

**ARTICLE 5. – APPEALS OF ADMINISTRATIVE DECISIONS AND, VARIANCES,
~~INTERPRETATIONS~~**

PART I. - GENERAL

5-1 - Requests to be Heard Expeditiously

As provided in section 4-17, the Board of Adjustment shall hear and decide all appeals of administrative decisions made by staff and, 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 Article 6, and obtain the necessary information to make sound decisions.

PART II. – APPEALS OF ADMINISTRATIVE DECISIONS

5-2 - Procedure for Filing an Appeal

5-2.1 *Standing.* Any person who has standing under N.C.G.S. § 160D-1402(c)~~G.S. 160A-393(d)~~ or the Town of Morehead City may appeal a determination decision to the Board of Adjustment. An appeal is taken by filing a notice of appeal with the clerk to the Board of Adjustment City Clerk. The notice of appeal shall state the grounds for the appeal. ¹

5-2.2 *Reserved.* ~~The Town 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 owner. The written notice shall be delivered by personal delivery, electronic mail, or by first class mail.~~

5-2.3 *Time to appeal.* The owner or other party ~~has shall have~~ thirty (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 shall have~~ thirty (30) days from receipt from any source of actual or constructive notice of the determination decision within which to file an appeal. In the absence of evidence to the contrary, notice pursuant to N.C.G.S. § 160D-403(b) given 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. ² It is the responsibility of the property owner or the party who sought the decision to give constructive notice to all persons with standing to appeal. Constructive notice of the decision shall consist of posting a sign containing the words "Zoning Decision" or "Subdivision Decision" in letters at least six (6) inches high and identifying the means to contact an official for information about the decision. The sign should be prominently posted on the property that is the subject of the decision for a minimum of ten (10) days.

5-2.4 *Record of decision.* The Town official who made the determination decision shall transmit to the Board all documents and exhibits constituting the record upon which the

¹ 160D-405(b)

² 160D-405(d)

~~decision action~~ 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.³

5-2.5 *Stays.* An appeal of a notice of violation or other enforcement order stays enforcement of the action appealed from and any accrual of fines assessed during the pendency of the appeal to the Board of Adjustment and any subsequent appeal in accordance with N.C.G.S. § 160D-1402 or during the pendency of any civil proceeding authorized by law or appeals therefrom, 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 the enforcement of the development regulation Ordinance. In that case, enforcement proceedings ~~are not 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 fifteen (15) days after ~~the such~~ request is filed. Appeal of decisions granting 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 Town of Morehead City 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.⁴

5-2.6 *Quasi-Judicial Procedures.* Appeals shall be processed in accordance with quasi-judicial procedures as outlined in Article 6. ~~The Board of Adjustment may reverse or affirm (wholly or partly) or may modify the order, requirement, decision, or determination appealed from and shall make any order, requirement, decision, or determination that in its opinion should be made in the case before it. To this end, the Board shall have all the powers of the officer from whom the appeal is taken.~~⁵

5-2.7 *Alternative dispute resolution.* The Town and other parties to an appeal may agree to mediation in accordance with the applicable rules for mediated settlement conferences in Superior Court. If the parties agree to mediation, a hearing on the merits of the matter will be delayed until the regular board meeting following the mediation.⁶

(Ord. No. 2014-03, §§ 11—16, 1-14-2014)

PART III. - VARIANCES

5-3 - Procedure for Submitting an Application for a Variance

5-3.1 An application for a variance shall be submitted to the Board of Adjustment by filing a copy of the application with the clerk to the Board of Adjustment. ~~administrator in the~~

³ 160D-405(e)

⁴ 160D-405(f)

⁵ Moved current content (now modified) to section 6-8. Added language referring to Article 6.

⁶ 160D-405(g)

~~Planning Department.~~ Applications shall be handled in the same manner as applications for special use permits in conformity with the provisions of Section 4-3, 4-4, and 4-9.

5-3.2 Variances. When unnecessary hardship would result from carrying out the strict letter of a zoning regulation, the Board of Adjustment shall vary any of the provisions of the Unified Development Ordinance upon a showing of all of the following: Variance criteria:⁷

(A) Unnecessary hardship would result from the strict application of the regulation. ordinance. It ~~is not shall not be~~ necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property.

(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. 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.⁸

(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 ~~is not shall not be regarded as~~ a self-created hardship.

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

(E) No change in permitted uses may be authorized by variance.

5-3.3 Appropriate conditions may be imposed on any variance, provided that the conditions are reasonably related to the variance.

5-3.4 Any conditions attached to the variance.~~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.

(Ord. No. 2006-07, § 7, 1-10-2006; Ord. No. 2013-21, § 12, 6-11-2013; Ord. No. 2014-03, §§ 17—23, 1-14-2014)

~~5-4 – Board Action on Appeals, Quasi-judicial Matters, and Variances~~

~~5-4.1 Appeals and Quasi-Judicial Matters other than Variances. A majority of the members shall be required to decide any quasi-judicial matter other than a variance or to determine an appeal made in the nature of certiorari.~~⁹

~~5-4.2 Variances. The concurring vote of four-fifths () of the Board shall be necessary to grant a variance.~~¹⁰

⁷ Criteria adjusted to incorporate clarification adjustments made by S.L. 2020-25.

⁸ This is an optional adjustment and would not become effective until January 1, 2021. 160D-705(d).

⁹ Moved to section 6-7

¹⁰ Moved to section 6-7

~~5-4.3 Vacant positions on the Board and members who are disqualified from voting on the 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.¹¹~~

~~5-4.4 *Quasi-Judicial Decisions and Judicial Review.* The Board 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 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 decision 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 shall provide notice and certify that proper notice has been made. When first class mail is used to deliver notice, three (3) days shall be added to the time to file the petition.¹²~~

(Ord. No. 2005-22, §§ 5, 6, 6-14-2005; Ord. No. 2014-03, §§ 24—28, 1-14-2014)

Editor's note— Ordinance No. 2014-03, § 24, adopted January 14, 2014, amended section 5-4 to read as set out herein. Previously section 5-4 was titled Board Action on Appeals and Variances.

¹¹ Moved to section 6-7

¹² Moved (now modified) to section 6-8.

ARTICLE 6. – QUASI-JUDICIAL PROCEDURE¹³ ~~HEARING PROCEDURES FOR APPEALS AND APPLICATIONS~~

6-1 – Quasi-Judicial Procedure ~~Hearing Required on Appeals and Applications~~

6-1.1 Before making a decision on an appeal or an application for a variance, special-use permit, or a petition from the planning staff to revoke a special-use permit, the Board of Adjustment, as the case may be, shall hold a hearing on the appeal or application.

6-1.2 *Process required.* The Board of Adjustment shall follow quasi-judicial procedures in determining appeals of administrative decisions, special use permits, variances, or any other quasi-judicial decision. ~~when deciding appeals and requests for variances and special use permits.~~¹⁴

~~6-1.3 Appropriate conditions may be placed upon any variance or special use permit provided that the conditions are reasonably related to the variance or special use permit.~~

~~6-1.4 The hearing Board 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.~~¹⁵

(Ord. No. 2014-03, §§ 30—32, 1-14-2014)

6-2 - Notice of Hearing

~~The administrator shall give notice of any hearing required by section 6-1 as follows:~~

6-2.1 *Advertised Notice of Hearing.* The Board of Adjustment shall fix a reasonable time for the hearing of the appeal, give public notice thereof, published in a newspaper of general circulation in the town at least once a week for two (2) successive calendar weeks in a newspaper having general circulation in the area. The notice shall be published the first time not less than ten (10) days nor more than twenty-five (25) days before the date fixed for the hearing. In computing such period, the day of publication is not to be included but the day of the hearing shall be included.¹⁶

~~6-2.2 The notice required by this section shall state the date, time, and place of the hearing, reasonably identify the lot that is the subject of the application or appeal, and give a brief description of the action requested or proposed.~~¹⁷

6-2.2 ~~3~~ *Mailed Notice of Hearing.* Notice of evidentiary hearings conducted pursuant to N.C.G.S. § 160D-406 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 this development regulation. ~~Ordinance.~~ In the absence of evidence to the contrary, the Town City may rely on the County tax listings to determine owners of property entitled to mailed notice. The notice must be deposited in the mail ~~mailed~~

¹³ 160D-406

¹⁴ 160D-406(a)

¹⁵ Moved to Notice of Hearing section.

¹⁶ Optional to keep. Not a statutory requirement.

¹⁷ Moved below Mailed Notice of Hearing.

at least ten (10) days, but not more than twenty-five (25) days, prior to the date of the hearing. Within that same time period, the Town City shall 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.¹⁸

6-2.3 Contents of Notice. The notice required by this section shall state the date, time, and place of the hearing, reasonably identify the lot(s) that is the subject of the evidentiary hearing and give a brief description of the action requested or proposed.¹⁹

6-2.4 Continuation. The Board of Adjustment may continue an evidentiary hearing that has been convened without further advertisement. If an evidentiary hearing is set for a given date and a quorum of the board is not then present, the hearing shall be continued until the next regular board meeting without further advertisement.²⁰

(Ord. No. 2005-22, § 7, 6-14-2005; Ord. No. 2014-03, § 33, 1-14-2014)

6-3 – Administrative Materials and Presentation of Evidence

6-3.1 Administrative materials. The administrator or staff to the Board of Adjustment shall transmit to the board all applications, reports, and written materials relevant to the matter being considered. The administrative materials may be distributed to the members of the board prior to the hearing if at the same time they are distributed to the board a copy is also provided to the appellant or applicant and to the landowner if that person is not appellant or applicant. The administrative materials shall become a part of the hearing record. The administrative materials may be provided in written or electronic form. Objections to inclusion or exclusion of administrative materials may be made before or during the hearing. Rulings on unresolved objections shall be made by the Board of Adjustment at the hearing.²¹

6-3.2 Presentation of Evidence. The applicant, Town official(s), and any person who would have standing to appeal the decision under N.C.G.S. § 160D-1402(d) shall have the right to participate as a party at the evidentiary hearing. Other witnesses may present competent, material, and substantial evidence that is not repetitive as allowed by the board.

Objections regarding jurisdictional and evidentiary issues, including but not limited to, the timeliness of an appeal or the standing of a party, may be made to the board. The board chair shall rule on any objections and the chair's rulings may be appealed to the full board. These

¹⁸ 160D-406(b). Of note, in practice the Town has been sending notice to property owners within 100' for many years.

¹⁹ Optional language contained in 6-2.2 of UDO currently.

²⁰ 160D-406(b), second paragraph

²¹ 160D-406(c)

rulings are also subject to judicial review pursuant to N.C.G.S. § 160D-1402. Objections based on jurisdictional issues may be raised for the first time on judicial review. ²²

~~6-3.1 The provisions of this section apply to all hearings for which a notice is required by section 6-1.~~

~~6-3.2 All persons who intend to present evidence to the permit-issuing Board, rather than arguments only, shall be sworn.~~

~~6-3.3 All findings and conclusions necessary to the issuance or denial of the requested permit or appeal (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.~~

6-4 – Appearance of Official, New Issues and Modification of Application at Hearing

6-4.1 Appearance of official, new issues. The official who made the decision or the person currently occupying that position if the decision-maker is no longer employed by the local government, shall be present at the evidentiary hearing as a witness. The appellant shall not be limited at the hearing to matters stated in a notice of appeal. If any party of the Town of Morehead City would be unduly prejudiced by the presentation of matters not presented in the notice of appeal, the board shall continue the hearing. ²³

6-4.2 Modification of Application for Variance or Special Use Permit at Hearing. ~~6-4.1~~ In response to questions or comments by persons appearing at the hearing or to suggestions or recommendations by the ~~City Council~~ or Board of Adjustment, the applicant may agree to modify his application, including the plans and specifications submitted. ~~6-4.2~~ 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 planning staff.

6-5 – Oaths Reserved

6-5.1 Oaths. The chair of the board or any member acting as chair and the clerk to the board are authorized to administer oaths to witnesses in any matter coming before the board. Any person who, while under oath during a proceeding before the board determining a quasi-judicial matter willfully swears falsely is guilty of a Class 1 misdemeanor. ²⁴

²² 160D-406(d)

²³ 160D-406(e)

Editor's note— Sections 7 through 9 of Ordinance No. 2008-55, adopted November 4, 2008, removed §§ 6-5—6-5.2, which pertained to tape recordings of hearings, and derived from Ordinance No. 2001-19, adopted June 12, 2001.

6-6 - Burden of Proof in Appeals and Variances

6-6.1 When an appeal is taken to the Board of Adjustment in accordance with section 5-2, the administrator shall have the initial burden of presenting to the Board 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.

6-6.2 The burden of presenting evidence sufficient to allow the Board of Adjustment to reach the conclusions set forth in subsection 5-3.2, as well as the burden of persuasion on those issues, remains with the applicant seeking the variance.

6-7 - Subpoenas

6-7.1 Subpoenas. The board making a quasi-judicial decision under this Article through the chair, or in the chair's absence anyone acting as chair, may subpoena witnesses and compel the production of evidence. To request issuance of a subpoena, the applicant, the Town official, and any person with standing under N.C.G.S. § 160D-1402(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 immediately appealed to the full board. If a person fails to obey a subpoena issued pursuant to this subsection, the board 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.²⁵

²⁴ 160D-406(f)

²⁵ 160D-406(g)

6-8 Voting

6-8.1 The concurring vote of four-fifths of the board shall be necessary to grant a variance. A majority of the members shall be required to decide any other quasi-judicial matter. For the purposes of this subsection, vacant positions on the board and members who are disqualified from voting on a quasi-judicial matter under N.C.G.S. § 160D-109(d) 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.²⁶

6-9 Decisions

- 6-9.1 Decisions. The board shall determine contested facts and make its decision within a reasonable time. When hearing an appeal, the board 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. 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, reflect the board's determination of contested facts and their application to applicable standards and be approved by the board and signed by the chair or other duly authorized member of the board. A quasi-judicial decision is effective upon filing the written decision with the clerk to the Board of Adjustment. The decision of the board shall be delivered within a reasonable time by personal delivery, electronic mail, or by first-class mail to the applicant, landowner, and to any person who has submitted a written request for a copy prior to the date the decision becomes effective. The person required to provide notice shall certify to the Town of Morehead City that proper notice has been made and the certificate shall be deemed conclusive in the absence of fraud.²⁷
- 6-9.2 Judicial Review. Every quasi-judicial decision shall be subject to review by the superior court in the nature of certiorari pursuant to N.C.G.S. § 160D-1402.²⁸ Appeals shall be filed within the timeframe specified in N.C.G.S. § 160D-1405(d).²⁹

Definitions

2-2.x Determination. A written, final and binding order, requirement, or determination regarding an administrative decision.³⁰

2-2.x Development regulation, regulation. In accordance with N.C.G.S. § 160D-102(14), a unified development ordinance, zoning regulation, subdivision regulation, erosion and

²⁶ 160D-406(i)

²⁷ 160D-406(j)

²⁸ 160D-406(k)

²⁹ Added based upon City Attorney feedback. N.C.G.S. § 160D-1402 as written currently states, "Unless specifically provided otherwise, a petition for review of a quasi-judicial decision 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 N.C.G.S. § 160D-406(j). When first-class mail is used to deliver notice, three days shall be added to the time to file the petition."

³⁰ 160D-102(10)

sedimentation control regulation, floodplain or flood damage prevention regulation, mountain ridge protection regulation, stormwater control regulation, wireless telecommunication facility regulation, historic preservation or landmark regulation, housing code, State Building Code enforcement, or any other regulation adopted pursuant to the Chapter, or a local act or charter that regulates land use or development. ³¹

2-2.x Evidentiary hearing. A hearing to gather competent, material, and substantial evidence in order to make findings for a quasi-judicial decision required by a development regulation. ³²

2-2.x Quasi-judicial decision. A decision involving the finding of facts regarding a specific application of development regulation and that requires the exercise of discretion when applying the standards of the regulation. Quasi-judicial decisions include but are not limited to decisions involving variances, special use permits, and appeals of administrative determinations. Decisions on the approval of subdivision plats and site plans are quasi-judicial in nature if the regulation authorizes a decision-making board to approve or deny the application based not only upon whether the application complies with the specific requirements set forth in the regulation, but also on whether application complies with one or more generally stated standards requiring a discretionary decision on the findings to be made by the decision-making board. ³³

Article 4-29 Procedure for Review of Major Subdivisions:

4-29.1 (E) Variances. Requests for variances from the standards contained in these regulations shall be processed in accordance with section 5-3 of this regulation. ~~The Council, upon receipt of a recommendation of the Planning Board, may authorize a variance from the design standards contained in these regulations, when, in its opinion, undue hardship may result from strict compliance. In order to grant any variance, the Council must make the findings required below, taking into account the nature of the proposed subdivision, the existing land use in the vicinity, the number of persons to reside or work in the proposed subdivision and the probable effect of the proposed subdivision upon traffic conditions in the vicinity. No variance shall be granted unless the council finds:-~~

~~(1) That there are special circumstances or conditions affecting said property such that the strict application of the provisions of this Ordinance would deprive the applicant of the reasonable use of his land;-~~

~~(2) That the variance is necessary for the preservation, or enjoyment of a substantial property right of the applicant;-~~

~~(3) That the circumstances giving rise to the need for the variance are peculiar to the parcel and are not generally characteristic of other parcels subject to this Ordinance; and-~~

³¹ 160D-102(14)

³² 160D-102(16)

³³ 160D-102(28)

~~(4) That the granting of the variance will not be detrimental to public health, safety, and welfare or injurious to other property in the general area in which said property is situated.~~

~~In granting a variance from the terms of these regulations, the Council may attach any reasonable conditions or safeguards deemed necessary to insure that the purposes and intent of this Ordinance are not compromised. No variance shall be granted which conflicts with any other applicable local, state, or federal statute, ordinance, or regulation.~~

Article 16-8 Permanent Dead End, Cul-De-Sac Streets

Permanent dead end streets should not exceed five hundred (500) feet in length unless necessitated by topography or property accessibility and should not be permitted to be over nine hundred (900) feet long. Cul-de-sac length shall be measured from the middle point of an intersection with either a through street or another cul-de-sac to the center point of the turnaround of the cul-de-sac. Cul-de-sacs shall not be used to avoid connection with an existing street or to avoid the extension of an important street. Cul-de-sacs over nine hundred (900) feet in length require a variance be granted in accordance with section 5-3 ~~subsection 4-29.1(E)~~ of this development regulation. Ordinance. In no case shall the overall length of a cul-de-sac exceed two thousand seven hundred (2,700) feet from a through street. ³⁴

Article 16-11 Curb and Gutter

Curbs and gutters shall be required in all subdivisions. Curb and gutter is not required to be installed in the following situations: 1) infill development of an existing street that does not have curb and gutter; 2) the addition of streets in an existing neighborhood without curb and gutter; 3) proposed streets in a Planned Development (PD) district which are proposed to be private streets not offered for dedication to the public; or 4) projects for which after reasonable due diligence by the applicant (e.g. consideration of layout adjustment, reduction in proposed buildable area, reduction in density, etc.), it has been determined that it would not be possible to receive approval of a stormwater management plan or stormwater permit exemption if curb and gutter were to be installed. ³⁵ ~~A variance may be requested from the Planning Board, with final approval by the City Council. Consideration in granting a variance would be based on the inability to receive state approval of a stormwater management plan or a letter of exemption under the Stormwater Regulations if curb and gutter is installed.~~

³⁴ This section was reviewed by the Town Fire Marshal who did not see a conflict with the current language as it relates to the Fire Code.

³⁵ Items 1 and 2 are reflective of feedback from the Public Services Director.