

P17-17
Proposed County Zoning Ordinance Text Amendment
(Article XVI, Board of Adjustment)

P17-17. Revision and Amendment to the Cumberland County Zoning Ordinance, Article XVI, Board of Adjustment; and requesting permission to Reprint the Zoning Ordinance inserting all text amendments approved since June 20, 2005 as listed.

AMEND Article XVI, Board of Adjustment as indicated below:

ARTICLE XVI
BOARD OF ADJUSTMENT

SECTION 1601. ESTABLISHMENT.

The Board of Commissioners, pursuant to N.C. GEN. STAT. §~~153A-340~~ ~~153A-345~~, does establish a Board of Adjustment. Such board shall consist of at least five members appointed by the Commissioners, with membership providing for a means of proportional representation of the County's territorial jurisdiction. The appointments shall be for staggered terms. Subsequent or new reappointments shall be for three-year terms; all appointments to fill vacancies shall be for the unexpired term. The Commissioners shall also appoint five alternate members at large to serve 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 in the same manner as regular members and at the regular times for appointment. Each alternate member, while attending any regular or special meeting of the board and serving in the absence of any regular member, shall have and exercise all the powers and duties of any regular member absent from the meeting.

SECTION 1602. PROCEEDINGS.

The Board shall elect a Chairperson ~~Chairman~~ and Vice-Chairperson ~~Vice-Chairman~~ from among its members. The Director shall assign a staff member to fill the Secretary and Clerk positions. Meetings of the board shall be held at the call of the Chairperson ~~Chairman~~ and at such other times as the board may determine. The Chairperson ~~Chairman~~ or any member acting as chair and the Secretary to the Board are authorized ~~is authorized in his official capacity~~ to administer oaths. The Chairperson may and compel the attendance of witnesses in any matter coming before the Board. Any person who, while under oath during a proceeding before the Board of Adjustment, willfully swears falsely is guilty of a Class 1 misdemeanor. The Vice-Chairperson or any ~~Any~~ member of the board while temporarily acting as Chairperson ~~Chairman~~ has and can

exercise like authority. All meetings of the board shall be open to the public. The board shall keep minutes of its proceedings, showing the vote of each member upon every motion or question, or if absent or failing to vote, indicating such fact. The board shall also keep records of its examinations and official action.

(Amd. 04-18-11)

SECTION 1603. POWERS AND DUTIES.

The Board of Adjustment ~~shall have the powers, authority and duty to~~ shall hear and decide all matters upon which it is required to pass under any statute or ordinance that regulates land use or development:

A. Hear and decide special use permits, requests for variances, and appeals of decisions ~~Act in all matters~~ relating to the administrative review of any order, requirement, decision or determination made by the Director or other administrative official regarding enforcement of this ordinance or other ordinance that regulates land use or development. (see Section 1604 below)

(Amd. 01-19-10)

B. Vary or modify any of the regulations or provisions of this ordinance related to the construction or alteration of buildings or structures, dimensional requirements and minimum standards of individual uses except for specific location criteria for individual uses, in accordance with Section 1605, where there are unnecessary hardships in carrying out the strict letter of this ordinance, so that the spirit, purpose and intent of the ordinance shall be observed, public safety is ~~and welfare~~ secured and substantial justice achieved ~~done~~;

(Amd. 01-19-10)

C. May hear and decide special use permit applications ~~Grant permit exceptions, called "Special Uses," in the classes of cases or situations and~~ in accordance with ~~the principles, conditions, safeguards~~ standards and procedures specified in Section 1606;

(Amd. 01-19-10)

D. Repealed. ~~Interpret the official zoning maps and pass upon disputed questions of lot lines or district boundary lines and similar questions as they arise in administration of this ordinance;~~

E. Rule on matters concerning nonconforming uses as to their continuance or discontinuance, expansion, reconstruction and, in general, compliance with Sections 1003 and 1004;

F. Rule on matters related to the County's Water Supply Watershed Management and Protection Ordinance regarding High Density developments, appeal of the Watershed Review Officer's decision, and hear request for variance from the County Water Supply Watershed Management and Protection Ordinance;

(Amd. 01-19-10)

G. Hear and rule on appeals and variance requests from the County's Flood Damage Prevention Ordinance, ~~and~~

H. *Repealed.*
(Amd. 01-19-10)

SECTION 1604. APPEALS ADMINISTRATIVE REVIEW.

The Board of Adjustment shall hear and decide from decisions of administrative officials charged with enforcement of the zoning ordinance and may hear appeals arising out of any other ordinance that regulates land use or development pursuant to all of the following: ~~Appeals may be taken to the Board of Adjustment by any person aggrieved or by an officer, department, board or bureau of the County affected by any decision of an administrative official charged with the enforcement or interpretation of this ordinance thought to be in error. Such appeals shall be filed with the Board of Adjustment by notice specifying the grounds for appeal. Appeal shall be filed within 30 calendar days from the date of the action being appealed. The officer from whom the appeal is taken shall forthwith transmit to the Board of Adjustment all the papers constituting the record upon which the action appealed from was taken, together with any additional written reports or documents, as the administrative official deems pertinent.~~

A. Any person who has standing under G.S. 160A-393(d) or the County may appeal a decision to the Board of Adjustment. The notice of appeal shall state the grounds for the appeal.

B. The official who made the decision shall give 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 subject property owner. The written notice shall be delivered by personal delivery, electronic mail, or by first-class mail;

C. The owner or other party shall have 30 days from receipt of the written notice within which to file an appeal. Any other person with standing to appeal shall have 30 days from receipt from any source of actual or constructive notice of the decision within which to file an appeal.

D. 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 Board of Adjustment 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 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 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.

E. Subject to the provisions of subdivision (E) of this sub-section, the board of adjustment shall hear and decide the appeal within a reasonable time.

F. The 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 County would be unduly prejudiced by the presentation of matters not presented in the notice of appeal, the board shall continue the hearing. 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.

~~The Board of Adjustment may after public hearing, so long as such action is in conformity with the terms of this ordinance, reverse or affirm, wholly or in part, or may modify any order, requirement, decision or determinations as ought to be made, and to that end shall have the powers of the administrative official from whom the appeal is taken.~~

(Amd. 01-19-10)

SECTION 1605. VARIANCE.

When unnecessary hardships would result from carrying out the strict letter of this ordinance, or other land use regulation or ordinance, ~~The Board of Adjustment may authorize in specific cases such variances from the terms of this ordinance upon request of a property owner or his authorized agent and may require any evidence necessary to make a determination of the case. Before the Board may grant any variance, the Board must find that all of the following conditions exist for an individual case~~ the Board of Adjustment shall vary any of the provisions of the ordinance upon a showing of all of the following:

A. 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. ~~There are extraordinary and exceptional conditions pertaining to the particular piece of property in question because of its size, shape or topography that are not applicable to other lands or structures in the same district; difficult~~

B. 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.~~Granting the variance requested will not confer upon the applicant any special privileges that are denied to other residents in the district in which the property is located;~~

C. 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 shall not be regarded as a self-created hardship.~~The literal interpretation of the provisions of this ordinance would deprive the applicant of rights commonly enjoyed by other residents of the district in which the property is located;~~

D. The requested variance is consistent with the spirit, purpose ~~will be in harmony with the purpose~~ and intent of the this ordinance, such that public safety is secured, and substantial justice is achieved; ~~and will not be injurious to the neighborhood or to the general welfare;~~

~~E. The special circumstances are not the result of the actions of the applicant;~~

~~F. The variance requested is the minimum variance that will make possible the legal use of the land, building or structure;~~

~~G. The variance is not a request to permit a use of land, building or structure which is not permitted by right or by special exception in the district involved and will not constitute any change in district boundaries; and~~

~~H. The existence of a nonconforming use of neighboring land, buildings or structures in the same district or of permitted or nonconforming uses in other districts does not constitute a reason for approval of the requested variance. In granting a variance, the Board may attach and the record shall reflect such conditions regarding the location, character and other features of the proposed building, structure or use as it may deem advisable. The record shall also state in detail any exceptional difficulty or unnecessary hardship upon which the request was based and which the Board finds to exist.~~

Appropriate conditions may be imposed on any variance, provided that the conditions are reasonably related to the variance. Any variance granted becomes null and void if not exercised within the time specified in such approvals, or if no date is specified, within one calendar year from the date of such approval. The Board of Adjustment is not authorized to grant variances to any use approved in a Conditional Zoning district or to the specific conditions or other performance criteria imposed upon such use. If the board denies ~~a the~~ variance request, the board ~~it~~ shall enter the reason for its action in the minutes of the meeting at which the action is taken. In the event of a denial, the Board of Adjustment shall not consider resubmission of the application for the same variance request on the same property without a substantial material change concerning the property and the application.

(Amd. 02-19-08; Amd. 04-18-11)

SECTION 1606. SPECIAL USE PERMITS.

The Board of Adjustment shall hear and decide applications for special use permits. The various Special Uses set forth in the Use Matrix in Article IV, because of special site or design requirements, operating characteristics or potential adverse effects on surrounding property and neighborhoods, shall be permitted only upon approval by the Board of Adjustment in accordance with the standards and procedures specified in the ordinance ~~and conditions as set forth in this section.~~ Reasonable and appropriate conditions may be imposed upon these permits.

A. Purpose. Permitting Special Uses adds flexibility to this ordinance. Subject to high standards of planning and design, certain property uses are allowed in the several districts where these uses would not otherwise be acceptable. By means of controls exercised through the Special Use Permit procedures, property uses that would otherwise be undesirable in certain districts can be developed to minimize any negative effects they might have on surrounding properties.

B. Procedure. Special Use Permits shall be granted by the Board of Adjustment as permitted for only those uses enumerated in Section 403, Use Matrix, as Special Uses. Uses specified as a Special Use in Section 403 shall be permitted only upon the issuance of a Special Use Permit by the Board of Adjustment.

The owner or owners of all property included in the petition for a Special Use Permit shall submit a complete application and a detailed site plan (drawn in accordance with the specifications listed in Section 1402) to the Planning and Inspections Staff. The Staff will schedule the application to be heard by the Board of Adjustment in accordance with the adopted time schedule. ~~The Planning and Inspections Staff shall also notify the Commanders of Fort Bragg, Pope Air Force Base, and Simmons Army Airfield of any application affecting the use of property located within five miles or less of the perimeter boundary of said bases in accordance with N.C. GEN. STAT. § 153A-323.~~

Developers are encouraged to discuss their Special Use plans with the Planning and Inspections Staff before submission. The staff shall assist the developer upon request by reviewing Special Use plans to ensure that the technical requirements of this ordinance are met before submission to the Board of Adjustment.

All applications and site plans shall provide information indicating compliance with the development standards for individual uses as listed in Article IX of this ordinance, as applicable, and the height and area regulations for the zoning district in which they are located, unless the provisions for the Special Use provide to the contrary.

C. Consideration of Application. The Board of Adjustment shall consider the application, site plan and any other evidence presented in accordance with this article and may grant or deny the Special Use Permit requested. In granting a Special Use Permit, the Board shall find that:

1. The use will not materially endanger the public health or safety if located according to the plan submitted and proposed;

2. The use meets all required conditions and specifications;

3. The use will maintain or enhance the value of adjoining or abutting properties, or that the use is a public necessity; and

4. The location and character of the use, if developed according to the plan as submitted and recommended, will be in harmony with the area in which it is to be located and is in general conformity with Cumberland County's most recent Land Use Plan, either comprehensive or a detailed area plan.

(Amd. 02-19-08)

D. Final Disposition. In granting approval of a Special Use Permit, the Board of Adjustment shall impose such reasonable terms and conditions as it may deem necessary for the protection of the public health, general welfare and public interest. In granting a Special Use Permit, the Board of Adjustment may ~~shall~~ give due consideration to one or all of the following:

1. The compatibility of the proposal, in terms of both use and appearance, with the surrounding neighborhood;

2. The comparative size, floor area and mass of the proposed structure in relationship to adjacent structures and buildings in the surrounding area and neighborhood;

3. The frequency and duration of various indoor and outdoor activities and special events, and the impact of these activities on the surrounding area;

4. The capacity of adjacent streets to handle increased traffic in terms of traffic volume, including hourly and daily levels and weight-bearing limitations;

5. The added noise level created by activities associated with the proposed use;

6. The requirements for public services where the demands of the proposed use are in excess of the individual demands of the adjacent land uses, in terms of police and fire protection, and the presence of any potential or real fire hazards created by the proposed use;

7. Whether the general appearance of the neighborhood will be adversely affected by the location of the proposed use on the parcel;

8. The impact of night lighting in terms of intensity, duration and frequency of use, as it impacts adjacent properties and in terms of presence in the neighborhood;

9. The impact of the landscaping of the proposed use, in terms of maintained landscaped areas, versus areas to remain in a natural state, as well as the openness of landscaped areas, versus the use of buffers and screens;

10. The impact of a significant amount of hard-surfaced areas for buildings, sidewalks, drives, parking areas and service areas, in terms of noise transfer, water runoff and heat generation;

11. The availability of public facilities and utilities;

12. The harmony in scale, bulk, coverage, function and density of the proposed development and compliance with the development standards of the individual uses; and

13. The reasonableness of the request as compared to the purpose and intent of the most recent Land Use Plan, this ordinance, and adopted policies, for the physical development of the district, and protection of the environment.

(Amd. 02-19-08)

All such additional conditions [imposed on the permit by the Board of Adjustment](#) shall be entered in the minutes of the meeting at which the Special Use Permit is granted, on the Special Use Permit itself, and on the approved plans submitted therewith. The specific conditions shall run with the land and shall be binding on the original applicants for the Special Use Permit, their heirs, successors and assigns. The applicant for the Special Use Permit is responsible for the recordation of the "Notice of Special Use Permit" with the Cumberland County Register of Deeds prior to application for any zoning permit.

If the Board denies the Special Use Permit, it shall enter the reason for its action in the minutes of the meeting at which the action is taken. In the event of a denial, the Board of Adjustment shall not consider resubmission of the application for the same Special Use Permit on the same property without a substantial material change concerning the property and the application.

E. Expiration of Permits. Any Special Use granted becomes null and void if not exercised within the time specified in such approval, or if no date is specified, within one calendar year from the date of such approval [if the permit has not been recorded with the County Register of Deeds](#). Furthermore, once the Certificate of Occupancy has been issued for a Special Use and then the Special Use ceases to exist for a time period of one calendar year or more, a re-submittal of the Special Use application for the same use may be required if there has been a material change in the ordinance standards *(Amd. 08-18-08)*

F. Modifications to Plans. The Board of Adjustment shall review any change, enlargement or alteration in site plans submitted as a part of a Special Use application, and new conditions may be imposed where findings require. The Planning and Inspections Staff may approve minor modifications of the approved plans in the same

manner as authorized in Section 506 for Conditional Zoning districts, provided that the changes do not materially alter the original plan as approved, and the intent and objectives of the original approval are not deviated from.

(Amd. 02-19-08; Amd. 04-18-11)

G. Noncompliance. If for any reason any condition imposed pursuant to this section is found to be illegal or invalid, the Special Use Permit shall be null and void and of no effect, and the Planning and Inspections Staff shall institute proceedings for the case to be reheard by the Board of Adjustment.

Compliance with all the conditions of a Special Use Permit is an essential element of the Special Use Permit's continued validity and effectiveness. If the Coordinator shall determine that a permittee has failed to comply with a condition of an approved Special Use Permit, he shall so notify the permittee or the permittee's successor in interest and shall place the matter on the Board of Adjustment's agenda for the Board's decision whether or not to revoke the Special Use Permit. Such hearing shall be on reasonable written notice to the permittee or the permittee's successor in interest and shall be a quasi-judicial proceeding according to quasi-judicial procedures. The decision of the Board of Adjustment shall be a final decision, and a decision to revoke the Special Use Permit may be appealed to the Superior Court of Cumberland County within 30 days after the permittee or the permittee's successor in interest has been served with written notice of the Board of Adjustment's decision. Service by personal delivery, [electronic mail](#) or certified mail, return receipt requested, of a certified copy of the Board of Adjustment's approved minutes for its meeting at which such decision is made, may constitute written notice and service of the Board of Adjustment's decision hereunder.

(Amd. 04-18-11)

H. Appeals of Special Use Permit Decisions. No appeal may be taken from the action of the Board of Adjustment in granting or denying a Special Use Permit except through the Cumberland County Superior Court in the same manner as set forth in this article for appeal of any Board of Adjustment decision.

SECTION 1607 HEARINGS

A. The Board of Adjustment shall determine contested facts and make its decision within a reasonable time. Every quasi-judicial decision shall be based upon competent, material, and substantial evidence in the record. Each quasi-judicial decision shall be reduced to writing and reflect the board's determination of contested facts and their application to the applicable standards. The written decision shall be signed by the Chair or other duly authorized member of the board. A quasi-judicial is effective upon filing the written decision with the Clerk to the board. The decision of the board shall be delivered by personal delivery, electronic mail, or by first-class mail to the applicant, property owner, and to any person who has submitted a written request for a copy, prior to the date the decision becomes effective. The Clerk to the board shall certify that proper notice has been made. ~~Any variance or Special Use Permit application considered by the Board of Adjustment requires a quasi-judicial hearing. All other~~

~~applications considered by the board shall be considered in the manner in which the governing regulation establishes. The board shall fix a reasonable time for hearing and give public notice as well as due notice to the parties in interest. Each quasi-judicial hearing shall follow quasi-judicial requirements including sworn testimony, the reliance on competent evidence, the right to question witnesses, avoiding ex parte contact and bias and matching up evidence to findings of fact. At the hearing, any person or party may appear in person or by agent or attorney. The board shall take action on all matters within a reasonable time after the termination of the proceedings.~~

~~(Amd. 08-18-08; Amd. 07-26-13)~~

The Secretary to the Board of Adjustment ~~Planning and Inspections Staff~~ shall ensure ~~also notify~~ the Commanders of Fort Bragg, Pope Army Airfield ~~Air Force Base~~, and Simmons Army Airfield are notified of any application affecting the use of property located within five miles or less of the perimeter boundary of said bases in accordance with N.C. GEN. STAT. § 153A-323.

SECTION 1608. REQUIRED VOTE.

A. The concurring vote of four-fifths of the members of the Board of Adjustment shall be necessary to reverse any order, requirement, decision or determination of any administrative official charged with the enforcement of this ordinance and to decide in favor of an applicant on any matter, except relating to Special Use Permits, which the board is required to pass, including granting variances from the provisions of this ordinance. Decisions for issuance of a Special Use Permit shall be made by the majority vote of the board members present at the meeting in which the request is heard. grant a variance. A majority of the members shall be required to decide any other quasi-judicial matter or to determine an appeal made in the nature of certiorari. For the purposes of this sub-section, 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 majority if there are no qualified alternates available to take the place of such members.

~~(Amd. 02-19-08; Amd. 04-18-11)~~

B. A member of the board exercising quasi-judicial functions pursuant to this article shall not participate in or vote on any quasi-judicial matter in a manner that would violate affected person's constitutional rights to an impartial decision maker. Impermissible violations of due process 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.

SECTION 1609. REVERSAL/REVOCATION OF DECISION.

After a hearing has been held and approval granted, the Board of Adjustment may reverse or revoke any decision notice to the property owner and affected applicant if not the owner ~~without a public hearing~~ upon finding that:

- A. The approval was obtained by fraud;
- B. The use for which such approval was granted is not being executed;
- C. The use for which such approval was granted has ceased to exist or has been suspended for one calendar year or more;
- D. The permit granted is being, or recently has been, exercised contrary to the terms or conditions of such approval;
- E. The permit granted is in violation of an ordinance or statute; or
- F. The use for which the approval was granted was so exercised as to be detrimental to the public health or safety, or so as to constitute a nuisance.

SECTION 1610. APPEAL OF FINAL DECISION.

Every quasi-judicial decision shall be subject to review by the Superior Court by proceedings in the nature of certiorari pursuant to N.C. GEN. STAT. § 160A-393. A petition for review shall be filed with the Clerk of Superior court by the later of 30 days after the decision is effective or after a written copy thereof is given in accordance with subdivision A of this sub-section. When first-class mail is used to deliver notice, three days shall be added to the time to file the petition.

~~Any decision of the Board of Adjustment is subject to review by the Superior Court by proceedings in the nature of certiorari. The aggrieved party shall file a "Notice of Intent to Appeal" with the Planning and Inspections Department on the next business day following the meeting in which the board's decision was made final, or the next business day following receipt of the written copy thereof and delivery is made to every aggrieved party, whichever is later. Any petition for review by the Superior Court shall be filed with the Clerk of Superior Court within of 30 calendar days after the decision of the Board is made final. The decision of the board may be delivered to the aggrieved party either by personal service or by registered mail or certified mail, return receipt requested.~~

~~(Amd. 01-19-10; Amd. 04-18-11)~~

State Statute References: N.C. GEN. STAT. §153A-345.1 and §160A-388

AUTHORIZE the County Planning and Inspections' staff to REPRINT the Cumberland County Zoning Ordinance in its entirety, including all text amendments to the zoning ordinance adopted on or after June 20, 2005 and as listed below:

(See next page of zoning text amendment listing.)

Cumberland County Zoning Ordinance Book

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