

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2007

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SENATE BILL 212

Short Title: Land-Use Permit Appeals.

(Public)

Sponsors: Senators Kinnaird; and Clodfelter.

Referred to: Judiciary I

February 20, 2007

1 A BILL TO BE ENTITLED  
2 AN ACT TO CLARIFY THE LAW REGARDING APPEALS OF QUASI-JUDICIAL  
3 DECISIONS MADE UNDER ARTICLE 19 OF CHAPTER 160A AND ARTICLE  
4 18 OF CHAPTER 153A OF THE GENERAL STATUTES.

5 The General Assembly of North Carolina enacts:

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

8 "**§ 160A-393. Appeals in the nature of certiorari.**

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

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

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

27 (1) If the decision being appealed involves a denial of a permit request, a  
28 denial of a variance, or a determination that property is being used in  
29 violation of an ordinance adopted under this Article, then any person

1 with an ownership or leasehold interest in the property in question, as  
2 well as the applicant for the permit or the variance (if different than the  
3 owner), has standing to file a petition.

4 (2) If the decision being appealed involves the issuance of a permit, the  
5 granting of a variance, or a determination that property is being used in  
6 conformity with an ordinance adopted under this Article, then the  
7 following persons shall have standing to file a petition, so long as they  
8 satisfy the general criteria set forth at the beginning of this subsection:

9 a. Any person who resides or owns property in such close  
10 proximity to the property that is the subject of the decision that  
11 the use of the property authorized by the decision would  
12 adversely affect that person's use or enjoyment of his or her  
13 residence or property or would adversely affect the value of that  
14 property.

15 b. Any person whose economic interests are directly threatened by  
16 the use authorized by the decision.

17 c. A property owners', neighborhood, or similar civic association  
18 if any of its members would have standing to challenge the  
19 decision as an individual, the interests sought to be protected  
20 are germane to the association's purpose, and neither the claim  
21 asserted nor the relief requested requires the participation of  
22 individual members who would have standing.

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

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

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

42 (f) Answer to the Petition. – The respondent may, but need not, file an answer to  
43 the petition, except that, if the respondent contends that any petitioner lacks standing to

1 bring the appeal, that contention must be set forth in an answer served on all petitioners  
2 at least 30 days prior to the hearing on the petition.

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

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

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

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

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

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

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

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

43 (j) Scope of Review. –

- 1           (1)   When reviewing the decision of a city council, board of adjustment, or  
2           planning board under the provisions of this section, the trial court shall  
3           ensure that the rights of petitioners have not been prejudiced because  
4           the decision-making body's findings, inferences, conclusions, or  
5           decisions were:
- 6           a.     In violation of constitutional provisions, including, but not  
7           limited to, those protecting procedural due process rights.
- 8           b.     In excess of the statutory authority conferred upon the  
9           municipality or the authority conferred upon the  
10           decision-making body by ordinance.
- 11           c.     Inconsistent with applicable procedures specified by statute or  
12           ordinance.
- 13           d.     Affected by other error of law.
- 14           e.     Unsupported by substantial competent evidence in view of the  
15           entire record.
- 16           f.     Arbitrary or capricious.
- 17           (2)   When the issue before the trial court is whether the decision-making  
18           body below erred in the interpretation of an ordinance, the trial court  
19           may review that issue de novo, provided that the court shall give due  
20           consideration to the construction adopted by those entities charged  
21           with execution and administration of the ordinance where that  
22           construction has been thoroughly considered and consistently applied  
23           by those entities.
- 24           (3)   The term "competent evidence," as used in this subsection, shall not  
25           preclude reliance by the decision-making body on evidence that would  
26           not be admissible under the rules of evidence as applied in the trial  
27           division of the General Court of Justice if (i) the evidence was  
28           admitted without objection, or (ii) the evidence appears to be  
29           sufficiently trustworthy and was admitted under such circumstances  
30           that were reasonable for the decision-making body to rely upon it.  
31           Notwithstanding the foregoing, the term "competent evidence" shall  
32           not be deemed to include the opinion testimony of lay witnesses (i.e.,  
33           persons not qualified by reason of specialized knowledge, skill,  
34           experience, training, or education to testify as an expert) as to matters  
35           about which only expert testimony would generally be admissible  
36           under the rules of evidence. By way of illustration without limitation,  
37           the term "competent evidence" shall not be deemed to include the  
38           opinion of lay witnesses as to whether (i) the use of property in a  
39           particular way would affect the value of other property, or (ii) the  
40           increase in vehicular traffic resulting from a proposed development  
41           would pose a danger to the public safety.
- 42           (k)   Decision of the Trial Court. – Following its review of the decision-making  
43           body in accordance with subsection (j) of this section, the trial court may affirm the  
44           decision, reverse the decision and remand the case with appropriate instructions, or

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

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

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

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

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

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

39 **"§ 153A-349. Appeals in the nature of certiorari.**

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

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

3 **"§ 160A-377. Appeals of decisions on subdivision plats.**

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

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

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

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

30 **"§ 153A-336. Appeals of decisions on subdivision plats.**

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

40       (b) When a subdivision ordinance adopted under this Part provides that a board  
41 of commissioners, planning board, or staff member is authorized to make only an  
42 administrative or ministerial determination in deciding whether to approve a preliminary  
43 or final subdivision plat, then any party aggrieved by that decision may seek to have the  
44 decision reviewed by filing an action in superior court seeking appropriate declaratory

1 or equitable relief. Such an action must be filed within the time frame specified in  
2 G.S. 153A-340(f) for petitions in the nature of certiorari.

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

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