

**ARTICLE 8
APPEALS, VARIANCES, AND INTERPRETATIONS**

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ARTICLE 8
APPEALS, VARIANCES, AND INTERPRETATIONS

8-1 Appeals

- A. An appeal from any final order or decision of the Zoning Administrator may be taken to the Board of Adjustment by any person with standing under G.S. 160D-405 or the City may appeal a decision to the board of adjustment. The appeal system established in this Ordinance provides for a review of cases in which a decision or interpretation made by the Zoning Administrator is alleged to be erroneous. For example, an appeal may contest the Zoning Administrator's decision regarding whether a particular use is permissible within a particular zoning district or the Zoning Administrator's interpretation of the methodology for calculating maximum permissible sign surface area.

Amended June 7, 2021

- B. The notice of appeal, stating the grounds for the appeal, is filed with the city clerk. G.S. 160D-405. An appeal must be taken within thirty days after the date of the decision or order appealed from.

Amended June 7, 2021

- C. Whenever an appeal is filed, the Zoning Administrator shall forthwith transmit to the Board of Adjustment all the papers constituting the record relating to the action appealed from.

- D. 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.

- E. The Board of Adjustment may reverse or affirm (wholly or partly) or may modify the order, requirement or decision or determination appealed from and shall make any order, requirement, decision or determination that in its opinion ought to be made in the case before it. To this end, the Board of Adjustment shall have all the powers of the officer from whom the appeal is taken. Board of Adjustment action on appeal requests shall comply with the voting requirements of Section 8-8 A.

- F. Evidentiary hearing procedures for appeal requests are delineated in Section 8-6. Hearing notice requirements are outlined in Section 8-7.

- G. The appeal system established herein applies only to decisions or interpretations made by the Zoning Administrator. This appeal system does not apply to decisions or interpretations made by the Planning Board or the City Council. Additionally, the Board of Adjustment is not authorized to issue advisory decisions regarding appeals. Only the formal decisions or interpretations of the Zoning Administrator may be appealed to the Board of Adjustment.
- H. The administrative official who made the decision shall give written notice by personal delivery, electronic mail, or first-class mail to the owner of the property that is the subject of the decision and to the party that sought the decision if different from the owner. They have 30 days from receipt of the written notice to file an appeal. The administrative official shall be present at the hearing as a witness. Anyone else having standing to appeal has 30 days from receipt of any source of actual or constructive notice of the decision within which to file an appeal. Verification of the posting must be provided to the administrative official. G.S. 160D-406.

Amended June 7, 2021

- I. If any party or city would be unduly prejudiced by the presentation of such matters (i.e., those not presented in the notice of appeal), the board shall continue the hearing. G.S. 160D-406(d).

Amended June 7, 2021

- J. The parties to an appeal may agree to mediation or other forms of alternative dispute resolution including without limitation mediation or arbitration.

8-2 Variances

A. General

1. An application for a variance along with the required filing fee shall be submitted to the Board of Adjustment by filing a copy of the application with the Zoning Administrator.
2. A variance may be granted by the Board of Adjustment if it concludes that strict enforcement of this Ordinance would result in practical difficulties or unnecessary hardships for the applicant and that, by granting the variance, the spirit of this Ordinance will be observed, public safety and welfare secured, and substantial justice done. It may reach these conclusions if it finds that:
 - (a) 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.
 - (b) 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. A variance may be granted when necessary and appropriate to make a reasonable accommodation under the Federal Fair Housing Act or for a person with a disability.

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- (c) 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.
 - (d) 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.
3. 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. 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 of Adjustment.
 4. A variance may be issued for an indefinite duration or for a specified duration only. Unless otherwise specified, any order or decision of the Board of Adjustment granting a variance shall expire if the applicant does not obtain a building permit or certificate of occupancy for such use within 60 calendar days from the date of the decision or if construction of the use has not commenced within 180 calendar days from the date of the issuance of a building permit.
 5. 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.
 6. No change in permitted uses may be authorized by variance.
 7. Evidentiary hearing procedures for variance requests are delineated in Section 8-6. Hearing notice requirements are outlined in Section 8-7.

B. Variances from Flood Hazard Overlay District Requirements

The Board of Adjustment is authorized to review and decide upon request for variances from the Flood Hazard Overlay District Requirements delineated in Section 5-6 pursuant to the provisions delineated in this section.

1. Variances may be issued by the Board of Adjustment for:
 - (a) The repair or rehabilitation of historic structures upon the determination that the proposed repair or rehabilitation will not preclude the structure's continued designation as a historic structure and that the variance is the minimum necessary to preserve the historic character and design of the structure.
 - (b) Functionally dependent facilities if determined to meet the definition as stated in Section 5-6.2, provided the provisions of subsections H, 2, 3, and 5 of that Section have been satisfied, and such facilities are protected by methods that minimize flood damages.
 - (c) Any other type of development provided it meets the requirements stated in this section.

2. In passing upon variances, the Board of Adjustment shall consider all technical evaluations, all relevant factors, all standards specified in other sections of this Ordinance, and:
 - (a) The danger that materials may be swept onto other lands to the injury of others;
 - (b) The danger to life and property due to flooding or erosion damage;
 - (c) The susceptibility of the proposed facility and its contents to flood damage and the effect of such damage on the individual owner;
 - (d) The importance of the services provided by the proposed facility to the community;
 - (e) The necessity to the facility of a waterfront location as defined under Section 5-6.2 as a functionally dependent facility, where applicable;
 - (f) The availability of alternative locations, not subject to flooding or erosion damage, for the proposed use;
 - (g) The compatibility of the proposed use with existing and anticipated development;
 - (h) The relationship of the proposed use to the comprehensive plan and floodplain management program for that area;
 - (i) The safety of access to the property in times of flood for ordinary and emergency vehicles;

- (j) The expected heights, velocity, duration, rate of rise, and sediment transport of the floodwaters and the effects of wave action, if applicable, expected at the site; and
 - (k) The costs of providing governmental services during and after flood conditions including maintenance and repair of public utilities and facilities such as sewer, gas, electrical and water systems, and streets and bridges.
3. A written report addressing each of the above factors shall be submitted with the application for a variance.
 4. Upon consideration of the factors listed above and the purposes of this Ordinance, the board of adjustment may attach such conditions to the granting of variances as it deems necessary to further the purposes of this Ordinance.
 5. Any applicant to whom a variance is granted shall be given written notice specifying the difference between the Base Flood Elevation (BFE) and the elevation to which the structure is to be built and that such construction below the Base Flood Elevation increases risks to life and property, and that the issuance of a variance to construct a structure below the Base Flood Elevation will result in increased premium rates for flood insurance up to \$25.00 per \$100.00 of insurance coverage. Such notification shall be maintained with a record of all variance actions, including justification for their issuance.
 6. The Zoning Administrator shall maintain the records of all appeal actions and report any variances to the Federal Emergency Management Agency and the State of North Carolina upon request.
 7. Conditions for Variances:
 - (a) Variances shall not be issued when the variance will make the structure in violation of other Federal, State, or local laws, regulations, or ordinances.
 - (b) Variances shall not be issued within any designated floodway or non-encroachment area if the variance would result in any increase in flood levels during the base flood discharge.
 - (c) Variances shall only be issued upon a determination that the variance is the minimum necessary, considering the flood hazard, to afford relief.
 - (d) Variances shall only be issued prior to development permit approval.
 - (e) Variances shall only be issued upon:
 - (1) A showing of good and sufficient cause;

- (2) A determination that failure to grant the variance would result in exceptional hardship; and
- (3) A determination that the granting of a variance will not result in increased flood heights, additional threats to public safety, or extraordinary public expense, create nuisance, cause fraud on or victimization of the public, or conflict with existing local laws or ordinances.

C. Variances from Watershed District Overlay Requirements

- 1. **Minor Variances.** Minor variances, as defined in Section 12-4, to the provisions of Section 5-3 may be approved by the Board of Adjustment pursuant to the procedures outlined in this Article. The Zoning Administrator shall keep a record of all such minor variances and shall submit, for each calendar year, the record to the Water Quality Section, of the NC Division of Environmental Management on or before January 1st of the following year. The record shall include a description of each project receiving a variance and the reasons for granting the variance.
- 2. **Major Variances.** Major variances, as defined in Section 12-4, shall be reviewed by the Board of Adjustment pursuant to the procedures outlined in this Article and a recommendation prepared for submission to the NC Environmental Management Commission (EMC). The record of a major variance review shall include the following items:
 - (a) The variance application;
 - (b) The hearing notices;
 - (c) The evidence presented;
 - (d) Motions, offers of proof, objections to evidence, and rulings on them;
 - (e) Proposed findings and exceptions; and
 - (f) The Board of Adjustment's recommendation, including all conditions proposed to be added to the permit.

Upon receiving the record of a major variance review from the Board of Adjustment, the EMC shall (i) review the variance request, (ii) prepare a final decision on the request, and (iii) forward its decision to the Board of Adjustment. If the EMC approves the variance as proposed, the Board of Adjustment shall prepare a final decision granting the proposed variance. If the EMC approves the variance with conditions and stipulations, the Board of Adjustment shall prepare a final decision, including such conditions and stipulations, granting the proposed variance. If the EMC denies the

variance request, the Board of Adjustment shall prepare a final decision denying the variance.

3. Notification Requirements. The hearing notice required in Section 8-7 shall also be sent by first class mail to all other local governments having watershed regulation jurisdiction in the particular watershed where the variance is being requested and to each entity using the water supply for consumption. Any comments submitted prior to a decision by the Board of Adjustment shall become a part of the record of proceedings of the Board of Adjustment.

D. Administrative Action on Insignificant or 'de minimus' Variances

The Planning Director, after consultation with the City Attorney, shall be authorized to grant a 'no action' letter to applicants for a variance when the violation of set back or similar failure to meet ordinance standards is less than five per cent of requirements. Such a letter shall state that the City will not take enforcement action based on the submitted violation. The applicant must provide the Planning Director with a plat or drawing clearly illustrating the ordinance discrepancy and must also document that the correction of the error would be cost prohibitive. No prospective actions may be considered.

8-3 Interpretations

- A. The Board of Adjustment is authorized to interpret the zoning map and to pass upon disputed questions of lot lines or district boundary lines and similar questions. If such questions arise in the context of an appeal from a decision of the Zoning Administrator, they shall be handled as provided in Section 8-1.
- B. An application for a map interpretation shall be submitted to the Board of Adjustment by filing a copy of the application with the Zoning Administrator. The application shall contain sufficient information to enable the Board of Adjustment to make the necessary interpretation.
- C. Interpretations of the location of floodway and floodplain boundary lines may be made by the Zoning Administrator as provided in Section 5-6.

8-4 Requests to Be Heard Expeditiously

The Board of Adjustment shall hear and decide all appeals, variance requests, and requests for interpretations as expeditiously as possible, consistent with the need to follow regularly established agenda procedures, provide notice in accordance with Section 8-7 and obtain the necessary information to make sound decisions.

8-5 Burden Of Proof in Appeals and Variances

- A. When an appeal is taken to the Board of Adjustment in accordance with Section 8-1, the Zoning Administrator shall have the initial burden of

presenting to the Board of Adjustment sufficient evidence and argument to justify the order or decision appealed from. The burden of presenting evidence and argument to the contrary then shifts to the appellant, who shall also have the burden of persuasion.

- B. The burden of presenting evidence sufficient to allow the Board of Adjustment to reach the conclusions set forth in Section 8-2, A, 2 as well as the burden of persuasion on those issues, remains with the applicant seeking the variance.

8-6 Evidentiary Hearing Procedures Required On Appeals and Variances

- A. Before making a decision on an appeal or an application for a variance, the Board of Adjustment shall hold an evidentiary hearing on the appeal or variance.
- B. Subject to subsection C below, the hearing shall be open to the public and all persons interested in the outcome of the appeal or application shall be given an opportunity to present evidence and arguments and ask questions of persons who testify.
- C. The Board of Adjustment may place reasonable and equitable limitations on the presentation of evidence and arguments and the cross-examination of witnesses so that the matter at issue may be heard and decided without undue delay.
- D. The Board of Adjustment may continue the hearing until a subsequent meeting and may keep the hearing open to take additional information up to the point a final decision is made. No further notice of a continued hearing need be published.

8-7 Notice of Hearing

The Zoning Administrator shall give notice of any hearing required by Section 8-6 for mailed and posted notice at least 10 but not more than 25 days prior to the date of the hearing as follows:

- A. The person or entity whose appeal, application, or request is the subject of the hearing.
- B. The owner of the property that is the subject of the hearing if the owner did not initiate the hearing.
- C. The owners of all parcels of land abutting the parcel of land that is the subject of the hearing; and
- D. To any other persons entitled to receive notice as provided by the zoning or unified development ordinance.

8-8 Board of Adjustment Action on Appeals and Variances

- A. With respect to appeals, a motion to reverse, affirm, or modify the order, requirement, decision, or determination appealed from shall include, insofar as practicable, a statement of the specific reasons or findings of facts that support the motion. If a motion to reverse or modify is not made or fails to receive the four-fifths vote necessary for adoption, then the motion is not approved.
- B. Before granting a variance, the Board of Adjustment must take a vote and vote affirmatively (by a 4/5 majority) on the required findings stated in Section 8-2, A, 2. Insofar as practicable, a motion to make an affirmative finding on each of the requirements set forth in Section 8-2, A, 2 shall include a statement of the specific reasons or findings of fact supporting such motion.
- C. A motion to deny a variance may be made on the basis that any one or more of the six criteria set forth in Section 8-2, A, 2 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 of Adjustment's decision if supported by more than one fifth of the Board's membership.
- D. 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 supermajority if there are no qualified alternates available to take the place of such members.
- E. Pursuant to the requirements of NCGS 160D-109(d), a member of the Board of Adjustment or any other body exercising the functions of a Board of Adjustment 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.

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8-9 Evidence

- A. The provisions of this Section apply to all hearings for which a notice is required by Section 8-6.
- B. All persons who intend to present evidence to the Board of Adjustment, rather than arguments only, shall be sworn.
- C. All findings and conclusions necessary to the issuance or denial of the requested appeal or variance (crucial findings) shall be based upon reliable evidence. Competent evidence (evidence admissible in a court of

law) shall be preferred whenever reasonably available, but in no case may crucial findings be based solely upon incompetent evidence unless competent evidence is not reasonably available, the evidence in question appears to be particularly reliable, and the matter at issue is not seriously disputed.

- D. The Board of Adjustment may subpoena witnesses and compel the production of evidence. If a person fails or refuses to obey a subpoena issued pursuant to this subsection, the Board of Adjustment may apply to the General Court of Justice for an order requiring that its order 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 NCGS 160D-405 & 160D-406 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. 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.

Amended June 7, 2021

8-10 Modification of Application at Hearing

- A. In response to questions or comments by persons appearing at the hearing or to suggestions or recommendations by the Board of Adjustment, the applicant may agree to modify his application, including the plans and specifications submitted.
- B. Unless such modifications are so substantial or extensive that the Board cannot reasonably be expected to perceive the nature and impact of the proposed changes without revised plans before it, the Board of Adjustment may approve the application with the stipulation that the permit will not be issued until plans reflecting the agreed upon changes are submitted to the Zoning Administrator.

8-11 Record

- A. A record shall be made of all hearings required by Section 8-6, and such record shall be kept as provided by state law. Accurate minutes shall also be kept of all such proceedings, but a transcript need not be made.
- B. Whenever practicable, all documentary evidence presented at a hearing as well as all other types of physical evidence shall be made a part of the record of the proceedings.

8-12 Written Decision

- A. Any decision made by the Board of Adjustment regarding an appeal or variance shall be reduced to writing and served upon the applicant or appellant and all other persons who make a written request for a copy.

- B. In addition to a statement of the Board of Adjustment's ultimate disposition of the case and any other information deemed appropriate, the written decision shall state the Board's findings and conclusions, as well as supporting reasons or facts.

8-13 Appeal of Board of Adjustment Decisions to Superior Court

Every final decision of the Board of Adjustment shall be subject to review by the Superior Court of the applicable county by proceedings in the nature of certiorari (see Section 11-7, Judicial Review).