

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2017

FILED SENATE
Apr 4, 2017
S.B. 642
PRINCIPAL CLERK

S

D

SENATE BILL DRS35274-MQ-95 (03/17)

Short Title: Burden of Proof - Planning and Zoning. (Public)

Sponsors: Senators Newton, B. Jackson, and Brock (Primary Sponsors).

Referred to:

1 A BILL TO BE ENTITLED
2 AN ACT TO PROVIDE REGULATORY RELIEF FOR LANDOWNERS BY
3 ESTABLISHING A REBUTTABLE PRESUMPTION OF PROPER LAND USE UNDER
4 THE ORDINANCE AND BY REQUIRING CLEAR AND CONVINCING EVIDENCE
5 TO REBUT THAT PRESUMPTION IN QUASI-JUDICIAL PROCEEDINGS BEFORE
6 THE BOARD OF ADJUSTMENT.

7 The General Assembly of North Carolina enacts:

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

9 "§ 160A-388. Board of adjustment.

10 ...

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

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



- 1 Absent an ordinance provision to the contrary, posting of signs shall not be
2 required.
- 3 (5) The official who made the decision shall transmit to the board all documents
4 and exhibits constituting the record upon which the action appealed from is
5 taken. The official shall also provide a copy of the record to the appellant
6 and to the owner of the property that is the subject of the appeal if the
7 appellant is not the owner.
- 8 (6) An appeal of a notice of violation or other enforcement order stays
9 enforcement of the action appealed from unless the official who made the
10 decision certifies to the board of adjustment after notice of appeal has been
11 filed that because of the facts stated in an affidavit, a stay would cause
12 imminent peril to life or property or because the violation is transitory in
13 nature, a stay would seriously interfere with enforcement of the ordinance.
14 In that case, enforcement proceedings shall not be stayed except by a
15 restraining order, which may be granted by a court. If enforcement
16 proceedings are not stayed, the appellant may file with the official a request
17 for an expedited hearing of the appeal, and the board of adjustment shall
18 meet to hear the appeal within 15 days after such a request is filed.
19 Notwithstanding the foregoing, appeals of decisions granting a permit or
20 otherwise affirming that a proposed use of property is consistent with the
21 ordinance shall not stay the further review of an application for permits or
22 permissions to use such property; in these situations the appellant may
23 request and the board may grant a stay of a final decision of permit
24 applications or building permits affected by the issue being appealed.
- 25 (7) Subject to the provisions of subdivision (6) of this subsection, the board of
26 adjustment shall hear and decide the appeal within a reasonable time.
- 27 (8) The official who made the decision shall be present at the hearing as a
28 witness. The appellant shall not be limited at the hearing to matters stated in
29 the notice of appeal. If any party or the city would be unduly prejudiced by
30 the presentation of matters not presented in the notice of appeal, the board
31 shall continue the hearing. The board of adjustment may reverse or affirm,
32 wholly or partly, or may modify the decision appealed from and shall make
33 any order, requirement, decision, or determination that ought to be made.
34 The board shall have all the powers of the official who made the decision.
- 35 (9) When hearing an appeal pursuant to G.S. 160A-400.9(e) or any other appeal
36 in the nature of certiorari, the hearing shall be ~~based on the record below and~~
37 ~~the scope of review shall be as provided in G.S. 160A-393(k).~~ heard de novo.
38 There shall be a rebuttable presumption that the actual or proposed use of the
39 property that is the subject of the appeal is valid or consistent with the
40 ordinance. The presumption of validity or consistency may be rebutted by
41 clear and convincing evidence to the contrary if presented by the city or the
42 official who made the decision.
- 43 (10) The parties to an appeal that has been made under this subsection may agree
44 to mediation or other forms of alternative dispute resolution. The ordinance
45 may set standards and procedures to facilitate and manage such voluntary
46 alternative dispute resolution.
- 47 ...
- 48 (e) Voting. –
- 49 (1) The concurring vote of four-fifths of the board shall be necessary to grant a
50 variance. A majority of the members shall be required to decide any other
51 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 for calculation of the requisite majority if there are no qualified alternates available to take the place of such members.

- (2) A member of any board 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 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.

...
 (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.~~ heard de novo. There shall be a rebuttable presumption that the actual or proposed use of the property that is the subject of the appeal is valid or consistent with the ordinance. The presumption of validity or consistency may be rebutted by clear and convincing evidence to the contrary if presented by the city or the official who made the decision. 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 shall be subject to review by the superior court by proceedings in the nature of certiorari pursuant to G.S. 160A-393. A petition for review 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 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.

...."

SECTION 2. This act is effective when it becomes law and applies to actions taken by the board of adjustment on or after that date.