

ARTICLE 800: MEMBERSHIP, PROCEDURES AND POWERS OF THE BOARD OF ADJUSTMENT

Section 801: Creation and Membership of Board of Adjustment.

A Board of Adjustment is hereby created. Said Board shall consist of such regular and alternate members, appointed in such a manner and for such a time, as set out below.

801.1 Membership.

Four (4) regular members and two (2) alternate members, who are residents of the City of Henderson, shall be appointed by the City Council. In addition, the Vice-Chairman of the Planning Board, if he is a resident of the City, shall serve as a fifth regular member of the Board of Adjustment with full voting and others rights and privileges as the other four regular representatives. In the event that the Vice-Chairman is not a resident of the City, or in the event that the Planning Board should fail to select a Vice-Chairman, then the City Council shall appoint a member from among those members that it has appointed to the Planning Board to serve as the fifth regular member of the Board of Adjustment. (Amended 4/16/07)

In the event that the City should elect to exercise its extraterritorial planning jurisdiction, as provided in the City Charter of the City of Henderson and/or N.C.G.S. 160A-360, then the membership shall be increased by adding five (5) additional regular members and two (2) alternates. Said additional members shall be residents of the extra-territorial planning area, and shall be appointed by the Vance County Board of County Commissioners. If the Board of County Commissioners fails to make appointments within ninety (90) days after receipt of a resolution from the City Council requesting that such appointments be made, the City Council may make such appointments as provided in GS 160A-362.

Members of the Board of Adjustment residing in the extraterritorial planning area shall sit and exercise equal rights, privileges and duties as prescribed for members of the Board residing in the City, but only with respect to matters in the extraterritorial planning area. Board members residing in the extraterritorial planning area shall be encouraged to voice opinions and recommendations concerning matters within the City but shall have no vote on these matters.

801.2. Term of Office.

Except as provided for the original Board, and, except for the position filled by the Vice Chairman or other member of the Planning Board, the term of office of all appointed members, shall be for three (3) years. The original Board of Adjustment shall be appointed as follows: two for three years, one for two years, one for one year. In the event that the City elects to exercise extraterritorial planning jurisdiction, the members appointed for the extraterritorial planning area shall be appointed as follows: one for three years, two for two years, two for one year.

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801.3 Alternate Members.

Alternate members, while attending any regular or special meeting of the Board and serving in the absence of any regular member, shall have and may exercise the powers and duties of said absent regular member, otherwise, alternate members shall have no vote. The Chairman of the Board of Adjustment shall select which alternate member will replace which absent member. The term of office for all alternate members shall be three (3) years.

801.4. Chairman.

The Board of Adjustment shall select, at its annual meeting, one of their members, who is a resident of the City, to serve until the next annual meeting as Chairman of the Board of Adjustment, and such other officers as they see fit. The Chairman, or in his absence, the Vice-Chairman, may administer oaths and compel the attendance of witnesses by subpoena. Meetings shall be held at the call of the Chairman and at such other times as the Board of Adjustment may determine.

801.5. Vacancies.

Vacancies shall be filled, as they occur, by the appropriate governing body. Persons filling vacancies shall be appointed to serve the remaining un-expired term of the person they are replacing. Faithful attendance at the meetings of the Board is a prerequisite to continued membership on this Board; the governing body who made the appointment of the member may remove and replace a member who fails to meet this requirement.

801.6. Compensation.

Members of the Board of Adjustment shall receive compensation for their services at the rate of twenty-five (\$25) dollars per meeting attended. Provided, however, that any honorary, ex-officio, or emeritus members (but excluding those holding such title as of April 1, 2007 during their continuing term of office) shall not be compensated as a member. (Amended 4/16/07)

801.7. Meetings.

All meetings of the Board of Adjustment shall be open to the public. The Board of Adjustment shall keep minutes of its proceedings, showing the vote of each member upon each question, and the absence or failure of any member to vote, and a copy of the minutes shall be maintained on file for public record.

Section 802: Powers and Duties

802.1. Powers and Duties of the Board of Adjustment.

The Board of Adjustment is an administrative agency which acts in a quasi-judicial capacity. The Board has the duty to investigate facts and from its investigation to draw conclusions as a basis of official action, and to exercise discretion of a judicial nature. It lacks the authority to amend

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this Ordinance. On the other hand, where the Board finds that unfair or unjust situations are reoccurring under the Ordinance and for which it cannot grant relief, then the Board is authorized to recommend to the City Council that this Ordinance be amended to address the situation. The Board of Adjustment's powers and duties are as set out below and include the following:

- (a) granting relief from the strict letter of this Ordinance when permitted by variances,
- (b) acting as a board of appeal from the Zoning Administrator's decision or any other administrative officer's decision under this Ordinance or any of the following ordinances and laws, the State Building Code, the Minimum Housing Code and any provision of Chapter 18, 19, 20, 21, 21A, 22, 23 of the City Code, and
- (c) the issuing of special use permits, and conditional use permits.

(Section 802.1 Amended 4/14/2014)

802.2. Administrative Relief.

The Board of Adjustment shall hear and decide appeals decisions of administrative officials charged with enforcement of the zoning or unified development ordinance and may hear appeals arising out of any other ordinance that regulates land use or development (including under the Building Code, the Minimum Housing Code; the Abandoned Structures Code, or any provision of Chapters, 18, 19, 20, 21, 21A, 22 or 23 of the City Code), pursuant to all of the following:

- (a) Any person who has standing under G.S. 160A-393 (d) or the city may appeal to the decision to the board of adjustment. An appeal is taken by filing a notice of appeal with the city clerk and the zoning administrator. The notice of appeal shall state the grounds for the appeal.
- (b) The official who made the decision shall give written notice to the owner of the property that is the subject of the decision and to the party who sought the decision, if different from the owner. The written notice shall be delivered by personal delivery, electronic mail, or by first-class mail.
- (c) The owner or other party shall have 30 days from receipt of the written notice within which to file an appeal. Any other person with standing to appeal shall have 30 days from receipt any source of actual or constructive notice of the decision within which to file an appeal.
- (d) The official who made the decision shall transmit to the board of all documents and exhibits constituting the record upon which the action appealed from is taken. The official shall also provide a copy of the record to the appellant is not the owner.
- (e) An appeal of a notice of violation or other enforcement order stays enforcement of the action appealed from unless the official who made the decision certifies to the board of adjustment after notice of appeal has been filed that because of the facts stated in an

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affidavit, a stay would cause imminent peril to life or property or because the violation is transitory in nature, a stay would seriously interfere with enforcement of the ordinance. In that case, enforcement proceedings shall not be stayed except by a restraining order, which may be granted by a court. If enforcement proceedings are not stayed, the appellant may file with the official a request for an expedited hearing of the appeal, and the board of adjustment shall meet to hear the appeal within 15 days after such a request is filed. Notwithstanding the foregoing, appeals of decisions granting a permit or otherwise affirming that a proposed use of property is consistent with the ordinance shall not stay the further review of an application for permits or permissions to use such property; in these situations the appellant may request and the board may grant a stay of a final decision of permit applications or building permits affected by the issue being appealed.

- (f) Subject to the provisions of subdivision (e) of this subsection, the board of adjustment shall hear and decide the appeal within a reasonable time.
- (g) The official who made the decision shall be present at the hearing as a witness. The appellant shall not be limited at the hearing to matters stated in the notice of appeal. If any party or the city would be unduly prejudiced by the presentation of matters not presented in the notice of appeal, the board shall continue the hearing. The board of adjustment may reverse or affirm, wholly or partly, or may modify the decision appealed from and shall make any order, requirement, decision, or determination that ought to be made. The board shall have all the powers of the official who made the decision.
- (h) When hearing an appeal pursuant to G.S. 160A 400.9(e) or any other appeal in the nature of certiorari, the hearing shall be based on the record below and the scope of review shall be as provided in G.S. 160A 393(k).
- (i) The parties to an appeal that has been made under this subsection may agree to mediation or other forms of alternative dispute resolution. (Section 802.2 Amended 4/14/2014)

802.3. Variances.

The Board of Adjustment shall accept and may hear and decide requests to vary or deviate from the strict letter of this Ordinance in situations and under conditions as set out below:

802.3.1. Variance from the Table of Permitted Uses.

Use variances, or a variance which would allow a use in a district other than one allowed under the Table of permitted uses under this ordinance, shall not be allowed.

802.3.2. Variance from Area or Dimensional Requirements.

Area variances, or a variance from dimensional requirements of this Ordinance, such as the minimum lot size, width, setback, or the number of parking spaces required, may be granted if the Board of Adjustment finds that the applicant has shown by the

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preponderance of the evidence that he has incurred an unnecessary hardship which was caused by the Ordinance and provided he demonstrates that all of the following conditions have been met:

- (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 the 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.

No change in permitted uses may be authorized by variance. Appropriate conditions may be imposed on any variance, provided that the conditions are reasonably related to the variance.

The concurring vote of four-fifths of the board shall be necessary to grant a variance. (A majority of the members shall be required to decide any other quasi-judicial matter or to determine an appeal made in the nature of certiorari.) For the purposes of this subsection, vacant positions on the board and members who are disqualified from voting on a quasi-judicial matter shall not be considered members of the board for calculation of the requisite majority if there are no qualified alternates available to take the place of such members. (Section 802.3.2 Amended 4/14/2014)

Section 803: Special Use Permit.

The Board of Adjustment shall hear and decide any application for a special use permit, and shall issue said permit where the applicant has demonstrated by the preponderance of the evidence that the standards of this Ordinance, including the following shall be met:

- (a) That the use will comply with the requirements of Article 600A and 600B of this Ordinance.
- (b) That the use will not materially and adversely affect the public health, safety or welfare;
- (c) That the use will not substantially injure the value of adjoining or abutting properties;

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- (d) That the use will be in harmony with the area in which it is located; or be a matter of public need;
- (e) That the use will not substantially contribute to an overburdening of municipal services;
- (f) That the use will be in conformity with the Henderson Land Use Plan and other duly adopted plans and policies of the City;

803.1. Conditions on Special Use Permits and Variances.

The Board of Adjustment may attach reasonable conditions related to development pursuant to a special use permit where the condition is related to mitigating or diminishing any impact or effect related to any standard in this Ordinance, or to a variance where the condition is appropriate to ensure development consistent with the standards for allowing a variance. Without limiting the scope of the conditions, those conditions may include:

- (a) That the proposed development be contingent on the existence of certain public facilities;
- (b) That the proposed development be required to observe setbacks or separations from existing uses in addition to that otherwise required by this Ordinance; or, to provide landscaping, in addition to that otherwise required by this Ordinance, to make the use more in harmony with the neighborhood;
- (c) That the proposed development be limited in terms of the hours, or manner, of operation.
- (d) That the variance or permit be limited to a particular duration.

Except as specifically modified or excluded by the Board of Adjustment, all permits and variances issued by the Board shall be subject to the condition that the proposed development will be in accordance with the application and site plan submitted.

Section 804: Rules of Procedure.

The Board of Adjustment is a quasi-judicial body. Its decisions shall comply with statutory and case law requirements including:

804.1. Application

An application for a Special Use Permit shall be on such form and processed in such a manner so as to comply with the requirements of Section 904 of this ordinance.

An application for a Variance or an appeal from the Zoning Administrator's decision shall be on such form as prescribed by the Zoning Administration, and shall unless specifically exempted by the Zoning Administrator include a site plan which complies with the requirements of subsection 903.2 of this ordinance. When an application for a variance is received, the Zoning

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Administration will review the application against the requirements of this ordinance and determine if it is complete. The Zoning Administrator will notify the applicant if he determines that the application is incomplete, and specify any additional information that will be required. Appeals from the Zoning Administrator’s decision and completed applications for a variance that are filed with the Zoning Administrator at least ten hays prior to the next Board of Adjustment has already agreed to consider two or more other matters on that date, in which case it may be scheduled for the meeting immediately following that one. Nothing shall preclude the applicant and the Zoning Administrator from arranging for the matter to be heard at a different time, providing the Chairman of the Board consents.

An application for a variance or an appeal of the Zoning Administrator’s decision shall be accompanied by a fee as follows:

<u>Type Application</u>	<u>Fee</u>
Appeal from Zoning Administrator or other administrative officer’s decision	\$350
Application for a Variance for a sign or an accessory structure to a single-family unit	\$350
Application for a variance, other than above (Amended 7/24/2006, 6/27/2013, 7/1/2015)	\$450

804.2 Copies

Unless otherwise required by the Zoning Administrator, any notice of appeal and application for a variance shall be filed in duplicate.

804.3 Notice of Hearings.

Notice of hearings conducted pursuant to this section shall be mailed to the person or entity whose appeal, application, or request is the subject of the hearing; to the owner of the property that is the subject of the hearing if the owner did not initiate the hearing; to the owners of all parcels of land abutting the parcel of land that is the subject of the hearing; and to any other persons entitled to receive notice as provided by the zoning or unified development ordinance. In the absence of evidence to the contrary, the city may rely on the county tax listing to determine owners of property entitled to mailed notice. The notice must be deposited in the mail at least 10 days, but not more than 25 days, prior to the date of the hearing. Within that same time period, the city shall also prominently post a notice of the hearing on the site that is the subject of the hearing or on an adjacent street or highway right of way. (Amended 4/14/2014)

804.4 Oaths and Subpoenas.

- (a) Oaths. - The chair of the board or any member acting as chair and the clerk to the board are–authorized to administer oaths to witnesses in any matter coming before the board. Any person who, while under oath during a proceeding before the board of adjustment, willfully swears falsely is guilty of a Class 1 misdemeanor.

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- (b) Subpoenas. - The board of adjustment through the chair, or in the chair's absence anyone acting as chair, may subpoena witnesses and compel the production of evidence. To request issuance of a subpoena, persons with standing under G.S. 160A-393(d) may make a written request to the chair explaining why it is necessary for certain witnesses or evidence to be compelled. The chair shall issue requested subpoenas he or she determines to be relevant, reasonable in nature and scope, and not oppressive. 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 of adjustment. 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 subpoena be obeyed, and the court shall have jurisdiction to issue these orders after notice to all proper parties. (Amended 4/14/2014)

804.5. Evidence in Special Use Permits and Variances.

In special use permit and variance hearings, witnesses shall be sworn and under oath, however, any objection to the evidence not being under oath shall be deemed waived if no objection is made to the Board prior to the time that the Board of Adjustment makes its findings on the matter.

804.6 Order of Presentation on Special Use Permits and Variances.

The Chairman shall conduct any hearing required to be held on a special use permit or a variance in such a manner as to afford substantive due process, considering the nature of the proceeding, to all persons involved. The chairman should follow the guidelines set out below in conducting hearings on variances and special use permits.

- (a) The Chairman will call the matter and indicate the nature of request. He will then identify persons intending to address the Board and where a number of witnesses are involved, if it is possible to align the witnesses and recognize one individual for purposes of allowing a limited cross-examination of witnesses;
- (b) The Chairman will then call on the Zoning Administrator to present the administrative record and to present information relevant to the proceeding. Then the Chairman will allow the applicant, identified persons contending to be aggrieved parties, and the Board to cross-examine the Administrator;
- (c) The Chairman will then call on the applicant to present his case and call his witness. Following direct testimony of each witness, the Chairman will afford an opportunity for the Administrator, aggrieved parties and the Board to cross-examine;
- (d) The Chairman will then call in the aggrieved parties and their witnesses. Following direct testimony of each witness, the Chairman will afford an opportunity for the Administrator, applicant, other aggrieved parties and the Board to cross-examine.
- (e) The Chairman will then inquire as to whether there are any objections to the evidence considered or the manner in which they have proceeded. He will inquire of the Zoning

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Administrator as to what, if any, issues of substantial controversy need to be specifically addressed. Any objections to the evidence should be resolved prior to the Board making findings.

Except where a party objects at the hearing and prior to findings being made to the nature of the proceedings of the evidence presented, the failure of the Chairman to follow the procedure or determine if the evidence should be properly considered shall not constitute error or a basis for appeal.

804.7. Findings of fact on Special use Permits and Variances.

Prior to the Board of Adjustment taking any action to approve, deny or approve with conditions any special use permit or variance, the Board shall make findings of fact as whether the standards of subsection 802.3 (for variance) and section 803 (for special use permits) any other standards in this ordinance over which there has been substantial controversy have been complied with.

In proceeding on the findings, a motion shall not be entertained until the Chairman has had an opportunity to inquire of the Board members whether any Board member contends that a particular standard has (or has not) been met, and whether he desires to address that issue. In the event that a motion is presented that does not contain findings of fact, the Chairman shall set the motion aside or allow it to be modified to set forth the necessary findings prior to allow it to be voted upon.

804.8. Decisions

The Board of Adjustments may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination appealed from, and shall make any order, requirements, decision or determination that in its opinion ought to be made in the matter. In approving the issuance of a permit, the Board shall have the power to impose any reasonable conditions on the permit which will minimize the impact of the proposed use of the property upon its neighbors, and preserve the best interest of the public as a whole.

The board shall determine contested facts and make its decision within a reasonable time. Every quasi-judicial decision shall be based upon competent, material, and substantial evidence in the record. Each quasi-judicial decision shall be reduced to writing and reflect the board's determination of contested facts and their application to the applicable standards. The written decision shall be signed by the chair or other duly authorized member of the board. A quasi-judicial decision is effective upon filing the written decision with the clerk to the board. The decision of the board shall be delivered by personal delivery, electronic mail, or by first class mail to the applicant, property owner, and to any person who has submitted a written request for a copy, prior to the date the decision becomes effective. The person required to provide notice shall certify that proper notice has been made. (Amended 4/14/2014)

804.9. Special Voting Requirements

The concurring vote of four-fifths of the board shall be necessary to grant a variance. A majority of the members shall be required to decide any other quasi-judicial matter or to determine an appeal made in the nature of certiorari. For the purposes of this subsection, vacant positions on the board and members who are disqualified from voting on a quasi-judicial matter shall not be considered members of the board for calculation of the requisite majority if there are no qualified alternates available to take the place of such members.

A member of the board or any other body exercising quasi-judicial functions pursuant to this Article shall not participate in or vote on any quasi-judicial matter in a manner that would violate affected persons' constitutional rights to an impartial decision maker. Impermissible conflicts include, but are not limited to, a member having a fixed opinion prior to hearing the matter that is not susceptible to change, undisclosed ex parte communications, a close familial, business, or other associational relationship with an affected person, or a financial interest in the outcome of the matter. If an objection is raised to a member's participation and that member does not recuse himself or herself, the remaining members shall by majority vote rule on the objection. (Amended 4/14/2014)

804.10. Quorum

The quorum for the purpose of hearing matters where 4/5 concurring vote of the Board is required shall not be less than 4/5 if the entire membership of the Board entitled to vote on the matter at hand; in other matters, a simple majority of the members appointed will suffice.

Section 805: Appeal.

Every quasi-judicial decision shall be subject to review by the superior court by proceedings in the nature of certiorari pursuant to G.S. 160A 393. A petition for review shall be filed with the clerk of superior court by the later of 30 days after the decision is effective or after a written copy thereof is given in accordance with §804.8 of this Ordinance. When first class mail is used to deliver notice, three days shall be added to the time to file the petition. (Amended 4/14/2014)

Section 806: Failure to Comply with the Terms of the Permit:

In the event that the applicant shall fail to comply with the permit of the conditions of any permit issued by the Board of Adjustment, said permit shall thereupon immediately become void and of no effect.

Any deviation, other than a minor or insignificant deviation, from the permit issued by the Board of Adjustment shall be authorized by the Board of Adjustment. Minor or insignificant deviation may be authorized by the Zoning Administrator.

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(RESERVED)