

# CHAPTER 14. APPEALS & VARIANCES

## SECTION 14.1. APPEAL OF ADMINISTRATIVE DECISION

### A. PURPOSE AND INTENT

This appeal procedure is proposed to establish a clear and predictable procedure for persons with standing to appeal a decision or determination by a review authority.

### B. APPLICABILITY

1. Appeals of administrative decisions or determinations by a County official, or legislative decisions by the Watershed Review Board, or legislative decisions by the Planning Board made pursuant to this Ordinance shall be reviewed and decided by the Board of Adjustment in accordance with this section.
2. Appeals of decisions by the Board of Commissioners or of decisions on quasi-judicial minor watershed variances by the Watershed Review Board are not subject to these standards, and shall be considered in accordance with Section 14.2, or Section 14.3, as appropriate.

### C. INITIATION

1. A property owner or other person with standing shall initiate an appeal by filing a written notice of appeal with the Administrator within 30 days of the date they receive the written notice of determination or decision being appealed.
2. Receipt of written notice provided via first class mail in accordance with NCGS Section 160D-403(b) of the shall be deemed to be received on the third business day following deposit of the notice for mailing with the United States Postal Service.

### D. STANDING

The following criteria are used to determine whether an individual has standing to bring civil actions for declaratory relief, injunctive relief or other remedies and joinder of complaint and petition for writ of certiorari in certain cases against administrative decisions in lieu of bringing an appeal to the Board of Adjustment under NCGS Section 160D-1402:

1. Any person possessing any of the following criteria:
  - i. An ownership interest in the property that is the subject of the decision being appealed, a leasehold interest in the property that is the subject of the decision being appealed, or an interest created by easement, restriction, or covenant in the property that is the subject of the decision being appealed.
  - ii. An option or contract to purchase the property that is the subject of the decision being appealed.
  - iii. An applicant before the review authority whose decision is being appealed.
2. Any other person who will suffer special damages as the result of the decision being appealed.
3. An incorporated or unincorporated association to which owners or lessees of property in a designated area belong by virtue of their owning or leasing property in that area, or an association otherwise organized to protect and foster the interest of the particular neighborhood or local area, so long as at least one of the members of the association would have standing as an individual to challenge the decision being appealed, and the association was not created in response to the particular development or issue that is the subject of the appeal.
4. The Moore County Board of County Commissioners.

### E. DECISION

1. The Board of Adjustment, at the conclusion of a quasi-judicial public hearing, shall decide the application for the appeal.
2. The decision shall be based on the competent, material, and substantial evidence in the record of the appeal, as supplemented by arguments presented at the quasi-judicial hearing, and the standards in Section 14.1.F, Review Criteria, and NCGS Section 160D-405.
3. The decision shall be one of the following:

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- i. Affirmation of the decision or determination (in whole or in part);
- ii. Modification of the decision or determination (in whole or in part); or
- iii. Reversal of the decision or determination (in whole or in part).

4. A vote to affirm, reverse, or modify a decision or determination shall require a simple majority of all Board of Adjustment members (excluding vacant board member positions and any board members who are recused from voting on a particular case). In accordance with §160D-406(i), simple majority calculations shall be based on the total number of board member positions, regardless of whether the member is absent. Positions may only be excluded from the simple majority calculation when the position is vacant and there is no appointed alternate or when a board member has been recused from voting based upon a conflict of interest in accordance with Section 2.1.E.
5. Each decision shall be made in writing and reflect the Board of Adjustment's determination of contested facts and their application to the standards in this Ordinance.
6. The written decision shall be signed by the Chair or other duly authorized member of the Board of Adjustment.
7. The decision of the Board of Adjustment shall be effective upon the filing of the written decision in the offices of the Planning Department.

#### F. REVIEW CRITERIA

1. The Board of Adjustment is limited to the following decisions in considering the appeal:
  - i. Whether the review authority erred in the determination of this Ordinance; or
  - ii. Whether the review authority erred in determining whether a standard of this Ordinance was met.
2. The BOA shall not hear any evidence or make any decision based on hardships or special conditions, except as part of an application for a variance.

#### G. EFFECT

1. The filing of an appeal shall stay all of the following:
  - i. Any further proceedings or actions conducted by the applicant except in such cases where such stoppage would cause imminent peril to life or property as determined by the Administrator;
  - ii. The application of any further remedies for violation of this Ordinance by the County; and
  - iii. The accumulation of any further fees or fines associated with violation of this Ordinance.
2. In the event enforcement proceedings are not stayed by an appeal, the appellant may file a request for an expedited hearing of the appeal in accordance with NCGS Section 160D-405(f), and the Board of Adjustment shall conduct a meeting to hear the appeal within 15 days of the date the request for an expedited hearing is filed.
3. Nothing shall prevent the Board of Adjustment from staying the issuance of any final approval of development applications, including building permits, affected by the issue being appealed in accordance with NCGS Section 160D-405(f).

#### H. APPEAL

Appeal of a quasi-judicial decision made by the Board of Adjustment shall be made to the Superior Court for Moore County in accordance with Section 14.2, Appeal of Quasi-Judicial Decision.

### SECTION 14.2. APPEAL OF QUASI-JUDICIAL DECISION

- A. Appeal of a quasi-judicial decision shall be subject to review by the Superior Court of Moore County by proceedings in the nature of certiorari and in accordance with NCGS Section 160D-406, Section 160D-1402, Section 160D-1403, and Section 160D-1405, as appropriate.
- B. The landowner or applicant shall file a petition for review with the Clerk of Court within 30 days of the date the decision is filed in the office of the appropriate review authority and delivered by personal delivery,

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electronic mail, or first-class mail to the applicant, landowner, and to any person who has submitted a written request for a copy, prior to the date the decision becomes effective.

- C.** Any other person with standing to appeal shall file a petition for review with the Clerk of Court within 30 days from receipt, by any source, actual or constructive notice of the decision being appealed.
- D.** Receipt of written notice provided via first class mail in accordance with NCGS Section 160D-403(b) shall be deemed to be received on the third business day following deposit of the notice for mailing with the United States Postal Service.

### SECTION 14.3. CHALLENGE TO LEGISLATIVE DECISION

#### A. OFFICIAL ZONING MAP ADOPTION OR AMENDMENT; DEVELOPMENT AGREEMENT

1. Legislative decisions made by the Board of Commissioners pursuant to the adoption of the Official Zoning Map, amendment to the Official Zoning Map, or with respect to a development agreement shall be subject to review at the request of any aggrieved party, as detailed within in NCGS Section 160D-1401, and NCGS Section 160D-1405, by the Superior Court for Moore County.
2. The challenge to the legislative decision must be filed with the Clerk of Court for the Superior Court of Moore County within 60 days from the receipt of written notice or receipt from any source of constructive notice of the determination.

#### B. ORDINANCE TEXT ADOPTION OR AMENDMENT

Legislative decisions made by the Board of Commissioners pursuant to the adoption of this Ordinance or other development regulation shall be subject to review at the request of any aggrieved party, as detailed in NCGS Section 160D-1401 and 160D-1405, by the Superior Court for Moore County. The appeal to the Superior Court must be filed within the following timeframes:

##### 1. VALIDITY OF ACTION

Challenges to the validity of ordinance language shall be filed within one year of the date that the ordinance or amendment becomes effective or when the party bringing the challenge has standing to file the challenge, whichever is later.

##### 2. PROCEDURAL FLAW

Challenges to an ordinance or amendment based upon the process of adoption shall be filed within three years of the adoption date of the ordinance or amendment.

#### C. DECISION BY WATERSHED REVIEW BOARD

Challenge of legislative decisions by the Watershed Review Board shall be made in accordance with Section 14.4, Appeal of Decision by Watershed Review Board.

### SECTION 14.4. APPEAL OF DECISION BY WATERSHED REVIEW BOARD

- A.** Appeals of legislative decisions made by the Watershed Review Board shall be made in accordance with Section 14.1, Appeal of Administrative Decision.
- B.** Appeals of a quasi-judicial decision on a minor watershed variance made by the Watershed Review Board shall be made in accordance with Section 14.2, Appeal of a Quasi-Judicial Decision.

### SECTION 14.5. ORIGINAL CIVIL ACTIONS

- A.** Persons with standing, as defined in NCGS Section 160D-1403.1 may bring an original civil action in Superior Court without first being heard by the Board of Adjustment for some administrative decisions, determinations of vested rights, and notices of violation in cases where the applicant claims the decision or a provision in this Ordinance is:

1. Unconstitutional;
2. Beyond statutory authority;
3. Pre-empted by State law; or

- 4.** A taking of all property value.
- B.** Direct appeals of determinations of the text in this Ordinance or the Official Zoning Map by a County official to Superior Court are not permitted and must first be heard by the Board of Adjustment, in accordance with this section.

**SECTION 14.6. VARIANCES****A. PURPOSE AND INTENT**

The purpose of this section is to allow deviations from certain standards of this Ordinance when the landowner demonstrates that, owing to special circumstances or conditions beyond the landowner's control (such as topographical conditions, narrowness, shallowness, or shape of a specific parcel of land), a literal application of the standards would result in undue and unique hardship to the landowner and the deviation would not be contrary to the public interest.

**B. APPLICABILITY**

- 1.** Development that would otherwise be subject to undue and unique hardship from the applications of the standards in this Ordinance may seek relief from the standards in accordance with this section.
- 2.** No variance may be sought that increases development density (e.g., units per acre) beyond that allowed in a base zoning district, or that would permit a use not allowed in a zoning district.
- 3.** Applications seeking variance from the watershed protection standards applicable in the Watershed Overlay Districts district shall be filed and considered in accordance with this section and Chapter 16.
- 4.** Applications seeking variance from the flood damage prevention standards applicable in the Special Flood Hazard Area shall be filed and considered in accordance with this section and Chapter 17.

**C. DECISION**

- 1.** The Board of Adjustment, after the conclusion of a quasi-judicial public hearing, shall decide the application for a variance.
- 2.** The decision shall be based on the competent, material, and substantial evidence in the record, as supplemented by the arguments presented at the quasi-judicial hearing, and the applicable standards in Section 14.2.D, Review Criteria.
- 3.** The decision shall be one of the following:
  - i.** Approval of the variance as proposed;
  - ii.** Approval of the variance with revisions; or
  - iii.** Denial of the variance.
- 4.** The vote on a variance shall require a 4/5 supermajority of all Board of Adjustment members (excluding vacant board member positions and any board members who are recused from voting on a particular case). In accordance with §160D-406(i), supermajority calculations shall be based on the total number of board member positions, regardless of whether the member is absent. Positions may only be excluded from the supermajority calculation when the position is vacant and there is no appointed alternate or when a board member has been recused from voting based upon a conflict of interest in accordance with Section 2.1.E.
- 5.** Each decision shall be made in writing and reflect the Board of Adjustment's determination of facts and their application to the standards in this Ordinance.
- 6.** The written decision shall be signed by the Chair or other duly authorized member of the Board of Adjustment.
- 7.** The decision of the Board of Adjustment shall be effective upon the filing of the written decision.

**D. REVIEW CRITERIA**

The standards in this section are organized into the standards applicable to variances from the zoning- and subdivision-related provisions, the flood hazard requirements, and watershed provisions.

**1. ZONING- AND SUBDIVISION-RELATED VARIANCE STANDARDS****I. REQUIRED FINDINGS OF FACT**

A zoning- or subdivision-related variance shall be approved on a finding the applicant demonstrates all of the following:

- 01.** 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.
- 02.** 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.
- 03.** 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 the variance shall not be regarded as a self-created hardship.
- 04.** 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.

**II. FACTORS THAT MAY NOT BE CONSIDERED**

None of the following may be used as the basis for approving a zoning-related or subdivision-related variance:

- 01.** Personal circumstances;
- 02.** A request for a particular use that is expressly, or by inference, prohibited in the zoning district;
- 03.** Hardships resulting from factors other than application of the relevant standards of this Ordinance;
- 04.** The fact that land or a structure may be utilized more profitably or be more marketable with a variance;
- 05.** The citing of other conforming or nonconforming uses of land or structures in the same or other zoning districts; or
- 06.** Financial hardship.

**2. FLOOD DAMAGE PREVENTION VARIANCE STANDARDS**

Criteria for the consideration of variances from the County's flood damage prevention standards are in Chapter 17.

**3. WATERSHED OVERLAY DISTRICT VARIANCE STANDARDS**

Criteria for the consideration of variance from the County's watershed overlay district standards are in Chapter 16.

**E. CONDITIONS**

In granting a variance, the Board of Adjustment may prescribe conditions of approval to ensure compliance with the standards of this section, and to assure that the use of the land to which the variance applies will be compatible with surrounding lands and will not alter the essential character of the neighborhood. Conditions shall be in accordance with the following:

- 1.** Conditions must be reasonably related to the variance application.
- 2.** A variance granted subject to a condition of approval shall be permitted as long as there is compliance with the condition.
- 3.** Violation of a condition of approval shall be deemed a violation of this Ordinance.
- 4.** If a violation or invalidation of a condition of approval occurs, the Administrator may initiate proceedings to revoke the authorization for the development subject to the variance.
- 5.** Conditions of approval shall comply with Section 10.10, Conditions of Approval.

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#### F. RECORDATION

If a variance application is approved, the notice of decision may be recorded by the applicant in the office of the Moore County Register of Deeds.

#### G. EFFECT

Approval of a variance authorizes only the particular regulatory relief approved by the Board of Adjustment. It does not exempt the applicant from the responsibility to obtain all other permits or development approvals required by this Ordinance or any other applicable laws and does not indicate that the development for which the variance is granted should receive other permits or development approvals under this Ordinance unless the relevant and applicable portions of this Ordinance are met.

#### H. VIOLATION

A violation of a variance or additional conditions of a variance is considered a violation of this Ordinance and subject to the same enforcement and penalties.

#### I. APPEAL

Appeal of a quasi-judicial decision made by the Board of Adjustment with respect to a variance application shall be made to the Superior Court for Moore County in accordance with Section 14.2, Appeal of Quasi-Judicial Decision.

## SECTION 14.7. REASONABLE ACCOMMODATION

#### A. PURPOSE AND INTENT

This section provides a procedure for reasonable accommodation of eligible persons in cases where the strict application of the standards of this Ordinance would deprive them of their right to equal opportunity to occupy a dwelling under the federal Fair Housing Act.

#### B. APPLICABILITY

1. For the purposes of this section, an eligible person is a person who meets the definition of a disabled or handicapped person under federal law.
2. A person recovering from substance abuse is considered a person with a disability or handicap, provided they are not currently engaging in the illegal use of controlled substances.

#### C. APPLICATION

1. An application for reasonable accommodation may be made by any of the following:
  - i. A person with a disability or handicap, or their legal representative; or
  - ii. A provider of housing for persons with disabilities or handicaps.
2. An application for reasonable accommodation shall also include the following:
  - i. The basis for the claim that the applicant or persons receiving services from the applicant is considered disabled or handicapped under federal law;
  - ii. The Ordinance provision from which the reasonable accommodation is being requested; and
  - iii. An explanation of why the reasonable accommodation is necessary to make specific land or development available for the applicant.

#### D. DECISION

1. The Board of Adjustment, at the conclusion of a quasi-judicial public hearing, shall decide the application for the reasonable accommodation.
2. The decision shall be based on the competent, material, and substantial evidence, as supplemented by arguments presented at the quasi-judicial hearing, and the standards in Section 14.3.E, Review Criteria.
3. The decision shall be one of the following:
  - i. Approval of the reasonable accommodation application as proposed;

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- ii. Approval of the reasonable accommodation application with revisions; or
- iii. Denial of the application.

4. Each decision shall be made in writing and reflect the Board of Adjustment's determination of contested facts and their application to the standards in this Ordinance.
5. The written decision shall be signed by the Chair or other duly authorized member of the Board of Adjustment.
6. The decision of the Board of Adjustment shall be effective upon the filing of the written decision in the offices of the Planning Department.

#### **E. REVIEW CRITERIA**

1. A reasonable accommodation application shall be approved on a finding the proposed accommodation:
  - i. Will be used by an individual or individuals with a disability or handicap protected under federal law;
  - ii. Is the minimum needed to provide accommodation; and
  - iii. Is reasonable and necessary.
2. For the purposes of this section, an accommodation is reasonable if it would not undermine the legitimate purposes of this Ordinance, it does not constitute a substantial alteration of this Ordinance or other County standard, and it will not impose significant financial and administrative burden upon the County.
3. For the purposes of this section, an accommodation is necessary if it would provide direct or meaningful improvement of the effects of the particular disability or handicap, and would afford handicapped or disabled persons equal opportunity to use housing in the County.

#### **F. EFFECT**

A reasonable accommodation shall not affect an applicant's obligation to comply with other applicable standards in this Ordinance that are not the subject of the reasonable accommodation application.

#### **G. EXPIRATION**

Reasonable accommodations such as an accessory manufactured home due to a medical hardship, are approved for a specified time on a case-by-case basis to be renewed for successive periods so long as the hardship continues to exist, as reviewed and approved by the Administrator.

#### **H. APPEAL**

Appeal of a quasi-judicial decision made by the Board of Adjustment with respect to a reasonable accommodation application shall be made to the Superior Court for Moore County in accordance with Section 14.2, Appeal of Quasi-Judicial Decision.