

**ARTICLE 6. QUASI-JUDICIAL PERMITS, ENFORCEMENT AND APPEALS
(SPECIAL USE PERMITS, VARIANCES AND APPEALS OF ADMINISTRATIVE DECISIONS)**

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6.1. PURPOSE.

6.1.1. This Article includes the regulations pertaining to Quasi-Judicial procedures, permits and appeals of Quasi-Judicial actions regarding zoning in the Town of Fairmont. Quasi-Judicial permits include, but are not limited to Special Use Permits, Variances, Subdivision Approvals and certain Appeals. The Board most often involved in these matters is the Board of Adjustment. The Board of Commissioners will also play a role in certain decisions.

6.2. PERMIT APPROVAL REQUIRED

6.2.1. No building or land shall hereafter be used and no building or part thereof shall be erected, moved, or altered unless it has first secured a Zoning Permit as provided in this Ordinance. No building or land shall hereafter be used and no building or part thereof shall be erected, moved, or altered unless it has subsequently acquired a Special Use Permit, Variance or Subdivision approval as may be required by this ordinance.

(Ord. 05/31/1977; 154.066)

6.2.2. Work Only as Approved in Permit. Zoning permits and other development permits are issued under

this Ordinance only when a review of the application submitted, including the site plans contained therein, indicates that the development will comply with the provisions of this Ordinance if completed as proposed. Such plans and applications as are finally approved are incorporated into any permit issued, and except as otherwise provided herein, all development shall occur strictly in accordance with such approved plans and applications.

6.3. SPECIAL USE PERMITS

6.3.1. **Definition.** As included in Article 2 of this ordinance, a Special Use Permit means a permit issued to authorize development or land uses in a particular zoning district upon presentation of competent, material, and substantial evidence establishing compliance with one or more general standards requiring that judgment and discretion be exercised as well as compliance with specific standards. The term includes permits previously referred to as conditional use permits or special exceptions.

Statutory Reference – N.C.G.S. Chapter 160D-102.

6.3.2. **General:** A land use designated as a "special use" in a particular zoning district is one that because of its nature, extent and external effects, generally is not appropriate in the district, but might be if subject to special standards and review that will ensure it is located, designed and operated in a manner that is in harmony with neighboring development and does not adversely affect the public health, safety and general welfare. Therefore, development associated with a land use designated as a special use is allowed only after to a Special Use Permit has been granted.

6.3.3. **Authority:** Special Use Permits shall be granted by the Town Board of Commissioners as permitted by G.S. 160D-705 for all special uses enumerated in the Table of Uses. Special uses may only be established by approval of the elected Board of Commissioners.

Statutory Authority – NCGS Chapter 160D-705(c) (Ord. 05/31/1977; 154.050)

6.3.4. **Conflict of Interest.** Refer to Article 4, Section 4.2 and to NCGS Chapter 160D-109(d).

6.3.5. **Process Required.** The following process shall apply to the consideration of all Special Use Permits. See *Figure 6-1 for Process Flow Diagram.*

- A. **Filing of Application.** The owner or owners of all the property included in the petition for a Special Use Permit shall submit required application information to the Town Zoning Enforcement Officer at least three weeks prior to the Planning and Zoning Board meeting at which it is to be heard. Such application shall include all of the requirements pertaining to it in this Ordinance.

- (i) Applications shall include a Site Plan as required in this Ordinance and be accompanied by a fee set according to the Town's adopted Fee Schedule. Instructions for Site Plans can be found at Section 5.5.

- B. Staff Review. The Zoning Enforcement Officer will review the petition for full compliance with all submittal requirements. If it does not fully comply, they will notify the petitioner of submittal deficiencies and allow him/her ten (10) calendar days to submit corrected information.
- C. Review by Planning and Zoning Board. No special use permit shall be approved until a review of the application has been conducted by the Planning and Zoning Board. The Planning and Zoning Board shall hear all requests for Special Use Permits within 30 days from submission. However, this requirement is not intended to prevent the Planning and Zoning Board from delaying action after review. The Planning and Zoning Board shall make a written recommendation to the Board of Commissioners.

Statutory Authority – NCGS Chapter 160D-301(b).

- (1) In its review of the application for a Special Use Permit, the Planning and Zoning Board may consider the following:
 - (i) The proposed use will not materially endanger the public health or safety. Considerations shall include:
 - a. traffic conditions in the vicinity, including the effect of additional traffic on streets and street intersections, and sight lines at street intersection and curb cuts;
 - b. provision of services and utilities, including sewer, water, electrical, garbage collections, fire protection;
 - c. soil erosion and sedimentation; and
 - d. protection of public, community, or private water supplies, including possible adverse effects on surface waters or groundwater.
 - (ii) The proposed use will comply with all regulations and standards generally applicable within the zoning district and any development regulations applicable to that specific use as included in this Ordinance.
 - (iii) The proposed development will not substantially injure the value of adjoining property, or is a public necessity. Considerations shall include:

- a. the relationship of the proposed use and the character of development to surrounding uses and development, including possible conflicts between them and how these conflicts will be resolved; and
 - b. whether the proposed development is so necessary to the public health, safety, and general welfare of the community or Town as a whole as to justify it regardless of its impact on the value of adjoining property.
- (iv) The proposed development will be in harmony with the area in which it is located. Considerations shall include:
 - a. The relationship of the proposed use and the character of development to surrounding uses and development, including possible conflicts between them and how these conflicts will be resolved.
- (v) The proposed development will be consistent with the Fairmont Town Comprehensive Land Use Plan. Considerations shall include:
 - a. Consistency with the Plan’s objectives for the various planning areas, its definitions of the various land use classifications and activity centers, and its locational standards.
- (vi) Adequate utilities, access roads, drainage, sanitation and/or other necessary facilities have already been provided or being provided in the proposed development permit application.

Statutory Reference – N.C.G.S. Chapter 160D-705(c); S.L. 2020-25, Section 17. (Ord. 05/31/1977; 154.050)

- D. Review and Decision by the Board of Commissioners. A quasi-judicial, evidentiary hearing shall be held by the Town Board of Commissioners prior to deciding on approval or denial of the application for a Special Use Permit in compliance with *Sections 6.3.5.(e) – 6.3.5.(o)*.
- E. Notice of Hearing. - Notice of evidentiary hearings conducted shall be mailed to:
 - (1) the person or entity whose appeal, application, or request is the subject of the hearing;
 - (2) the owner of the property that is the subject of the hearing if the owner did not initiate the hearing;
 - (3) the owners of all parcels of land abutting the parcel of land that is the subject of the hearing; and

**Process Flow Diagram:
Special Use Permit**

Application Submitted (at least three weeks prior to meeting at which it will be heard)

Staff Review

Application Adjustments (if needed)

Review of Application by the Planning and Zoning Board; written recommendation made to Town Board of Commissioners

Notice of Evidentiary Hearing mailed to applicant, land owner, owners of parcels abutting the subject property; Property is posted

Evidentiary Hearing Conducted

Decision of Town Board of Commissioners is delivered to applicant and property owner in writing.

Appeals (petitions for review of a quasi-judicial decision) shall be filed with the clerk of superior court within 30 days after the decision is effective or after a written copy of the appeal is given in accordance with NCGS 160D-406(j).

Figure 6-1

- (4) any other persons entitled to receive notice as provided by the local development regulation. In the absence of evidence to the contrary, the local government may rely on the Town tax listing to determine owners of property entitled to mailed notice.
- (5) The notice must be deposited in the mail at least 10 days, but not more than 25 days, prior to the date of the hearing. Within that same time period, the local government 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.

Statutory Authority – NCGS Chapter 160D-406(b).

- F. *Administrative Materials.* The Zoning Enforcement Officer shall transmit to the board all applications, reports, and written materials relevant to the matter being considered.
- (1) 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.
 - (2) The administrative materials shall become a part of the hearing record.
 - (3) The administrative materials may be provided in written or electronic form.
 - (4) Objections to inclusion or exclusion of administrative materials may be made before or during the hearing. Rulings on unresolved objections shall be made by the board at the hearing.

Statutory Authority – NCGS Chapter 160D-406(c).

- G. *Continuations of Properly Advertised Hearings.* The board may continue an evidentiary hearing that has been convened without further advertisement.

Statutory Authority – NCGS Chapter 160D-406(b)

- H. *Quorum Required for Hearing, Continuance.* If an evidentiary hearing is set for a given date and a quorum of the board is not then present, the hearing shall be continued until the next regular board meeting without further advertisement.

Statutory Authority – NCGS Chapter 160D-406(b)

I. Presentation of Evidence.

- (1) Parties in the Presentation of Evidence. The applicant, the Town, and any person who would have standing to appeal the decision under G.S. 160D-1402(d) shall have the right to participate as a party at the evidentiary hearing.
- (2) Other Witnesses. Other witnesses may present competent, material, and substantial evidence that is not repetitive as allowed by the board.
- (3) Objections. 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.
- (4) Ruling on Objections. The board chair shall rule on any objections and the chair's rulings may be appealed to the full board. These rulings are also subject to judicial review pursuant to G.S. 160D-1402.
- (5) Objections on Jurisdiction. Objections based on jurisdictional issues may be raised for the first time on judicial review.

Statutory Authority – NCGS Chapter 160D-406(d).

J. Appearance of Official/New Issues.

- (1) Town Official Must Be Present. The official who made the decision or the person currently occupying that position if the decision-maker is no longer employed by the Town, shall be present at the evidentiary hearing as a witness.
- (2) Content. The appellant shall not be limited at the hearing to matters stated in a notice of appeal.
- (3) Continuance. 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.

Statutory Authority – NCGS Chapter 160D-406(e).

- K. Oaths. The chair of the board or any member acting as chair and the clerk to the board are authorized to administer oaths to witnesses in any matter coming before the board.

(Ord. 05/31/1977; 154.050)

- (1) Violation of Oath. Any person who, while under oath during a proceeding before the

board determining a quasi-judicial matter, willfully swears falsely is guilty of a Class 1 misdemeanor.

Statutory Authority – NCGS Chapter 160D-406(f)

L. Subpoenas.

- (1) Who May Issue Subpoenas. The board making a quasi-judicial decision under NCGS Chapter 160D through the chair, or in the chair’s absence anyone acting as chair, may subpoena witnesses and compel the production of evidence.
- (2) Request to be Made in Writing. To request issuance of a subpoena, the applicant, the Town, and any person with standing under G.S. 160D-1402(d) may make a written request to the chair explaining why it is necessary for certain witnesses or evidence to be compelled. The chair shall issue requested subpoenas he or she determines to be relevant, reasonable in nature and scope, and not oppressive.
- (3) Ruling on Motions Regarding Subpoenas. The chair shall rule on any motion to quash or modify a subpoena. Decisions regarding subpoenas made by the chair may be immediately appealed to the full board.
- (4) Failure to Obey. If a person fails or refuses to obey a subpoena issued pursuant to this subsection, the board or the party seeking the subpoena may apply to the General Court of Justice for an order requiring that its subpoena be obeyed, and the court shall have jurisdiction to issue these orders after notice to all proper parties.

Statutory Authority – NCGS Chapter 160D-406(g)

M. Consideration by Town Board of Commissioners. In considering Special Use Permit applications, reasonable and appropriate conditions and safeguards may be imposed on these permits.

- (1) Where appropriate such conditions may include requirements that street and utility rights-of-way be dedicated to the public and that provision be made for recreational space and facilities.
- (2) Conditions and safeguards imposed under this subsection shall not include requirements for 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 the local government nor requirements for which the courts have held to be unenforceable if imposed directly by the local government, 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.

Statutory Authority – NCGS Chapter 160D-705(c).

- (3) Before the Board of Commissioners approves any Special Use Permit application, it may consider the following:
- (i) The proposed use will not materially endanger the public health or safety. Considerations shall include:
 - a. traffic conditions in the vicinity, including the effect of additional traffic on streets and street intersections, and sight lines at street intersection and curb cuts;
 - b. provision of services and utilities, including sewer, water, electrical, garbage collections, fire protection;
 - c. soil erosion and sedimentation; and
 - d. protection of public, community, or private water supplies, including possible adverse effects on surface waters or groundwater.
 - (ii) The proposed use will comply with all regulations and standards generally applicable within the zoning district and any development regulations applicable to that specific use as included in this Ordinance.
 - (iii) The proposed development will not substantially injure the value of adjoining property, or is a public necessity. Considerations shall include:
 - a. the relationship of the proposed use and the character of development to surrounding uses and development, including possible conflicts between them and how these conflicts will be resolved; and
 - b. whether the proposed development is so necessary to the public health, safety, and general welfare of the community or Town as a whole as to justify it regardless of its impact on the value of adjoining property.
 - (iv) The proposed development will be in harmony with the area in which it is located. Considerations shall include:
 - a. The relationship of the proposed use and the character of development to surrounding uses and development, including possible conflicts between them and how these conflicts will be resolved.
 - (v) The proposed development will be consistent with the Fairmont Town Comprehensive Land Use Plan. Considerations shall include:
 - a. Consistency with the Plan’s objectives for the various planning areas, its definitions of the various land use classifications and activity centers, and its locational standards.

**Statutory Reference – N.C.G.S. Chapter 160D-705(c); S.L. 2020-25, Section 17.
(Ord. 7/7/2003, Section 38)**

- N. Voting. The Planning and Zoning Board may decide to approve the application as submitted, modify and approve the application or deny the application for a Special Use Permit. Reasons for denial shall be clearly stated in writing by the Board. When issuing or denying special use permits, no vote greater than a majority vote shall be required for the city council to issue such permits, and every such decision of the Board shall be subject to review by the superior court by proceedings in the nature of a certiorari.
- (1) Votes Needed to Determine Appeals in Nature of Certiorari. A majority of the members shall be required to determine an appeal made in the nature of certiorari.
 - (2) Votes Needed on Other Quasi-Judicial Matters. A majority of the members shall be required to decide any other quasi-judicial matter.
 - (3) Vacancies. For the purposes of this subsection, vacant positions on the board and members who are disqualified from voting on a quasi-judicial matter under G.S. 160D-1-9(d) shall not be considered members of the board for calculation of the requisite majority if there are no qualified alternates available to take the place of such members.

Statutory Authority – NCGS Chapter 160D-406(i)

- O. Decisions. The Planning and Zoning Board shall determine contested facts and make its decision within a reasonable time.
- (1) Appeals. When hearing an appeal, the board may reverse or affirm, wholly or partly, or may modify the decision appealed from and shall make any order, requirement, decision, or determination that ought to be made.
 - (2) Power of the Board. The board shall have all the powers of the official who made the decision.
 - (3) Basis for Decision. Every quasi-judicial decision shall be based upon competent, material, and substantial evidence in the record.
 - (4) Decision to be in Writing. Each quasi-judicial decision 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 duly authorized member of the board.
 - (5) When Decision is Effective. A quasi-judicial decision is effective upon filing the written decision with the clerk to the board or such other office or official as the development regulation specifies.
 - (6) Delivery. The decision of the board shall be delivered within a reasonable time by personal delivery, electronic mail, or by first-class mail to the applicant, landowner, and to any person who has submitted a written request for a copy prior to the date the decision becomes effective.
 - (7) Provide Notice. The person required to provide notice shall certify to the Town that proper notice has been made and the certificate shall be deemed conclusive

in the absence of fraud.

Statutory Authority – NCGS Chapter 160D-406(j)

- P. Modifications. Minor modifications to special use permits shall be those that do not involve a change in uses permitted or the density of overall development permitted may be reviewed and approved administratively. Any modifications approved shall only be applicable to those properties whose owners apply for the modification. If the change requested involves a change in permitted uses or the density of the overall development, these are considered major changes and shall require a new Special Use Permit process.

Statutory Reference – N.C.G.S. Chapter 160D-705(c), Special Use Permits; 403(d); 703(b).

Q. Cancellation by Surrender of a Special Use Permit.

- (1) Any Special Use Permit which has been previously approved may be offered for surrender by the property owner or his agent by submitting a written application to the Town Clerk.
- (2) The Town will accept the offer of surrender and cancel the Special Use Permit if all the following conditions are met: (i) there are no existing zoning violations of the Special Use Permit; and (ii) the property is undeveloped or the existing use is permitted in the underlying zoning district.
- (3) Approval of the application will result in the Special Use Permit being cancelled and the property becoming subject to the existing underlying zoning district. Upon the cancellation of a Special Use Permit, any expansion of an existing use or any new development must conform to all the requirements of the underlying zoning district.
- (4) Following the cancellation, the designation of the previously approved Special Use Permit will be removed from the Official Zoning Map and the property will be shown to be in the appropriate underlying zoning district.

- R. Revocation. Revocation of a special use permit shall follow the same process for approval as is applicable to the approval of a special use permit.

(Ord. 05/31/1977; 154.052 B) (Ord. 05/31/1977; 154.218 I)

- (1) The Zoning Enforcement Officer or his or her designee, will have the authority to issue a notice of violation of a Special Use Permit. The notice of violation will provide thirty (30) days to correct the violation. If the violation is not corrected to the satisfaction of the planning director, then the planning director, or his or her designee, has the authority to send a letter of revocation of the Special Use Permit. The owner of the property will have thirty (30) days from receipt of the letter of

revocation of the Special Use Permit to appeal the violation determination to the zoning board of adjustment.

- (2) Subsequent to the completion of any appeals provided for in pertaining to the revocation of a Special Use Permit, the special use for which the Special Use Permit was granted must cease and the future use of the property must be in conformance with the standards of this ordinance for the district where the property is located. Any use or development of the property commenced pursuant to the Special Use Permit must conform or be brought into conformance with the standards of the district where the property is located.

Statutory Reference – N.C.G.S. Chapter 160D-705(c), Special Use Permits.

- S. (s) *Multiple Parcels.* If multiple parcels of land are subject to a special use permit, the owners of individual parcels may apply for permit modification so long as the modification would not result in other properties failing to meet the terms of the special use permit or regulations.

Statutory Reference – N.C.G.S. Chapter 160D-705(c), Special Use Permits.

6.3.6. **Duration.**

- A. A Special Use Permit issued by the Town shall become null and void if construction or occupancy of the proposed use as specified on the Special Use Permit has not commenced within one (1) year of the date of issuance.
- B. Extension of time for a Special Use Permit, not to exceed one (1) one-year extension may be granted by the Town upon review and recommendation by the Planning and Zoning Board, provided a request for such extension is submitted in writing prior to the original expiration date. In granting an extension, the Town shall have no authority to amend the conditions of the Special Use Permit or approve any major modifications to the approved plan.
- C. If the project is vested as prescribed under Article 16 the statutory vesting expires for an uncompleted development project if development work is intentionally and voluntarily discontinued for a period of not less than 24 consecutive months, and the statutory vesting period granted by this section for a nonconforming use of property expires if the use is intentionally and voluntarily discontinued for a period of not less than 24 consecutive months. the 24-month discontinuance period is automatically tolled during the pendency of any board of adjustment proceeding or civil action in a State or federal trial or appellate court regarding the validity of a development permit, the use of the property, or the existence of the statutory vesting period granted by this section. The 24-month discontinuance period is also tolled during the pendency of any litigation involving the development project or property that is the subject of the vesting.

Statutory Reference – N.C.G.S. Chapter 160D-108(d) Vesting.

6.4. VARIANCES.

6.4.1. Purpose. Variances are intended to address practical difficulties or provide relief from a hardship resulting from strict application of zoning standards. Variances may not be used to permit a use in a zoning district that is not otherwise allowed in that district, nor shall variances be used to vary or waive the subdivision standards of the Fairmont Town Subdivision Regulations. Variances can be used to provide relief from the dimensional standards of the Zoning Ordinance, such as setback requirements, height of structures, lot coverage and similar standards. Variances and the conditions of the variance apply to the and run with the property. A transfer of ownership or occupancy has no impact on the application of a variance to the property.

(Ord. 05/31/1977; 154.085 B)

6.4.2. Process Required. The Board of Adjustment for Fairmont shall follow quasi-judicial procedures when deciding on variances. The regulations below apply specifically to variance decisions.

Statutory Authority – NCGS Chapter 160D-406(a) and 160D-705

- A. Filing. An application for a variance shall be submitted to the Board of Adjustment by filing a copy of the application, on a form approved by the Town Board of Commissioners, and payment of the required filing fee to the Town Clerk. An Agent designated by the property owner may file the application for a variance and must complete the Agent Form. Signature(s) of the Property Owners are required on that form. An application for a variance shall be considered filed when delivered to the office of the Town Clerk, the required filing fee paid, and the date and time of filing entered on the application by the Town Clerk. The Clerk shall then submit the completed application to the Zoning Enforcement Officer.
- B. Date for Hearing. The Town’s Board of Adjustment with the Zoning Enforcement Officer shall establish a date for the evidentiary hearing.
- C. Notice of Hearing. - Notice of evidentiary hearings conducted shall be mailed to:
 - (1) the person or entity whose appeal, application, or request is the subject of the hearing;
 - (2) the owner of the property that is the subject of the hearing if the owner did not initiate the hearing; and
 - (3) the owners of all parcels of land abutting the parcel of land that is the subject of the hearing;
 - (4) any other persons entitled to receive notice as provided by the local development

regulation. In the absence of evidence to the contrary, the local government may rely on the Town tax listing to determine owners of property entitled to mailed notice.

- (5) The notice must be deposited in the mail at least 15 days, but not more than 25 days, prior to the date of the hearing. Within that same time period, the local government 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 board may continue an evidentiary hearing that has been convened without further advertisement. If an evidentiary hearing is set for a given date and a quorum of the board is not then present, the hearing shall be continued until the next regular board meeting without further advertisement.

Statutory Authority – NCGS Chapter 160D-406(b).
(Ord. 05/31/1977; 154.085 2)

- D. *Distribution of Materials.* The Zoning Enforcement Officer shall transmit to the Board of Adjustment all documents and exhibits constituting the record upon which the action appealed from is taken. The Zoning Enforcement Officer 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.
 - (1) The 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.
 - (2) The administrative materials shall become a part of the hearing record.
 - (3) The administrative materials may be provided in written or electronic form.
 - (4) Objections to inclusion or exclusion of administrative materials may be made before or during the hearing. Rulings on unresolved objections shall be made by the board at the hearing.

Statutory Authority – NCGS Chapter 160D-406(c).

- E. *Zoning Enforcement Officer Present at Hearing.* The Zoning Enforcement Officer shall be present at the hearing.
- F. *Continuations of Properly Advertised Hearings.* The Planning Board may continue an evidentiary hearing that has been convened without further advertisement.

Statutory Authority – NCGS Chapter 160D-406(b)

- G. *Quorum Required for Hearing, Continuance.* If an evidentiary hearing is set for a given date

and a quorum of the board is not then present, the hearing shall be continued until the next regular board meeting without further advertisement.

Statutory Authority – NCGS Chapter 160D-406(b)

H. Presentation of Evidence.

- (1) Parties in the Presentation of Evidence. The applicant, the Town, and any person who would have standing to appeal the decision under G.S. 160D-1402(d) shall have the right to participate as a party at the evidentiary hearing.
- (2) Other Witnesses. Other witnesses may present competent, material, and substantial evidence that is not repetitive as allowed by the board.
- (3) Objections. 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.
- (4) Ruling on Objections. The board chair shall rule on any objections and the chair's rulings may be appealed to the full board. These rulings are also subject to judicial review pursuant to G.S. 160D-1402.
- (5) Objections on Jurisdiction. Objections based on jurisdictional issues may be raised for the first time on judicial review.

Statutory Authority – NCGS Chapter 160D-406(d).

I. Appearance of Official/New Issues.

- (1) Town Official Must Be Present. The official who made the decision or the person currently occupying that position if the decision-maker is no longer employed by the Town, shall be present at the evidentiary hearing as a witness.
- (2) Content. The appellant shall not be limited at the hearing to matters stated in a notice of appeal.
- (3) Continuance. 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.

Statutory Authority – NCGS Chapter 160D-406(e).

- J. Oaths. The chair of the board or any member acting as chair and the clerk to the board are authorized to administer oaths to witnesses in any matter coming before the board.
- (1) Violation of Oath. Any person who, while under oath during a proceeding before

the board determining a quasi-judicial matter, willfully swears falsely is guilty of a Class 1 misdemeanor.

Statutory Authority – NCGS Chapter 160D-406(f)

K. Subpoenas.

- (1) Who May Issue Subpoenas. The board making a quasi-judicial decision under NCGS Chapter 160D through the chair, or in the chair's absence anyone acting as chair, may subpoena witnesses and compel the production of evidence.
- (2) Request to be Made in Writing. To request issuance of a subpoena, the applicant, the Town, and any person with standing under G.S. 160D-1402(d) may make a written request to the chair explaining why it is necessary for certain witnesses or evidence to be compelled. The chair shall issue requested subpoenas he or she determines to be relevant, reasonable in nature and scope, and not oppressive.
- (3) Ruling on Motions Regarding Subpoenas. The chair shall rule on any motion to quash or modify a subpoena. Decisions regarding subpoenas made by the chair may be immediately appealed to the full board.
- (4) Failure to Obey. If a person fails or refuses to obey a subpoena issued pursuant to this subsection, the board or the party seeking the subpoena may apply to the General Court of Justice for an order requiring that its subpoena be obeyed, and the court shall have jurisdiction to issue these orders after notice to all proper parties.

Statutory Authority – NCGS Chapter 160D-406(g)

L. Decisions. The Board of Adjustment shall determine contested facts and make its decision within a reasonable time.

- (1) Basis for Decision. Every quasi-judicial decision shall be based upon competent, material, and substantial evidence in the record.
- (2) Decision to be in Writing. Each quasi-judicial decision 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 duly authorized member of the board.
- (3) When Decision is Effective. A quasi-judicial decision is effective upon filing the written decision with the clerk to the board or such other office or official as the development regulation specifies.

- (4) Delivery. The decision of the board shall be delivered within a reasonable time by personal delivery, electronic mail, or by first-class mail to the applicant, landowner, and to any person who has submitted a written request for a copy prior to the date the decision becomes effective.
- (5) Provide Notice. The person required to provide notice shall certify to the Town that proper notice has been made and the certificate shall be deemed conclusive in the absence of fraud.

**Statutory Authority – NCGS Chapter 160D-406(j)
(Ord. 05/31/1977; 154.086)**

M. Decision Basis for Variance. When unnecessary hardships would result from carrying out the strict letter of the zoning ordinance, the Board of Adjustment may vary any of provisions of the ordinance upon a showing of all of the following:

- 1) Unnecessary hardship would result from the strict application of the regulation. It shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property.
- 2) The hardship results from conditions that are peculiar to the property, such as location, size, or topography. *Hardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the neighborhood or the general public, may not be the basis for granting a variance.* A variance may also be granted when necessary and appropriate to make a reasonable accommodation under the Federal Fair Housing Act for a person with a disability.
- 3) The hardship did not result from actions taken by the applicant or the property owner. The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship.
- 4) The requested variance is consistent with the spirit, purpose, and intent of the regulation, such that public safety is secured and substantial justice is achieved.

Statutory Authority – NCGS Chapter 160D-405(e) and 160D-705(d); S.L. 2020-25.

N. No change in permitted uses may be authorized by variance. Appropriate conditions may be imposed on any variance, provided that the conditions are reasonably related to the variance. Any other development regulation that regulates land use or development may provide for variances from the provisions of those ordinances consistent with the provisions of this subsection.

Statutory Authority – NCGS Chapter 160D-405(e) and 160D-705(d); S.L. 2020-25.

- 6.4.3. Voting. The concurring vote of four-fifths of the Board of Adjustment shall be necessary to grant a variance. For the purposes of this subsection, vacant positions on the board and members who are disqualified from voting on a quasi-judicial matter under G.S. 160D-109(d) shall not be considered members of the board for calculation of the requisite majority if there are no qualified alternates available to take the place of such members.

Statutory Authority – NCGS Chapter 160D-406(i).

- 6.4.4. Statute of Limitations. A variance may be issued for an indefinite duration or for a specified duration only. Unless otherwise specified, any order or decision of the Board of Adjustment granting a variance shall expire if the applicant does not obtain a building permit or certificate of occupancy for such use within 60 days from the date of the decision or if construction of the use has not commenced within 180 days from the date of the issuance of a building permit.

Statutory Reference – N.C.G.S. Subchapter II of Chapter 1.

- 6.4.5. Variance Not a Site-Specific Vesting Plan. A variance does not constitute a site-specific vesting plan, and approval of a site-specific vesting plan with the condition that a variance be obtained does not confer a vested right unless and until the necessary variance is obtained. If a sketch plan or other document fails to describe with reasonable certainty the type and intensity of use for a specified parcel or parcels of property, it may not constitute a site-specific vesting plan.

Statutory Reference – N.C.G.S. 160D-108.1(a).

- 6.4.6. Record. A record shall be made of all hearings and such record shall be kept as provided by state law. Accurate minutes shall also be kept of all such proceedings, but a transcript need not be made. Whenever practicable, all documentary evidence presented at a hearing as well as all other types of physical evidence shall be made a part of the record of the proceedings.
- 6.4.7. Revocation. In addition to initiation of enforcement actions under G.S. 160D-404, development approvals may be revoked by the local government issuing the development approval by notifying the holder in writing stating the reason for the revocation. The revocation of a development approval by a staff member may be appealed pursuant to G.S. 160D-405. The conduct of any activity or the use, operation, construction, maintenance or removal of any facility in violation of any of the conditions of a variance shall be grounds for revocation of said variance. The Zoning Enforcement Officer shall set a date for public hearing before the Board of Adjustment and at such time said Board may revoke the variance, citing the reasons therefor. Notice of such hearing shall be made in the same manner as required for a variance application. The local government shall follow the same development review and approval process required for issuance of the development approval, including any required notice or hearing, in the review and approval of any revocation of that approval. Development approvals shall be revoked for any substantial departure from the approved application, plans, or specifications; for refusal or failure to comply with the requirements of any applicable local development regulation or any State law delegated to the local government for enforcement purposes in lieu of the State; or for false statements or misrepresentations made in securing the approval. Any development approval mistakenly issued in violation of an applicable State or local law may also be revoked. Unless otherwise specified by

the Board of Adjustment, all activities or facilities permitted by the variance shall cease and/or be removed not later than sixty calendar days following the date of determination to revoke the variance. The determination of the Board of Adjustment shall be deemed final and may not be appealed to the Board of Commissioners.

Statutory Authority – NCGS Chapter 160D-403(f).

- 6.4.8. Duration of Development Approval (Variance). Unless a different period is provided by a quasi-judicial development approval, a development agreement, or a local ordinance, a development approval issued pursuant to this Ordinance shall expire one year after the date of issuance if the work authorized by the development approval has not been substantially commenced.

If after commencement the work or activity is discontinued for a period of 12 months after commencement, the development approval shall immediately expire. The time periods set out in this subsection shall be tolled during the pendency of any appeal. No work or activity authorized by any development approval that has expired shall thereafter be performed until a new development approval has been secured. Nothing in this subsection shall be deemed to limit any vested rights secured under G.S. 160D-108.

Statutory Authority – NCGS Chapter 160D-403(c).

6.5. APPEALS OF ADMINISTRATIVE DECISIONS: PROCEDURE

- 6.5.1. Purpose. Persons with interests in property zoned by the Town of Fairmont have the right to appeal decisions of the Zoning Enforcement Officer as the chief administrative official of the town responsible for administration of the Zoning Ordinance. This section outlines the process for taking such appeal.
- 6.5.2. Process Required. The Board of Adjustment for the Town shall follow the quasi-judicial procedures outlined below when hearing and deciding appeals of administrative decisions. Appeal of a decision made pursuant to an erosion and sedimentation control regulation, a stormwater control regulation, or a provision of the housing code shall not be made to the Board of Adjustment unless required by a local government ordinance or code provision. The regulations below apply specifically to the appeals of administrative zoning decisions.

Statutory Authority – NCGS Chapter 160D-405(a); S.L. 2020-25; 160D-705

- A. Standing and Filing of Appeal. Any person who has standing under G.S. 160D-1402(c) or the local government may appeal an administrative decision to the board. The owner or other party has 30 days from receipt of the written notice of the determination within which to file an appeal. Any other person with standing to appeal has 30 days from receipt from any source of actual or constructive notice of the determination within which to file an appeal. In the absence of evidence to the contrary, notice given pursuant to G.S. 160D-403(b) by first-class mail is deemed received on the third business day following deposit of the notice for mailing with the United States Postal Service. An appeal is taken by filing

with the Town Clerk an application for appeal of an administrative decision on a form approved by the Town Board of Commissioners which specifies the grounds therefore. An application for appeal shall be considered filed when delivered to the office of the Town Clerk, the required filing fee paid, and the date and time of filing entered on the application by the Town Clerk. The Clerk shall forward the complete application to the Zoning Enforcement Officer.

Statutory Authority – NCGS Chapter 160D-405(b); 160D-405(d); S.L. 2020-25.

- B. *Date for Hearing.* The Town's Board of Adjustment with the Zoning Enforcement Officer shall establish a date for the evidentiary hearing.
- C. *Notice of Hearing.* - Notice of evidentiary hearings conducted shall be mailed to:
- (1) the person or entity whose appeal, application, or request is the subject of the hearing;
 - (2) the owner of the property that is the subject of the hearing if the owner did not initiate the hearing; and
 - (3) the owners of all parcels of land abutting the parcel of land that is the subject of the hearing;
 - (4) any other persons entitled to receive notice as provided by the local development regulation. In the absence of evidence to the contrary, the local government may rely on the Town tax listing to determine owners of property entitled to mailed notice.
 - (5) The notice must be deposited in the mail at least 10 days, but not more than 25 days, prior to the date of the hearing. Within that same time period, the local government 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 board may continue an evidentiary hearing that has been convened without further advertisement. If an evidentiary hearing is set for a given date and a quorum of the board is not then present, the hearing shall be continued until the next regular board meeting without further advertisement.

Statutory Authority – NCGS Chapter 160D-406(b).

- D. *Distribution of Materials.* The Zoning Enforcement Officer shall transmit to the Board of Adjustment all documents and exhibits constituting the record upon which the action appealed from is taken. The Zoning Enforcement Officer 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.

- (1) The 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.
- (2) The administrative materials shall become a part of the hearing record.
- (3) The administrative materials may be provided in written or electronic form.
- (4) Objections to inclusion or exclusion of administrative materials may be made before or during the hearing. Rulings on unresolved objections shall be made by the board at the hearing.

Statutory Authority – NCGS Chapter 160D-406(c).

- E. *Zoning Enforcement Officer Present at Hearing.* The Zoning Enforcement Officer shall be present at the hearing.
- F. *Continuations of Properly Advertised Hearings.* The board may continue an evidentiary hearing that has been convened without further advertisement.

Statutory Authority – NCGS Chapter 160D-406(b)

- G. *Quorum Required for Hearing, Continuance.* If an evidentiary hearing is set for a given date and a quorum of the board is not then present, the hearing shall be continued until the next regular board meeting without further advertisement.

Statutory Authority – NCGS Chapter 160D-406(b)

- H. *Presentation of Evidence.*
 - (1) *Parties in the Presentation of Evidence.* The applicant, the Town, and any person who would have standing to appeal the decision under G.S. 160D-1402(d) shall have the right to participate as a party at the evidentiary hearing.
 - (2) *Other Witnesses.* Other witnesses may present competent, material, and substantial evidence that is not repetitive as allowed by the board.
 - (3) *Objections.* 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.
 - (4) *Ruling on Objections.* The board chair shall rule on any objections and the chair's rulings may be appealed to the full board. These rulings are also subject to judicial review pursuant to G.S. 160D-1402.

- (5) Objections on Jurisdiction. Objections based on jurisdictional issues may be raised for the first time on judicial review.

Statutory Authority – NCGS Chapter 160D-406(d).

I. Appearance of Official/New Issues.

- (1) Town Official Must Be Present. The official who made the decision or the person currently occupying that position if the decision-maker is no longer employed by the Town, shall be present at the evidentiary hearing as a witness.
- (2) Content. The appellant shall not be limited at the hearing to matters stated in a notice of appeal.
- (3) Continuance. 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.

Statutory Authority – NCGS Chapter 160D-406(e).

- J. Oaths. The chair of the board or any member acting as chair and the clerk to the board are authorized to administer oaths to witnesses in any matter coming before the board.

- (1) Violation of Oath. Any person who, while under oath during a proceeding before the board determining a quasi-judicial matter, willfully swears falsely is guilty of a Class 1 misdemeanor.

Statutory Authority – NCGS Chapter 160D-406(f)

K. Subpoenas.

- (1) Who May Issue Subpoenas. The board making a quasi-judicial decision under NCGS Chapter 160D through the chair, or in the chair's absence anyone acting as chair, may subpoena witnesses and compel the production of evidence.
- (2) Request to be Made in Writing. To request issuance of a subpoena, the applicant, the Town, and any person with standing under G.S. 160D-1402(d) may make a written request to the chair explaining why it is necessary for certain witnesses or evidence to be compelled. The chair shall issue requested subpoenas he or she determines to be relevant, reasonable in nature and scope, and not oppressive.
- (3) Ruling on Motions Regarding Subpoenas. The chair shall rule on any motion to quash or modify a subpoena. Decisions regarding subpoenas made by the chair may be immediately appealed to the full board.
- (4) Failure to Obey. If a person fails or refuses to obey a subpoena issued pursuant to this subsection, the board or the party seeking the subpoena may apply to the General Court of Justice for an order requiring that its subpoena be obeyed, and the court shall have jurisdiction to issue these orders after

notice to all proper parties.

Statutory Authority – NCGS Chapter 160D-406(g)

- L. Decisions. The Board of Adjustment shall determine contested facts and make its decision within a reasonable time.
- (1) Appeals. When hearing an appeal, the board may reverse or affirm, wholly or partly, or may modify the decision appealed from and shall make any order, requirement, decision, or determination that ought to be made.
 - (2) Power of the Board. The board shall have all the powers of the official who made the decision.
 - (3) Basis for Decision. Every quasi-judicial decision shall be based upon competent, material, and substantial evidence in the record.
 - (4) Decision to be in Writing. Each quasi-judicial decision 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 duly authorized member of the board.
 - (5) When Decision is Effective. A quasi-judicial decision is effective upon filing the written decision with the clerk to the board or such other office or official as the development regulation specifies.
 - (6) Delivery. The decision of the board shall be delivered within a reasonable time by personal delivery, electronic mail, or by first-class mail to the applicant, landowner, and to any person who has submitted a written request for a copy prior to the date the decision becomes effective.
 - (7) Provide Notice. The person required to provide notice shall certify to the Town that proper notice has been made and the certificate shall be deemed conclusive in the absence of fraud.

Statutory Authority – NCGS Chapter 160D-406(j)

6.5.3. Stays. An appeal of a notice of violation or other enforcement order stays enforcement of the action appealed from and accrual of any fines assessed during the pendency of the appeal to the Board of Adjustment and any subsequent appeal in accordance with G.S. 160D-1402 or during the pendency of any civil proceeding authorized by law or appeals therefrom, unless the official who made the decision certifies to the board after notice of appeal has been filed that, because of the facts stated in an affidavit, a stay would cause imminent peril to life or property or, because the violation is transitory in nature, a stay would seriously interfere with enforcement of the development

regulation. In that case, enforcement proceedings are not stayed except by a restraining order, which may be granted by a court. If enforcement proceedings are not stayed, the appellant may file with the official a request for an expedited hearing of the appeal, and the board shall meet to hear the appeal within 15 days after the request is filed.

Notwithstanding any other provision of this section, appeals of decisions granting a development approval or otherwise affirming that a proposed use of property is consistent with the development regulation does not stay the further review of an application for development approvals to use the property; in these situations, the appellant or local government may request and the board may grant a stay of a final decision of development approval applications, including building permits affected by the issue being appealed.

Statutory Authority – NCGS Chapter 160D-405(f); S.L. 2020-25.

6.5.4. Alternative Dispute Resolution. The parties to an appeal that has been made under this section may agree to mediation or other forms of alternative dispute resolution. The development regulation may set standards and procedures to facilitate and manage such voluntary alternative dispute resolution.

Statutory Authority – NCGS Chapter 160D-405(g)

6.5.5. No Estoppel. G.S. 160D-1403.2, limiting a local government's use of the defense of estoppel, applies to proceedings under this section.

Statutory Authority – NCGS Chapter 160D-405(h)

6.6. APPEALS OF VARIANCES, SPECIAL USE PERMITS, AND OTHER QUASI-JUDICIAL DECISIONS.

6.6.1. Judicial Review. Every quasi-judicial decision shall be subject to review by the superior court by proceedings in the nature of certiorari pursuant to G.S. 160D-1402. Appeals shall be filed within the times specified in G.S. 160D-1405(d).

Statutory Authority – NCGS Chapter 160D-406(k)

6.6.2. Appeals in the Nature of Certiorari.

A. Applicability. This section applies to appeals of quasi-judicial decisions of decision-making boards when that appeal is to superior court and in the nature of certiorari as required by this Article.

Statutory Authority – NCGS Chapter 160D-1402(a)

B. Filing the Petition. An appeal in the nature of certiorari shall be initiated by filing a petition for writ of certiorari with the superior court. The petition shall do all of the following:

- (1) State the facts that demonstrate that the petitioner has standing to seek review.

- (2) Set forth allegations sufficient to give the court and parties notice_of_the grounds upon which the petitioner contends that an error was made.
- (3) Set forth with particularity the allegations and facts, if any, in support of allegations that, as the result of an_impermissible conflict as described in G.S. 160D-1-9, or locally adopted conflict rules, the decision-making body was not sufficiently impartial to comply with due process principles.
- (4) Set forth the relief the petitioner seeks.

Statutory Authority – NCGS Chapter 160D-1402(b)

C.Standing. A petition may be filed under this section only by a petitioner who has standing to challenge the decision being appealed. The following persons have standing to file a petition under this section:

- (1) Any person meeting possessing any of the following criteria:
 - (i) Has an ownership interest in the property that is the subject of the decision being appealed, a leasehold interest in the property that is the subject of the decision being appealed, or an interest created by easement, restriction, or covenant in the property that is the subject of the decision being appealed.
 - (ii) Has an option or contract to purchase the property that is the subject of the decision being appealed.
 - (iii) Was an applicant before the decision-making board whose decision is being appealed.
- (2) Any other person who will suffer special damages as the result of the decision being appealed.
- (3) 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.
- (4) A local government whose decision-making board has made a decision that the governing board believes improperly grants a variance from or is otherwise inconsistent with the proper interpretation of a development regulation adopted by that governing board.

Statutory Authority – NCGS Chapter 160D-1402(c)

- D. Respondent. The respondent named in the petition shall be the local government whose decision-making board made the decision that is being appealed, except that if the petitioner is a local government that has filed a petition pursuant to Subsection 6.6.2(c)(4) above, then the respondent shall be the decision-making board. If the petitioner is not the applicant before the decision-making board whose decision is being appealed, the petitioner shall also name that applicant as a respondent. Any petitioner may name as a respondent any person with an ownership or leasehold interest in the property that is the subject of the decision being appealed who participated in the hearing, or was an applicant, before the decision-making board.

Statutory Authority – NCGS Chapter 160D-1402(d)

- E. Writ of Certiorari. Upon filing the petition, the petitioner shall present the petition and a proposed writ of certiorari to the clerk of superior court of the Town in which the matter arose. The writ shall direct the respondent local government, or the respondent decision-making board if the petitioner is a local government that has filed a petition pursuant to Subsection 6.6.2(c)(4), to prepare and certify to the court the record of proceedings below within a specified date. The writ shall also direct the petitioner to serve the petition and the writ upon each respondent named therein in the manner provided for service of a complaint under Rule 4(j) of the Rules of Civil Procedure, except that, if the respondent is a decision-making board, the petition and the writ shall be served upon the chair of that decision-making board. Rule 4(j)(5) d. of the Rules of Civil Procedure applies in the event the chair of a decision-making board cannot be found. No summons shall be issued. The clerk shall issue the writ without notice to the respondent or respondents if the petition has been properly filed and the writ is in proper form. A copy of the executed writ shall be filed with the court. Upon the filing of a petition for writ of certiorari, a party may request a stay of the execution or enforcement of the decision of the quasi-judicial board pending superior court review. The court may grant a stay in its discretion, and on such conditions that properly provide for the security of the adverse party. A stay granted in favor of a city or Town shall not require a bond or other security.

Statutory Authority – NCGS Chapter 160D-1402(e)

- F. Response to the Petition. The respondent may, but need not, file a response to the petition, except that, if the respondent contends for the first time that any petitioner lacks standing to bring the appeal, that contention must be set forth in a response served on all petitioners at least 30 days prior to the hearing on the petition. If it is not served within that time period, the matter may be continued to allow the petitioners time to respond pursuant to subparagraph (j) of this section.

Statutory Authority – NCGS Chapter 160D-1402(f)

- G. Intervention. Rule 24 of the Rules of Civil Procedure governs motions to intervene as a petitioner or respondent in an action initiated under this section with the following exceptions:

- (1) Any person described in Section 6.6.2(C)(1) has standing to intervene and shall be allowed to intervene as a matter of right.
- (2) Any person, other than one described in Section 6.6.2(C)(1) who seeks to intervene as a petitioner must demonstrate that the person would have had standing to challenge the decision being appealed in accordance with Sections 6.6.2(C)(2) through (4).
- (3) Any person, other than one described in Section 6.6.2(C)(1) of this section, who seeks to intervene as a respondent must demonstrate that the person would have had standing to file a petition in accordance with Sections 6.6.2(C)(2) through (4). If the decision-making board had made a decision that is consistent with the relief sought by the petitioner.

Statutory Authority – NCGS Chapter 160D-1402(g)

H. *The Record*. The record shall consist of the decision and all documents and exhibits submitted to the decision-making board whose decision is being appealed, together with the minutes of the meeting or meetings at which the decision being appealed was considered. Upon request of any party, the record shall also contain an audio or videotape of the meeting or meetings at which the decision being appealed was considered if such a recording was made. Any party may also include in the record a transcript of the proceedings, which shall be prepared at the cost of the party choosing to include it. The parties may agree, or the court may direct, that matters unnecessary to the court's decision be deleted from the record or that matters other than those specified herein be included. The record shall be bound and paginated or otherwise organized for the convenience of the parties and the court. A copy of the record shall be served by the local government respondent, or the respondent decision-making board, upon all petitioners within three days after it is filed with the court.

Statutory Authority – NCGS Chapter 160D-1402(h)

I. *Hearing on the Record*. The court shall hear and decide all issues raised by the petition by reviewing the record submitted in accordance with Section 6.6.2(H) above. The court shall allow the record to be supplemented with affidavits, testimony of witnesses, or documentary or other evidence if, and to the extent that, petition raises any of the following issues, in which case the rules of discovery set forth in the North Carolina Rules of Civil Procedure apply to the supplementation of the record of these issues:

- (1) Whether a petitioner or intervener has standing.
- (2) Whether, as a result of impermissible conflict as described in G.S. 160D-1-9 or locally adopted conflict rules, the decision-making body was not sufficiently impartial to comply with due process principles.
- (3) Whether the decision-making body erred for the reasons set forth in Section 6.6.2(J)(i) and (ii) below.

Statutory Authority – NCGS Chapter 160D-1402(i)

J. Scope of Review.

- (1) When reviewing the decision of a decision-making board under the provisions of this section, the court shall ensure that the rights of petitioners have not been prejudiced because the decision-making body's findings, inferences, conclusions, or decisions were:
 - (i) In violation of constitutional provisions, including those protecting procedural due process rights.
 - (ii) In excess of the statutory authority conferred upon the local government, including preemption, or the authority conferred upon the decision-making board by ordinance.
 - (iii) Inconsistent with applicable procedures specified by statute or ordinance.
 - (iv) Affected by other error of law.
 - (v) Unsupported by competent material and substantial evidence in view of the entire record.
 - (vi) Arbitrary or capricious.
- (2) When the issue before the court is one set forth in sub-subdivisions (i) through (iv). of subdivision (a) of this subsection, including whether the decision-making board erred in interpreting an ordinance, the court shall review that issue de novo. The court shall consider the interpretation of the decision-making board, but is not bound by that interpretation, and may freely substitute its judgment as appropriate. Whether the record contains competent, material, and substantial evidence is a conclusion of law, reviewable de novo.
- (3) The term "competent evidence," as used in this subsection, does not preclude reliance by the decision-making board 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 (i) except for the items noted in sub-subdivisions (i), (ii), and (iii) of this subdivision that are conclusively incompetent, the evidence was admitted without objection or (ii) 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. The term "competent evidence," as used in this subsection, shall, regardless of the lack of a timely objection, not be deemed to include the opinion testimony of lay witnesses as to any of the following:
 - (ii) The use of property in a particular way would affects the value of other property.

- (iii) The increase in vehicular traffic resulting from a proposed development would pose a danger to the public safety.
- (iv) Matters about which only expert testimony would generally be admissible under the rules of evidence.

Statutory Authority – NCGS Chapter 160D-1402(j)

- K. Action Not Rendered Moot by Loss of Property. Subject to the limitations in the State and federal constitutions and State and federal case law, an action filed under this section is not rendered moot, if during the pendency of the action, the aggrieved person loses the applicable property interest as a result of the local government action being challenged and exhaustion of an appeal described herein is required for purposes of preserving a claim for damages under G.S. 160D-1403.1.

Statutory Authority – NCGS Chapter 160D-1402(j1)

- L. Decision of the Court. Following its review of the decision-making board in accordance with subsection (j) of this section, the court may affirm the decision, reverse the decision and remand the case with appropriate instructions, or remand the case for further proceedings. If the court does not affirm the decision below in its entirety, then the court shall be guided by the following in determining what relief should be granted to the petitioners:
 - (1) If the court concludes that the error committed by the decision-making board is procedural only, the court may remand the case for further proceedings to correct the procedural error.
 - (2) If the court concludes that the decision-making board has erred by failing to make findings of fact such that the court cannot properly perform its function, then the court may remand the case with appropriate instructions so long as the record contains substantial competent evidence that could support the decision below with appropriate findings of fact. However, findings of fact are not necessary when the record sufficiently reveals the basis for the decision below or when the material facts are undisputed and the case presents only an issue of law.
 - (3) If the court concludes that the decision by the decision-making board is not supported by competent, material, and substantial evidence in the record or is based upon an error of law, then the court may remand the case with an order that directs the decision-making board to take whatever action should have been taken had the error not been committed or to take such other action as is necessary to correct the error. Specifically:
 - (i) If the court concludes that a permit was wrongfully denied because the denial was not based on competent, material, and substantial evidence or was otherwise based on an error of law, the court shall remand with instructions that the permit be issued, subject to any conditions expressly consented to by the permit applicant as part of the application or during the

board of adjustment appeal or writ of certiorari appeal.

- (ii) If the court concludes that a permit was wrongfully issued because the issuance was not based on competent, material, and substantial evidence or was otherwise based on an error of law, the court may remand with instructions that the permit be revoked.
- (iii) If the court concludes that a zoning board decision upholding a zoning enforcement action was not supported by substantial competent evidence or was otherwise based on an error of law, the court shall reverse the decision.

Statutory Authority – NCGS Chapter 160D-1402(k)

M. Effect of Appeal and Ancillary Injunctive Relief.

- (1) If a development approval is appealed, the applicant shall have the right to commence work while the appeal is pending. However, if the development approval is reversed by a final decision of any court of competent jurisdiction, the applicant shall not be deemed to have gained any vested rights on the basis of actions taken prior to or during the pendency of the appeal and must proceed as if no development approval had been granted.
- (2) Upon motion of a party to a proceeding under this section, and under appropriate circumstances, the court may issue an injunctive order requiring any other party to that proceeding to take certain action or refrain from taking action that is consistent with the court’s decision on the merits of the appeal.

Statutory Authority – NCGS Chapter 160D-1402(l)

- N. Joinder. A declaratory judgment brought under G.S. 160D-14-1 or other civil action relating to the decision at issue may be joined with the petition for writ of certiorari and decided in the same proceeding.

Statutory Authority – NCGS Chapter 160D-1402(m)

- O. Stays. An appeal under this section is stayed as provided in G.S. 160D-405.

Statutory Authority – NCGS Chapter 160D-1402(n)

6.7. SUBDIVISION APPROVALS.

- 6.7.1. Process Required. The Board of Commissioners shall follow quasi-judicial procedure when deciding on subdivision approvals.

Statutory Authority – NCGS Chapter 160D-405(a) and 406(a)

See Fairmont Town Subdivision Regulations, Article 15, Procedure for Review and Approval of Subdivision Plats.

6.8. APPEAL OF DECISIONS ON SUBDIVISION PLATS.

6.8.1. Appeal of decisions made by the Fairmont Town Board of Commissioners on preliminary or final subdivision plats shall be subject to review by the superior court by proceedings in the nature of certiorari. The provisions of Chapter 160D-406 and this section shall apply to those appeals.

Statutory Authority – NCGS Chapter 160D-1403(a)

6.8.2. When a subdivision regulation adopted under this Chapter provides that the decision whether to approve or deny a preliminary or final subdivision plat is administrative, then that decision of the board shall be subject to review by filing an action in superior court seeking appropriate declaratory or equitable relief within 30 days from receipt of the written notice of the decision, which shall be made as provided in G.S. 160D-403(b).

Statutory Authority – NCGS Chapter 160D-1403(b)

6.8.3. For purposes of this section, a subdivision regulation shall be deemed to authorize a quasi-judicial decision if the decision-making entity under Chapter 160D-803(c) is authorized to decide whether to approve or deny the plat based not only upon whether the application complies with the specific requirements set forth in the regulation, but also on whether the application complies with one or more generally stated standards requiring a discretionary decision to be made.

Statutory Authority – NCGS Chapter 160D-1403(c)

6.9. CIVIL ACTION FOR DECLARATORY RELIEF, OTHER REMEDIES; JOINDER OF COMPLAINT AND PETITION FOR WRIT OF CERTIORARI IN CERTAIN CASES

6.9.1. Civil Action. Except as otherwise provided in this section for claims involving questions of interpretation, in lieu of any remedies available under G.S. 160D-405 or 160D-108(h), a person with standing, as defined in subsection (b) of this section, may bring an original civil action seeking declaratory relief, injunctive relief, damages, or any other remedies provided by law or equity, in superior court or federal court to challenge the enforceability, validity, or effect of a local land development regulation for any of the following claims:

- A. The ordinance, either on its face or as applied, is unconstitutional.
- B. The ordinance, either on its face or as applied, is ultra vires, preempted, or otherwise in excess of statutory authority.

- C. The ordinance, either on its face or as applied, constitutes a taking of property.
- D. If the decision being challenged is from an administrative official charged with enforcement of a local land development regulation, the party with standing must first bring any claim that the ordinance was erroneously interpreted to the applicable board of adjustment pursuant to G.S. 160D-405. An adverse ruling from the board of adjustment may then be challenged in an action brought pursuant to this subsection with the court hearing the matter de novo together with any of the claims listed in this subsection.

Statutory Authority – NCGS Chapter 160D-1403.1(a)

6.9.2. Standing. Any of the following criteria provide standing to bring an action under this section:

- A. The person has an ownership, leasehold, or easement interest in, or possesses an option or contract to purchase the property that is the subject matter of a final and binding decision made by an administrative official charged with applying or enforcing a land development regulation.
- B. The person was a development permit applicant before the decision-making board whose decision is being challenged.
- C. The person was a development permit applicant who is aggrieved by a final and binding decision of an administrative official charged with applying or enforcing a land development regulation.

Statutory Authority – NCGS Chapter 160D-1403.1(b)

6.9.3. Time for Commencement of Action. Any action brought pursuant to this section shall be commenced within one year after the date on which written notice of the final decision is delivered to the aggrieved party by personal delivery, electronic mail, or by first-class mail.

Statutory Authority – NCGS Chapter 160D-1403.1(c)

6.9.4. Joinder. An original civil action authorized by this section may, for convenience and economy, be joined with a petition for writ of certiorari and decided in the same proceedings. The Rules of Civil Procedure govern the parties for the claims raised in the original civil action. The record of proceedings in the appeal pursuant to G.S. 160D-1402 shall not be supplemented by discovery from the civil action unless supplementation is otherwise allowed under G.S. 160D-1402(i). The standard of review in the original civil action for the cause or causes of action pled as authorized by subsection (a) of this section is de novo. The standard of review of the petition for writ of certiorari is the standard established in G.S. 160D-1402(j).

Statutory Authority – NCGS Chapter 160D-1403.1(d)

6.9.5. Action Not Rendered Moot by Loss of Property. Subject to the limitations in the State and federal constitutions and State and federal case law, an action filed under this section is not rendered moot,

if during the pendency of the action, the aggrieved person loses the applicable property interest as a result of the local government action being challenged and exhaustion of an appeal described herein is required for purposes of preserving a claim for damages under this section.

Statutory Authority – NCGS Chapter 160D-1403.1(e)

6.9.6. Stays. An appeal under this section is stayed as provided in G.S. 160D-405.

Statutory Authority – NCGS Chapter 160D-1403.1(f)

6.9.7. Definitions. The definitions in G.S. 143-755 apply in this section.

Statutory Authority – NCGS Chapter 160D-1403.1(g)

6.10. NO ESTOPPEL EFFECT WHEN CHALLENGING DEVELOPMENT CONDITIONS.

6.10.1. A local government may not assert before a board of adjustment or in any civil action the defense of estoppel as a result of actions by the landowner or permit applicant to proceed with development authorized by a development permit as defined in G.S. 143-755 if the landowner or permit applicant is challenging conditions that were imposed and not consented to in writing by a landowner or permit applicant.

Statutory Authority – NCGS Chapter 160D-1403.2

6.11. OTHER CIVIL ACTIONS.

6.11.1. Except as expressly stated, Chapter 160D does not limit the availability of civil actions otherwise authorized by law or alter the times in which they may be brought.

Statutory Authority – NCGS Chapter 160D-1404.

6.12. STATUTES OF LIMITATIONS.

6.12.1. Zoning Map Adoption or Amendments. A cause of action as to the validity of any regulation adopting or amending a zoning map adopted under this Ordinance or other applicable law or a development agreement adopted under Article 11 of this Ordinance accrues upon adoption of the ordinance and shall be brought within 60 days as provided in G.S. 1-54.1.

Statutory Authority – NCGS Chapter 160D-1405(a).

6.12.2. Text Adoption or Amendment. Except as otherwise provided in Section 6.12.1. above, an action challenging the validity of a development regulation adopted under this Chapter or other

applicable law shall be brought within one year of the accrual of such action. Such an action accrues when the party bringing such action first has standing to challenge the ordinance. A challenge to an ordinance on the basis of an alleged defect in the adoption process shall be brought within three years after the adoption of the ordinance.

Statutory Authority – NCGS Chapter 160D-1405(b).

- 6.12.3. *Enforcement Defense*. Nothing in this section or in G.S. 1-54(10) or G.S. 1-54.1 bars a party in an action involving the enforcement of a development regulation 1403.1 or in an action under G.S. 160D-from raising as a claim or defense in the proceedings the enforceability or the invalidity of the ordinance. Nothing in this section or in G.S. 1-54(10) or G.S. 1-54.1 bars a party who files a timely appeal from an order, requirement, decision, or determination made by an administrative official contending that the party is in violation of a development regulation from raising in the judicial appeal the invalidity of the ordinance as a defense to the order, requirement, decision, or determination. A party in an enforcement action or appeal may not assert the invalidity of the ordinance on the basis of an alleged defect in the adoption process unless the defense is formally raised within three years of the adoption of the challenged ordinance.

Statutory Authority – NCGS Chapter 160D-1405(c).

- 6.12.4. *Termination of Grandfathered Status*. When a use constituting a violation of a zoning or unified development ordinance is in existence prior to adoption of the zoning or unified development ordinance creating the violation, and that use is grandfathered and subsequently terminated for any reason, a local government shall bring an enforcement action within 10 years of the date of the termination of the grandfathered status, unless the violation poses an imminent hazard to health or public safety.

Statutory Authority – NCGS Chapter 160D-1405(d).

- 6.12.5. *Quasi-Judicial Decisions*. Unless specifically provided otherwise, a petition for review of a quasi-judicial decision shall be filed with the clerk of superior court by the later of 30 days after the decision is effective or after a written copy thereof is given in accordance with G.S. 160D-406(j). When first-class mail is used to deliver notice, three days shall be added to the time to file the petition.

Statutory Authority – NCGS Chapter 160D-1405(e).

- 6.12.6. *Others*. Except as provided by this section, the statutes of limitations shall be as provided in Subchapter II of Chapter 1 of the General Statutes.

Statutory Authority – NCGS Chapter 160D-1405(f)