
ZEBULON

NORTH CAROLINA

**TOWN OF ZEBULON
JOINT PUBLIC HEARING AGENDA
BOARD OF COMMISSIONERS AND PLANNING BOARD
February 13, 2023
7:00 PM**

I. CALL TO ORDER

II. APPROVAL OF THE AGENDA


III. PUBLIC HEARING

- A. **TA-2023-01 – BOA/ Article 10 of UDO.** Amendment to Article 10 of Zebulon UDO to change the makeup of the Board of Adjustment and assign the duties to the members of the Planning Board.

IV. ADJOURNMENT

STAFF REPORT
TA -2023-01
BOARD OF ADJUSTMENT
FEBRUARY 13, 2023

Topic: TA 2023-01 BOARD OF ADJUSTMENT

Speaker: Michael J. Clark, AICP, CZO, Planning Director
From: Michael J. Clark, AICP, CZO, Planning Director
Prepared by: Michael J. Clark, AICP, CZO, Planning Director
Approved by:  Joseph M. Moore II, PE, Town Manager

Executive Summary:

The Board of Commissioners will consider public comment regarding an amendment to Section 10.2.2 of the Unified Development Ordinance (UDO) to assign the duties and responsibilities of the Board of Adjustment to the Planning Board and match membership.

Background:

The current makeup of the Board of Adjustment as a standalone board has been unsustainable since the adoption of the UDO. Currently, this board does not have the required representation for a quorum as interest from the members has decreased and filling the board has been unsuccessful.

The proposed text amendments would assign the Planning Board the responsibility of also operating as the Board of Adjustment. As an existing operating Board, they understand standard rules of procedure and staff would be able to add on progressive training following each meeting to educate and maintain an understanding of quasi-judicial procedures and applicable standards.

Discussion:

The discussion before the Board is to determine if the amendments to Section 10.2.2 will allow the Town to sustainably operate the Board of Adjustment.

Policy Analysis:

NCGS 160D-302 and UDO Section 10.2.2 requires the Town to have a Board of Adjustment to hear appeals, variances, and reasonable accommodations.

Financial Analysis:

Failure to maintain a quorum of the Board of Adjustment will undermine and dilute the Town's development goals and objectives by making the UDO unenforceable. Development inconsistent with the goals and objectives of the Town's UDO negatively affects property values and increases legal fees to challenge unheard variance and appeal requests in Superior Court. Furthermore, continuing to maintain a standalone Board of Adjustment will result in the need to hire an additional Planner 2 and Continuing Education to supplement the Board's inconsistent meeting schedule with monthly training sessions and field trips.

Rolling these duties into the Planning Board will not require additional personnel or funds.

Staff Recommendation:

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Staff Recommends accepting public comment and referring the matter to the Planning Board for recommendation.

Attachments:

1. Draft Amendments to Section 10.2.2
2. Applicable Sections of NCGS 160-D

10: REVIEWING AGENCIES

10.1. OVERVIEW

As identified in [Article 2: Procedures](#), the following review authorities have powers and responsibilities for administering this Ordinance, especially with regard to procedures related to development applications.

- 10.1.1. Board of Adjustment (BOA);
- 10.1.2. Board of Commissioners (BOC);
- 10.1.3. Planning Board;
- 10.1.4. Technical Review Committee (TRC); and
- 10.1.5. Town staff, comprised of the Building Inspector, Planning Director, and Town Manager.

10.2. BOARD OF ADJUSTMENT (BOA)

The Board of Adjustment is hereby established in accordance with Section 160D-302 of the North Carolina General Statutes. The BOA shall have the following powers and duties, composition, and rules of procedure under this Ordinance:

10.2.1. POWERS AND DUTIES

A. APPLICATION REVIEW AND DECISION

To review and decide applications for:

1. Appeals of decisions by town staff members deciding applications under this Ordinance; and
2. Variances.

B. OTHER POWERS AND DUTIES

To exercise other powers and authority provided to it by the Board of Commissioners, this Ordinance, or state law.

C. WATERSHED REVIEW BOARD

The Board of Adjustment shall serve as the Watershed Review Board and review and decide variance requests from the watershed protection standards in accordance with [Section 2.2.21, Variance](#).

10.2.2. COMPOSITION

A. MEMBERSHIP

1. The BOA shall consist of ~~five~~seven regular members.
2. ~~The BOA membership shall consist of members of the Planning Board.~~

B. RESIDENCE LOCATION AND APPOINTMENT

1. ~~Four~~Five members shall be citizens and residents of the town and shall be appointed by the Town of Zebulon Board of Commissioners;
2. ~~One~~Two members shall be ~~a~~citizens of Wake County and reside outside the town but within the extraterritorial jurisdiction boundaries of the town and shall be appointed by the Board of Commissioners of Wake County.
 - a. If despite good faith efforts, enough residents of the extra territorial planning area cannot be found to fill the seats reserved for residents of the area, then the Wake County Board of Commissioners may appoint other residents of the county (including residents of the town) to fill these seats.
 - b. If the county Board of Commissioners fails to make these appointments within 90 days after receiving a resolution from the town Board of Commissioners requesting that they be made, the town Board of Commissioners may make them.
3. If a regular ~~or alternate~~-in-town member moves outside the town, or if an extra-territorial area regular ~~member or alternate~~ moves outside the planning jurisdiction, that shall constitute a resignation from the BOA, effective upon the date a replacement is appointed.

ARTICLE 10: REVIEWING AGENCIES

10.2. Board of Adjustment (BOA)

~~C.~~ **ALTERNATE MEMBERS**

- ~~1.~~ In addition to regular members, the BOA shall have two alternate members.
- ~~2.~~ One alternate member shall be shall be a citizen and resident of the town and shall be appointed by the town Board of Commissioners.
- ~~3.~~ One member shall be a citizen of Wake County and reside outside the town but within the extraterritorial jurisdiction boundaries of the town and shall be appointed by the Board of Commissioners of Wake County.
- ~~4.~~ Alternate members shall be appointed for the same term, at the same time, and in the same manner as regular members.
- ~~5.~~ Each alternate member, while attending any regular or special meeting of the BOA and serving in the absence of any regular member, shall exercise all the powers and duties of a regular member.
- ~~6.~~ Town alternate members shall only replace regular town members and extraterritorial alternate members shall only replace regular extraterritorial members.

~~D.C.~~ **MEMBER TERMS**

1. Board of Adjustment members shall be appointed for three-year staggered terms expiring on June 30.
2. Members may continue to serve until their successors have been appointed.
3. There shall be no term limits for those serving on the BOA.

~~E.D.~~ **VACANCIES**

Vacancies occurring for reasons other than expired terms shall be filled as they occur for the unexpired remainder of the term either by the town Board of Commissioners or the County Commissioners of Wake County, depending upon the area represented.

~~F.E.~~ **OFFICERS**

1. The BOA shall elect a Chair and Vice-Chair and create and fill such other offices as it may determine. The term of the Chair and other officers shall be one year, with eligibility for re-election.
2. Election of officers shall take place at the first meeting of the Board following the beginning of the fiscal year.

10.2.3. RULES OF PROCEDURE

A. GENERALLY

The BOA shall adopt rules for the transaction of its business and shall keep a record of its members' attendance and its resolutions, discussions, findings and recommendations, which record shall be a public record.

B. COMPENSATION

Members of the BOA shall receive no compensation for their services.

C. SCHEDULE

1. The BOA shall establish a regular meeting time and place.
2. Unless there is no business to be conducted, the BOA shall hold at least one meeting monthly.
3. The BOA may elect to change and/or delete meeting dates, times and/or locations of its regular meetings.

D. OPEN MEETINGS

All meetings and hearings shall be open to the public.

E. OFFICIAL RECORD

1. The BOA shall keep minutes of its proceedings showing the vote of each member upon each question and the absence or failure of any member to vote.
2. Unless otherwise provided by law, all records and minutes shall be public record.

F. QUORUM

1. No official business of the BOA may be conducted without a quorum present.

ARTICLE 10: REVIEWING AGENCIES

10.2. Board of Adjustment (BOA)

2. A quorum shall be defined as the number of members equal to four-fifths of the regular board membership, excluding vacant seats.

G. VOTING

1. The concurring vote of four-fifths of the BOA members shall be necessary to grant a variance.
2. A simple majority of the BOA members shall be required to decide any other matter.
3. Members who are recused from voting due to a conflict of interest shall not be counted towards a simple or super majority.
4. The members appointed to the BOA by the Board of Wake County Commissioners as representatives of the extraterritorial area outside the town shall have equal rights, privileges and duties with the other members of the BOA regardless of whether the matters at issue arise within the town or within the extraterritorial area.

H. ATTENDANCE

Faithful attendance at meetings of the BOA is considered a prerequisite to continued membership, and the appointing authority may remove and replace any member continually delinquent in his duty to attend.

1. Regular members of the Board of Adjustment may be removed by the Board of Commissioners at any time for failure to attend three consecutive meetings or for failure to attend 70 percent or more of the meetings within any 12-month period or for any other good cause related to performance of duties.
- ~~2. Alternate members may be removed for repeated failure to attend or participate in meetings when requested to do so in accordance with regularly established procedures.~~

I. CONFLICT OF INTEREST

1. A member of the BOA shall not vote, nor participate in any manner that would violate an affected person's constitutional rights to an impartial decision maker; including, but are not limited to:
 - a. A member having a fixed opinion prior to hearing the matter that is not susceptible to change;
 - b. Undisclosed ex-parte communication;
 - c. A close family, business, or other associational relationship with an affected person; or
 - d. Financial interest in the outcome of the matter.
2. If an objection is raised to a member's participation and that member does not recuse their self, the remaining members shall by majority vote rule on the objection.

§ 160D-302. Boards of adjustment.

(a) Composition. - A local government may by ordinance provide for the appointment and compensation of a board of adjustment consisting of five or more members, each to be appointed for three-year terms. In appointing the original members or in the filling of vacancies caused by the expiration of the terms of existing members, the governing board may appoint certain members for less than three years so that the terms of all members shall not expire at the same time. The governing board 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 serving on behalf of any regular member has all the powers and duties of a regular member.

(b) Duties. - The board shall hear and decide all matters upon which it is required to pass under any statute or development regulation adopted under this Chapter. The ordinance may designate a planning board or governing board to perform any of the duties of a board of adjustment in addition to its other duties and may create and designate specialized boards to hear technical appeals. If any board other than the board of adjustment is assigned decision-making authority for any quasi-judicial matter, that board shall comply with all of the procedures and the process applicable to a board of adjustment in making quasi-judicial decisions. (2019-111, s. 2.4; 2020-3, s. 4.33(a); 2020-25, s. 51(a), (b), (d).)

§ 160D-307. Extraterritorial representation on boards.

(a) Proportional Representation. - When a city elects to exercise extraterritorial powers under this Chapter, it shall provide a means of proportional representation based on population for residents of the extraterritorial area to be regulated. The population estimates for this calculation shall be updated no less frequently than after each decennial census. Representation shall be provided by appointing at least one resident of the entire extraterritorial planning and development regulation area to the planning board, board of adjustment, appearance commission, and the historic preservation commission if there are historic districts or designated landmarks in the extraterritorial area.

(b) Appointment. - Membership of joint municipal-county planning agencies or boards of adjustment may be appointed as agreed by counties and cities. The extraterritorial representatives on a city advisory board authorized by this Article shall be appointed by the board of county commissioners with jurisdiction over the area. The county shall make the appointments within 90 days following the receipt of a request from the city that the appointments be made. Once a city provides proportional representation, no power available to a city under this Chapter is ineffective in its extraterritorial area solely because county appointments have not yet been made. If there is an insufficient number of qualified residents of the extraterritorial area to meet membership requirements, the board of county commissioners may appoint as many other residents of the county as necessary to make up the requisite number. When the extraterritorial area extends into two or more counties, each board of county commissioners concerned shall appoint representatives from its portion of the area, as specified in the ordinance. If a board of county commissioners fails to make these appointments within 90 days after receiving a resolution from the city council requesting that they be made, the city council may make them.

(c) Voting Rights. - If the ordinance so provides, the outside representatives may have equal rights, privileges, and duties with the other members of the board to which they are appointed, regardless of whether the matters at issue arise within the city or within the extraterritorial area; otherwise, they shall function only with respect to matters within the extraterritorial area. (2019-111, s. 2.4; 2020-3, s. 4.33(a); 2020-25, ss. 8, 51(a), (b), (d).)

§ 160D-404. Enforcement.

(a) Notices of Violation. - When staff determines work or activity has been undertaken in violation of a development regulation adopted pursuant to this Chapter or other local development regulation or any State law delegated to the local government for enforcement purposes in lieu of the State or in violation of the terms of a development approval, a written notice of violation may be issued. The notice of violation shall be delivered to the holder of the development approval and to the landowner of the property involved, if the landowner is not the holder of the development approval, by personal delivery, electronic delivery, or first-class mail and may be provided by similar means to the occupant of the property or the person undertaking the work or activity. The notice of violation may be posted on the property. The person providing the notice of violation shall certify to the local government that the notice was provided, and the certificate shall be deemed conclusive in the absence of fraud. Except as provided by G.S. 160D-1123 or G.S. 160D-1206 or otherwise provided by law, a notice of violation may be appealed to the board of adjustment pursuant to G.S. 160D-405.

§ 160D-405. Appeals of administrative decisions.

(a) Appeals. - Except as provided in G.S. 160D-1403.1, appeals of administrative decisions made by the staff under this Chapter shall be made to the board of adjustment unless a different board is provided or authorized otherwise by statute or an ordinance adopted pursuant to this Chapter. If this function of the board of adjustment is assigned to any other board pursuant to G.S. 160D-302(b), that board shall comply with all of the procedures and processes applicable to a board of adjustment hearing appeals. Appeal of a decision made pursuant to an erosion and sedimentation control regulation, a stormwater control regulation, or a provision of the housing code shall not be made to the board of adjustment unless required by a local government ordinance or code provision. Appeals of administrative decisions on subdivision plats shall be made as provided in G.S. 160D-1403.

(b) Standing. - Any person who has standing under G.S. 160D-1402(c) or the local government may appeal an administrative decision to the board. An appeal is taken by filing a notice of appeal with the local government clerk or a local government official designated by ordinance. The notice of appeal shall state the grounds for the appeal.

(c) Repealed by Session Laws 2020-25, s. 10, effective June 19, 2020.

(d) Time to Appeal. - The owner or other party has 30 days from receipt of the written notice of the determination within which to file an appeal. Any other person with standing to appeal has 30 days from receipt from any source of actual or constructive notice of the determination within which to file an appeal. In the absence of evidence to the contrary, notice given pursuant to G.S. 160D-403(b) by first-

class mail is deemed received on the third business day following deposit of the notice for mailing with the United States Postal Service.

(e) Record of Decision. - The official who made the decision shall transmit to the board all documents and exhibits constituting the record upon which the decision 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.

(f) Stays. - An appeal of a notice of violation or other enforcement order to the board of adjustment and any subsequent appeal in accordance with G.S. 160D-1402 stays enforcement of the action appealed from and accrual of any fines assessed during the pendency of the appeal or during the pendency of any civil proceeding authorized by law or related appeal. If, however, the official who made the decision certifies to the board 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 development regulation, then enforcement proceedings are not 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 shall meet to hear the appeal within 15 days after the request is filed.

Notwithstanding any other provision of this section, appeals of decisions granting a development approval or otherwise affirming that a proposed use of property is consistent with the development regulation does not stay the further review of an application for development approvals to use the property; in these situations, the appellant or local government may request and the board may grant a stay of a final decision of development approval applications, including building permits affected by the issue being appealed.

(g) Alternative Dispute Resolution. - The parties to an appeal that has been made under this section may agree to mediation or other forms of alternative dispute resolution. The development regulation may set standards and procedures to facilitate and manage voluntary alternative dispute resolution.

(h) No Estoppel. - G.S. 160D-1403.2, limiting a local government's use of the defense of estoppel, applies to proceedings under this section. (2019-111, s. 2.4; 2020-3, s. 4.33(a); 2020-25, ss. 10, 50(b), 51(a), (b), (d); 2022-62, s. 59(a).)

§ 160D-705. Quasi-judicial zoning decisions.

(a) Provisions of Ordinance. - The zoning or unified development ordinance may provide that the board of adjustment, planning board, or governing board hear and decide quasi-judicial zoning decisions. The board shall follow quasi-judicial procedures as specified in G.S. 160D-406 when making any quasi-judicial decision.

(b) Appeals. - Except as otherwise provided by this Chapter, the board of adjustment shall hear and decide appeals from administrative decisions regarding administration and enforcement of the zoning regulation or unified development ordinance and may hear appeals arising out of any other ordinance

that regulates land use or development. The provisions of G.S. 160D-405 and G.S. 160D-406 are applicable to these appeals.

(c) Special Use Permits. - The regulations may provide that the board of adjustment, planning board, or governing board hear and decide special use permits in accordance with principles, conditions, safeguards, and procedures specified in the regulations. Reasonable and appropriate conditions and safeguards may be imposed upon these permits. Where appropriate, such conditions may include requirements that street and utility rights-of-way be dedicated to the public and that provision be made for recreational space and facilities. Conditions and safeguards imposed under this subsection shall not include requirements for which the local government does not have authority under statute to regulate nor requirements for which the courts have held to be unenforceable if imposed directly by the local government, including, without limitation, taxes, impact fees, building design elements within the scope of G.S. 160D-702(b), driveway-related improvements in excess of those allowed in G.S. 136-18(29) and G.S. 160A-307, or other unauthorized limitations on the development or use of land.

The regulations may provide that defined minor modifications to special use permits that do not involve a change in uses permitted or the density of overall development permitted may be reviewed and approved administratively. Any other modification or revocation of a special use permit shall follow the same process for approval as is applicable to the approval of a special use permit. If multiple parcels of land are subject to a special use permit, the owners of individual parcels may apply for permit modification so long as the modification would not result in other properties failing to meet the terms of the special use permit or regulations. Any modifications approved apply only to those properties whose owners apply for the modification. The regulation may require that special use permits be recorded with the register of deeds.

(d) Variances. - When unnecessary hardships would result from carrying out the strict letter of a zoning regulation, the board of adjustment shall vary any of the provisions of the zoning regulation upon a showing of all of the following:

(1) Unnecessary hardship would result from the strict application of the regulation. It is not 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. A variance may be granted when necessary and appropriate to make a reasonable accommodation under the Federal Fair Housing Act for a person with a disability.

(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 is not a self-created hardship.

(4) The requested variance is consistent with the spirit, purpose, and intent of the regulation, such that public safety is secured and substantial justice is achieved.

No change in permitted uses may be authorized by variance. Appropriate conditions may be imposed on any variance, provided that the conditions are reasonably related to the variance. Any other

development regulation that regulates land use or development may provide for variances from the provisions of those ordinances consistent with the provisions of this subsection. (2019-111, s. 2.4; 2020-3, s. 4.33(a); 2020-25, ss. 17, 50(b), 51(a), (b), (d).)