

STAFF REPORT

DOCKET # UDO-242

STAFF: [Chris Murphy](#)

REQUEST

A UDO Text Amendment proposed by City County Planning Board staff to amend Chapter B of the *Unified Development Ordinances* to reflect changes made by the General Assembly of North Carolina to the North Carolina General Statutes in Session Law 2013-126/House Bill (H.B.) 276 entitled “AN ACT TO CLARIFY AND MODERNIZE STATUTES REGARDING ZONING BOARDS OF ADJUSTMENT.” – (UDO-242)

BACKGROUND

H.B. 276 was a bi-partisan bill aimed at modernizing the Zoning Boards of Adjustment statutes, which originally date to 1923, but which have been amended, often in a dis-jointed fashion, seventeen (17) times over the past century. The House of Representatives and the Senate both adopted the bill with unanimous votes. The bill originated as a proposal from the Zoning, Planning and Land Use Section of the North Carolina Bar Association, but received extensive input from the North Carolina Homebuilders Association, the North Carolina Chapter of the American Planning Association, the North Carolina Association of Zoning Officials, the League of Municipalities, the Association of County Commissioners and various other industry groups.

ANALYSIS

Amendments to the Zoning Board of Adjustment statutes approved as part of H.B. 276’s adoption can be placed into three groups of changes. The first group of changes is a set of stylistic and organizational changes aimed at clarifying the statutes and modernizing the language. The second group of changes is largely technical in nature, dealing with the administering of oaths, processing subpoenas, the provisions for judicial review, etc. The third group of changes incorporates a variety of modernization and uniformity provisions to the statutes. These include modernizing the appeal process, the voting requirements for various case types, providing for the land owner posting his own property to provide constructive notice of a permit/decision, uniform notice requirements for hearings before the board, etc.

The amendments set forth in UDO-242 incorporate the changes made to the General Statutes in H.B. 276. The Unified Development Ordinances (UDO) will be consistent with those provisions and with all other jurisdictions in the State of North Carolina.

RECOMMENDATION

APPROVAL

UDO-242

**AN ORDINANCE PROPOSED BY CITY-COUNTY PLANNING AND DEVELOPMENT SERVICES
STAFF AMENDING ARTICLE VI OF THE *UNIFIED DEVELOPMENT ORDINANCES* TO
COMPLY WITH NEW STATE REQUIREMENTS CONCERNING ZONING BOARD OF
ADJUSTMENTS**

Be it ordained by the City Council of the City of Winston-Salem, North Carolina, that the *Unified Development Ordinances* is hereby amended as follows:

Section 1. Chapter B, Article VI – Administration and Amendments is hereby amended as follows:

6-1.4 BOARD OF ADJUSTMENT

(A) Special Use Permits Authorized by the Board of Adjustment

- (1) Board of Adjustment Review. The Board of Adjustment shall review all requests for permits as designated in Table B.2.6 and Section B.2-5.
- (2) Planning Board Report. Applications for special use permits may be approved by the Board of Adjustment after such board receives a report from the Planning Board and holds a duly advertised public hearing in each case, except that the Planning Board shall not be required to review and report on applications for:
 - (a) Riding Stables per Table B.2.6;
 - (b) Kennels, Outdoor per Table B.2.6;
 - (c) Shooting Ranges, Outdoor per Table B.2.6;
 - (d) Manufactured Homes Class A, Class B and Class C per Table B.2.6;
 - (e) Expansion or Conversion of a Nonconforming Use per Sections B.5-2.3(B) and B.5-2.4(A);
 - (f) Accessory Uses as follows:
 - (i) Dwelling, Accessory (Detached) per Section B.2-6.4(C);
 - (ii) Separation, Processing, Storage or Wholesale Sale of Materials in LCID's per Section B.2-5.41(N); or
 - (iii) Home Occupations in Rural Areas (GMAs 4 and 5) per Section B.2-6.4(D)(2)(b);
 - (g) Accessory Structures as follows:
 - (i) Exceeding size limits for accessory structures per Section B.3 1.2(E);
 - (h) Parking reductions for churches per Sections B.2-5.21(D) and B.2-5.22(C);
 - (i) Veterinary Services per Table B.2.6;
 - (j) Reserved.
 - (k) Keeping of horses, mules, donkeys, goats, sheep, or cattle(W) per Section B.3-11.4;

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(l) Child Daycare, Large Home.

The Planning Board shall submit its report in writing to the Director of Inspections not more than sixty (60) days after receipt of the application in accordance with established review procedures. In reviewing the request, the Planning Board shall review the application to assure compliance with all provisions of this Ordinance. The Planning Board report shall make a finding that the application as submitted either complies with the Ordinance, complies with recommended conditions, or does not comply with the Ordinance. If the Planning Board recommends conditions, the Planning Board shall have the authority to recommend conditions as identified in Section B.6-1.3(A)(1) to reduce impacts associated with the project.

- (3) Required Findings. The Board of Adjustment shall issue a special use permit only when the Board of Adjustment makes an affirmative finding as follows:
- (a) That the use will not materially endanger the public health or safety if located where proposed and developed according to the application and plan as submitted and approved;
 - (b) That the use meets all required conditions and specifications;
 - (c) That the use will not substantially injure the value of adjoining or abutting property, or that the use is a public necessity; and,
 - (d) That the location and character of the use, if developed according to the application and plan submitted and approved, will be in harmony with the area in which it is to be located and in general conformity with *Legacy*.

Except with regard to the conversion of nonconforming uses in Section B.5-2, no provision of this Ordinance shall be interpreted as conferring upon the Board of Adjustment the authority to approve an application for a special use permit for any use unless authorized in Table B.2.6. In approving an application for the issuance of a special use permit, the Board of Adjustment may impose additional reasonable and appropriate conditions and safeguards to protect the public health and safety, and the value of neighboring properties, and the health and safety of neighboring residents. If the Board of Adjustment denies the application for the issuance of a special use permit, it shall enter the reasons for denial in the minutes of the meeting at which the action was taken.

- (4) Permit Expiration. A special use permit shall become void if the terms of such permit, in the judgment of the Director of Inspections, are not exercised within a period of two (2) years from the date of approval. Special use permits are also subject to the provisions in Section B.1-5.2 Vested Rights.
- (5) Extension of Permit. A letter requesting an extension of time and indicating the reason for such request, submitted prior to the termination date and duly approved by the Board of Adjustment, shall extend the validity of such permit for a period of six (6) months. No other extension of time shall be granted.
- (6) Review of Request for Extension. In considering such extension, the Board of Adjustment may make such changes in the conditions under which the permit was

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granted as may be indicated by any new information relating to the property or to the use proposed thereon, provided the extension or changes still comply with the affirmative finding set forth above.

- (7) Special Use District Zoning. No separate special use permit is required for a use which is permitted as a part of a special use district zoning adopted by the Elected Body and which meets the requirements of this Ordinance.

(B) Variances

- (1) Authority. No provision of this Ordinance shall be interpreted as conferring upon the Board of Adjustment the authority to approve an application for a variance of the conditions of a permitted use except with respect to the specific waiving of requirements as to:
 - (a) General Dimension Requirements for Zoning Districts listed in Sections B.2-1.2, B.2-1.3, B.2-1.4 and B.2-1.5 and shall only include minimum zoning lot area and width, minimum setbacks, maximum impervious surface cover, or maximum height;
 - (b) Floodplain regulations as specified in Section C.2-2.7;
 - (c) Vehicular use landscaping requirements as specified in Section B.3-4;
 - (d) Bufferyard requirements as specified in Section B.3-5;
 - (e) Setback and landscaping requirements of the TO District as specified in Section B.2-1.6(B);
 - (f) Width of private access easements where such easement is for single family residential uses and where said private access easement was established prior to April 17, 1978;
 - (g) Off-street parking and loading as specified in Section B.3-3;
 - (h) Delay of building permits within designated Transportation Plan corridors as specified in Section B.3-7.1;
 - (i) Residential infill setback requirements as specified in Section B.3-8; (W) and
 - (j) Conservation Standards for the NCO District as specified in Section B.2-1.6(A).
- (2) Limitations. The Board of Adjustment shall not grant a variance to permit a use not permitted in the applicable zoning district, nor shall it grant a variance for a site plan feature or condition adopted in conjunction with a special use district zoning.
- (3) Public Hearing. Applications for variances may be approved by the Board of Adjustment after such Board of Adjustment holds a duly advertised public hearing in each case.
- (4) ~~Difficulty or Hardship.~~ Said application for a variance may be approved only upon a finding of ~~practical difficulty or unnecessary hardship~~ in meeting the dimensional requirements of this Ordinance; **The** ~~which difficulties~~ **hardship** **must** arise from the recorded platting or deeding of land or any building

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constructed and completed prior to the adoption of this Ordinance, ~~or~~ from any act of a public agency, or from natural conditions beyond the control of the property owner. **The Board of Adjustment shall vary the provisions of the ordinance upon a showing of all of the following:**

- (i) The unnecessary hardship would result from the 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 the granting of a variance shall not be regarded as a self-created hardship; and**
- (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.**

- (5) Findings. The Board of Adjustment shall approve of a variance only when the Board of Adjustment makes an affirmative finding as follows:
 - (a) That the approval of the variance will not materially endanger the public health or safety if located where proposed and developed according to the application and plan as submitted and approved;
 - (b) That the use of the property otherwise meets all required conditions and specifications;
 - (c) That the approval of the variance will not substantially injure the value of adjoining or abutting property, or that the use is a public necessity; and,
 - (d) That the location and character of the use, if developed according to the variance, will otherwise be in harmony with the area in which it is to be located and in general conformity with *Legacy*.
 - (e) That the basis for a hardship determination in subsection B.6-1.4(B)(4) is met.**
- (6) Review of Applications. Any such variance shall observe the spirit and purpose of this Ordinance and shall be granted only with reference to conditions and circumstances peculiar to the property involved. ~~In passing upon such requests the Board of Adjustment may specify additional reasonable and appropriate conditions and safeguards, which must be reasonably related to the condition or circumstance that gives rise to the need for a variance, to protect the public health and safety, the value of neighboring properties and the health and safety of neighboring residents.~~ If the Board of Adjustment denies the application for a variance, it shall enter the reasons for the denial in the minutes of the meeting at which the action was taken.

(7) Conditions. Appropriate conditions may be imposed on any variance, provided that the conditions are reasonably related to the variance.

(8) Voting on Variance Requests. The concurring vote of four-fifths (4/5) of the board shall be necessary to grant a variance. 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 alternatives to take the place of such members.

(C) Appeals and Interpretations

(1) General. The Board of Adjustment shall hear and pass upon appeals from and shall review any ~~disputed order, requirements, decision or determination~~ made by the Director of Inspections or his/her designee. The Board of Adjustment shall also hear and pass upon all other matters upon which it is required to act under this Ordinance. The appeal request is subject to the following:

(a) Only written decisions or determinations shall be appealed. A decision includes any final and binding order, requirement or determination. The Director of Inspections, or his or her designee shall give written notice to the owner of the property that is 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.

(b) The owner or other party receiving the written notice shall have thirty (30) days from receipt of the written notice, decision or determination to file an appeal. Any other person or party with standing to appeal shall have thirty (30) days from receipt of any source of actual or constructive notice of the decision or determination to file an appeal. It shall be conclusively presumed that all persons with standing to appeal have constructive notice of the decision from the date the landowner or applicant posts a sign on the property using six inch (6") letters with the words "ZONING DECISION" or "SUBDIVISION DECISION" along with information identifying the means to contact an official for information about the decision in a prominent location on the property for at least ten (10) days. Posting of such signs is not the only form of constructive notice. Verification of the posting shall be provided by the owner or applicant to the official who made the decision.

(c) The Director of Inspections or his/her designee shall transmit to the Board of Adjustment all documents and exhibits constituting the record upon which the action appealed from is taken. The Director of Inspections or his/her designee shall also provide a copy of the record to the appellant and to the owner of the property that is the subject of the appeal if the appellant is not the owner.

(d) An appeal of a notice of violation or other enforcement action stays

enforcement of the action appealed from unless the official who made the decision certified to the Board of Adjustment after notice of appeal has been filed that because facts stated in the 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 fifteen (15) days after such 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 of Adjustment may grant a stay of a final decision of permit applications or building permits affected by the issue being appealed. Otherwise, the Board of Adjustment shall hear and decide the appeal within a reasonable time.

(e) The official who made the decision shall be present at the hearing as a witness. The appellant may 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 of Adjustment shall continue the hearing.

(f) Procedure to be Used in Processing Appeals and Interpretations of Decisions of the Director of Inspection or His/Her Designee Authorized by the Board of Adjustment.

(i) Applications for appeals of decisions, determinations or interpretations of the Director of Inspections or his/her designee to be considered in any month by the Board of Adjustment shall be made by the property owner or the owner's authorized agent or any other party with standing to the City/County Clerk not less than twenty (20) days prior to the established meeting date of that month. Each petition shall be accompanied by:

- A fee as authorized in Section B.8.
- The written decision of the Director of Inspections or his/her designee that is the subject of the requested appeal or interpretation.

(2) Board of Adjustment Authority. Upon appeal, the Board of Adjustment shall have the following powers:

(a) To hear and decide appeals based on alleged error in any order, requirement or decision made by the Director of Inspections or his/her

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designee in the enforcement of this Ordinance;

(b) To hear and decide requests for special exceptions or for the interpretation of the Official Zoning Maps or for decisions upon other special questions upon which the Board of Adjustment is authorized to pass.

(c) 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 of Adjustment shall have all the powers of the official who made the decision.

(d) When hearing an appeal pursuant to G.S. 160A-409(e) or any other appeal in the nature of certiorari, the hearing shall be based on the record and the scope of review shall be as provided in G.S. 160A-393(k).

~~(3) Four Fifths (4/5) Vote Required. (W) The concurring vote of four fifths (4/5) of the members of the Board of Adjustment shall be necessary to reverse any order requirement, decision, or interpretation of the Director of Inspections.~~

~~(4) Majority Vote Required. (F) The concurring vote of a simple majority of the members of the Board of Adjustment shall be necessary to reverse any order requirement, decision, or interpretation of the Director of Inspections.~~

(3) Voting on Appeals/Interpretations. A majority of the members shall be required to overturn a decision of the Director of Inspections or his/her designee. 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 alternatives to take the place of such members.

(D) Procedure to be Used in Processing Special Use Permits, and Variances, Requests ~~and Appeals and Interpretations~~ Authorized by the Board of Adjustment.

(1) Applications: Applications for special use permits or variances to be considered in any month by the Board of Adjustment shall be made by the property owner or the owner's authorized agent to the Director of Inspections not less than twenty (20) days prior to the established meeting date of that month. Each petition shall be accompanied by:

(i) A fee as authorized in Section B.8.

(ii) (F) Fifteen (15) copies of a scaled site plan (plot plan) of the property which may be prepared by either professional or non-professional persons showing the location of any existing and proposed structure(s) and any relevant notations on the site plan concerning the request. Staff shall determine if a site plan is required with an appeal or interpretation application.

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(W) Fifteen (15) copies of a scaled site plan (plot plan) of the property showing the location of any existing and proposed structure(s) and any relevant notations on the site plan concerning the request. Staff shall determine if a site plan is required with an appeal or interpretation application.

(iii) Any other written materials the applicant would like to submit to the Board for consideration of the application.

(2) ~~Posting~~ **Posted Notice of Hearing.** The applicant shall post on the property a notice of public hearing at least ten (10) days prior to the date of the hearing before the Board of Adjustment.

Such notice shall be of sufficient size to contain, and shall contain, heavy black lettering not less than three (3) inches high on a white background and shall be posted in a conspicuous place on the premises. Where such posting is not clearly visible from the nearest public right-of-way, a second directional sign which is clearly visible from the nearest public right-of-way shall be posted. A sign shall be provided by the Director of Inspections consistent with these requirements. Such sign structure shall be removed by the applicant within thirty (30) days after said public hearing.

~~(3) Advertisement. The Board of Adjustment shall advertise a public hearing not less than ten (10) days in advance of such hearing, by a single insertion in a daily or weekly newspaper of general circulation in Winston-Salem and in Forsyth County.~~

(3) Mailed Notice of Hearing. Notice of hearings shall be mailed to the person or entity whose appeal, application or request is the subject of the public hearing; to the owner of the property that is subject to the public hearing, if different from the applicant; to the owners of all parcels of land abutting the parcel of land that is the subject of the hearing; and to any other person entitled to receive notice as otherwise provided in the Unified Development Ordinances. The County Tax listing shall be utilized to determine the owners entitled to receive mailed notice. The notice must be deposited in the mail at least ten (10), but not more than twenty-five (25) days, prior to the date of the hearing.

(4) Voting on Special Use Permits and Variance Requests. The concurring vote of four-fifths (4/5) of the board shall be necessary to grant a variance. A majority of the members shall be required to issue a Special Use Permit. 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 alternatives to take the place of such members.

(EF) **Quasi-Judicial** Decisions

~~Decisions of the Board of Adjustment regarding special use permits, variances, appeals from the Zoning Officer, and any other questions upon which the Board of Adjustment is authorized to pass, shall be filed in the office of the Secretary of the Board of Adjustment.~~

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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. 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 secretary of the board. A quasi-judicial decision is effective upon filing the written decision with the clerk to the board. 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.

(~~F~~G) Approved Site Plans

Any site (plot) plans approved as a part of an application shall become a part of that application and shall not be changed. A modified site plan may be submitted and the changes may be approved by the Director of Inspections if in his opinion the changes are minor in nature and are consistent with the intent of the original site plan or conditions. Changes to site plans that are not considered minor by the Director of Inspections shall be approved by the Zoning Board of Adjustment.

(H) Subpoena Power

The board of adjustment through the chair, or in the chair's absence, anyone acting as chair, may subpoena witnesses and compel the production of evidence. To request issuance of a subpoena, a person with standing under G.S. 160A-393(d) may make a written request to the chair explaining why it is necessary for certain witnesses or evidence to be compelled. The chair shall issue requested subpoenas he/she determines to be relevant, reasonable in nature and scope, and not oppressive. Decisions regarding subpoenas made by the chair may be appealed to the full Board of Adjustment. If a person fails or refuses to obey a subpoena issued pursuant to the subsection, the Board of Adjustment or the party seeking the subpoena may apply to the General Court of Justice for an order requiring that its subpoena be obeyed.

(I) Voting on All Other Matters

All other matters coming before the Board of Adjustment, such as the approval of minutes or decision regarding rehearing requests, etc. shall be decided based on majority vote. 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 alternatives to take the place of such members.

Section 2. This Ordinance shall be effective upon adoption.

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2013

SESSION LAW 2013-126
HOUSE BILL 276

AN ACT TO CLARIFY AND MODERNIZE STATUTES REGARDING ZONING BOARDS
OF ADJUSTMENT.

The General Assembly of North Carolina enacts:

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

"§ 160A-388. Board of adjustment.

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

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

(a2) Notice of Hearing. – Notice of hearings conducted pursuant to this section shall be mailed to the person or entity whose appeal, application, or request is the subject of the hearing; to the owner of the property that is the subject of the hearing if the owner did not initiate the hearing; to the owners of all parcels of land abutting the parcel of land that is the subject of the hearing; and to any other persons entitled to receive notice as provided by the zoning or unified development ordinance. In the absence of evidence to the contrary, the city may rely on the county tax listing to determine owners of property entitled to mailed notice. The notice must be deposited in the mail at least 10 days, but not more than 25 days, prior to the date of the hearing. Within that same time period, the city shall also prominently post a notice of the hearing on the site that is the subject of the hearing or on an adjacent street or highway right-of-way.

(b) A zoning ordinance or those provisions of a unified development ordinance adopted pursuant to the authority granted in this Part shall provide that the board of adjustment shall hear and decide appeals from and review any order, requirement, decision, or determination made by an administrative official charged with the enforcement of that ordinance. An appeal may be taken by any person aggrieved or by an officer, department, board, or bureau of the city. Appeals shall be taken within times prescribed by the board of adjustment by general rule,



~~by filing with the officer from whom the appeal is taken and with the board of adjustment a notice of appeal, specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken. An appeal stays all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board of adjustment, after notice of appeal has been filed with him, that because of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property or that because the violation charged is transitory in nature a stay would seriously interfere with enforcement of the ordinance. In that case proceedings shall not be stayed except by a restraining order, which may be granted by the board of adjustment or by a court of record on application, on notice to the officer from whom the appeal is taken and on due cause shown. The board of adjustment shall fix a reasonable time for the hearing of the appeal, give due notice thereof to the parties, and decide it within a reasonable time. The board of adjustment may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination appealed from, and shall make any order, requirement, decision, or determination that in its opinion ought to be made in the premises. To this end the board shall have all the powers of the officer from whom the appeal is taken.~~

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

- (1) 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.
- (2) 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.
- (3) The owner or other party shall have 30 days from receipt of the written notice within which to file an appeal. 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.
- (4) 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.
- (5) The official who made the decision shall transmit to the board all documents and exhibits constituting the record upon which the action appealed from is taken. The official shall also provide a copy of the record to the appellant and to the owner of the property that is the subject of the appeal if the appellant is not the owner.
- (6) 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. 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 or building permits affected by the issue being appealed.

- (7) Subject to the provisions of subdivision (6) of this subsection, the board of adjustment shall hear and decide the appeal within a reasonable time.
- (8) 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.
- (9) 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).
- (10) 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.

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

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

- (1) 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.
- (2) 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.
- (3) 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.
- (4) The requested variance is consistent with the spirit spirit, purpose, and intent of the ordinance shall be observed, ordinance, such that public safety and welfare secured, safety is secured, and substantial justice done. is achieved.

No change in permitted uses may be authorized by variance. 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. 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.

(e) Voting. –

(1) The concurring vote of four-fifths of the members of the board shall be necessary to reverse any order, requirement, decision, or determination of any administrative official charged with the enforcement of an ordinance adopted pursuant to this Part, or to decide in favor of the applicant any matter upon which it is required to pass under any ordinance, or to grant a variance from the provisions of the ordinance. grant a variance. A majority of the members shall be required to decide any other 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" members of the board for calculation of the requisite supermajority majority if there are no qualified alternates available to take the place of such members.

(e1) A member of the board or any other body 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 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.

(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. 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 of the board shall be subject to review by the superior court by proceedings in the nature of certiorari. Any certiorari pursuant to G.S. 160A-393. A petition for review by the superior court shall be filed with the clerk of superior court within by the later of 30 days after the decision of the board is filed in such office as the ordinance specifies, 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. delivered to every aggrieved party who has filed a written request for such copy with the secretary or chairman of the board at the time of its hearing of the case, whichever is later. The decision of the board may be delivered to the aggrieved party either by personal service or by registered mail or certified mail return receipt requested.

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

(g) Subpoenas. – The board of adjustment adjustment through the chair, or in the chair's absence anyone acting as chair, may subpoena witnesses and compel the production of evidence. To request issuance of a subpoena, persons with standing under G.S. 160A-393(d)

may make a written request to the chair explaining why it is necessary for certain witnesses or evidence to be compelled. 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. Decisions regarding subpoenas made by the chair may be appealed to the full board of adjustment. If a person fails or refuses to obey a subpoena issued pursuant to this subsection, the board of adjustment or the party seeking the subpoena may apply to the General Court of Justice for an order requiring that its order subpoena 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 this subsection 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.

SECTION 2.(a) G.S. 160A-388(e1) is recodified as G.S. 160A-388(e)(2).

SECTION 2.(b) G.S. 160A-388(e)(2), as recodified by Section 2(a) of this act, reads as rewritten:

"(2) A member of ~~the any board or any other body~~ 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 ~~conflicts~~ 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."

SECTION 3.(a) G.S. 153A-345 is repealed except that any local modification to that section in effect on September 30, 2013, shall be treated as a local modification to G.S. 160A-388 from October 1, 2013, through June 30, 2015.

SECTION 3.(b) Article 18 of Chapter 153A of the General Statutes is amended by adding a new section to read:

§ 153A-345.1. Board of adjustment.

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

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

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

SECTION 4. G.S. 160A-381(c) reads as rewritten:

"(c) The regulations may also provide that the board of adjustment, the planning board, or the city council may issue special use permits or conditional use permits in the classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified therein and may impose reasonable and appropriate conditions and safeguards upon these permits. When deciding special use permits or conditional use permits, the city council or planning board shall follow quasi-judicial procedures. Notice of hearings on special or conditional use permit applications shall be as provided in G.S. 160A-388(a2). No vote greater than a majority vote shall be required for the city council or planning board to issue such permits. 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 majority. Every such decision of the city council or planning board shall be subject to review of the superior court in the nature of certiorari in accordance with G.S. 160A-388.

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

SECTION 5. G.S. 153A-340(c1) reads as rewritten:

"(c1) The regulations may also provide that the board of adjustment, the planning board, or the board of commissioners may issue special use permits or conditional use permits in the classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified therein and may impose reasonable and appropriate conditions and safeguards upon these permits. Where appropriate, the conditions may include requirements that street and utility rights-of-way be dedicated to the public and that recreational space be provided. When deciding special use permits or conditional use permits, the board of county commissioners or planning board shall follow quasi-judicial procedures. Notice of hearings on special or conditional use permit applications shall be as provided in G.S. 160A-388(a2). No vote greater than a majority vote shall be required for the board of county commissioners or planning board to issue such permits. 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 majority. Every such decision of the board of county commissioners or planning board shall be subject to review of the superior court in the nature of certiorari consistent with G.S. 153A-345."

SECTION 6. G.S. 153A-44 reads as rewritten:

"§ 153A-44. Members excused from voting.

The board may excuse a member from voting, but only upon questions involving the member's own financial interest or official conduct or on matters on which the member is prohibited from voting under G.S. 14-234, 153A-340(g), or ~~153A-345(e1)-160A-388(e)(2).~~ For purposes of this section, the question of the compensation and allowances of members of the board does not involve a member's own financial interest or official conduct."

SECTION 7. G.S. 153A-336(a) reads as rewritten:

"(a) When a subdivision ordinance adopted under this Part provides that the decision whether to approve or deny a preliminary or final subdivision plat is to be made by a board of commissioners or a planning board, other than a planning board comprised solely of members of a county planning staff, and the ordinance authorizes the board of commissioners or planning board to make a quasi-judicial decision in deciding whether to approve the subdivision plat, then that quasi-judicial decision of the board of commissioners or planning board shall be subject to review by the superior court by proceedings in the nature of certiorari. The provisions of G.S. 153A-340(f), ~~153A-345(e2)-160A-388(e2)(2),~~ and 153A-349 shall apply to those appeals."

SECTION 8. G.S. 153A-340(c1) reads as rewritten:

"(c1) The regulations may also provide that the board of adjustment, the planning board, or the board of commissioners may issue special use permits or conditional use permits in the classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified therein and may impose reasonable and appropriate conditions and safeguards upon these permits. Where appropriate, the conditions may include requirements that street and utility rights-of-way be dedicated to the public and that recreational space be provided. When deciding special use permits or conditional use permits, the board of county commissioners or planning board shall follow quasi-judicial procedures. No vote greater than a majority vote shall be required for the board of county commissioners or planning board to issue such permits. 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 majority. Every such decision of the board of county commissioners or planning board shall be subject to review of the superior court in the nature of certiorari consistent with ~~G.S. 153A-345.~~ G.S. 160A-388."

SECTION 9. G.S. 153A-349(c) is repealed.

SECTION 10. G.S. 153A-349.8(c) reads as rewritten:

"(c) If the developer fails to cure the material breach within the time given, then the local government unilaterally may terminate or modify the development agreement; provided, the notice of termination or modification may be appealed to the board of adjustment in the manner provided by ~~G.S. 153A-345(b).~~ G.S. 160A-388(b1)."

SECTION 11. G.S. 160A-75 reads as rewritten:

"§ 160A-75. Voting.

No member shall be excused from voting except upon matters involving the consideration of the member's own financial interest or official conduct or on matters on which the member is prohibited from voting under G.S. 14-234, 160A-381(d), or ~~160A-388(e1)-160A-388(e)(2).~~ In all other cases, a failure to vote by a member who is physically present in the council chamber,

or who has withdrawn without being excused by a majority vote of the remaining members present, shall be recorded as an affirmative vote. The question of the compensation and allowances of members of the council is not a matter involving a member's own financial interest or official conduct.

An affirmative vote equal to a majority of all the members of the council not excused from voting on the question in issue, including the mayor's vote in case of an equal division, shall be required to adopt an ordinance, take any action having the effect of an ordinance, authorize or commit the expenditure of public funds, or make, ratify, or authorize any contract on behalf of the city. In addition, no ordinance nor any action having the effect of any ordinance may be finally adopted on the date on which it is introduced except by an affirmative vote equal to or greater than two thirds of all the actual membership of the council, excluding vacant seats and not including the mayor unless the mayor has the right to vote on all questions before the council. For purposes of this section, an ordinance shall be deemed to have been introduced on the date the subject matter is first voted on by the council."

SECTION 12. G.S. 160A-377(a) reads as rewritten:

"(a) When a subdivision ordinance adopted under this Part provides that the decision whether to approve or deny a preliminary or final subdivision plat is to be made by a city council or a planning board, other than a planning board comprised solely of members of a city planning staff, and the ordinance authorizes the council or planning board to make a quasi-judicial decision in deciding whether to approve the subdivision plat, then that quasi-judicial decision of the council or planning board shall be subject to review by the superior court by proceedings in the nature of certiorari. The provisions of G.S. 160A-381(c), ~~160A-388(e2)~~, ~~160A-388(e2)(2)~~, and 160A-393 shall apply to those appeals."

SECTION 13. G.S. 160A-393(c)(3) reads as rewritten:

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

SECTION 14. G.S. 160A-393(j)(2) reads as rewritten:

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

SECTION 15. This act becomes effective October 1, 2013, and applies to actions taken on or after that date by any board of adjustment.

In the General Assembly read three times and ratified this the 10th day of June, 2013.

s/ Daniel J. Forest
President of the Senate

s/ Thom Tillis
Speaker of the House of Representatives

s/ Pat McCrory
Governor

Approved 4:20 p.m. this 19th day of June, 2013