

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2007

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SENATE DRS35069-LR-28A (01/31)

Short Title: Land-Use Permit Appeals. (Public)

Sponsors: Senator Kinnaird.

Referred to:

A BILL TO BE ENTITLED

AN ACT TO CLARIFY THE LAW REGARDING APPEALS OF QUASI-JUDICIAL
DECISIONS MADE UNDER ARTICLE 19 OF CHAPTER 160A AND ARTICLE
18 OF CHAPTER 153A OF THE GENERAL STATUTES.

The General Assembly of North Carolina enacts:

SECTION 1.(a) Article 19 of Chapter 160A of the General Statutes is
amended by adding a new section to read:

"§ 160A-393. Appeals in the nature of certiorari.

(a) Applicability. – This section applies to appeals to superior court by
proceedings in the nature of certiorari authorized under the provisions of this Article.

(b) Filing the Petition. – An appeal in the nature of certiorari shall be initiated by
filing with the superior court a petition for writ of certiorari. The petition shall state the
facts that demonstrate that the petitioner has standing to seek review and shall set forth
the grounds upon which the petitioner contends that an error was made as well as the
relief the petitioner seeks. The facts in support of allegations that the votes of one or
more members of the decision-making body were affected by impermissible bias or
conflict of interest shall be set forth with particularity.

(c) Standing. – A petition may be filed under this section only by a person who
has standing to challenge the decision being appealed. A person has standing if a
reasonable person in the position of the person seeking to challenge the decision could
reasonably conclude that the use of the property authorized by the decision would be
likely to adversely affect the interests of that person in some real, substantial, and
concrete way that is demonstrably different in nature or degree than the manner in
which the decision affects members of the general public. Without limiting the
generality of the foregoing, the following principles shall apply in determining whether
a petitioner has standing:

- 1 (1) If the decision being appealed involves a denial of a permit request, a
2 denial of a variance, or a determination that property is being used in
3 violation of an ordinance adopted under this Article, then any person
4 with an ownership or leasehold interest in the property in question, as
5 well as the applicant for the permit or the variance (if different than the
6 owner), has standing to file a petition.
- 7 (2) If the decision being appealed involves the issuance of a permit, the
8 granting of a variance, or a determination that property is being used in
9 conformity with an ordinance adopted under this Article, then the
10 following persons shall have standing to file a petition, so long as they
11 satisfy the general criteria set forth at the beginning of this subsection:
- 12 a. Any person who resides or owns property in such close
13 proximity to the property that is the subject of the decision that
14 the use of the property authorized by the decision would
15 adversely affect that person's use or enjoyment of his or her
16 residence or property or would adversely affect the value of that
17 property.
- 18 b. Any person whose economic interests are directly threatened by
19 the use authorized by the decision.
- 20 c. A property owners', neighborhood, or similar civic association
21 if any of its members would have standing to challenge the
22 decision as an individual, the interests sought to be protected
23 are germane to the association's purpose, and neither the claim
24 asserted nor the relief requested requires the participation of
25 individual members who would have standing.

26 For purposes of this subsection, the term "person" refers to any legal entity
27 authorized to bring suit in his, her, or its own name, and the term "owner" refers to any
28 person having an ownership interest in property.

29 (d) Respondent. – The respondent named in the petition shall be the city whose
30 council, board of adjustment, planning board, or other body made the decision that is
31 being appealed. If the petitioner is not the applicant before the council, board of
32 adjustment, or planning board whose decision is being appealed, the petitioner shall
33 name that applicant as a respondent. Any petitioner may, but need not, also name as a
34 respondent any person who participated in the hearing before the council, board of
35 adjustment, or planning board.

36 (e) Writ of Certiorari. – Upon filing the petition, the petitioner shall present the
37 petition and a proposed writ of certiorari to the clerk of court of the county in which the
38 matter arose. The writ shall direct the respondent city to prepare and certify to the court
39 the record of proceedings below within a specified date. The writ shall also direct that
40 the petitioner shall serve the petition and the writ upon each respondent named therein
41 in the manner provided for service of a complaint under Rule 4j of the Rules of Civil
42 Procedure. No summons shall be issued. The clerk shall issue the writ without notice to
43 the respondent or respondents if the petition has been properly filed and the writ is in
44 proper form. A copy of the executed writ shall be filed with the court.

1 (f) Answer to the Petition. – The respondent may, but need not, file an answer to
2 the petition, except that, if the respondent contends that any petitioner lacks standing to
3 bring the appeal, that contention must be set forth in an answer served on all petitioners
4 at least 30 days prior to the hearing on the petition.

5 (g) Intervention. – Rule 24 of the Rules of Civil Procedure shall govern motions
6 to intervene as a petitioner or respondent in an action initiated under this section, except
7 that:

8 (1) If the petitioner is not the applicant before the council, board of
9 adjustment, or planning board whose decision is being appealed and
10 the petitioner fails to name the applicant as a respondent, then the
11 applicant may intervene as a matter of right.

12 (2) Except as otherwise stated in subdivision (1) of this subsection, an
13 intervenor must demonstrate that a reasonable person in the position of
14 the intervenor could reasonably believe that the outcome of the appeal
15 could adversely affect the interests of that person in some real,
16 substantial, and concrete way that is demonstrably different in nature
17 or degree than the manner in which the decision affects members of
18 the general public.

19 (h) The Record. – The record shall consist of all documents and exhibits
20 submitted to the council, planning board, or board of adjustment whose decision is
21 challenged, together with the minutes of the meeting or meetings at which the matter
22 appealed was considered. Upon request of any party, the record shall also contain an
23 audio or videotape of the meeting or meetings at which the matter appealed was
24 considered if such a recording was made. Any party may also include in the record a
25 transcript of the proceedings, which shall be prepared at the cost of the party choosing
26 to include it. The parties may agree, or the court may direct, that matters unnecessary to
27 the court's decision be deleted from the record or that matters other than those specified
28 herein be included. The record shall be bound and paginated or otherwise organized for
29 the convenience of the parties and the court. A copy of the record shall be served by the
30 municipal respondent upon all petitioners within three days after it is filed with the
31 court.

32 (i) Hearing on the Record. – The court shall hear and decide all issues raised by
33 the petition by reviewing the record submitted in accordance with subsection (h) of this
34 section, except that the court may, in its discretion, allow the record to be supplemented
35 with affidavits, testimony of witnesses, or documentary or other evidence if and to the
36 extent that the record is not adequate to allow an appropriate determination of the
37 following issues:

38 (1) Whether a petitioner or intervenor has standing.

39 (2) Whether, as a result of bias or conflict of interest, the decision-making
40 body was not sufficiently impartial to comply with due process
41 principles.

42 (3) Whether the decision-making body erred for the reasons set forth in
43 sub-subdivisions a. and b. of subdivision (1) of subsection (j) of this
44 section.

1 (j) Scope of Review. –

2 (1) When reviewing the decision of a city council, board of adjustment, or
3 planning board under the provisions of this section, the trial court shall
4 ensure that the rights of petitioners have not been prejudiced because
5 the decision-making body's findings, inferences, conclusions, or
6 decisions were:

7 a. In violation of constitutional provisions, including, but not
8 limited to, those protecting procedural due process rights.

9 b. In excess of the statutory authority conferred upon the
10 municipality or the authority conferred upon the
11 decision-making body by ordinance.

12 c. Inconsistent with applicable procedures specified by statute or
13 ordinance.

14 d. Affected by other error of law.

15 e. Unsupported by substantial competent evidence in view of the
16 entire record.

17 f. Arbitrary or capricious.

18 (2) When the issue before the trial court is whether the decision-making
19 body below erred in the interpretation of an ordinance, the trial court
20 may review that issue de novo, provided that the court shall give due
21 consideration to the construction adopted by those entities charged
22 with execution and administration of the ordinance where that
23 construction has been thoroughly considered and consistently applied
24 by those entities.

25 (3) The term "competent evidence," as used in this subsection, shall not
26 preclude reliance by the decision-making body on evidence that would
27 not be admissible under the rules of evidence as applied in the trial
28 division of the General Court of Justice if (i) the evidence was
29 admitted without objection, or (ii) the evidence appears to be
30 sufficiently trustworthy and was admitted under such circumstances
31 that were reasonable for the decision-making body to rely upon it.
32 Notwithstanding the foregoing, the term "competent evidence" shall
33 not be deemed to include the opinion testimony of lay witnesses (i.e.,
34 persons not qualified by reason of specialized knowledge, skill,
35 experience, training, or education to testify as an expert) as to matters
36 about which only expert testimony would generally be admissible
37 under the rules of evidence. By way of illustration without limitation,
38 the term "competent evidence" shall not be deemed to include the
39 opinion of lay witnesses as to whether (i) the use of property in a
40 particular way would affect the value of other property, or (ii) the
41 increase in vehicular traffic resulting from a proposed development
42 would pose a danger to the public safety.

43 (k) Decision of the Trial Court. – Following its review of the decision-making
44 body in accordance with subsection (j) of this section, the trial court may affirm the

1 decision, reverse the decision and remand the case with appropriate instructions, or
2 remand the case for further proceedings. If the court does not affirm the decision below
3 in its entirety, then the court shall be guided by the following in determining what relief
4 should be granted to the petitioners:

5 (1) If the court concludes that the error committed by the decision-making
6 body is procedural only, the court may remand the case for further
7 proceedings to correct the procedural error.

8 (2) If the court concludes that the decision-making body has erred by
9 failing to make findings of fact such that the court cannot properly
10 perform its function, then the court may remand the case with
11 appropriate instructions so long as the record contains substantial
12 competent evidence that could support the decision below with
13 appropriate findings of fact. However, findings of fact are not
14 necessary when the record sufficiently reveals the basis for the
15 decision below or when the material facts are undisputed and the case
16 presents only an issue of law.

17 (3) If the court concludes that the decision below is not supported by
18 substantial competent evidence in the record or is based upon an error
19 of law, then the court may remand the case with an order that directs
20 the council, board of adjustment, or planning board to take whatever
21 action should have been taken had the error not been committed or to
22 take such other action as is necessary to correct the error. Without
23 limiting the generality of the foregoing, (i) if the court concludes that a
24 permit was wrongfully denied because the denial was not based on
25 substantial competent evidence or was otherwise based on an error of
26 law, the court shall remand with instructions that the permit be issued;
27 and (ii) if the court concludes that a permit was wrongfully issued
28 because the issuance was not based on substantial competent evidence
29 or was otherwise based on an error of law, the court shall remand with
30 instructions that the permit be revoked.

31 (l) Ancillary Injunctive Relief. – Upon motion of a party to a proceeding under
32 this section, and under appropriate circumstances, the trial court may issue an injunctive
33 order requiring any other party to that proceeding to take certain action or refrain from
34 taking action that is consistent with the court's decision on the merits of the appeal. By
35 way of illustration without limitation, if the court affirms the decision of a board of
36 adjustment that a petitioner is in violation of a zoning ordinance, the court may issue an
37 order enjoining the petitioner from continuing the violation."

38 **SECTION 1.(b)** Article 18 of Chapter 153A of the General Statutes is
39 amended by adding a new section to read:

40 "**§ 153A-349. Appeals in the nature of certiorari.**

41 Whenever appeals to superior court by proceedings in the nature of certiorari are
42 authorized under the provisions of this Article, the provisions of G.S. 160A-393 shall be
43 applicable to those appeals. In this context, the term "city council," as used in

1 G.S. 160A-393, shall be deemed to refer to the "board of commissioners," and the term
2 "city" or "municipality" shall be deemed to refer to the "county."

3 **SECTION 2.(a)** Article 19 of Chapter 160A of the General Statutes is
4 amended by adding a new section to read:

5 "**§ 160A-377. Appeals of decisions on subdivision plats.**

6 (a) When a subdivision ordinance adopted under this Part provides that the
7 decision whether to approve or deny a preliminary or final subdivision plat is to be
8 made by a city council or a designated planning board (other than a planning board
9 comprised solely of members of a city planning staff) and the ordinance authorizes the
10 council or planning board to make a quasi-judicial determination in deciding whether to
11 approve the subdivision plat, then the decision of the council or planning board shall be
12 subject to review by the superior court by proceedings in the nature of certiorari. The
13 provisions of G.S. 160A-381(c) and G.S. 160A-393 shall apply to those appeals.

14 (b) When a subdivision ordinance adopted under this Part provides that a city
15 council, designated planning board, or staff member is authorized to make only an
16 administrative or ministerial determination in deciding whether to approve a preliminary
17 or final subdivision plat, then any party aggrieved by that decision may seek to have the
18 decision reviewed by filing an action in superior court seeking appropriate declaratory
19 or equitable relief. Such an action must be filed within the time frame specified in
20 G.S. 160A-381(c) for petitions in the nature of certiorari.

21 (c) For purposes of this section, an ordinance shall be deemed to authorize a
22 quasi-judicial determination on a preliminary or final plat application if the ordinance (i)
23 authorizes the council or planning board to decide whether to approve or deny the plat
24 based not only on whether the application complies with the specific requirements set
25 forth in the ordinance, but also whether it complies with one or more generally stated
26 standards requiring a discretionary determination to be made by the council or planning
27 board; or (ii) authorizes the council or planning board to approve the subdivision plat
28 subject to conditions that impose requirements or limitations on the subdivision beyond
29 those set forth in the ordinance."

30 **SECTION 2.(b)** Article 18 of Chapter 153A of the General Statutes is
31 amended by adding a new section to read:

32 "**§ 153A-336. Appeals of decisions on subdivision plats.**

33 (a) When a subdivision ordinance adopted under this Part provides that the
34 decision whether to approve or deny a preliminary or final subdivision plat is to be
35 made by a board of commissioners or a designated planning board (other than a
36 planning board comprised solely of members of a county planning staff) and the
37 ordinance authorizes the board of commissioners or planning board to make a
38 quasi-judicial determination in deciding whether to approve the subdivision plat, then
39 the decision of the board of commissioners or planning board shall be subject to review
40 by the superior court by proceedings in the nature of certiorari. The provisions of
41 G.S. 153A-340(f) and G.S. 153A-349 shall apply to those appeals.

42 (b) When a subdivision ordinance adopted under this Part provides that a board
43 of commissioners, planning board, or staff member is authorized to make only an
44 administrative or ministerial determination in deciding whether to approve a preliminary

1 or final subdivision plat, then any party aggrieved by that decision may seek to have the
2 decision reviewed by filing an action in superior court seeking appropriate declaratory
3 or equitable relief. Such an action must be filed within the time frame specified in
4 G.S. 153A-340(f) for petitions in the nature of certiorari.

5 (c) For purposes of this section, an ordinance shall be deemed to authorize a
6 quasi-judicial determination on a preliminary or final plat application if the ordinance (i)
7 authorizes the board of commissioners or planning board to decide whether to approve
8 or deny the plat based not only on whether the application complies with the specific
9 requirements set forth in the ordinance, but also whether it complies with one or more
10 generally stated standards requiring a discretionary determination to be made by the
11 board of commissioners or planning board; or (ii) authorizes the board of
12 commissioners or planning board to approve the subdivision plat subject to conditions
13 that impose requirements or limitations on the subdivision beyond those set forth in the
14 ordinance."

15 **SECTION 3.** This act becomes effective January 1, 2008, and applies to
16 actions filed on or after that date.