

(G) Effect of Approval

- (1) Approval of a Conditional District is binding on the property and the development and use of the subject property shall be governed by the Ordinance requirements applicable to the specific Conditional District and all approved conditions.
- (2) The applicant shall comply with all requirements established in the Conditional District approval Ordinance. Only those uses and structures included in the Conditional District approval Ordinance and approved site plan shall be allowed on the subject property.

(H) Zoning Atlas Designation

Following approval of the Conditional District by the Board of County Commissioners, the subject property shall be identified on the Zoning Atlas by the appropriate district designation.

(I) Alterations to an Approved Conditional District

- (1) Except as provided in Section 6.7.2 for MPD-CD projects, changes to approved plans and conditions of development shall be treated as changes to the zoning atlas and shall be processed as an amendment to such as contained in this Article.
- (2) The Planning Director may approve minor changes without going through the amendment process. The Planning Director, at his/her discretion, may elect not to allow any proposal as a minor change and will forward the detailed application for changes to the Planning Board and Board of County Commissioners for consideration in accordance with the procedures outlined herein.
- (3) A minor change is one that will not:
 - (a) Alter the basic relationship of the proposed development to adjacent property,
 - (b) Alter the approved land uses,
 - (c) Increase the density or intensity of development, and/or
 - (d) Decrease the off-street parking ratio or reduce the buffer yards provided at the boundary of the site.

2.9.2 Public Hearing and Notification Requirements

The requirement for a public hearing shall follow the procedures for a Zoning Atlas Amendment in Section 2.8.6. Notice of the public hearing shall follow the procedures in Section 2.8.7.

SECTION 2.10: VARIANCES

2.10.1 Purpose

The procedures of this section authorize the Board of Adjustment to modify or vary regulations of this Ordinance when strict compliance with the regulation or standard would result in unnecessary hardships upon the subject property.

2.10.2 Application Requirements

- (A) Applications for a Variance shall be submitted on forms provided by the Planning Department in accordance with Section 2.2 of this Ordinance. Ten copies of the application and supporting documentation shall be submitted.
- (B) Applications shall include:
 - (1) The section reference, and copy of the existing regulatory language, that is the subject of the application,

- (2) A description of the specific modification sought by the applicant. For example, if the request is for a modification of a corner lot setback requirement, the applicant shall provide the exact reduction of the established corner lot setback requested as part of the application,
- (3) A plot plan, site plan, or other similar document(s) denoting the physical impact of the proposed request on the parcel,
- (4) A narrative outlining the answers to the five required findings detailed within Section 2.10.4 of the Ordinance justifying the issuance of the variance, and
- (5) Copies of any additional information deemed essential by the applicant justifying the approval of the request.

2.10.3 Burden of Proof

Applicants shall have the burden of establishing by competent material and substantial evidence, in the form of testimony, exhibits, documents, models, plans, and other materials, that the application meets the requirements for approval of a Variance

2.10.4 Authorized Variances

A variance may be approved by the Board of Adjustment in cases where unnecessary hardships would result from carrying out the strict letter of the Ordinance, when substantial evidence in the official record of the application supports all of the following findings:

- (A) Unnecessary hardship would result from the strict application of the Ordinance. It shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property.
- (B) 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 general public, may not be the basis for granting a variance.
- (C) 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.
- (D) The requested variance is consistent with the spirit, purpose, and intent of the Ordinance, such that public safety is secured and substantial justice is achieved.

2.10.5 Additional Criteria for Authorized Variances – Special Flood Hazard Areas

In addition to the criteria contained within Section 2.10.4, any application for a variance from the flood regulations shall abide by the following additional criteria:

- (A) Variances may be issued for the repair or rehabilitation of historic structures upon the determination that the proposed repair or rehabilitation will not preclude the structure's continued designation as a historic structure and the variance is the minimum necessary to preserve the historic character and design of the structure.
- (B) In considering variances from the requirements of the flood regulations, the Board of Adjustment shall consider all technical evaluations, all relevant factors, all standards specified in other sections of this Ordinance, and:
 - (1) The danger that materials may be swept onto other lands to the injury of others;
 - (2) The danger to life and property due to flooding or erosion damage;
 - (3) The susceptibility of the proposed facility and its contents to flood damage and the effect of such damage on the individual owner;
 - (4) The importance of the services provided by the proposed facility to Orange County;

- (5) The necessity to the facility of a waterfront location, where applicable;
 - (6) The availability of alternative locations, not subject to flooding or erosion damage, for the proposed use;
 - (7) The compatibility of the proposed use with existing and anticipated development;
 - (8) The relationship of the proposed use to the Orange County Comprehensive Plan and floodplain management program for the area;
 - (9) The safety of access to the property in times of flood for ordinary and emergency vehicles;
 - (10) The expected heights, velocity, duration, rate of rise, and sediment transport of the flood waters and the effects of wave action, if applicable, expected at the site;
 - (11) The costs of providing governmental services during and after flood conditions including maintenance and repair of public utilities and facilities such as sewer, gas, electrical and water systems, and streets and bridges; and
 - (12) The request for a variance is not after-the-fact or for a situation of one's own making.
- (C) A written report addressing each of the above factors shall be submitted with the application for a variance.
- (D) Upon consideration of the factors listed above and the purposes of this Ordinance, the Board of Adjustment may attach such reasonable conditions to the granting of variances as it deems necessary to further the purposes of this Ordinance.
- (E) Variances shall not be issued within any designated floodway or non-encroachment area if any increase in flood levels during the base flood discharge would result.
- (F) Conditions for Variances:
- (1) Variances may not be issued when the variance will make the structure in violation of other Federal, State, or local laws, regulations, or ordinances.
 - (2) Variances shall only be issued upon a determination that the variance is the minimum necessary, considering the flood hazard, to afford relief.
 - (3) Variances shall only be issued upon:
 - (a) A showing of good and sufficient cause;
 - (b) A determination that failure to grant the variance would result in exceptional hardship;
 - (c) A determination that the granting of a variance will not result in increased flood heights, additional threats to public safety, or extraordinary public expense, create nuisance, cause fraud on or victimization of the public, or conflict with existing local laws or ordinances; and,
 - (d) That the circumstances on the subject property are unique to the subject property and not to properties in general.
- (G) Any applicant to whom a variance is granted shall be given written notice specifying the difference between the Base Flood Elevation (BFE) and the elevation to which the structure is to be built and a written statement that the cost of flood insurance will be commensurate with the increased risk resulting from the reduced reference level elevation. Such notification shall be maintained with a record of all variance actions.
- (H) The Floodplain Administrator shall maintain the records of all appeal actions and report any variances to the FEMA and the State of North Carolina upon request.

2.10.6 Additional Criteria for Authorized Variances –Watershed Protection Overlay District

- (A) Minor variances for dimensional requirements of the Watershed Protection Overlay District may be approved by the Board of Adjustment in accordance with Section 2.12 of this Ordinance.
- (B) The Board of Adjustment may approve variance applications to allow the use of off-site septic easements for lots created before January 1, 1994, and for non-conforming lots of record.
- (C) A description of each project receiving a variance and the reason for granting the variance shall be submitted for each calendar year to the Division of Water Quality on or before January 1st of the following year.
- (D) All other local governments having jurisdiction within the watershed area and the entity using the water supply for consumption shall be notified of the variance application at least 15 days prior to action on the application. The Planning Department shall notify other local governments via first class mail.

(E) Modifications of the Impervious Surface Ratio

Modifications of the Impervious Surface Ratios may be requested through one of the following provisions:

- (1) Through variance procedures of the Board of Adjustment, as described in this subsection (2.10.6).
- (2) Through approval and recordation of a conservation agreement, as provided in Article 4 of Chapter 121 of the N.C. General Statutes, between Orange County and a land owner that prohibits development of land in a protected watershed in perpetuity.
 - (a) In such cases, a modification of the required impervious surface ratios may be approved administratively but only to the extent that additional land in the same watershed is conserved or protected from development. In such instances, the land that will be subject to a conservation agreement must be adjacent to the land proposed for development and for which a modification of the impervious surface ratios is sought.
 - (i) As an example, a person owning a 40,000 square foot lot and subject to a 12% impervious surface ratio would be limited to 4,800 square feet of impervious coverage. If the person's plans called for 5,500 square feet of coverage (a difference of 700 square feet), the recording of a conservation easement on 5,833 square feet of contiguous property would satisfy the impervious surface ratio requirements. (12% of 5,833 square feet is 700 square feet.)
 - (b) The conservation easement shall describe the property restricted in a manner sufficient to pass title, provide that its restrictions are covenants that run with the land and, in form, be approved by the County Attorney.
 - (c) The conservation easement shall, upon its recording, be in the place of a first priority lien on the property (excepting current ad valorem property taxes) and shall remain so unless, with the approval of Orange County, it is released and terminated.
 - (i) Orange County shall require the priority of the conservation easement to be certified by and attorney-at-law, licensed to practice law in the State of North Carolina and approved to certify title to real property by a lending institution (bank or savings and loan association) doing business in Orange County.

- (d) Orange County approval of a release or termination of the conservation agreement shall be declared on the document releasing or terminating the agreement.
 - (i) The document shall be signed by the Orange County Manager, upon approval of the Orange County Board of Commissioners.
 - (ii) No such document shall be effective to release or terminate the conservation agreement until it is filed for registration with the Register of Deeds of Orange County.

2.10.7 Procedure for Certain Stream Buffer Variance Requests

Requests for variances from stream buffer requirements within 50-feet from the top of the stream bank shall abide by the following procedure:

- (A) The Erosion Control Officer shall make a finding of fact as to whether the following requirements have been met:
 - (1) There are practical difficulties or unnecessary hardships that prevent compliance with the strict letter of the stream buffer protection requirements. Practical difficulties or unnecessary hardships shall be evaluated in accordance with the following:
 - (a) If the applicant complies with the provisions of the stream buffer requirements, he/she can secure no reasonable return from, nor make reasonable use of, his/her property.
 - (i) Merely proving that the variance would permit a greater profit from the property will not be considered adequate justification for a variance.
 - (ii) Moreover, the Erosion Control Officer shall consider whether the variance is the minimum possible deviation from the stream buffer requirements that will make reasonable use of the property possible.
 - (b) The hardship results from application of the stream buffer requirements to the property rather than from other factors such as deed restrictions or other hardship.
 - (c) The hardship is due to the physical nature of the applicant's property, such as its size, shape, or topography, which is different from that of neighboring property.
 - (d) The applicant did not cause the hardship by knowingly or unknowingly violating the stream buffer requirements.
 - (e) The applicant did not purchase the property after the effective date of the stream buffer requirements, and then request a variance.
 - (f) The hardship is unique to the applicant's property, rather than the result of conditions that are widespread.
 - (i) If other properties are equally subject to the hardship created in the restriction, then granting a variance would be a special privilege denied to others, and would not promote equal justice.
 - (g) The variance is in harmony with the general purpose and intent of the State's riparian buffer protection requirements and preserves its spirit; and
 - (h) In granting the variance, the public safety and welfare have been ensured, water quality has been protected, and substantial justice has been done.

- (B) If the Erosion Control Officer determines that a variance request meets the requirements in (A) above, then he/she shall prepare a preliminary finding and submit it to the State's Environmental Management Commission.
- (C) Preliminary findings on variance requests sent to the State's Environmental Management Commission shall be reviewed by said Commission within 90 days after receipt by the Director of the Environmental Management Commission.
- (D) The purpose of the State Environmental Management Commission's review is to determine if it agrees with the Erosion Control Officer's findings regarding whether that the requirements in subsection (A) have been met.
- (E) The following actions shall be taken depending on the State Environmental Management Commission's decision on the variance request:
 - (a) Upon the State Environmental Management Commission's approval, the Erosion Control Officer shall issue a final decision granting the variance.
 - (b) Upon the State Environmental Management Commission's approval with conditions or stipulations, the Erosion Control Officer shall issue a final decision, which includes these conditions or stipulations.
 - (c) Upon the State Environmental Management Commission's denial, the Erosion Control Officer shall issue a final decision denying the variance.
- (F) Requests for appeals of determinations made by the State's Environmental Management Commission that the requirements of subsection (A) have not been met shall be made to the State's Office of Administrative Hearings.

2.10.8 Unauthorized Variances

- (A) Other than stream buffer variances outside of the first 50-feet from the centerline of a stream, the Board of Adjustment is not authorized to grant variances to any of the standards of:
 - (1) Article 7 - Subdivision Design and Improvements,
 - (2) Section 6.15 - Erosion and Sedimentation Control,
 - (3) Section 6.14 - Stormwater Management, and
 - (4) Section 6.16 - Environmental Impact Reports
- (B) The Board of Adjustment is not authorized to grant a variance that would permit a use in a district where that use is neither a Permitted Use nor a Special Use.

2.10.9 Review Procedures

- (A) Applications for a Variance shall be reviewed and acted upon by the Board of Adjustment in accordance with the procedures contained in Section 2.12 of this Ordinance.
- (B) The Planning Director shall complete an assessment of the application and provide a recommendation on the disposition of the application.
- (C) The assessment shall be introduced at the hearing and become part of the record.

2.10.10 Findings of Fact

- (A) Required findings of fact, as listed in Section 2.10.4, shall be made in the indicated order by the Board of Adjustment.
- (B) The Board of Adjustment is not empowered to grant a variance without an affirmative finding of fact supported by substantial evidence in the record of proceedings before the Board.

2.10.11 Conditions of Approval

The Board of Adjustment may impose appropriate conditions provided that such conditions are reasonably related to the variance.

2.10.12 Notice Requirements

Notice of matters before the Board of Adjustment shall follow the procedures in Section 2.12.6.

SECTION 2.11: INTERPRETATIONS

2.11.1 Generally

An appeal from an order, requirement, decision or determination of the Planning Director shall be decided by the Board of Adjustment based upon its findings of fact and to achieve the intent of this Ordinance. In exercising this power, the Board of Adjustment shall act in a prudent manner so that the purposes of this Ordinance shall be served. The effect of the decision shall not be to vary the terms of this Ordinance nor add to the list of Permitted Uses in the districts.

2.11.2 Application Requirements

- (A) Applications for an appeal of an interpretation of a decision, file determination, directive, Notice of Violation, or other similar determination shall be submitted on forms provided by the Planning Department in accordance with Section 2.2 of this Ordinance. Ten copies of the application and supporting documentation shall be submitted.
- (B) Applications must be received by the Planning Director no later than 30 days after the decision, file determination, directive, Notice of Violation, or other similar determination was made.

2.11.3 Burden of Proof

Applicants shall have the burden of establishing by competent material and substantial evidence, in the form of testimony, exhibits, documents, models, plans, and other materials, that the application meets the requirements for approval of an appeal from an order, requirement, decision, or determination of the Planning Director.

2.11.4 Stay on Further Proceedings

- (A) An appeal to the Board of Adjustment from a decision or determination of the Planning Director stays all proceedings in furtherance of the decision or determination appealed from, except as provided herein.
- (B) An appeal to the Board of Adjustment of a determination or decision of the Planning Director shall not stay further proceedings in furtherance of the decision or determination appealed from, if the Planning Director certifies to the Board of Adjustment in an affidavit either:
 - (1) A stay would cause imminent peril to life or property, or
 - (2) The situation appealed from is transitory in nature and, therefore an appeal would seriously interfere with enforcement of the Ordinance.
- (C) In either instance, the Planning Director shall place in the determination facts to support the conclusion if (B)(1) and/or (B)(2) are invoked.
- (D) If (B)(1) and/or (B)(2) are invoked, and approved by the Board of Adjustment, enforcement proceedings shall not be stayed except through the issuance of a restraining order issued by a court of competent jurisdiction. If enforcement proceedings are not stayed, the appellant may file a request for an expedited hearing of the appeal.

2.11.5 Review Procedures

- (A) Applications for an appeal of an interpretation shall be reviewed and acted upon by the Board of Adjustment in accordance with the procedures contained in Section 2.12 of this Ordinance.
- (B) The conduct of the hearing shall be consistent with the provisions of Section 2.12 of this Ordinance.
- (C) The Planning Director shall complete an assessment of the application and provide a recommendation on the disposition of the application. The assessment shall include all relevant facts utilized in rendering the disputed decision and the rationale for the interpretation made by the Planning Director.
- (D) The assessment shall be introduced at the hearing and become part of the record.
- (E) Upon hearing all evidence associated with the application, the Board of Adjustment shall close the hearing and render a decision on the matter to affirm, modify, or reverse the decision of the Planning Director.

2.11.6 Findings of Fact

The Board of Adjustment shall provide a detailed rationale for its decision in the form of an order to affirm, modify, or reverse the decision of the Planning Director. This order shall provide the necessary justification for the Board's action based on the testimony and evidence entered into the record during the hearing.

2.11.7 Notice Requirements

Notice requirements shall follow Section 2.12.6(A). Other subsections of Section 2.12.6 are not applicable to applications for an appeal of an interpretation.

SECTION 2.12: BOARD OF ADJUSTMENT

2.12.1 General Provisions

- (A) The Board shall act on all applications before it.
- (B) The Board shall act on any appeal of a Stop Work Order issued by the Planning Director at its next regularly scheduled meeting or at a special meeting called for that purpose.

2.12.2 Quasi-Judicial Proceedings

- (A) The Board of Adjustment acts in a quasi-judicial capacity. However, it is not intended that its proceedings be conducted as formally as those before courts.
- (B) The rules of procedure and evidence set forth in this Ordinance shall be followed to protect the interests of all parties and the public.
- (C) The presiding officer shall administer oaths to all witnesses and shall make rulings necessary to preserve fairness, order, or proper decorum in any matter before the Board of Adjustment. Any person who, while under oath during a proceeding before the Board, willfully swears falsely is guilty of a Class I misdemeanor.
- (D) Any member of the Board of Adjustment or any interested party may object to, and the presiding officer may exclude, any evidence, testimony, or statement that is deemed incompetent, irrelevant, immaterial, or unduly repetitious and therefore fails to reasonably address the issues before the Board of Adjustment.

2.12.3 Evidence and Testimony

- (A) **Interested Party and Objections**

- (1) Any interested party shall be permitted to present evidence or testimony, cross-examine witnesses, inspect documents, and offer evidence or testimony in explanation or rebuttal.
- (2) Any member of the Board of Adjustment may question any interested party.
- (3) Persons other than interested parties may offer competent, relevant, and material testimony or evidence that is not repetitive as allowed by the Board.
- (4) Administrative materials such as applications, staff reports, and other relevant administrative materials shall become part of the hearing record and may be provided in written or electronic form.
 - (a) Administrative materials shall be distributed to the applicant and to the landowner, if that person is not the applicant, at the same time they are distributed to the Board.
 - (b) 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.
- (5) Objections regarding jurisdictional and evidentiary issues, including but not limited to, the timeliness of an appeal or the standing of a party, may be made to the Board. The Board chair shall rule on any objections and the chair's ruling may be appealed to the full Board.

(B) Subpoenas

- (1) The Board of Adjustment may subpoena witnesses and compel the production of evidence.
- (2) To request issuance of a subpoena, persons with standing as detailed under NCGS 160D-1402(c), shall 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 in those cases where testimony or evidence is deemed to be relevant, reasonable in nature and scope, and not oppressive.
- (3) The chair shall rule on any motion to quash or modify a subpoena. Decisions regarding subpoenas made by the chair may be appealed to the full Board.
- (4) If a person fails or refuses to obey a subpoena issued pursuant to this subsection, the Board of Adjustment, or the party seeking the subpoena, may apply to the General Court of Justice for an order requiring that its order be obeyed, and the Court will have jurisdiction to issue those orders after notice to all proper parties.
- (5) No testimony of any witness before the Board of Adjustment, pursuant to a subpoena issued in exercise of the power conferred by this subsection, may be used against the witness in any civil or criminal action, other than a prosecution for false swearing committed on the examination.
- (6) Anyone who, while under oath during a proceeding before the Board of Adjustment, willfully swears falsely, is guilty of a Class 1 misdemeanor.

2.12.4 Quorum and Vote Required

- (A) A quorum of the Board is necessary to conduct any business and shall consist of four members.
- (B) The affirmative vote of four of the members of the Board shall be necessary in order to effect any variation in this Ordinance.
- (C) A majority of the members shall be required to decide on the issuance of a Special Use Permit or an appeal application.

2.12.5 Notification of Board Action

- (A) Within five working days after Board action, the Planning Director shall have available in the Planning Department's office a notice of decision of the Board's action.
- (B) The Planning Director shall notify the parties to an application or appeal of the Board's disposition. This includes the applicant, the property owner if different from the applicant, or any individual who has submitted a written request for a copy prior to the date the decision becomes effective. This notice shall be made by registered or certified mail within five working days of the Board's actions.
- (C) The Planning Director shall keep a copy of the Board's action on file.

2.12.6 Notice Requirements for Matters Before the Board

- (A) Notice for Special Use Permit or Variance applications shall follow the process in Section 2.7.6
- (B) In the case of an appeal of a Stop Work Order issued by the Planning Director, the Planning Director shall give written notice by certified mail to the property owner, and/or person(s) engaged in the alleged violation. Notification of adjacent property owners, posting of property, and publication of a hearing notice is not required.

SECTION 2.13: EXEMPT SUBDIVISIONS

2.13.1 Generally

- (A) Persons proposing divisions of land that do not constitute a subdivision must request a determination of an exempt subdivision status with the Planning Director. Activities that do not constitute a subdivision are found in Section 7.2.1.
- (B) One copy of the final mylar plat and three paper copies of the plat shall be submitted with the request for a determination for an exempt subdivision.
- (C) Exempt subdivisions shall comply with all applicable non-plat requirements of this Ordinance.

2.13.2 Review and Action

- (A) Following receipt of a request for a determination of an exempt subdivision status, the Planning Director shall make a determination of the land division's exempt or nonexempt status.
- (B) If the Planning Director determines that the proposed land division does not constitute a subdivision, the Planning Director shall certify the proposed land division as exempt and include the necessary statement on the plat certifying same.
- (C) If the Planning Director determines that the proposed land division constitutes a subdivision, the applicant shall be informed of such in writing and shall be required to submit the appropriate Subdivision application.

SECTION 2.14: MINOR SUBDIVISIONS

2.14.1 Review and Decision Processes and Flow Charts
