

## ARTICLE 12

## PLANNING BOARD ACTING AS THE BOARD OF ADJUSTMENT

### 12.1 THE PLANNING BOARD ACTING AS THE BOARD OF ADJUSTMENT

(A) **Establishment.** The **Planning Board acting as the Board of Adjustment** consists of five (5) regular members and **three (3) alternates**. The five (5) regular members and the **three (3) alternate members** shall be appointed by the Village Council. The alternate **members** shall serve on the **Planning Board acting as the Board of Adjustment** in the absence or recusal, for any cause, of any regular member. When so seated, the alternate **members** shall have the same powers and duties as the regular **members** they replace.

(B) **Appointment.** **The Planning Board acting as the Board of Adjustment** regular members and the **alternates** shall be appointed for three (3) year staggered terms, but both regular members and the alternate **member** may continue to serve until their successors have been appointed. Vacancies may be filled for the unexpired terms only. Board members may be appointed to succeed themselves.

If a regular or alternate member moves outside the Village's corporate limits, that shall constitute a resignation from the Board, effective upon the date the member moves outside the jurisdiction and no longer meets the required qualifications for office.

(C) **Expenses.** Members of the **Planning Board acting as the Board of Adjustment** shall serve without pay.

(D) **Powers and Duties.** The **Planning Board acting as the Board of Adjustment** shall have the following powers and duties:

- (1) To hear and decide appeals according to the procedures of this article, where it is alleged there is an error in any order, decision, determination, or interpretation made by the Zoning Administrator or Zoning Enforcement Officer in the administration and enforcement of this article.
- (2) To grant variances from the terms of this article according to the standards and procedures prescribed herein.
- (3) To serve as the local watershed review board as authorized and prescribed in G.S. 15A NCAC 02B and these regulations.

(E) **Meetings.** All meetings of the **Planning Board acting as the Board of Adjustment** shall be held at a regular place and time and shall be open to the public. 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 Ordinance. In the absence of evidence to the contrary, the Village 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 ten (10) days, but not more than 25 days, prior to the date of the hearing. Within that same time period, the Village 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.

The Board shall keep minutes of its proceedings, showing the vote of each member upon each question, or, if absent or failing to vote, an indication of such fact. Final disposition of permits, appeals or variances shall be recorded in the minutes, indicating the reasons of the Board therefore, all of which shall become a part of the public record.

- (F) **Quorum.** No final action shall be taken on any matter unless a quorum is present. For the purposes of granting variances a quorum shall be 4/5ths of the membership of the Board. For all other matters, only a majority of the members shall be required to decide any other quasi-judicial matter or to determine an appeal in the nature of certiorari. For the purposes of this subsection, vacant positions on the board and members who are disqualified from voting on a quasi-judicial matter shall not be considered ‘members of the board’ for calculation of the requisite supermajority if there are no qualified alternates available to take the place of such members. For the purposes of conducting other business related to the function of the Board, such as adopting or amending rules of procedure or approving the agenda, a quorum shall be a simple majority of the full membership of the board.
- (G) **Conflicts of Interest.** A member of the **Planning Board acting as the Board of Adjustment** shall not participate in or vote on any quasi-judicial matter in a manner that would violate the 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.
- (H) **Officers.** The **Planning Board** shall elect one (1) of its members as chair and another as vice-chair and shall appoint a secretary to keep minutes of its proceedings.
- (I) **Rules of Procedure.** The Board shall abide by the following rules of procedure until such time as they need to be altered to conform to judicial rulings.
- (1) All hearings of the **Planning Board acting as the Board of Adjustment** are to be conducted as quasi-judicial proceedings.
  - (2) All persons wishing to testify about a matter before the **Planning Board acting as the Board of Adjustment** must be sworn in. The Chair of the Board or any member acting as Chair and the Clerk to the Board may administer oaths to witnesses in any matter coming before the Board.
  - (3) Board members can only consider testimony that is pertinent to the matter at hand.
  - (4) Subpoenas. The **Planning Board acting as the Board of Adjustment** through the Chair, or in the Chair's absence anyone acting as chair, may subpoena witnesses

and compels 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 **Planning Board acting as the Board of Adjustment**. If a person fails or refuses to obey a subpoena issued pursuant to this subsection, the **Planning Board acting as 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, and the court shall have jurisdiction to issue these orders after notice to all proper parties.

- (5) Each party is allowed to cross-examine the witnesses of the other party.
  - (6) Each party is allowed to present exhibits that support their case.
  - (7) The Board may not consider the opinions of the parties involved. Testimony must be based on factual evidence.
  - (8) Board members may not discuss the issue with other members of the Board prior to the hearing.
  - (9) The decision of the Board must be based upon competent, material, and substantial evidence presented at the hearing. The Board must render its decision in writing signed by the Chair or other duly authorized member of the Board. This decision must state the Board's determination of contested facts and their application to the applicable standards.
  - (10) All questions concerning rules or procedure should be directed to the Village Attorney or Village Administrator.
- (J) **Voting.** A concurring vote of a majority of the Board shall be necessary to reverse any order, requirement, decision or determination of the Zoning Administrator or to decide in favor of the applicant any matter upon which it is required to pass under this chapter. A concurring vote of the four-fifths (4/5) majority of the Board shall be necessary to reverse or to effect any variance authorized by this article. Vacant seats on the Board and members disqualified from voting in a particular case shall not be considered 'members of the Board' when calculating the requisite 4/5 majority.
- (K) **Re-hearings and Appeals from a Decision of the **Planning Board acting as the Board of Adjustment**.**
- (1) **Rehearing.** An application for a rehearing shall be made in the same manner as provided for an original appeal within a period of 30 days from receipt of the written notice of the appeal. In addition, specific information to enable the Board of Adjustment to determine whether or not there has been a substantial change in facts, evidence, or conditions of the case, shall be presented in writing or graphically. The Board shall deny a rehearing, if, in its judgment, such change in facts, evidence or conditions has not been proven. In the event that the Board

finds that a rehearing is warranted, it shall thereupon proceed in the same manner as for the original hearing.

- (2) **Waiting Period Required.** Upon the denial of an original application or adverse ruling on appeal, or upon the denial of an application for which a rehearing has been conducted, whichever is applicable, a similar application may not be filed for a period of one (1) year after the date of denial of the original application.
- (3) **Appeals.** Any person or persons, jointly or severally, aggrieved by any decision of the board, may, within 30 days after the Board's decision, but not thereafter, present to a court of competent jurisdiction a petition duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of illegality, whereupon such decision of the board shall be subject to review by Superior Court proceedings in the nature of certiorari as provided by law.

## 12.2 APPEALS.

- (A) The **Planning Board acting as the Board of Adjustment** shall hear and decide appeals from any order, requirement, decision, or determination made by the Zoning Administrator or Zoning Enforcement Officer pertaining to this article.
- (B) An appeal may be taken by any person aggrieved by any order, requirement, decision or determination made by the Zoning Administrator, Zoning Enforcement Officer or other Village official based in whole or in part upon the provisions of this article. The appeal shall be taken within 30 days from receipt of the Zoning Administrator, Zoning Enforcement Officer, or other Village official's 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 Zoning Administrator, Zoning Enforcement Officer, or other Village official's written notice shall be delivered by personal delivery, electronic mail, or by first-class mail.
- (C) 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 (6) inches high and identifying the means to contact a Village 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 ten (10) days. Any such posting of signs shall be the responsibility of the landowner or applicant. Verification of the posting shall be provided to the Village official who made the decision. Posting of signs shall not be required.
- (D) The Village official who made the decision shall transmit to the Board all documents and exhibits constituting the record upon which the action appealed is taken. The Village 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.
- (E) 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 **Planning Board acting as the Board of Adjustment** after the 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 **Planning Board acting as 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.

- (F) Subject to the provisions outlined in Section 12.2 (E), the **Planning Board acting as the Board of Adjustment** shall hear and decide appeals within a reasonable period of time. The Zoning Administrator, Zoning Enforcement Officer, or other Village official shall set a date and time for a public hearing before the **Planning Board acting as the Board of Adjustment**. Adjoining property owners and individuals with standing shall be notified of the hearing in accordance with the procedures outlined in Section 12.1 (E). The person mailing notices shall certify that the notices have been mailed, and the date of such mailing. Cost of postage shall be reimbursed through fees set by the Village Council.
- (G) The Board shall conduct public hearings using quasi-judicial procedures, allowing cross examination among all participants. Hearings shall be conducted allowing sworn testimony by all interested parties, for the single purpose of collection of factual evidence. The Board may disallow presentation of opinion and hearsay, and if allowed, shall discount such presentation as secondary and insufficient to refute any factual representation entered into evidence; provided that technical opinions rendered by persons professionally qualified and with no personal or financial interest in the case, may be given consideration as fact.
- (H) The Zoning Administrator, Zoning Enforcement Officer, or any other Village 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 Village would be unduly prejudiced by the presentation of matters not presented in the notice of appeal, the Board shall continue the hearing.
- (I) The **Planning Board acting as 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.
- (J) 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).
- (K) The parties to an appeal that has been made under this subsection may agree to mediation or other forms of alternative dispute resolution.

### 12.3 VARIANCES.

The **Planning Board acting as the Board of Adjustment** may authorize upon appeal in specific cases variances from the terms of this chapter as will not be contrary to the public interest where, owing to special conditions a literal enforcement of the provisions of this chapter would result in unnecessary hardship. The **Planning Board acting as the Board of Adjustment** shall not grant a variance from the terms of this ordinance unless and until the Board has found all of the following:

- (A) A written application for a variance is submitted demonstrating:
  - (1) There are unnecessary hardships in the way of carrying out the strict letter of these regulations. This shall be construed to mean:
    - (a) The hardship results from the application of the requirements of this chapter;
    - (b) The hardship is suffered by the applicant's property;
    - (c) The hardship is not the result of the applicant or property owner's own actions; and
    - (d) The hardship is peculiar to the applicant's property, such as its location, size, or topography.
  - (2) That the variance would be in harmony with the general purpose and intent of this chapter and preserves its spirit.
  - (3) That in granting the variance, the public safety and welfare have been assured and substantial justice has been done.
  - (4) That the reasons set forth in the application justify the granting of a variance, and that the variance is the minimum one that will make possible the reasonable use of the land or structure.
- (B) Notice of the public hearing shall be given as required by state statutes for quasi-judicial decisions and as listed in Section 12.1 (E). At the public hearing any party may appear in person or by agent or by attorney.
- (C) The **Planning Board acting as the Board of Adjustment** shall make findings that all requirements have been met for a variance.
- (D) The **Planning Board acting as the Board of Adjustment** shall make a finding that the reasons set forth in the application justify the granting of the variance and that the variance is the minimum one that will make possible the reasonable use of the land, building or structure.
- (E) The **Planning Board acting as the Board of Adjustment** shall further make a finding that the granting of the variance will be in harmony with the general purpose and intent of this Ordinance and the Land Use Plan, and will not be injurious to the neighborhood, or otherwise detrimental to the public welfare. The fact that property may be utilized more profitably will not be considered in granting a variance.

- (F) In granting any variance, the **Planning Board acting as the Board of Adjustment** may prescribe appropriate conditions and safeguards in conformity with this chapter. Violation of the conditions and safeguards, when made a part of the terms under which the variance is granted, shall be deemed a violation of this chapter.
- (G) Under no circumstances shall the **Planning Board acting as the Board of Adjustment** grant a variance to allow a use not permissible under the terms of this ordinance in the district involved, or any use expressly or by implication prohibited by the terms of this Ordinance in the district involved.

*Editor's Note:*

*Ordinance of July 9, 2018 repealed the separate authority for a Board of Adjustment and assigned the duties of the Board of Adjustment to the Planning Board and increased the number of alternates on the Planning Board from one (1) to three (3).*