

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2005

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SENATE BILL 970

Short Title: Land-Use Permit Appeals.

(Public)

Sponsors: Senator Kinnaird.

Referred to: Judiciary II.

March 24, 2005

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

5 The General Assembly of North Carolina enacts:

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

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

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

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

18 (c) Standing. – A petition may be filed under this section only by a person who
19 has standing to challenge the decision being appealed. A person has standing if a
20 reasonable person in the position of the person seeking to challenge the decision could
21 reasonably conclude that the use of the property authorized by the decision would be
22 likely to adversely affect the interests of the person in some real, substantial, and
23 concrete way that is not speculative, insignificant, or philosophical, or that is
24 demonstrably different in nature or degree than the manner in which the decision affects
25 members of the general public. Without limiting the generality of the foregoing, the
26 following principles shall apply in determining whether a petitioner has standing:

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

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

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

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

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

17 (3) An incorporated property owners association to which all owners of
18 property in a designated area belong by virtue of their ownership of
19 property in such area shall have standing to challenge the issuance of a
20 permit, the granting of a variance, or a determination that property is
21 being used in conformity with an ordinance adopted under this Part if
22 any of the members of such incorporated property owners association
23 would have standing to challenge the decision as an individual.

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

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

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

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

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

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

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

10 (2) Except as otherwise stated in subdivision (1) of this subsection, an
11 intervenor must demonstrate that a reasonable person in the position of
12 the intervenor could reasonably believe that the outcome of the appeal
13 could adversely affect the interests of the person in some real,
14 substantial, and concrete way that is not purely speculative,
15 insignificant, or philosophical or that is demonstrably different in
16 nature or degree than the manner in which the decision affects
17 members of the general public.

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

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

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

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

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

43 (j) Scope of Review.

1 (1) When reviewing the decision of a city council, board of adjustment, or
2 planning agency under the provisions of this section, the trial court
3 shall ensure that the rights of petitioners have not been prejudiced
4 because the decision-making body's findings, inferences, conclusions,
5 or decisions were:

6 a. In violation of constitutional provisions, including, but not
7 limited to, those protecting procedural due process rights.

8 b. In excess of the statutory authority conferred upon the
9 municipality or the authority conferred upon the decision-
10 making body by ordinance.

11 c. Inconsistent with applicable procedures specified by statute or
12 ordinance.

13 d. Affected by other error of law.

14 e. Unsupported by substantial competent evidence in view of the
15 entire record.

16 f. Arbitrary or capricious.

17 (2) When the issue before the trial court is whether the decision-making
18 body below erred in interpreting an ordinance, the trial court may
19 review that issue de novo and substitute its own judgment for that of
20 the decision-making body.

21 (3) The term "competent evidence" as used in this subsection shall not
22 preclude reliance by the decision-making body on evidence that would
23 not be admissible under the rules of evidence as applied in the trial
24 division of the General Court of Justice if (i) the evidence was
25 admitted without objection, or (ii) the evidence appears to be
26 sufficiently trustworthy and was admitted under such circumstances
27 that it was reasonable for the decision-making body to rely upon it.
28 Notwithstanding the foregoing sentence, the term "competent
29 evidence" shall not be deemed to include the opinion testimony of lay
30 witnesses or persons not qualified by reason of specialized knowledge,
31 skill, experience, training, or education to testify as an expert as to
32 matters about which only expert testimony would generally be
33 admissible under the rules of evidence. By way of illustration without
34 limitation, the term "competent evidence" shall not be deemed to
35 include the opinion of lay witnesses as to whether (i) the use of
36 property in a particular way would affect the value of other property,
37 or (ii) the increase in vehicular traffic resulting from a proposed
38 development would pose a danger to the public safety.

39 (k) Decision of the Trial Court. – Following its review of the decision-making
40 body in accordance with subsection (j) of this section, the trial court may affirm the
41 decision, reverse the decision and remand the case with appropriate instructions, or
42 remand the case for further proceedings. If the court does not affirm the decision below
43 in its entirety, then the court shall be guided by the following in determining what relief
44 should be granted to the petitioners.

- 1 (1) If the court concludes that the error committed by the decision-making
2 body is procedural only, the court may remand the case for further
3 proceedings to correct the procedural error.
- 4 (2) If the court concludes that the decision-making body has erred by
5 failing to make findings of fact such that the court cannot properly
6 perform its function, then the court may remand the case with
7 appropriate instructions so long as the record contains substantial
8 competent evidence that could support the decision below with
9 appropriate findings of fact. However, findings of fact are not
10 necessary when the record sufficiently reveals the basis for the
11 decision below or when the material facts are undisputed and the case
12 presents only an issue of law.
- 13 (3) If the court concludes that the decision below is not supported by
14 substantial competent evidence in the record, or is based upon an error
15 of law, then the court may remand the case with an order that directs
16 the council, board of adjustment, or planning agency to take whatever
17 action should have been taken had the error not been committed or to
18 take such other action as is necessary to correct the error. Without
19 limiting the generality of the foregoing, (i) if the court concludes that a
20 permit was wrongfully denied because the denial was not based on
21 substantial competent evidence or was otherwise based on an error of
22 law, the court shall remand with instructions that the permit be issued;
23 and (ii) if the court concludes that a permit was wrongfully issued
24 because the issuance was not based on substantial competent evidence
25 or was otherwise based on an error of law, the court shall remand with
26 instructions that the permit be revoked.

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

34 **SECTION 2.** Article 18 of Chapter 153A of the General Statutes is amended
35 by adding a new section to read:

36 **"§ 153A-349. Appeals in the nature of certiorari.**

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

42 **SECTION 3.** Article 19 of Chapter 160A of the General Statutes is amended
43 by adding a new section to read:

44 **"§ 160A-377. Appeals of decisions on subdivision plats.**

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

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

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

25 **SECTION 4.** Article 18 of Chapter 153A of the General Statutes is amended
26 by adding a new section to read:

27 **"§ 153A-377. Appeals of decisions on subdivision plats.**

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

37 (b) When a subdivision ordinance adopted under this Part provides that a board
38 of commissioners, planning agency, or staff member is authorized to make only an
39 administrative or ministerial determination in deciding whether to approve a preliminary
40 or final subdivision plat, then any party aggrieved by such decision may seek to have
41 the decision reviewed by filing an action in superior court seeking appropriate
42 declaratory or equitable relief. Such an action must be filed within the time frame
43 specified in G.S. 153A-340(f) for petitions in the nature of certiorari.

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

11 **SECTION 5.** This act is effective when it becomes law and applies to
12 actions filed on or after that effective date.