

# ARTICLE 6 QUASI-JUDICIAL HEARINGS

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## **6.01 Provisions Applicable to All Quasi-Judicial Hearings**

### **6.01.01 General Provisions**

- A.** All hearings of the Board of Adjustment and all quasi-judicial hearings of the Historic Preservation Commission shall be conducted in a quasi-judicial manner as described in this Section 6.01.
- B.** Subject to the specific provisions of Section 6.04 as to appeals, the Board of Adjustment or Historic Preservation Commission (both being referred to in this Section 6.01 as “board”) shall hear and decide every appeal and application within a reasonable time.
- C.** The board may subpoena witnesses and compel the production of evidence at the request of the Town, the applicant, and any person with standing pursuant to the procedures set forth in the board’s Rules of Procedure.
- D.** Administrative Materials. The board packet shall include the Administrator’s analysis of the issues, identifying any information, documents, and adopted plans material to the case. The Administrator’s analysis may also include recommendations as appropriate. The board packet shall be distributed to the members of the board, applicants, or appellants, the landowner if not the applicant or appellant and any other party to the case. Subject to the board’s rulings on any objection, these materials shall be entered as part of the hearing record.
- E.** Each hearing conducted by the board shall provide an opportunity for parties and interested members of the public to testify and offer competent, material, and substantial evidence, but the board may limit the time available for each person offering testimony and may exclude testimony and evidence which is cumulative or redundant.
- F.** Hearings shall be conducted in compliance with the board’s duly adopted Rules of Procedure.
- G.** The Town is considered a party in every hearing before the board.
- H.** 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.

- I. The board may continue any hearing until a subsequent meeting at a specified time, date, and place without further advertisement or notice, and may keep a hearing open to take additional information up to the point a final decision is made.
- J. If a 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 or notice.

**6.01.03 Voting**

- A. The concurring vote of four-fifths of the Board of Adjustment shall be necessary to 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 paragraph, 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.
- B. Once a member is physically present at a board meeting, any subsequent failure to vote shall be recorded as an affirmative vote unless the member has been excused or has been allowed to withdraw from the meeting in accordance with this Section.
- C. A member shall not participate in or vote on any quasi-judicial matter in a manner that would violate affected persons' constitutional rights to an impartial decision maker. Impermissible conflicts include, but are not limited to:
  - 1. A member having a fixed opinion prior to hearing the matter that is not susceptible to change;
  - 2. Undisclosed ex parte communications;
  - 3. A close familial, business, or other associational relationship with an affected person; or
  - 4. A financial interest in the outcome of the matter.
- D. 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.
- E. A member may be allowed to withdraw from the entire remainder of a meeting by majority vote of the remaining members present for any good and sufficient reason other than the member's desire to avoid voting on matters to be considered at that meeting.
- F. Except as authorized in this Section, a motion to allow a member to be excused from voting or excused from the remainder of the meeting is in order only if made by or at the initiative of the member directly affected.

G. A roll call vote shall be taken upon the request of any member.

**6.01.04 Notice of Hearing**

A. The Administrator shall give notice of any hearing of the board as follows:

1. **Contents of Notice:** Every notice shall state the date, time, and place of 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.
2. **Mailed Notice:** Notice shall be mail by depositing in the mail at least 10 days, but not more than twenty-five (25) days, prior to the date of the hearing to:
  - a. The person or entity whose appeal, application, or request is the subject of the hearing;
  - b. The owner of the property that is the subject of the hearing if the owner did not initiate the hearing;
  - c. The owners of all parcels of land abutting the parcel of land that is the subject of the hearing;
  - d. The owners of real property located within 150 feet of the subject lot(s);
  - e. The owners of any real property in a protected district, whose property boundary has triggered application of transitional zone standards; and
  - f. Any other persons who have submitted a written request for notice and intervening parties so long as the request for notice or intervention request have been filed prior to notification being mailed.
3. **Posted Notice:** At least ten (10) days, but not more than twenty-five (25) days prior to the date of the hearing, the Administrator shall also 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. The signs to be posted shall include the date, time and location of the hearing and shall direct the public to detailed information about the hearing.

**6.01.05 Board Packet.** The Administrator 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 the 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.

**6.01.06 Modification of Applications After Distribution of Board Packet Except Appeals of Staff Decisions.**

**A. Modification of Application Between Distribution of the Board Packet and the Board Meeting:**

1. **Modification in Response to Administrator's Recommendation or Request:** An applicant may not significantly modify an application between the distribution of the board packet containing the Staff Report of the case and the board meeting unless the proposed modification is in direct response to a specific request or recommendation by the Administrator.
  - a. A proposed modification, even in response to the Administrator's recommendation or request, shall be submitted to the Administrator prior to the hearing in sufficient time for the Administrator to fully evaluate the impacts of the proposed modification.
  - b. If the Administrator determines that the applicant did not submit the proposed modification prior to the hearing in sufficient time for the Administrator to fully evaluate the impacts of the proposed modification, the applicant will be given the choice between the hearing being rescheduled until the next regularly scheduled meeting of the board or withdrawal of the proposed modification.
2. **Insignificant or Minor Modifications in an Application:** An applicant may make a non-substantial modification to an application between the distribution of the board packet containing the Staff Report and the scheduled hearing.
  - a. A proposed non-substantial modification shall be submitted to the Administrator prior to the hearing in sufficient time for the Administrator to fully evaluate the impacts of the proposed modification. However, if an applicant proposes an insignificant modification to an application during the scheduled hearing, and the Administrator indicates that adequate time exists to evaluate the insignificant modification can be fully evaluated with or without a recess by the board, the modified application may be acted upon by the board.
  - b. If the Administrator determines that the applicant did not submit the proposed modification prior to the hearing in sufficient time for the Administrator to fully evaluate the impacts of the proposed modification, the applicant will be given the choice between the hearing being rescheduled until the next regularly scheduled meeting of the board or withdrawal of the proposed modification.
3. **Major Modification of an Application:** An applicant seeking to significantly modify an application between the distribution of the board packet containing the Staff Report of the case and the board meeting, whether in response to Staff recommendations or self-initiated, must file a new application.

4. **Determination as to whether a Proposed Modification is Insignificant, Minor or Major:** The Planning Director shall make the determination as to whether a modification is “insignificant”, “minor” or “major” in accordance with Section 4.16. The determination of the Planning Director shall constitute the final decision of the Town and is not appealable.

**B. Modification of Application in Response to Concerns & Issues Raised at the Hearing**

1. In response to questions or comments by persons appearing at the hearing or to suggestions or recommendations by the board an applicant may agree to modify an application, including the plans and specifications submitted.
2. Unless such modification is so substantial or extensive that the board cannot reasonably be expected to perceive the nature and impact of the proposed change without revised plans before it, the board may approve the application with the condition that the special use permit will not be issued until plans reflecting the agreed upon changes are submitted and approved by the Administrator.

**6.01.07 Testimony and Documentary Evidence**

- A. Oaths:** All persons who present testimony to the board shall be sworn. The Chair of the board or any member temporarily acting as Chair, and the Clerk to the board are authorized to administer oaths to witnesses in any matter coming before the board.
1. Any person who, while under oath during a proceeding before the board, willfully swears falsely is guilty of a Class 1 misdemeanor.
- B. Speakers:** At any meeting of the board, when the meeting is opened for public testimony:
1. Speakers shall be recognized in the order in which they have signed up unless a different order is requested by the board and agreed upon by the speakers.
  2. Each speaker wishing to address the board shall state their name and then shall be sworn.
  3. All persons addressing the board shall be treated respectfully by other persons in attendance at the meeting, and all speakers shall conduct themselves with proper decorum. The board may address in its Rules of Procedures under what circumstances the presiding officer or board may direct that a person who violates proper decorum may be removed, but the Chair shall have inherent authority to have removed a person who threatens other participants or member of the board as well as any person whose behavior is so disruptive as to prevent the board from continuing the hearing.
- C. Competent Evidence:** The board may address the standards for authenticating and admitting evidence in its duly adopted Rules of Procedure.

1. The rules of evidence as applied in the trial division of the General Court of Justice do not strictly apply. However, no evidence shall be considered unless:
  - a. The evidence appears to be sufficiently trustworthy and was admitted under such circumstances that it was reasonable for the decision-making board to rely upon it; or
  - b. The evidence was admitted without objection,
2. To be considered “competent”, testimony shall generally meet the following:
  - a. The witness has personal knowledge of the subject of the testimony; and
  - b. The subject of the testimony is relevant to an issue involved in the hearing.
3. To be considered “competent”, documentary evidence shall generally require authentication. A document is authenticated by one of the following methods:
  - a. Certification, by signature, title and seal, of the person who is the custodian of the records; or
  - b. Information within the document which establishes its origin and reliability; or
  - c. Testimony by a person with personal knowledge of the document’s origin and reliability.
4. If a copy is used in place of an original, testimony must be offered by a witness establishing the date and author of the document and confirming that such document is a true and accurate copy of the original document.
5. Photographs must be accompanied by testimony as to the date and place where the photograph was taken and a statement that the photograph fairly and accurately represents the subject is depicted.
6. Notwithstanding the forgoing, and regardless of the lack of a timely objection, the term “competent evidence” shall not be deemed to include the opinion testimony of lay witnesses as to any of the following, and such testimony shall be deemed incompetent:
  - a. The use of property in a particular way would affect the value of other property; or
  - b. The increase in vehicular traffic resulting from a proposed development would pose a danger to the public safety; or
  - c. Matters about which only expert testimony would generally be admissible under the rules of evidence.

**6.01.08 Burden of Presenting Evidence; Burden of Persuasion**

- A. Evidence:** The burden of presenting evidence shall be upon the party or parties urging a particular position. However, at a minimum, the applicant or appellant must provide

substantial competent and credible evidence which addresses every material issue to be determined by the board.

- B. Credibility:** In making its decision the board may explicitly or implicitly make credibility determinations regarding the testimony of any witness, and where the board has concluded that the testimony of a particular witness is incredible or otherwise unreliable, it is not bound to accept that testimony and may not only reject it but, if warranted, may make a contrary finding from the facts asserted.
- C. Persuasion:** The burden of persuasion shall be on the applicant or appellant or other party or person advocating a particular position.

**6.01.09 Decisions of the Board**

- A.** The board's decision shall resolve all contested facts and their application to the applicable standards.
- B.** All findings and conclusions made by the board shall be based upon competent, material, and substantial evidence presented at the hearing, including all information in the board packet, unless objected to by a party and excluded by the board.
- C.** Any conditions imposed by the board that are essential to the board's approval of the application must be consented to in writing by the landowner and the permit applicant prior to final approval of the board's written decision.
- D.** Each decision, including any conditions adopted by the board, shall be reduced to writing, reflect the board's determination of contested facts and their application to the applicable standards, and be approved by the board and signed by the Chair or other authorized member of the board.
- E.** The decision shall be effective upon approval by the board, signature by the filing with the Clerk of the board.
- F.** The decision shall be delivered by personal delivery, electronic mail, or by first class mail to the applicant, landowner, and to any other person appearing as a party before the board, and any person who has submitted a written request for a copy prior to the date the decision becomes effective.
  - 1. The Clerk of the board shall certify that proper notice shall be made.
- G.** Any conditions attached to an approval shall be entered on the face of any necessary zoning permit landowner.

**6.01.10 Reconsideration of Board Action**

- A.** Whenever the board denies an application on any basis other than the failure of the applicant to submit a complete application, such action may not be reconsidered by the board at a later time unless the applicant clearly demonstrates that:
  - 1. Circumstances affecting the subject property have substantially changed, or

2. New information is available that could not, with reasonable diligence, have been presented at a previous hearing and is submitted to the Administrator within thirty (30) days of the denial.
  - a. The submission of purported new information under this Section shall not, however, toll the period during which an applicant may seek judicial review of the denial and does not extend the period within which an appeal must be taken.
- B. Notwithstanding Subsection 6.01.10(A), the board may at any time consider a new application affecting the same property as an application previously denied.
  1. A new application is one that differs in some substantial way from the one previously considered.

(Ord. PL00147-010417, 02-16-201; Ord, PL02335-030719, 05-09-2019; Ord. PL04196-090820, 07-01-2021; Ord. PL04727-050721, 07-01-2021)

**6.02 Board of Adjustment Consideration of Special Use Permit, Transitional Zones and Major Subdivision Preliminary Plat Applications**

**6.02.01** An applicant for a special use permit or major subdivision preliminary plat approval must produce substantial competent and credible evidence demonstrating each of the following:

- A. The application is complete;
- B. If completed as proposed, the development or subdivision:
  1. Will comply with the requirements of this Ordinance;
  2. Will not materially endanger the public health or safety;
  3. Will not substantially injure the value of adjoining or abutting property;
  4. Will be in harmony with the area in which it is to be located;
  5. Will be in general conformity with the Comprehensive Plan and all other relevant plans officially adopted by the Town; and
  6. In cases involving transitional zones, meets the standards of Subsection 6.02.02.

**6.02.02 Transitional Zones**

- A. Transitional zones are hereby established and may apply to the procedures and evidence required for development in any existing zoning districts. The land within a transitional zone may be used as permitted in the underlying district, but only pursuant to the procedures and standards applicable to these zones, as created under this Section.
- B. Transitional zones attach to each R1, R1A, RR, R2, and RA district, (hereinafter, “the protected district”) without regard to the current uses in that district. They are established for the purpose of creating special protections for residents of protected



districts from the potential adverse impacts of certain potentially incompatible nearby development, based upon the legislative finding that the general requirements of this ordinance have not been sufficient to protect the residents of such protected districts from the adverse consequences of such developments and that the variety of circumstances which may need to be ameliorated in the face of such development are not amenable to a “one size fits all” approach.

- C.** The location of a transitional zone shall be determined as follows.
1. For designated development in an adjacent zone, the transitional zone shall be measured from the closest point of the area used or disturbed for the development to the boundary of any protected district as measured from all points along that boundary, the nearest point controlling applicability of this Subsection.
  2. For development subject to transitional zones within the protected districts, the transitional zone shall be measured from the closest point of the area used or disturbed for the development to the boundary of any protected lot, the nearest point controlling applicability of this Subsection.
- D.** The size of the transitional zone varies with the type of development proposed. The following are the transitional zones as shown in the Table of Principal Uses, Table of Accessory Uses, and Table of Temporary Uses:
1. T50: transitional zone equal to fifty feet (50')
  2. T75: transitional zone equal to seventy-five feet (75')
  3. T125: transitional zone equal to 125 feet
  4. T200: transitional zone equal to 200 feet
  5. T300: transitional zone equal to 300 feet
- E.** Whenever a development approval is sought to authorize development within a transitional zone, and any area used or disturbed for the development will be located within the pertinent transitional zone, a special use permit is required. If any portion of the area used or disturbed for the development falls within the transitional zone the standards of this Section shall apply to the entire development. The Board may deny the application if the requirements of this Section are not met, or it may place reasonable conditions on the development, in addition to such conditions as may otherwise be reasonably imposed, specifically designed to mitigate the potential impacts identified herein.
1. Exemption: Development within an approved Industrial Park shall not be subject to the requirements of Subsection 6.02.02.
- F.** In addition to all other requirements of this ordinance which pertain to the proposed development, including but not limited to those relating to the location and placement of structures, the type and quantity of landscape buffering, the type and location of

lighting, and the size of setbacks, in order to meet the requirements of this Section, the applicant must produce substantial competent and credible evidence demonstrating the following:

1. That the planned development will effectively and to the greatest degree reasonably possible, mitigate the impacts of the proposed development upon the protected district, including but not limited to:
  - a. noise impacts;
  - b. light impacts; and
  - c. any other predictable negative effect, including but not limited to:
    - i. negative visual effects;
    - ii. negative traffic effects; and
    - iii. negative health effects.

**G.** Because of the variable topography and characteristics of particular tracts of land within the Town’s zoning jurisdiction, the solutions incorporated into the development plan by the applicant must be tailored to specifically address the characteristics of the particular location in relation to the protected district. Only if an applicant can demonstrate by clear and convincing evidence that the normal requirements of the ordinance are themselves sufficient to protect the protected district may the application be approved without additional measures being incorporated into the site-specific development plan.

**6.02.03 Board of Adjustment Action on Special Use Permits and Major Subdivision Preliminary Plat Applications**

**A. Conclusions of Law:** In deciding whether to approve or deny an application for a special use permit or a major subdivision preliminary plat, the Board shall proceed according to the following format:

1. The Board shall determine whether the application is complete.
  - a. The burden of presenting a complete application to the Board shall be upon the applicant. The fact that the Administrator believes the application is complete or the applicant has submitted all requested supplemental documentation to the Administrator shall not bind the Board to conclude that the application is complete. The Board is the final arbiter of whether an application is complete.
  - i. If the Board concludes that the application is incomplete in a hearing conducted following a demand by the applicant for immediate action by the Board pursuant to Subsection 4.06.02(A) or the applicant refuses to provide the information determined by the Board necessary to complete the application, the application shall be denied.

- ii. If the Board otherwise concludes that the application is incomplete the Board may deny the application or may give the applicant an appropriate opportunity to complete the application if the applicant expresses an interest in timely supplementing the application to make it complete.
      - A. A motion to continue the hearing in order to afford the applicant an opportunity to complete the application shall state the location, date and time of the reconvened hearing.
      - B. A case continued under these circumstances shall not require the same Board identity at the reconvened hearing, as the applicant will be expected to present his full case at that time.
    - b. If an application includes features which must be approved by another Town board, commission or department, then such approvals must be obtained prior to the hearing.
  - 2. If the Board concludes that the application is complete, the Board next shall consider whether the application complies with all of the applicable requirements of this Ordinance. If the Board concludes that an element of the application does not fully comply with this Ordinance but has a minimal effect on the issues before the Board, it may conditionally approve the application. If the Board concludes that the application does not comply with all applicable requirements of this Ordinance and conditions will not sufficiently cure the deficiencies or the Board concludes that the deficiency is material to the Board's approval, then the Board shall deny the application.
  - 3. If the Board concludes that the application is complete and will comply with this Ordinance if completed as proposed, then before it may approve the permit or subdivision it must find all the following based upon substantial competent and credible evidence in the record:
    - a. The development or subdivision as proposed will not materially endanger the public health or safety, and
    - b. The development or subdivision as proposed will not substantially injure the value of adjoining or abutting property, and
    - c. The development or subdivision as proposed will be in harmony with the area in which it is to be located, and
    - d. The development or subdivision as proposed will be in general conformity with the Comprehensive Plan and all other relevant plans officially adopted by the Town.
- B. Conditions:** Even when a development or subdivision meets the criteria above, the Board may still impose conditions on an approval.

1. All conditions shall be reasonable and appropriate and shall be related to the predicted impacts of the development.
2. Unless the Board explicitly orders otherwise, every approval is conditioned upon the development being completed in accordance with the plans submitted by the applicant, the commitments and representations concerning the proposed development made by the applicant and representatives at the public hearing, and final conformity with all requirements of the UDO.
3. The Board may attach to a special use permit a condition limiting the permit to a specified duration and in appropriate situations may provide additional process including another public hearing after the special use has begun to evaluate unanticipated impacts, provided such a condition shall not be employed to terminate a special use for which substantial construction or reconstruction has occurred.
4. Without limiting the foregoing, conditions should normally require measures to address impacts on the:
  - a. public health or safety, and
  - b. values of adjoining or abutting properties, and
  - c. harmony with the area in which it is located, and
  - d. in the case of Transitional Zones, noise, light, and other predictable negative effects such as visual, traffic and health.
5. Conditions imposed under this section shall not include requirements which the town does not have authority under statute to regulate nor requirements for which the courts have held to be unenforceable if imposed directly by a municipality, 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.

**6.02.04 Voting:** The adoption of each conclusion of law under Subsection 6.02.03(A), which is required in order to issue the permit, authorize the preliminary plat or deny the application shall be by majority vote. Should any conclusion of law fail to be adopted, the application shall be denied.

**6.02.05** Special Use Permits shall be recorded at the office of the Watauga County Register of Deeds.

(Ord. 20140384, 08-18-2014; Ord. 20150272, 06-18-2015; Ord. PL01298-020218, 04-19-2018; Ord. PL02335-030719, 05-09-2019; Ord. PL04196-090820, 07-01-2021; Ord. PL04727-050721, 07-01-2021)

**6.03 Board of Adjustment Consideration of Variance Requests**

**6.03.01** A variance is specific to the lot and to the development for which it is requested and neither the nonconforming use of lands, buildings, or structures in the same zoning district; nor the permitted use of lands, buildings or structures in other zoning districts are grounds for the granting of a variance.

**6.03.02** A variance granted must be specific and the minimum variance required.

**6.03.03** Financial hardship alone does not constitute grounds for the granting of a variance.

**6.03.04** The fact that a lot may be utilized for greater profit if the variance is granted is not grounds for the granting of a variance.

**6.03.05** No change in permitted uses may be authorized by variance.

**6.03.06** A variance may not enlarge or expand nonconformities.

**6.03.07** In order for a variance to be granted, the applicant must produce substantial competent and credible evidence to show, and the Board of Adjustment must conclude, the following:

- A.** Unnecessary hardship would result from the strict application of the Ordinance; however, it shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property; and
- B.** The hardship results from conditions that are peculiar to the property such as location, size or topography; however, 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; and
- C.** The hardship did not result from actions taken by the applicant or the landowner however 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.
- D.** The requested variance is consistent with the spirit, purpose, and intent of the Ordinance, such that public safety is secured and substantial justice is achieved.

**6.03.08** In granting variances, the Board may impose appropriate conditions reasonably related to the condition or circumstance that give rise to the variance and which will ensure that the use of the property to which the variance applies will be as compatible as practicable with the surrounding properties.

**6.03.09** A variance may be granted for a limited or indefinite duration.

**6.03.10 Water Supply Watershed Variances**

- A.** Before a Water Supply Watershed Variance is heard by the Board, the Administrator shall notify in writing each local government having jurisdiction in the watershed as well as any entity using the watershed for water consumption.

1. Such notice shall include a description of the variance being requested. Local governments receiving notice of the variance request may submit comments to the Administrator prior to a decision by the Watershed Review Board, which for this purpose shall be the Board of Adjustment. Such comments shall become a part of the record.
  2. In considering the decision whether to recommend that a major variance from the requirements of Article 29 be granted, the Board shall apply the criteria of Subsection 6.03.07.
  3. The Board may place appropriate conditions on the recommended approval of the major variance but they must be reasonably related to the variance.
- B.** If the Board recommends that a major variance be granted, the Administrator shall promptly prepare a preliminary record of the hearing and transmit it to the North Carolina Environmental Management Commission, (hereafter “EMC”) for its consideration. The preliminary record shall include:
1. The variance application; and
  2. The hearing notices; and
  3. The evidence presented; and
  4. Motions, offers of proof, objections to evidence, and rulings on them; and
  5. Proposed findings and exceptions; and,
  6. The proposed decision, including all recommended conditions. Proposed conditions should be appropriate and reasonably related to the variance.
- C.** The Board shall take final action in accordance with the decision by the EMC:
1. If the EMC approves the variance as proposed, the Administrator shall prepare a final decision granting the recommended major variance and the Board shall adopt the decision at its next meeting.
  2. If the EMC approves the variance but makes modifications to the recommended major variance, the Administrator shall prepare a final decision, in accordance with the action of the EMC, and the Board shall adopt the modified decision at its next meeting.
  3. In the EMC denies the recommend major variance the Administrator shall prepare a final decision in accordance denying the major variance, and the Board shall adopt the denial at its next meeting.

**6.03.11 Special Flood Hazard Area Variance**

- A.** A Special Flood Hazard Area variance may be issued for:

1. The repair or rehabilitation of historic structures upon the determination that the proposed repair or rehabilitation will not preclude the structure's continued designation as a historic structure and that the variance is the minimum necessary to preserve the historic character and design of the structure;
  2. Functionally dependent facilities if determined to meet the definition as stated in Article 34, provided such facilities are protected by methods that minimize flood damages during the base flood and create no additional threats to public safety; or
  3. Any other requirements of Article 30.
- B. Limitations on Variances:**
1. Variances shall not be issued when the variance will make the structure in violation of other Federal, State, or local laws, regulations, or Ordinances.
  2. Variances shall not be issued within any designated floodway or non-encroachment area if the variance would result in any increase in flood levels during the base flood discharge.
  3. Variances shall only be issued upon a determination that the variance is the minimum necessary, considering the flood hazard, to afford relief.
  4. Variances shall only be issued prior to development approval.
  5. Variances shall only be issued upon:
    - a. A showing of good and sufficient cause;
    - b. A determination that failure to grant the variance would result in exceptional hardship; and
    - c. A determination that the granting of a variance will not result in increased flood heights, additional threats to public safety, or extraordinary public expense, create nuisance, cause fraud on or victimization of the public, or conflict with existing local laws or Ordinances.
- C.** A written report addressing each of the factors in 6.03.11(D) shall be submitted by the applicant with the application for a variance.
- D.** The Board shall consider all technical evaluations, all relevant factors, all standards specified in other Sections of Article 30, and:
1. The danger that materials may be swept onto other lands to the injury of others;
  2. The danger to life and property due to flooding or erosion damage;
  3. The susceptibility of the proposed facility and its contents to flood damage and the effect of such damage on the individual owner;
  4. The importance of the services provided by the proposed facility to the community;

5. The necessity to the facility of a waterfront location as a functionally dependent facility, where applicable;
  6. The availability of alternative locations, not subject to flooding or erosion damage, for the proposed use;
  7. The compatibility of the proposed use with existing and anticipated development;
  8. The relationship of the proposed use to the comprehensive plan and floodplain management program for that area;
  9. The safety of access to the property in times of flood for ordinary and emergency vehicles;
  10. The expected heights, velocity, duration, rate of rise, and sediment transport of the floodwaters and the effects of wave action, if applicable, expected at the site; and
  11. The costs of providing governmental services during and after flood conditions including maintenance and repair of public utilities and facilities such as sewer, gas, electrical and water systems, and streets and bridges.
- E.** Upon consideration of the factors listed in Subsection 6.03.11(D) and the purposes of this Article 30 Flood Damage Prevention, the Board may attach such conditions to the granting of variances as it deems necessary to further the purposes and objectives of Article 30.
- F.** Any applicant to whom a variance is granted shall be given written notice specifying the difference between the Base Flood Elevation (BFE) and the elevation to which the structure is to be built and that such construction below the BFE increases risks to life and property, and that the issuance of a variance to construct a structure below the BFE will result in increased premium rates for flood insurance up to \$25 per \$100 of insurance coverage. Such notification shall be maintained with a record of all variance actions, including justification for their issuance.
- G.** The Floodplain Administrator shall maintain the records of all appeal actions and report any variances to the Federal Emergency Management Agency and the State of North Carolina upon request.

**6.03.12** **Voting:** The adoption of each conclusion of law under Subsection 6.03.07 and the granting of a variance shall require a four-fifths vote of the Board. Should any conclusion of law receive less than a four-fifths vote, the variance shall be denied.

**6.03.13** Variances shall be recorded at the office of the Watauga County Register of Deeds.

(Ord. PL02335-030719, 05-09-2019; Ord. PL04727-050721, 07-01-2021)

#### **6.04 Appeals of Administrative Decisions**

**6.04.01** Administrative decisions on applications for minor work may be appealed to the Historic Preservation Commission.



**6.04.02** The Board of Adjustment shall hear and decide appeals of all other administrative decisions made by staff including decisions related to erosion and sedimentation control and stormwater control.

**6.04.03** An appeal is taken by filing a notice of appeal with the Planning and Inspections Department on the prescribed form, accompanied by the required fee. The notice of appeal shall state the grounds for the appeal, which should generally be sufficient to allow for a thorough understanding by the board of the decision appealed.

**A.** An appeal may be filed by any of the following:

1. A person who has an ownership interest in the property that is the subject of the decision being appealed.
2. A person who has a leasehold interest in the property that is the subject of the decision being appealed.
3. A person who has an interest created by easement, restriction or covenant in the property that is the subject of the decision being appealed.
4. A person who has an option or contract to purchase the property that is the subject of the decision being appealed.
5. A person who was the applicant for the decision in question.
6. Any other person who will suffer special damages as the result of the decision being appealed.
7. An incorporated or unincorporated association to which owners or lessees of property in a designated area belong by virtue of their owning or leasing property in that area, or an association otherwise organized to protect and foster the interest of the particular neighborhood or local area, so long as at least one of the members of the association would have standing as an individual to challenge the decision being appealed, and the association was not created in response to the particular development or issue that is the subject of the appeal.

8. The Town.

**B.** An appeal of an administrative decision, including the imposition of penalties, must be taken within thirty (30) days after the date of the receipt of the notice of the determination in the case of the owner or the applicant, or thirty (30) from actual or constructive notice by any other person with standing to appeal.

1. Delivery by first-class mail shall be deemed received on the third business day following deposit of the item for mailing with the United States Postal Service, except that an earlier date can be established by a return receipt for a certified mail notice. Delivery by electronic mail shall be deemed received on the date sent.
2. Constructive notice shall include, but shall not be limited to, any visible signs of the initiation of construction work on a site.

3. It shall be conclusively presumed that all persons with standing to appeal have constructive notice of the decision from the date a sign containing the words "Zoning Decision" or "Subdivision Decision" in letters at least six inches (6") high and identifying the means to contact an official for information about the decision is prominently posted on the property that is the subject of the decision, provided the sign remains on the property for at least ten (10) days. Any such posting shall be the responsibility of the landowner or applicant, and verification of the posting shall be provided to the official who made the decision. Posting of signs however is not required.

**6.04.03** Once the appeal has been filed, the Administrator shall schedule a public hearing at the first available meeting and give public notice in accordance with Subsection 6.01.04.

- A. The Administrator shall prepare a report detailing the facts relevant to the decision and shall transmit to the board all documents and exhibits constituting the record of the decision from which the appeal 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.

**6.04.04** **Appeal Stays Enforcement Action:**

- A. An appeal of a decision of violation under Subsection 12.01.01 stays enforcement of the action appealed from and accrual of any fines assessed during the pendency of the appeal unless the Administrator who made the decision certifies to the Board after notice of appeal has been filed:
  1. That because of the facts stated in an affidavit, a stay would cause imminent peril to life or property, or
  2. Because the violation is transitory in nature, a stay would seriously interfere with enforcement of the Ordinance.
- B. The appellant shall be notified of the Administrator's certification.
- C. Following certification, enforcement proceedings shall not be stayed except by a restraining order, which may be granted by a court.
- D. If enforcement proceedings are not stayed, the appellant may file with the Administrator a request for an expedited hearing of the appeal.
  1. The Board shall meet to hear the appeal within fifteen (15) days after such a request is filed.
- E. 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 development 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 development permit applications or building permits affected by the issue being appealed.

- F. The certification and stay procedures of this Section shall not apply with regard to the pursuit of criminal charges where appropriate.

**6.04.05**     **Deviations from Matters Presented in Notice of Appeal:** The appellant shall not be limited at the hearing to matters stated in the notice of appeal. If any party or the Town would be unduly prejudiced by the presentation of matters not presented in the notice of appeal, the board shall continue the hearing.

**6.04.06**     **Scope of Hearing:** The hearing shall be based on the record below and the scope of review shall be as follows:

- A. The board shall ensure that the rights of the appellant have not been prejudiced because the Administrator’s findings, inferences, conclusions, or decisions were:
  - 1. In violation of constitutional provisions, including those protecting procedural due process rights.
  - 2. In excess of the statutory authority conferred upon the Town by ordinance.
  - 3. Inconsistent with applicable procedures specified by statute or ordinance.
  - 4. Affected by other error of law.
  - 5. Unsupported by substantial competent evidence in view of the entire record.
  - 6. Arbitrary or capricious.
- B. When the issue before the board is whether the Administrator erred in interpreting an ordinance, the board shall review that issue de novo. The board shall consider the interpretation of the Administrator, but is not bound by that interpretation, and may freely substitute its judgment as appropriate.

**6.04.07**     The parties to an appeal that has been made under this Section may agree to mediation or other forms of alternative dispute resolution. If all parties confirm they wish to engage in alternative dispute resolution, the board shall adjourn the hearing to give them a reasonable opportunity to do so.

**6.04.08**     **Decision**

- A. The board may reverse or affirm, wholly or in part, 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 Administrator who made the decision.
- B. When hearing an appeal regarding the amount of a civil penalty, the board shall consider the following to the extent relevant, in addition to such other circumstances as the board deems relevant:

1. The timing and effectiveness of any action taken by the appellant to remedy the situation;
  2. The cost of the action required to remedy the violation;
  3. The timeframe of any previous violation and the similarity of the previous violation to the current violation committed by the appellant; and
  4. Penalties incurred as a result of delay in the appellant's obtaining a determination with respect to the violation as a result of the Board's meeting schedule.
- C. The board may reduce the penalty imposed if it determines:
1. That the appellant has acted in good faith, and
  2. That the failure of the appellant to correct a violation is the result of circumstances beyond the appellant's control, or
  3. That there are other circumstances which make the amount of the presumptive civil penalty unfair under in that particular case.

**6.04.09 Voting:** The decision shall be by majority vote.

(Ord. PL01810-082218, 10-16-2018; Ord. PL04727-050721, 07-01-2021)

**6.05 Appeal of Decisions of the Historic Preservation Commission**

**6.05.01** The Board of Adjustment shall hear and decide appeals of any decision by the Historic Preservation Commission granting or denying a Certificate of Appropriateness ("COA").

**6.05.02** An appeal of the issuance or denial of a COA is initiated by a person timely filing a Notice of Appeal, in accordance with Article 4, accompanied by the required fee.

- A. An appeal may be filed by any of the following:
1. A person who has an ownership interest in the property that is the subject of the decision being appealed.
  2. A person who has a leasehold interest in the property that is the subject of the decision being appealed.
  3. A person who has an interest created by easement, restriction or covenant in the property that is the subject of the decision being appealed.
  4. A person who has an option or contract to purchase the property that is the subject of the decision being appealed.
  5. A person who was the applicant for the decision in question.
  6. Any other person who will suffer special damages as the result of the decision being appealed.
  7. An incorporated or unincorporated association to which owners or lessees of property in a designated area belong by virtue of their owning or leasing property

in that area, or an association otherwise organized to protect and foster the interest of the particular neighborhood or local area, so long as at least one of the members of the association would have standing as an individual to challenge the decision being appealed, and the association was not created in response to the particular development or issue that is the subject of the appeal.

8. The Town.

- B. An appeal of a decision by the Historic Conservation Commission on an application for a Certificate of Appropriateness must be taken within thirty (30) days after the date of the receipt of the notice of the decision. The date of receipt shall be conclusively presumed as three days after the notice of the decision or order appealed from has been deposited in the United States mail by the Administrator, with proper postage affixed, and addressed in accordance with the provisions of Section 1.13 except that an earlier date can be established by a return receipt for a certified mail notice. The date of receipt of an email is the date of transmission.
- C. An appeal is taken by filing a notice of appeal with the Administrator on the prescribed form, accompanied by the required fee. The notice of appeal shall state the grounds for the appeal, which should generally be sufficient information to allow for a thorough review by the Board.
- D. The Administrator shall stamp the appeal with the date received

**6.05.04 Appeal Stays Commission Decision:**

- A. A decision by the Historic Preservation Commission granting a Certificate of Appropriateness shall be stayed while the appeal is pending.

**6.05.05 Burden of Proof:** The burden of proof and burden of persuasion shall be on the party appealing the decision of the Commission.

**6.05.06 Scope of Action:** An appeal of a Commission decision shall be in the nature of certiorari. The hearing shall be based on the Commission record and the scope of review shall be as follows:

- A. The Board shall uphold the decision of the Commission unless it finds the decision is:
  - 1. In violation of constitutional provisions, including those protecting procedural due process rights.
  - 2. In excess of the authority conferred upon the Commission by statute or ordinance.
  - 3. Inconsistent with applicable procedures specified by statute or ordinance.
  - 4. Affected by other error of law.
  - 5. Unsupported by substantial competent evidence in view of the entire record.
  - 6. Arbitrary or capricious.

- B. The term "competent evidence," as used in this Section, shall not preclude reliance by the Commission on evidence that would not be admissible under the rules of evidence as applied in the trial division of the General Court of Justice if the evidence appears to be sufficiently trustworthy and was obtained under such circumstances that it was reasonable for the Commission to rely upon it.

**6.05.07 Board Action**

- A. The Board may reverse or affirm, wholly or in part, 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 Commission which made the decision.

(Ord. 20160438, 03-16-2017; Ord. PL04727-050721, 07-01-2021)

**6.06 Appeals from Decisions under the Minimum Housing Ordinance.**

- 6.06.01 The Board shall hear appeals of decisions issued under the Town's Minimum Housing Code by the Housing Inspector. Such appeals shall proceed and be decided pursuant to the general procedural provisions set forth in section 6.01 of this Article and the applicable provisions of the Minimum Housing Code. In the event of any conflict, the provisions of the Minimum Housing Code shall prevail.

(Ord. PL04727-050721, 07-01-2021)

**6.07 Judicial Review**

- A. Every decision of the Board shall be subject to review by the superior court by proceedings in the nature of certiorari pursuant to G.S. 160D-1402.
- B. A petition for review by the superior court 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 Subsection 6.01.09(E).
- C. When first-class mail is used to deliver notice, three days shall be added to the time to file the petition.

(Ord. PL04727-050721, 07-01-2021)