

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2005

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SENATE DRS75202-LR-70A (03/09)

Short Title: Land-Use Permit Appeals.

(Public)

Sponsors: Senator Kinnaird.

Referred to:

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.** 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 to superior court by  
proceedings in the nature of certiorari authorized under the provisions of this Article.

(b) 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 state the  
facts that demonstrate that the petitioner has standing to seek review and shall set forth  
the grounds upon which the petitioner contends that an error was made as well as the  
relief the petitioner seeks. The facts in support of allegations that the votes of one or  
more members of the decision-making body were affected by impermissible bias or  
conflict of interest shall be set forth with particularity.

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

- 1           (1) If the decision being appealed involves a denial of a permit request, a  
2 denial of a variance, or a determination that property is being used in  
3 violation of an ordinance adopted under this Article, then any person  
4 with an ownership or leasehold interest in the property in question, as  
5 well as the applicant for the permit or the variance (if different than the  
6 owner), has standing to file a petition.
- 7           (2) If the decision being appealed involves the issuance of a permit, the  
8 granting of a variance, or a determination that property is being used in  
9 conformity with an ordinance adopted under this Article, then the  
10 following persons shall have standing to file a petition, so long as they  
11 satisfy the general criteria set forth at the beginning of this subsection:
- 12           a. Any person who resides or owns property in such close  
13 proximity to the property that is the subject of the decision that  
14 the use of the property authorized by the decision would  
15 adversely affect such person's use or enjoyment of his or her  
16 residence or property or would adversely affect the value of  
17 such property.
- 18           b. Any person whose economic interests are directly threatened by  
19 the use authorized by the decision.
- 20           (3) An incorporated property owners association to which all owners of  
21 property in a designated area belong by virtue of their ownership of  
22 property in such area shall have standing to challenge the issuance of a  
23 permit, the granting of a variance, or a determination that property is  
24 being used in conformity with an ordinance adopted under this Part if  
25 any of the members of such incorporated property owners association  
26 would have standing to challenge the decision as an individual.
- 27           (4) For purposes of this subsection, the term "person" refers to any legal  
28 entity authorized to bring suit in his, her, or its own name, and the term  
29 "owner" refers to any person having an ownership interest in property.
- 30           (d) Respondent. – The respondent named in the petition shall be the city whose  
31 council, board of adjustment, planning agency, or other body made the decision that is  
32 being appealed. If the petitioner is not the applicant before the council, board of  
33 adjustment, or planning agency whose decision is being appealed, the petitioner shall  
34 name such applicant as a respondent. Any petitioner may, but need not, also name as a  
35 respondent any person who participated in the hearing before the council, board of  
36 adjustment, or planning agency.
- 37           (e) Writ of Certiorari. – Upon filing the petition, the petitioner shall present the  
38 petition and a proposed writ of certiorari to the clerk of court of the county in which the  
39 matter arose. The writ shall direct the respondent city to prepare and certify to the court  
40 the record of proceedings below within a specified date. The writ shall also direct that  
41 the petitioner shall serve the petition and the writ upon each respondent named therein  
42 in the manner provided for service of a complaint under Rule 4j of the Rules of Civil  
43 Procedure. No summons shall be issued. The clerk shall issue the writ without notice to

1 the respondent or respondents if the petition has been properly filed and the writ is in  
2 proper form. A copy of the executed writ shall be filed with the court.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

30 **"§ 153A-377. Appeals of decisions on subdivision plats.**

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

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

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

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

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