

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2009

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SENATE BILL 44

Short Title: Appeals of Quasi-Judicial Land-Use Decisions. (Public)

Sponsors: Senator Kinnaird.

Referred to: Judiciary II.

February 4, 2009

A BILL TO BE ENTITLED

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

The General Assembly of North Carolina enacts:

SECTION 1.(a) Part 3 of Article 19 of Chapter 160A of the General Statutes is amended by adding a new section to read:

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

(a) Applicability. – This section applies to appeals 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.

(b) For purposes of this section, the following terms mean:

(1) Decision-making board. – A city council, planning board, board of adjustment, or other board making quasi-judicial decisions appointed by the city council under this Article or under comparable provisions of any local act.

(2) Person. – Any legal entity authorized to bring suit in the legal entity's name.

(c) Filing the Petition. – An appeal in the nature of certiorari shall be initiated by filing with the superior court a petition for writ of certiorari. The petition shall:

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

(2) Set forth the grounds upon which the petitioner contends that an error was made. The facts, if any, in support of allegations that, as the result of impermissible conflict as described in G.S. 160A-388(e1), the decision-making body was not sufficiently impartial to comply with due process principles shall be set forth with particularity.

(3) Set forth the relief the petitioner seeks.

(d) 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 shall have standing to file a petition under this section:

(1) Any person meeting any of the following criteria:

a. Has an ownership interest, leasehold interest, or other interest created by easement, restriction, or covenant in the property that is the subject of the decision being appealed.

b. Has an option or contract to purchase the property that is the subject of the decision being appealed.



1 c. Was an applicant before the decision-making board whose decision
2 is being appealed.

3 (2) Any person with an ownership interest or leasehold interest in property any
4 portion of which is located within 200 feet of the boundary of the property
5 that is the subject of the decision being appealed.

6 (3) Any other person who will suffer special damages as the result of the
7 decision being appealed. For purposes of this subdivision, 'special damages'
8 mean a substantial harm suffered by a person that is distinct from the rest of
9 the community, amounting to a reduction in the value of such person's
10 property.

11 (4) An incorporated or unincorporated association to which owners or lessees of
12 property in a designated area belong by virtue of their owning or leasing
13 property in that area, or an association otherwise organized to protect and
14 foster the interest of a particular neighborhood or local area, so long as at
15 least one of the members of the association would have standing as an
16 individual to challenge the decision being appealed, and the association was
17 not created in response to the particular development or issue that is the
18 subject of the appeal.

19 (5) A city whose decision-making board has made a decision that the council
20 believes improperly grants a variance from or is otherwise inconsistent with
21 the proper interpretation of an ordinance adopted by that council.

22 (e) Respondent. – The respondent named in the petition shall be the city whose
23 decision-making board made the decision that is being appealed, except that if the petitioner is
24 a city that has filed a petition pursuant to subdivision (d)(5) of this section, then the respondent
25 shall be the decision-making board. If the petitioner is not the applicant before the
26 decision-making board whose decision is being appealed, the petitioner shall also name that
27 applicant as a respondent. Any petitioner may name as a respondent any person with an
28 ownership or leasehold interest in the property that is the subject of the decision being appealed
29 who participated in the hearing before the decision-making board.

30 (f) Writ of Certiorari. – Upon filing the petition, the petitioner shall present the petition
31 and a proposed writ of certiorari to the clerk of court of the county in which the matter arose.
32 The writ shall direct the respondent city (or the respondent decision-making board if the
33 petitioner is a city that has filed a petition pursuant to subdivision (d)(5) of this section) to
34 prepare and certify to the court the record of proceedings below within a specified date. The
35 writ shall also direct that the petitioner shall serve the petition and the writ upon each
36 respondent named therein in the manner provided for service of a complaint under Rule 4j of
37 the Rules of Civil Procedure (except that, if the respondent is a decision-making board, the
38 petition and the writ shall be served upon the chairman of that decision-making board). No
39 summons shall be issued. The clerk shall issue the writ without notice to the respondent or
40 respondents if the petition has been properly filed and the writ is in proper form. A copy of the
41 executed writ shall be filed with the court.

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

46 (h) Intervention. – Rule 24 of the Rules of Civil Procedure shall govern motions to
47 intervene as a petitioner or respondent in an action initiated under this section with the
48 following exceptions:

49 (1) Any person described in subdivision (d)(1) of this section shall have
50 standing to intervene and shall be allowed to intervene as a matter of right.

1 (2) Any person, other than one described in subdivision (d)(1) of this section,
2 who seeks to intervene as a petitioner must demonstrate that the person
3 would have had standing to challenge the decision being appealed in
4 accordance with subdivisions (d)(2) through (d)(5) of this section.

5 (3) Any person, other than one described in subdivision (d)(1) of this section,
6 who seeks to intervene as a respondent must demonstrate that the person
7 would have had standing to file a petition in accordance with subdivisions
8 (d)(2) through (d)(5) of this section if the decision-making board had made a
9 decision that is consistent with the relief sought by the petitioner(s).

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

21 (j) Hearing on the Record. – The court shall hear and decide all issues raised by the
22 petition by reviewing the record submitted in accordance with subsection (h) of this section.
23 Except that the court may, in its discretion, allow the record to be supplemented with affidavits,
24 testimony of witnesses, or documentary or other evidence if, and to the extent that, the record is
25 not adequate to allow an appropriate determination of the following issues:

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

27 (2) Whether, as a result of impermissible conflict as described in
28 G.S. 160A-388(e1), the decision-making body was not sufficiently impartial
29 to comply with due process principles.

30 (3) Whether the decision-making body erred for the reasons set forth in
31 sub-subdivisions a. and b. of subdivision (1) of subsection (k) of this section.

32 (k) Scope of Review. –

33 (1) When reviewing the decision of a decision-making board under the
34 provisions of this section, the trial court shall ensure that the rights of
35 petitioners have not been prejudiced because the decision-making body's
36 findings, inferences, conclusions, or decisions were:

37 a. In violation of constitutional provisions, including those protecting
38 procedural due process rights.

39 b. In excess of the statutory authority conferred upon the city or the
40 authority conferred upon the decision-making board by ordinance.

41 c. Inconsistent with applicable procedures specified by statute or
42 ordinance.

43 d. Affected by other error of law.

44 e. Unsupported by substantial competent evidence in view of the entire
45 record.

46 f. Arbitrary or capricious.

47 (2) When the issue before the trial court is whether the decision-making board
48 erred in interpreting an ordinance, the trial court may review that issue de
49 novo and freely substitute its judgment for that of the decision-making
50 board, provided that the court may give due consideration to the construction
51 adopted by those entities charged with the execution and administration of

1 the ordinance, taking into account the extent to which such construction may
2 have been based on sound reasoning and consistent application.

3 (3) The term "competent evidence," as used in this subsection, shall not preclude
4 reliance by the decision-making board on evidence that would not be
5 admissible under the rules of evidence as applied in the trial division of the
6 General Court of Justice if (i) the evidence was admitted without objection,
7 or (ii) the evidence appears to be sufficiently trustworthy and was admitted
8 under such circumstances that it was reasonable for the decision-making
9 board to rely upon it. The term "competent evidence" shall not be deemed to
10 include the opinion testimony of lay witnesses as to any of the following:

11 a. The use of property in a particular way would affect the value of
12 other property.

13 b. The increase in vehicular traffic resulting from a proposed
14 development would pose a danger to the public safety.

15 c. Matters about which only expert testimony would generally be
16 admissible under the rules of evidence.

17 (1) Decision of the Trial Court. – Following its review of the decision-making board in
18 accordance with subsection (k) of this section, the trial court may affirm the decision, reverse
19 the decision and remand the case with appropriate instructions, or remand the case for further
20 proceedings. If the court does not affirm the decision below in its entirety, then the court shall
21 be guided by the following in determining what relief should be granted to the petitioners:

22 (1) If the court concludes that the error committed by the decision-making board
23 is procedural only, the court may remand the case for further proceedings to
24 correct the procedural error.

25 (2) If the court concludes that the decision-making board has erred by failing to
26 make findings of fact such that the court cannot properly perform its
27 function, then the court may remand the case with appropriate instructions so
28 long as the record contains substantial competent evidence that could
29 support the decision below with appropriate findings of fact. However,
30 findings of fact are not necessary when the record sufficiently reveals the
31 basis for the decision below or when the material facts are undisputed and
32 the case presents only an issue of law.

33 (3) If the court concludes that the decision by the decision-making board is not
34 supported by substantial competent evidence in the record or is based upon
35 an error of law, then the court may remand the case with an order that directs
36 the decision-making board to take whatever action should have been taken
37 had the error not been committed or to take such other action as is necessary
38 to correct the error. Specifically:

39 a. If the court concludes that a permit was wrongfully denied because
40 the denial was not based on substantial competent evidence or was
41 otherwise based on an error of law, the court shall remand with
42 instructions that the permit be issued.

43 b. If the court concludes that a permit was wrongfully issued because
44 the issuance was not based on substantial competent evidence or was
45 otherwise based on an error of law, the court shall remand with
46 instructions that the permit be revoked.

47 (m) Ancillary Injunctive Relief. – Upon motion of a party to a proceeding under this
48 section, and under appropriate circumstances, the trial court may issue an injunctive order
49 requiring any other party to that proceeding to take certain action or refrain from taking action
50 that is consistent with the court's decision on the merits of the appeal."

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

3 **"§ 153A-349. Appeals in the nature of certiorari.**

4 (a) Whenever appeals of quasi-judicial decisions of decision-making boards are to
5 superior court and in the nature of certiorari as required by this Article, the provisions of
6 G.S. 160A-393 shall be applicable to those appeals.

7 (b) For purposes of this section, as used in G.S. 160A-393, the term "city council" shall
8 be deemed to refer to the "board of commissioners," and the term "city" or "municipal" shall be
9 deemed to refer to the "county."

10 (c) For purposes of this section, the "impermissible conflict as described in
11 G.S. 160A-388(e1)" shall mean "impermissible conflict as described in G.S. 153A-345(e1)."

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

14 **"§ 160A-377. Appeals of decisions on subdivision plats.**

15 (a) When a subdivision ordinance adopted under this Part provides that the decision
16 whether to approve or deny a preliminary or final subdivision plat is to be made by a city
17 council or a planning board, other than a planning board comprised solely of members of a city
18 planning staff, and the ordinance authorizes the council or planning board to make a
19 quasi-judicial decision in deciding whether to approve the subdivision plat, then that
20 quasi-judicial decision of the council or planning board shall be subject to review by the
21 superior court by proceedings in the nature of certiorari. The provisions of G.S. 160A-381(c),
22 160A-388(e2), and 160A-393 shall apply to those appeals.

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

30 (c) For purposes of this section, an ordinance shall be deemed to authorize a
31 quasi-judicial decision if the city council or planning board is authorized to decide whether to
32 approve or deny the plat based not only upon whether the application complies with the
33 specific requirements set forth in the ordinance, but also on whether the application complies
34 with one or more generally stated standards requiring a discretionary decision to be made by
35 the city council or planning board."

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

38 **"§ 153A-336. Appeals of decisions on subdivision plats.**

39 (a) When a subdivision ordinance adopted under this Part provides that the decision
40 whether to approve or deny a preliminary or final subdivision plat is to be made by a board of
41 commissioners or a planning board, other than a planning board comprised solely of members
42 of a county planning staff, and the ordinance authorizes the board of commissioners or
43 planning board to make a quasi-judicial decision in deciding whether to approve the
44 subdivision plat, then that quasi-judicial decision of the board of commissioners or planning
45 board shall be subject to review by the superior court by proceedings in the nature of certiorari.
46 The provisions of G.S. 153A-340(f), 153A-345(e2), and 153A-349 shall apply to those appeals.

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

1 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 decision if the board of commissioners or planning board is authorized to decide
5 whether to approve or deny the plat based not only upon whether the application complies with
6 the specific requirements set forth in the ordinance, but also on whether the application
7 complies with one or more generally stated standards requiring a discretionary decision to be
8 made by the board of commissioners or planning board."

9 **SECTION 3.** G.S. 63-34 reads as rewritten:

10 "**§ 63-34. Judicial review.**

11 (a) Any person aggrieved by any decision of the board of appeals, or any taxpayer, or
12 any officer, department, board, or bureau of the political subdivision, may present to the
13 superior court a verified petition setting forth that the decision is illegal, in whole or in part, and
14 specifying the grounds of the illegality. Such petition shall be presented to the court within 30
15 days after the decision is filed in the office of the board. Such petition shall comply with the
16 provisions of G.S. 160A-393.

17 (b) ~~Upon presentation of such petition the court may allow a writ of certiorari directed~~
18 ~~to the board of appeals to review such decision of the board.~~The allowance of the writ shall not
19 stay proceedings upon the decision appealed from, but the court may, on application, on notice
20 to the board and on due cause shown, grant a restraining order.

21 (c) The board of appeals shall not be required to return the original papers acted upon
22 by it, but it shall be sufficient to return certified or sworn copies thereof or of such portions
23 thereof as may be called for by the writ. The return shall concisely set forth such other facts as
24 may be pertinent and material to show the grounds of the decision appealed from and shall be
25 verified.

26 (d) ~~The court shall have exclusive jurisdiction to affirm, modify, or set aside the~~
27 ~~decision brought up for review, in whole or in part, and if need be, to order further proceedings~~
28 ~~by the board of appeals. The findings of fact by the board, if supported by substantial evidence,~~
29 ~~shall be accepted by the court as conclusive, and no objection to a decision of the board shall be~~
30 ~~considered by the court unless such objection shall have been urged before the board, or if it~~
31 ~~was not so urged, unless there were reasonable grounds for failure to do so.~~

32 (e) Costs shall not be allowed against the board of appeals unless it appears to the court
33 that it acted with gross negligence, in bad faith, or with malice, in making the decision appealed
34 from."

35 **SECTION 4.** G.S. 162A-93(b) reads as rewritten:

36 "(b) The provisions of subsection (a) shall not apply if the city council adopts an
37 annexation ordinance including an area served by a district and finds, after a public hearing,
38 that adequate fire protection cannot be provided in the area because of the level of available
39 water service. Notice of the public hearing shall be provided by first class mail to each affected
40 customer and by publication in a newspaper having general circulation in the area, each not less
41 than 10 days before the hearing. The clerk's certification of the mailing shall be deemed
42 conclusive in the absence of fraud. Any resident of the annexed area aggrieved by such a
43 finding of the council may file a petition for review in the superior court in the nature of
44 certiorari, within 30 days after the finding. The petition for review in the nature of certiorari
45 shall comply with G.S. 160A-393."

46 **SECTION 5.** G.S. 160A-388(e1) reads as rewritten:

47 "(e1) A member of the board or any other body exercising ~~the functions of a board of~~
48 ~~adjustment~~quasi-judicial functions pursuant to this Article shall not participate in or vote on
49 any quasi-judicial matter in a manner that would violate affected persons' constitutional rights
50 to an impartial decision maker. Impermissible conflicts include, but are not limited to, a
51 member having a fixed opinion prior to hearing the matter that is not susceptible to change,

1 undisclosed ex parte communications, a close familial, business, or other associational
2 relationship with an affected person, or a financial interest in the outcome of the matter. If an
3 objection is raised to a member's participation and that member does not recuse himself or
4 herself, the remaining members shall by majority vote rule on the objection."

5 **SECTION 6.** G.S. 153A-345(e1) reads as rewritten:

6 "(e1) A member of the board or any other body exercising ~~the functions of a board of~~
7 ~~adjustment~~ quasi-judicial functions pursuant to this Article shall not participate in or vote on
8 any quasi-judicial matter in a manner that would violate affected persons' constitutional rights
9 to an impartial decision maker. Impermissible conflicts include, but are not limited to, a
10 member having a fixed opinion prior to hearing the matter that is not susceptible to change,
11 undisclosed ex parte communications, a close familial, business, or other associational
12 relationship with an affected person, or a financial interest in the outcome of the matter. If an
13 objection is raised to a member's participation and that member does not recuse himself or
14 herself, the remaining members shall by majority vote rule on the objection."

15 **SECTION 7.** This act becomes effective January 1, 2010, and applies to appeals
16 filed on or after that date.