



DATE: September 18th, 2018

CASE: TA-02-18 – Board of Adjustment updates

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SUMMARY

In 2013, the state legislature updated the regulations and restrictions related to a local Board of Adjustment's powers and duties. The proposed text amendments to Article 2 and Article 6 of the Concord Development Ordinance align the city's policies with the state statutes so that the city's Board of Adjustment functions in accordance with state regulations.

2.2.2. POWERS AND DUTIES

A. Pursuant to NCGS § 160A-388, the Board of Adjustment shall have the following powers, duties and authority:

1. to hear and decide appeals from the decisions of the Administrator in which it is alleged there is an error in an order, requirement, decision, or determination made by the Administrator in the enforcement of this Ordinance (NCGS § 160A-388(b));
2. to hear and decide on applications for variances from the terms of the zoning ordinance pursuant to Section 2.2 of this Ordinance and NCGS § 160A-388(d). The Board shall have the authority to place conditions, including time limits, on variances;

~~3. to interpret the Official Zoning Map and shall pass upon disputed questions of lot lines or district boundary lines and similar questions that may arise in the administration of this Ordinance (NCGS § 160A-388(c)); and~~

43. to exercise such other powers as may be granted by this Ordinance.

B. Quasi-judicial Procedures

The consideration of any appeal, variance or interpretation, as provided above, shall be in accordance with the quasi-judicial procedures as set forth in ~~Sections 3.1.7 and~~ Section 6.3 of this Ordinance.

1. Any quasi-judicial matter pertaining to property in the extra-territorial jurisdiction of the City shall only be considered by the Commission with the extra-territorial jurisdiction member present.
2. The Board of Adjustment shall adopt all rules and procedures necessary or convenient for the conduct of its business, consistent with the North Carolina General Statutes.

6.3. PERMITS ISSUED BY THE ZONING BOARD OF ADJUSTMENT

6.3.1. GENERAL PROVISIONS.

All permits issued by the Board of Adjustment under this section shall be subject to the following General Conditions, including a “Quasi-Judicial Evidentiary Public Hearing”. The provisions of this subsection apply to any application for a special exception, variance, appeal, or any other quasi-judicial action.

6.3.2. APPLICATION REQUIREMENTS.

A. Times to Apply.

1. A notice of appeal of an administrative decision from a final decision relating to an application for development approval shall be submitted to the Administrator within thirty (30) days from receipt of the decision.
2. Applications for variances and certificates of non-conformity adjustments shall be submitted to the Zoning Administrator according to the annual schedule adopted by the Board.

- B. **Fee Required.** All applications, including applications for re-hearings, shall be accompanied by a fee as established by City Council in the annual Budget Ordinance. This fee partially defrays the City's expense in keeping records relating to the application, verifying the application, advertising a public hearing on the application, and performing other services required by statute or ordinance in processing the application to its conclusion. No refund of the fee or any part thereof shall be made unless the application is withdrawn prior to hearing. However, in the case of applications brought challenging the decision, determination, order, requirements or interpretation of the administrative official pursuant, the filing fee and any civil penalty will be returned to the applicant if the Board of Adjustment decides that the position of the City official is erroneous; except as stated herein no civil penalty shall be reduced by the Board. A fee shall not be required if the application is made by the City or any agency created and appointed by the Concord City Council to perform governmental functions.

- C. **Notices Required.** Three kinds of Notices are required before the Board of Adjustment may consider applications. Notices shall be made by publication, mail, and posting on or near the subject property. The requirements for each type of notice are listed in [Section 1.6 Article 3 at section 3-1](#).

Comment [SS1]: Corrected reference

6.3.3. QUASI-JUDICIAL PUBLIC HEARING PROCEDURES.

- A. **Generally.** In making quasi-judicial decisions, the decision-makers must investigate facts, or ascertain the existence of facts, hold hearings, weigh evidence, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature. In the land use context, these quasi-judicial decisions involve the application of land use policies to individual situations, such as variances, special exceptions, and appeals of administrative determinations. These decisions involve two key elements: 1.) The finding of

facts regarding the specific proposal and 2.) The exercise of some discretion in applying the standards of the ordinance. Due process requirements for quasi-judicial decisions mandate that certain standards be observed when these decisions are made. This includes a hearing with the right of the parties to offer evidence, have sworn testimony, and have findings of fact supported by competent, substantial, and material evidence.

- B. Conduct of Hearing.** Any person or persons may appear at a public hearing and submit evidence, either individually or as a representative. Each person who appears at a public hearing, after first taking an oath or affirmation to give accurate and truthful testimony, shall state, for the record, his or her name, address, and if appearing on behalf of an organization or group, its name and mailing address.
1. All parties in interest shall have the right to present evidence and cross-examine witnesses, as to any competent, material, and relevant facts, inspect documents, and make oral argument.
 2. The burden of proof is upon the party who files the application, and if the party fails to meet its burden, the reviewing body shall deny the request.
 3. The Board of Adjustment shall act as a fact-finding body and shall approve or disapprove the application in accordance with the evidence presented before it that is competent, relevant, and material. Every decision shall include the vote, abstention from voting, or absence of each member.
- C.** The decision of the quasi-judicial proceeding, including findings of fact and conclusions of law, shall be filed in the Office of the City Clerk and recorded at the Cabarrus County Registry. A written copy shall be mailed to the applicant and to any person who has filed a written request for such copy with the Office of the City Clerk or chairperson of the zoning board of adjustment at the time of its hearing of the case. Delivery shall be by any of the following means: personal service, registered mail, or certified mail, return receipt requested.
1. ~~Quasi-judicial permits~~ Variations shall be approved by a four-fifths majority of the members of the Board, excluding any un-filled vacancies and members disqualified from voting on a particular matter present at the meeting and not otherwise excused. All other quasi-judicial matters heard by the Board of Adjustment may be decided by a simple majority of the members, excluding any un-filled vacancies and members disqualified from voting on a particular matter.
 2. Appeals from the Board of Adjustment shall be filed with the Clerk of the Cabarrus County Superior Court within 30 days of the final decision of the Board. The Board of Adjustment's decision shall be considered a final decision after the Board approves the official minutes containing such during an official meeting.

Comment [SS2]: 160A-388€(2)

ED. GENERAL FACTS TO BE CONSIDERED.

1. Uniform rules and standards are set forth in this Article, which regulate the interpretation of the text of this Ordinance and the Official Zoning Maps, the appeal from administrative decisions, the issuance of variances, and the granting of non-conformity exceptions. Under this authority, the Board of Adjustment is required to determine the applicability of facts to a particular case. It is recognized that the required facts are not reducible to any precise formula, but rather they must be gathered from the varying circumstances of the actual cases as they arise.
2. In passing on any case the Board of Adjustment shall determine that the request meets all applicable requirements of this Code, and if there are conflicts between the Code provisions, the more restrictive shall apply unless an overlay district authorizes a lesser standard.
3. In passing on any case, and as a further guide to its decision-making, the Board of Adjustment may also consider, among other things the following, if relevant to the requested interpretation, appeal, variance, and special exception permit(s):
 - A. The establishment, maintenance, or operation of the proposed use shall not be detrimental to or endanger the public health, safety, or general welfare.
 - B. The character and use of buildings and structures adjoining or in the vicinity of the property mentioned in the application.
 - C. The character of the neighborhood, considering the location, type, and height of buildings or structures and the type and extent of landscaping and screening on the site.
 - D. The number of persons residing, studying, working in or otherwise occupying buildings adjoining or in the vicinity of the property mentioned in the application.
 - E. Traffic conditions in the area and accessibility of the building for fire and police protection. Any measures shall be taken to provide ingress and egress so designed as to minimize traffic hazards and to minimize traffic congestion on the public roads.
 - F. Accessibility of light and air to the premises and to the property in the vicinity.
 - G. The location, kind and size of surface and subsurface structures in the vicinity of the property mentioned in the application, such as water mains, sewers and other utilities.

- H. Materials of combustible, hazardous, explosive, or inflammable nature to be sold, stored, or kept on the premises.
- I. Protection of occupants of the building from stormwater, noise, dust, on-street parking, odor, vibration, smoke, gases, or other noxious or offensive substances, uses or actions.
- J. The type of electric illumination for the proposed use, with special reference to its effect on nearby structures and the glare, if any, from such illumination in surrounding sleeping quarters.
- K. The public records and other competent testimony concerning the location of the zoning district boundary lines.
- L. The relation of the proposed application to conditions in the vicinity which have changed since the zoning district was originally determined.
- M. The effect on the orderly development and improvement of surrounding property for uses permitted within the zoning district.
- N. Compliance with any other applicable Sections of this Ordinance.

6.3.4. VARIANCES.

- (a) A variance is not a right. It may be granted to an applicant only if the applicant establishes that ~~practical difficulties or unnecessary hardships would result from carrying out the strict letter of this ordinance. The Board shall have the power to vary or modify any of the provisions of the ordinance relating to the use, construction, or alteration of buildings or structures or the use of land, so that the spirit, purpose, and intent of the ordinance are shall be observed, public safety is and welfare secured, and substantial justice is achieved. done.~~
- (b) Any person may petition the Zoning Board of Adjustment for a variance granting permission to use the person's land in a manner otherwise prohibited by this ordinance. To qualify for a variance, the petitioner must show all of the following:
- (1) Unnecessary hardships would result from strict application of this 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 hardships result from conditions that are peculiar to the property, such as the location, size, or topography of the property. 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.

Comment [SS3]: Cannot vary use per 160A-388(d), so just better to strike this clause

Comment [SS4]: Modified to be consistent with 160A-388(d)

(3) The hardships did not result from actions taken by the petitioner. 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.

Comment [SS5]: Align with language of 160A-388(d)

- (c) (4) The requested variance is consistent with the spirit, purpose, and intent of this ordinance; will secure public safety ~~and welfare~~; and will ~~preserve~~ achieve substantial justice. The Zoning Board of Adjustment may impose reasonable and appropriate conditions and safeguards upon any variance it grants.

Comment [SS6]: Align with language of 160A-388(d)

- (d) Statutory exceptions.

Notwithstanding subdivisions (a) through (c) of this section, exceptions to sections 4.3 through 4.5 as well as any deed restrictions and protective covenants requirements may be granted in any of the following instances:

(1) When there is a lack of practical alternatives for a road crossing, railroad crossing, bridge, airport facility, or utility crossing as long as it is located, designed, constructed, and maintained to minimize disturbance, provide maximum nutrient removal, protect against erosion and sedimentation, have the least adverse effects on aquatic life and habitat, and protect water quality to the maximum extent practicable through the use of best management practices (BMPs).

(2) When there is a lack of practical alternatives for a stormwater management facility; a stormwater management pond; or a utility, including, but not limited to, water, sewer, or gas construction and maintenance corridor, as long as it is located 15 feet landward of all perennial and intermittent surface waters and as long as it is located, designed, constructed, and maintained to minimize disturbance, provide maximum nutrient removal, protect against erosion and sedimentation, have the least adverse effects on aquatic life and habitat, and protect water quality to the maximum extent practicable through the use of BMPs.

(3) A lack of practical alternatives may be shown by demonstrating that, considering the potential for a reduction in size, configuration, or density of the proposed activity and all alternative designs, the basic project purpose cannot be practically accomplished in a manner which would avoid or result in less adverse impact to surface waters.

(e) No change in permitted uses may be authorized by variance.

Comment [SS7]: Align with language of 160A-388

6.3.5. APPEALS OF ADMINISTRATIVE DECISIONS.

Any person aggrieved or any agency or officer, department, board, including the governing board of the City of Concord affected by any decision, order, requirement, or determination relating to the interpretation, compliance, or application of chapters 1 and 2 of this Part and made by an administrative official charged with the enforcement of these chapters may file an appeal to the Board of Adjustment. If an administrative official charged with enforcement of chapter 1 and 2 of this part is unable to make a decision because of vagueness or ambiguity in the meaning or

application of these chapters or the zoning map, ~~determine a lot or zoning district boundary line,~~ determine whether a proposed use is allowed within a zoning district, or resolve similar questions or uncertainties, the official is hereby authorized to bring an appeal to the Board of Adjustment. In an appeal to the Board of Adjustment, regarding an administrative decision or interpretation, the Board's scope of review shall be limited to determining whether the decision or interpretation by the Administrator was in accordance with the intent and requirements of this Ordinance, and accordingly, the Board will affirm or reverse the decision.

Comment [SS8]: Strike.

6.3.6. CERTIFICATES OF NONCONFORMITY ADJUSTMENT.

- A. Certificates of Nonconformity Adjustment shall be required to enlarge, expand or otherwise alter any Nonconforming Use or Structure.
- B. In addition to the application requirements stated at section ~~6.3.2 4-9-1-~~ ~~above,~~ Applications for a Certificate of Nonconformity Adjustment shall include a detailed plan of the existing site, showing, the degree of Nonconformity with respect to the dimensional and design regulations of this Ordinance. In the case of a Nonconforming Use the application shall include a detailed explanation of the current Use including documentation of traffic generated by the current use.
- C. The Board of Adjustment may impose conditions to lessen the size or scope of the nonconformity. The Board may determine what the nonconformity operator/owner must do to the property for certification. For example, landscaping or fencing may be required or a shift of operations away from adjoining properties may be stipulated.

Comment [SS9]: Correcting reference

6.3.7. REVIEW OF PREVIOUS PROCEEDINGS OR DECISIONS BY THE BOARD OF ADJUSTMENT

- A. All quasi-judicial decisions of the Board of Adjustment, whether or not such decision contain limiting conditions, may be set aside or modified upon a finding that:
 - 1. Fraud, material, misrepresentation or other misconduct occurred at the proceeding before the Board of Adjustment; or
 - 2. Violation of any limiting condition imposed in accordance with subsection 6.3.4. (c) or 6.3.6. C. ~~below~~ or violation of any provision of this chapter exists on the subject property
- B. No decision shall be set aside or modified until the landowner and tenant (if any) are sent written notice and a hearing on the matter is first held. If a review proceeding is held to determine that the applicable conditions and provisions of this chapter are being met, special attention to the impact of the original action on adjoining properties and the extent to which financial investments were made in reliance of the decision, particularly for decisions

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made prior to the application of this provision. After the hearing the prior decision may be reversed, modified, or affirmed.