

ARTICLE VII

APPEALS, VARIANCES, INTERPRETATIONS

7-1 APPEALS

- (A) An appeal from any final order or decision of the Zoning Administrator may be taken to the Board of Adjustment by any person aggrieved. An appeal is taken by filing with the Zoning Administrator and the Board of Adjustment a written notice of appeal specifying the grounds therefor. A notice of appeal shall be considered filed with the Zoning Administrator and the Board of Adjustment when delivered to the Department of Planning and Inspections, the required filing fee paid, and the date and time of filing entered on the notice by the planning staff.
- (B) An appeal must be taken within thirty days after the date of the decision or order appealed from.
- (C) Whenever an appeal is filed, the Zoning Administrator shall forthwith transmit to the Board of Adjustment all the papers constituting the record relating to the action appealed from.
- (D) An appeal stays all actions by the Zoning Administrator seeking enforcement of or compliance with the order or decision appealed from, unless the Zoning Administrator certifies to the Board of Adjustment that (because of facts stated in the certificate) a stay would, in his opinion, cause imminent peril to life or property. In that case, proceedings shall not be stayed except by order of the Board of Adjustment or a court, issued on application of the party seeking the stay, for due cause shown, after notice to the Zoning Administrator.
- (E) The Board of Adjustment may reverse or affirm (wholly or partly) or may modify the order, requirement or decision or determination appealed from and shall make any order, requirement, decision or determination that in its opinion ought to be made in the case before it. To this end, the Board of Adjustment shall have all the powers of the officer from whom the appeal is taken.

7-2 VARIANCES

7-2.1 General

- (A) An application for a variance along with the required filing fee shall be submitted to the Board of Adjustment by filing a copy of the application with the Zoning Administrator.
- (B) A variance may be granted by the Board of Adjustment if it concludes that strict enforcement of this Ordinance would result in practical difficulties or unnecessary hardships for the applicant and that, by granting the variance, the spirit of this Ordinance will be observed, public safety and welfare secured, and substantial justice done. It may reach these conclusions if it finds that:

- (1) If the applicant complies strictly with the provisions of the ordinance, he can make no reasonable use of his property;
 - (2) The hardship of which the applicant complains is one suffered by the applicant rather than by neighbors or the general public;
 - (3) The hardship relates to the applicant's land, rather than personal circumstances;
 - (4) The hardship is unique, or nearly so, rather than one shared by many surrounding properties;
 - (5) The hardship is not the result of the applicant's own actions; and
 - (6) The variance will neither result in the extension of a nonconforming situation in violation of Article VI nor authorize the initiation of a nonconforming use of land.
- (C) In granting variances, the Board of Adjustment may impose such reasonable conditions as will ensure that the use of the property to which the variance applies will be as compatible as practicable with the surrounding properties.
- (D) A variance may be issued for an indefinite duration or for a specified duration only. Unless otherwise specified, any order or decision of the Board of Adjustment granting a variance shall expire if the applicant does not obtain a building permit or certificate of occupancy for such use within 60 days from the date of the decision or if construction of the use has not commenced within 180 days from the date of the issuance of a building permit.
- (E) The nature of the variance and any conditions attached to it shall be entered on the face of the zoning permit, or the zoning permit may simply note the issuance of the variance and refer to the written record of the variance for further information. All such conditions are enforceable in the same manner as any other applicable requirement of this Ordinance.

7-2.2 Variances From Flood Hazard Overlay District Requirements

- (A) In passing upon an application for a variance from the Flood Hazard Overlay District Requirements (Section 12-2), the Board of Adjustment, as established by Section 3-2, shall consider all technical evaluations, all relevant factors, all standards specified in other Sections of this Ordinance, and:
- (1) the danger that materials may be swept onto other lands to the injury of others;
 - (2) the danger of life and property due to flooding or erosion damage;
 - (3) the susceptibility of the proposed facility and its contents to flood damage and the effect of such damage on the individual owner;

- (4) the importance of the services provided by the proposed facility to the community;
- (5) the necessity of the facility of a waterfront location, where applicable;
- (6) the availability of alternative locations on the subject property, not subject to flooding or erosion damage, for the proposed use;
- (7) the compatibility of the proposed use with existing and anticipated development;
- (8) the relationship of the proposed use to the land development plan and floodplain management program for that area;
- (9) the safety of access to the property in times of flood for ordinary and emergency vehicles;
- (10) the expected heights, velocity, duration, rate of rise and sediment transport of the flood waters and the effects of wave action, if applicable, expected at the site; and
- (11) the costs of providing governmental services during and after flood conditions including maintenance and repair of public utilities and facilities such as sewer, gas, electrical, and water systems, and roads and bridges.

Upon consideration of the factors listed above and the purposes of this Ordinance, the Board of Adjustment may attach such conditions to the granting of variances as it deems necessary to further the purposes of this Ordinance. Variances are subject to review by the Federal Emergency Management Agency.

- (B) Variances shall not be issued within any designated floodway if any increase in flood levels during the base flood discharge would result.
- (C) Conditions for variances:
 - (1) Variances may not be issued when the variance will make the structure in violation of other Federal, State, or local laws, regulations, or ordinances.
 - (2) Variances shall only be issued upon a determination that the variance is the minimum necessary, considering the flood hazard, to afford relief.
 - (3) Variances shall only be issued upon (i) a showing of good and sufficient cause; (ii) a determination that failure to grant the variance would result in exceptional hardship; and (iii) a determination that the granting of a variance will not result in increased flood heights, additional threats to public safety, extraordinary public expense, create nuisance, cause fraud on or victimization of the public, or conflict with existing local law or ordinances.
 - (4) Any applicant to whom a variance is granted shall be given written notice specifying the difference between the base flood elevation and the elevation to which the structure is to be built and a written statement that the cost of

flood insurance will be commensurate with the increased risk resulting from the reduced lowest floor elevation. Such notification shall be maintained with a record of all variance actions.

- (5) The Zoning Administrator shall maintain the records of all appeal actions and report any variances to the Federal Emergency Management Agency upon request.
- (D) Variances may be issued for the reconstruction, rehabilitation or restoration of structures listed on the National Register of Historic Places or the State Inventory of Historic Places without regard to the procedures set forth in subsections (A) and (C).

7-2.3 Variances From Watershed District Overlay Requirements

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

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

7-2.4 Variances From Airport Overlay Requirements

- (A) Any person desiring to erect or increase the height of any structure, or permit the growth of any tree, or use property not in compliance with the regulations prescribed

in Section 12-6 may apply to the Board of Adjustment for a variance in accordance with the provisions of Section 7-2. The application for variance shall be accompanied by a determination from the Federal Aviation Administration as to the effect of the proposal on the operation of air navigation facilities and the safe, efficient use of navigable airspace. Such variances shall be allowed where it is duly found that a literal application or enforcement of the regulations will result in unnecessary hardship and relief, if granted, will not be contrary to the public interest, will not create a hazard to air navigation, will do substantial justice and will be in accordance with the spirit of this Section. Additionally, no application for a variance to the requirements of Section 12-6 may be considered by the Board of Adjustment unless a copy of this application has been furnished to the manager of the Tarboro-Edgecombe County Airport for advice as to the aeronautical effects of the variance. If the Airport Manager does not respond to the application within thirty days after receipt, the Board of Adjustment may act on its own to grant or deny said application.

- (B) Any variance granted, if such action is deemed advisable to effectuate the purpose of Section 12-6 and be reasonable in the circumstances, may be so conditioned as to require the owner of the structure or tree in question to install, operate or maintain, at the owner's expense, such markings and lights as may be necessary. If deemed proper by the Board of Adjustment, this condition may be modified to require the owner to permit the Tarboro-Edgecombe County Airport Authority, at its own expense, to install, operate and maintain the necessary markings and lights.

7-3 INTERPRETATIONS

- (A) The Board of Adjustment is authorized to interpret the zoning map and to pass upon disputed questions of lot lines or district boundary lines and similar questions. If such questions arise in the context of an appeal from a decision of the Zoning Administrator, they shall be handled as provided in Section 7-1.
- (B) An application for a map interpretation shall be submitted to the Board of Adjustment by filing a copy of the application with the Zoning Administrator. The application shall contain sufficient information to enable the Board of Adjustment to make the necessary interpretation.
- (C) Interpretations of the location of floodway and floodplain boundary lines may be made by the Zoning Administrator as provided in Section 12-2.8.

7-4 REQUESTS TO BE HEARD EXPEDITIOUSLY

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

7-5 BURDEN OF PROOF IN APPEALS AND VARIANCES

- (A) When an appeal is taken to the Board of Adjustment in accordance with Section 7-1, the Zoning Administrator shall have the initial burden of presenting to the Board of Adjustment sufficient evidence and argument to justify the order or decision

appealed from. The burden of presenting evidence and argument to the contrary then shifts to the appellant, who shall also have the burden of persuasion.

- (B) The burden of presenting evidence sufficient to allow the Board of Adjustment to reach the conclusions set forth in Section 7-2.1(B), as well as the burden of persuasion on those issues, remains with the applicant seeking the variance.

7-6 BOARD ACTION ON APPEALS AND VARIANCES

- (A) With respect to appeals, a motion to reverse, affirm, or modify the order, requirement, decision, or determination appealed from shall include, insofar as practicable, a statement of the specific reasons or findings of facts that support the motion. If a motion to reverse or modify is not made or fails to receive the four-fifths vote necessary for adoption, then the motion is not approved.
- (B) Before granting a variance, the Board of Adjustment must take a vote and vote affirmatively (by a 4/5 majority) on the required findings stated in subsection 7-2.1(B). Insofar as practicable, a motion to make an affirmative finding on each of the requirements set forth in Section 7-2.1(B) shall include a statement of the specific reasons or findings of fact supporting such motion.
- (C) A motion to deny a variance may be made on the basis that any one or more of the six criteria set forth in Section 7-2.1(B) are not satisfied or that the application is incomplete. Insofar as practicable, such a motion shall include a statement of the specific reasons or findings of fact that support it. This motion is adopted as the Board of Adjustment's decision if supported by more than one fifth of the Board's membership (excluding vacant seats).

7-7 HEARING PROCEDURES REQUIRED ON APPEALS AND VARIANCES

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

7-8 NOTICE OF HEARING

The Zoning Administrator shall give notice of any hearing required by Section 7-7 as follows:

- (A) Notice shall be given to the appellant or applicant and any other person who makes a written request for such notice by mailing to such persons a written notice not later than ten days before the hearing.
- (B) Notice shall be given to neighboring property owners by mailing a written notice not later than ten days before the hearing to those persons who have listed for taxation real property any portion of which is located within 600 feet of the lot that is the subject of the application or appeal. Notice may also be given by prominently posting signs in the vicinity of the property that is the subject of the proposed action.
- (C) The notice required by this Section shall state the date, time and place of the hearing, reasonably identify the property that is the subject of the application or appeal, and give a brief description of the action requested or proposed.

7-9 EVIDENCE

- (A) The provisions of this Section apply to all hearings for which a notice is required by Section 7-7.
- (B) All persons who intend to present evidence to the Board of Adjustment, rather than arguments only, shall be sworn.
- (C) All findings and conclusions necessary to the issuance or denial of the requested appeal or variance (crucial findings) shall be based upon reliable evidence. Competent evidence (evidence admissible in a court of law) shall be preferred whenever reasonably available, but in no case may crucial findings be based solely upon incompetent evidence unless competent evidence is not reasonably available, the evidence in question appears to be particularly reliable, and the matter at issue is not seriously disputed.

7-10 MODIFICATION OF APPLICATION AT HEARING

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

7-11 RECORD

- (A) A record shall be made of all hearings required by Section 7-7, and such record shall be kept as provided by state law. Accurate minutes shall also be kept of all such proceedings, but a transcript need not be made.
- (B) Whenever practicable, all documentary evidence presented at a hearing as well as all other types of physical evidence shall be made a part of the record of the proceedings.

7-12 WRITTEN DECISION

- (A) Any decision made by the Board of Adjustment regarding an appeal or variance shall be reduced to writing and served upon the applicant or appellant and all other persons who make a written request for a copy.
- (B) In addition to a statement of the Board of Adjustment's ultimate disposition of the case and any other information deemed appropriate, the written decision shall state the Board's findings and conclusions, as well as supporting reasons or facts.