Hearing. – Notice of hearings conducted pursuant to this section shall be
31 mailed to the person or entity whose appeal, application, or request is the subject of the hearing;
32 to the owner of the property that is the subject of the hearing if the owner did not initiate the
33 hearing; to the owners of all parcels of land abutting the parcel of land that is the subject of the
34 hearing; and to any other persons entitled to receive notice as provided by ordinance. In the
35 absence of evidence to the contrary, the city may rely on the county tax listing to determine
36 owners of property entitled to mailed notice. The notice must be deposited in the mail at least



1 10 days, but not more than 25 days, prior to the date of the hearing. Within that same time
2 period, the city shall also prominently post a notice of the hearing on the site that is the subject
3 of the hearing or on an adjacent street or highway right-of-way.

4 (b) Appeals. – The board of adjustment shall hear and decide appeals from any decision
5 made by an official charged with the enforcement of a zoning or unified development
6 ordinance and may hear appeals arising out of any other ordinance that regulates land use or
7 development.

8 (1) Any person who has standing under G.S. 160A-393(d), or the city, may
9 appeal a decision to the board of adjustment. An appeal is taken by filing a
10 notice of appeal with the city clerk. The notice of appeal shall state the
11 grounds for the appeal.

12 (2) The official who made the decision shall give written notice to the owner of
13 the property that it is subject of the decision and to the party who sought the
14 decision, if different from the owner. The written notice shall be delivered
15 by personal delivery, electronic mail, or by first-class mail.

16 (3) The owner or other party shall have 30 days from receipt of the written
17 notice within which to file an appeal. Any other person with standing to
18 appeal shall have 30 days from receipt from any source of actual or
19 constructive notice of the decision within which to file an appeal.

20 (4) It shall be conclusively presumed that all persons with standing to appeal
21 have constructive notice of the decision from the date a sign containing the
22 words "Zoning Decision" or "Subdivision Decision" in letters at least six
23 inches high and identifying the decision made by the official is prominently
24 posted on the property that is the subject of the decision, provided the sign
25 remains on the property for at least 10 days. Posting of signs is not the only
26 form of constructive notice. Any such posting shall be the responsibility of
27 the landowner or applicant. Verification of the posting shall be provided by
28 the official who made the decision. Absent an ordinance provision to the
29 contrary, posting of signs shall not be required.

30 (5) The official whose decision is appealed shall transmit to the board all
31 documents and exhibits constituting the record upon which the action
32 appealed from is taken. The official shall also provide a copy of the record to
33 the appellant and to the owner of the property that is the subject of the
34 appeal if the appellant is not the owner.

35 (6) An appeal of a notice of violation or other enforcement order stays
36 enforcement of the action appealed from, unless the official whose decision
37 is appealed certifies to the board of adjustment, after notice of appeal has
38 been filed, that because of the facts stated in an affidavit a stay would cause
39 ~~imminent peril to life or property or that because the violation charged is-~~
40 ~~transitory in nature a stay would seriously interfere with enforcement of the~~
41 ~~ordinance. In that case, enforcement proceedings shall not be stayed except~~
42 ~~by a restraining order, which may be granted by a court. If enforcement~~
43 ~~proceedings are not stayed, the appellant may file with the official a request~~
44 ~~for an expedited hearing of the appeal, and the board of adjustment shall~~
45 ~~meet to hear the appeal within 15 days after such a request is filed.~~
46 Notwithstanding the foregoing, appeals of decisions granting a permit or
47 otherwise affirming that a proposed use of property is consistent with the
48 ordinance shall not stay the further review of an application for permits or
49 permissions to use such property.

50 (7) Subject to the provisions of subdivision (6) of this subsection, the board of
51 adjustment shall hear and decide the appeal within a reasonable time.

- 1 (8) The official who made the decision shall be present at the hearing as a
2 witness. The appellant shall not be limited at the hearing to matters stated in
3 the notice of appeal. If any party or the city would be unduly prejudiced by
4 the presentation of matters not presented in the notice of appeal, the board
5 may continue the hearing. The board of adjustment may reverse or affirm,
6 wholly or partly, or may modify the decision appealed from and shall make
7 any order, requirement, decision, or determination that ought to be made.
8 The board shall have all the powers of the official from whom the appeal is
9 taken.
- 10 (9) When hearing an appeal pursuant to G.S. 160A-400.9(e), or any other appeal
11 in the nature of certiorari, the hearing shall be based on the record below and
12 the scope of review shall be as provided in G.S. 160A-393(k).

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

36 (c) Special and Conditional Use Permits. – ~~The zoning ordinance may provide that the~~
37 ~~board of adjustment may permit special exceptions to the zoning regulations in specified~~
38 ~~classes of cases or situations as provided in subsection (d) of this section, not including~~
39 ~~variances in permitted uses, and that the board may use hear and decide special and conditional~~
40 ~~use permits, all to be permits in accordance with the principles, conditions, safeguards,~~
41 ~~standards and procedures specified in the ordinance. Reasonable and appropriate conditions~~
42 ~~may be imposed upon these permits. The ordinance may also authorize the board to interpret~~
43 ~~zoning maps and pass upon disputed questions of lot lines or district boundary lines and similar~~
44 ~~questions as they arise in the administration of the ordinance. The board shall hear and decide~~
45 ~~all matters referred to it or upon which it is required to pass under any zoning ordinance.~~

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

1 (1) Unnecessary hardship would result from the strict application of the
 2 ordinance. It shall not be necessary to demonstrate that, in the absence of the
 3 variance, no reasonable use can be made of the property.
 4 (2) The hardship results from conditions that are peculiar to the property, such
 5 as location, size, or topography. Hardships resulting from personal
 6 circumstances, as well as hardships resulting from conditions that are
 7 common to the neighborhood or the general public, may not be the basis for
 8 granting a variance.
 9 (3) The hardship did not result from actions taken by the applicant or the
 10 property owner. The act of purchasing property with knowledge that
 11 circumstances exist that may justify the granting of a variance shall not be
 12 regarded as a self-created hardship.
 13 (4) The requested variance is consistent with the ~~spirit~~ spirit, purpose, and intent
 14 of the ~~ordinance shall be observed,~~ ordinance, such that public safety and
 15 welfare secured, safety is secured, and substantial justice ~~done.~~ is achieved.
 16 No change in permitted uses may be authorized by variance. ~~Appropriate conditions, which~~
 17 ~~must be reasonably related to the condition or circumstance that gives rise to the need for a~~
 18 ~~variance, may be imposed on any approval issued by the board.~~ Appropriate conditions may be
 19 imposed on any variance, provided that the conditions are reasonably related to the variance.
 20 Any other ordinance that regulates land use or development may provide for variances
 21 consistent with the provisions of this subsection.

22 (e) Voting. –

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

36 (e1)

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

48 (f) Quasi-Judicial Decisions and Judicial Review. –

49 (1) The board shall determine contested facts and make its decision within a
 50 reasonable time. Every quasi-judicial decision shall be based upon
 51 competent, material, and substantial evidence in the record. Each

1 quasi-judicial decision shall be reduced to writing and reflect the board's
 2 determination of contested facts and their application to the applicable
 3 standards. The written decision shall be signed by the chair or other duly
 4 authorized member of the board. A quasi-judicial decision is effective upon
 5 filing the written decision with the clerk to the board or such other office or
 6 official as the ordinance specifies. The decision of the board shall be
 7 delivered by personal delivery, electronic mail, or by first-class mail to the
 8 applicant and property owner and to any other person who has submitted a
 9 written request for a copy prior to the date the decision becomes effective.
 10 The person required to provide notice shall certify that proper notice has
 11 been made.

12 (e2)

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

26 (f)

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

31 (g)

32 (h) Subpoenas. – The board of adjustment adjustment through the chair, or in the chair's
 33 absence anyone acting as chair, may subpoena witnesses and compel the production of
 34 evidence. To request issuance of a subpoena, persons with standing under G.S. 160A-393(d)
 35 may make a written request to the chair explaining why it is necessary for certain witnesses or
 36 evidence to be compelled. The chair shall issue requested subpoenas he or she determines to be
 37 relevant, reasonable in nature and scope, and not oppressive. The chair shall rule on any motion
 38 to quash or modify a subpoena. Decisions regarding subpoenas made by the chair may be
 39 appealed to the full board of adjustment. If a person fails or refuses to obey a subpoena issued
 40 pursuant to this subsection, the board of adjustment or the party seeking the subpoena may
 41 apply to the General Court of Justice for an order requiring that its order subpoena be obeyed,
 42 and the court shall have jurisdiction to issue these orders after notice to all proper parties. No
 43 testimony of any witness before the board of adjustment pursuant to a subpoena issued in
 44 exercise of the power conferred by this subsection may be used against the witness in the trial
 45 of any civil or criminal action other than a prosecution for false swearing committed on the
 46 examination. Any person who, while under oath during a proceeding before the board of
 47 adjustment, willfully swears falsely, is guilty of a Class 1 misdemeanor."

48 **SECTION 2.(a)** G.S. 153A-345 is repealed.

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

51 **"§ 153A-345.1. Board of adjustment.**

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

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

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

9 **SECTION 3.** G.S. 160A-381(c) reads as rewritten:

10 (c) The regulations may also provide that the board of adjustment, the planning board,
11 or the city council may issue special use permits or conditional use permits in the classes of
12 cases or situations and in accordance with the principles, conditions, safeguards, and
13 procedures specified therein and may impose reasonable and appropriate conditions and
14 safeguards upon these permits. When deciding special use permits or conditional use permits,
15 the city council or planning board shall follow quasi-judicial procedures. Notice of hearings on
16 special or conditional use permit applications shall be as provided in G.S. 160A-388(a2). No
17 vote greater than a majority vote shall be required for the city council or planning board to
18 issue such permits. For the purposes of this section, vacant positions on the board and members
19 who are disqualified from voting on a quasi-judicial matter shall not be considered "members
20 of the board" for calculation of the requisite majority. Every such decision of the city council or
21 planning board shall be subject to review of the superior court in the nature of certiorari in
22 accordance with G.S. 160A-388.

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

26 **SECTION 4.** G.S. 153A-340(c1) reads as rewritten:

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

42 **SECTION 5.** This act becomes effective October 1, 2013, and applies to all board
43 of adjustment actions taken on or after that date.