

## **Article XII. BOARD OF ADJUSTMENT**

### **Section 12.1 Establishment of Board of Adjustment**

A Board of Adjustment is hereby established. Said Board shall consist of nine (9) regular members and two alternate members. Five (5) of the members of the Board of Adjustment shall be appointed by the Board of Commissioners of the City of Mount Airy, and four (4) of the members shall be appointed by the Board of Commissioners of Surry County. One alternate member shall be appointed by the City of Mount Airy and one alternate member shall be appointed by Surry County.

Three of the members of the Board of Adjustment shall be appointed for terms of four (4) years, and two (2) of the members of the Board of Adjustment shall be appointed for terms of two (2) years by the City of Mount Airy. Two of the members of the Board of Adjustment shall be appointed for terms of four (4) years and two (2) members of the Board of Adjustment shall be appointed for terms of two (2) year by Surry County. The alternate members shall be appointed for terms of two years by the City of Mount Airy and Surry County. Members and alternate members may be reappointed for any number of successive terms.

All members shall have equal rights, privileges, and duties in all matters. The concurring vote of eight (8) members of the Board shall be necessary to reverse any order, requirement, decision or determination of any administrative official charged with enforcement of this Ordinance or to decide in favor of the applicant any matter upon which it is required to pass under the Zoning Ordinance or to affect any variation of such Ordinance.

The Chairman of the Board of Adjustment, or in his absence the acting chairman, may appoint the alternates to sit for any regular members in case of the absence or disqualification of any regular members. In such case the alternate members shall have the same powers and duties of the regular members they are replacing during such time. In no case, however, shall more than nine (9) regular members or combination of regular members and the alternate members be empowered to vote on any matter that comes before the Board.

### **Section 12.2 Proceedings of the Board of Adjustment**

The Board of Adjustment shall elect a chairman and a vice-chairman from its members who shall serve for one (1) year or until re-elected or until their successors are elected. The Board shall appoint a secretary, who may be municipal officer, an employee of the City, or a member of the Board of Adjustment. The Board shall adopt rules and by-laws in accordance with the provisions of this Ordinance and of Article 19, Chapter 160A of the General Statutes of North Carolina. Meetings of the Board shall be held at the call of the chairman and at such other times as the Board may determine. The chairman, or in his absence the vice-chairman, may administer oaths and compel the attendance of witnesses by subpoena. All meetings of the Board shall be open to the public.

**Section 12.3**            **Appeals, Hearings, and Notice**

An appeal from the decision of the Zoning Administrator may be taken by the aggrieved party to the Board of Adjustment. Such appeal shall be taken within thirty (30) days by filing with the Zoning Administrator a notice of appeal specifying the grounds thereof. The Zoning Administrator shall forthwith transmit to the Board all papers constituting the record upon which the action appealed from was taken. The Board of Adjustment shall fix a reasonable time for hearing the appeal, give public notice thereof, as well as due notice to the parties in interest and decide the same within a reasonable time. At the hearing, any party may appear in person or by agent or attorney.

On all appeals, application and other matters brought before the Board of Adjustment, said Board shall inform in writing all the parties involved of its decision and the reasons thereof.

**Section 12.4**            **Stay of Proceedings**

An appeal stays all legal proceedings in furtherance of the action appealed from, unless the Zoning Administrator certifies to the Board of Adjustment after the notice of appeal shall have been filed with him, that by reason of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life and property. In such case, proceedings shall not be stayed otherwise than by a restraining order which may be granted by the Board of Adjustment or by a court or record on application, on notice to the Zoning Administrator, on due cause shown.

**Section 12.5**            **Powers and Duties of the Board of Adjustment**

The Board of Adjustment shall have the following powers and duties.

- A.    Administrative Review: To hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by the Zoning Administrator in the enforcement of this Ordinance.
- B.    Change In Kind of Non-Conforming Use: The Board may permit change in use from one non-conforming use to another as provided for in Section 11.5.
- C.    Zoning Permits with Vested Rights: To hear and decide Zoning Permits With Vested Rights in accordance with Article XIV of this Ordinance.
- D.    Conditional Use Permits: To hear and decide, in particular cases, and subject to appropriate conditions and safeguards, permits for conditional uses as authorized by Article VI. In granting a conditional use permit the Board shall make the following affirmative findings:
  - (1)    The Use requested is among those listed as an eligible Conditional Use in the District in which the subject property is located.

- (2) That the Conditional Use will not materially endanger the public health or safety if located where proposed and developed according to the plan as proposed;
- (3) That the Conditional Use meets all required conditions and specifications;
- (4) That the Conditional Use will not substantially injure the value of adjoining or abutting property, or that the use is a public necessity; and,
- (5) That the location and character of the Conditional Use if developed according to the plan as proposed will be in harmony with the area in which it is to be located and in general conformity with the plan of development of the City and its environs.

All Conditional Use applications within Historic Landmarks and Preservation Overlay Districts shall be reviewed by the Historic Preservation Commission at its next regular meeting after the application has been submitted in accordance with the requirements of this ordinance. The Historic Preservation Commission shall forward its comments and recommendations within 45 days of the filing of the application to the Board of Adjustment.

In granting a Conditional Use Permit, the Board may impose such additional restrictions and requirements upon such Permit as it may deem necessary in order that the purpose and intent of this ordinance are served, public welfare secured and substantial justice done. If all requirements and conditions are accepted by the applicant, the Board shall authorize the issuance of the Conditional Use Permit, otherwise the Permit shall be denied. Any Conditional Use Permit so authorized shall be perpetually binding upon the property included in such Permit unless subsequently changed or amended by the Board, as provided for in this Article.

The Board may change or amend any Conditional Use Permit, after a public hearing and subject to the same consideration as provided for in this Article for the original issuance of Conditional Use Permit.

No proposal to amend or change any Conditional Use Permit shall be considered within three (3) months of the date of the original authorization of such Permit or within three (3) months of hearing of any previous proposal to amend or change any such Permit.

- E. Variances To authorize upon appeal in specific cases such variances from the terms of the Ordinances as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the provisions of this ordinance will, in an individual case, result in practical difficulty or unnecessary hardship, so that the spirit of the ordinance shall be observed, public safety and welfare secured, and substantial justice done.

Such variance may be granted in such individual case of unnecessary hardship where the Board of Adjustment makes the following affirmative findings:

- (1) There are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the Ordinance.
  - a) If he complies with the provision of the Ordinance, the property owner can secure no reasonable return from or make no reasonable use of, his property.
  - b) The hardship results from the application of the Ordinance.
  - c) The hardship is suffered by the applicant's property.
  - d) The hardship is not a result of the applicant's own action.
  - e) The hardship is peculiar to the applicant's property.
- (2) The variance is in harmony with the general purpose and intent of the Ordinance and preserves its spirit.
- (3) In granting the variance the public safety and welfare have been assured and substantial justice has been done.

F. Variances From Watershed Overlay District Requirements: The Board of Adjustment may authorize variances from the specific requirements of the Watershed Overlay Districts in the same manner and subject to the same procedures and requirements of this Ordinance for authorizing other variances, provided that:

- (1) A notice be mailed by first class mail to all other local governments having watershed regulation jurisdiction within the particular watershed where the variance is requested and to each entity using that water supply for consumption.
- (2) If the variance request is for a major variance as defined herein the following procedure shall apply. If the Board of Adjustment decides in favor of granting the major variance, the Board shall then prepare a preliminary record of the hearing and submit it to the North Carolina Environmental Commission (EMC) for review and action. If the Board does not decide in favor of granting the major variances such unfavorable action shall constitute denial.
- 3) In the event of a favorable action by the Board on a major variance, the Board shall cause the record of their hearing to be promptly submitted to the EMC. The record of the hearing shall include but not be limited to:
  - a) The variance application;
  - b) The hearing notices;
  - c) The evidence presented;
  - d) Motions, offers of proof, objections to evidence, and rulings on them;
  - e) Findings and exception; and
  - f) The action of the Board including any conditions proposed.

- (4) If the EMC approves the major variance or approves with conditions or stipulations added, the EMC shall prepare a decision which authorizes the Board of Adjustment to issue a final decision which would include any conditions or stipulations added by the EMC. If the EMC denies the major variance, then the EMC shall prepare and transmit it to the Board of Adjustment. The Board shall then prepare a final decision denying the major variance.

- G. Interpretation of the Watershed Boundaries: The Board of Adjustment shall have the power to make adjustments to the exterior boundary of Watershed Overlay Districts by removing all or part of a piece of property from a Watershed Overlay District where it finds that all or part of such property actually lies outside the drainage area of such Watershed. In any case where there is a dispute as to whether a property or any part of a property that is shown on the Official Zoning Map as being in a Watershed Overlay District actually drains to that Watershed, the Board of Adjustment shall, upon appeal by the owner, make a determination as to the facts of the matter as it affects the subject property.

In determining whether a property or part of a property drains to the Watershed as indicated on the map, the Board of Adjustment shall base its determination on actual field conditions of the property as determined by topographical conditions. In making its determination, the Board of Adjustment may require the appellant to produce relevant expert testimony and exhibits.

After hearing such appeal, the Board shall find that the subject property (all or part) is either in the designated Watershed or out of the designated Watershed. If the Board shall find that the subject property is out of the designated Watershed, the Board shall order the Map to be adjusted to show the subject property to be outside the designated Watershed. In making such order, the Board of Adjustment shall designate the Watershed in which the subject property is located. If such designation causes the subject property to be located in another Watershed Overlay District, the order shall cause the map to be adjusted to show the same.

- H. Variance From Flood Damage Prevention Overlay District Requirements. The Board may authorize variances from the specific requirements of the Flood Damage Prevention Overlay District in the same manner and subject to the same procedures and requirements of this ordinance for authorizing other variances.

1. In passing upon such variances, the Board shall consider all technical evaluations and relevant factors, and:
  - The danger that materials may be swept onto other lands to the injury of others;
  - The danger to life and property due to flooding or erosion damage;

- The susceptibility of the proposed facility and its contents to flood damage and the effect of such damage on the individual owner;
  - The importance of the services provided by the proposed facility to the community;
  - The necessity to the facility of a waterfront location, where applicable;
  - The availability of alternative locations, not subject to flooding or erosion damage, for the proposed facility;
  - The compatibility of the proposed use with existing and anticipated development;
  - The relationship of the proposed use to the comprehensive plan and floodplain management program for that area;
  - The safety of access to the property in times of flood for ordinary and emergency vehicles;
  - The expected heights, velocity, duration, rate of rise and sediment transport of the floodwaters and effects of wave action if applicable, expected at the site; and
  - 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.
2. The findings listed above shall be submitted to the Board of Adjustment in writing, and included in the application for a variance.
  3. Upon consideration of the factors listed above, and the purposes of this Section, the appeal board may attach such conditions to the granting of variances as it deems necessary to further the purposes of this Section.
  4. Variances shall not be issued within any designated floodway if there is any increase in flood levels during the base flood discharge.
  5. Conditions for variances are as follows:
    - Variances may not be issued when the variance will render the structure in violation of other federal, state, or local laws, regulations, or ordinances.

- Variances shall only be issued upon a determination that the variance is the minimum necessary, considering the flood hazard, to afford relief;
  - Variances shall only be issued upon:
    - A showing of good and sufficient cause;
    - A determination that failure to grant the variance would result in exceptional hardship; and
    - A determination that the granting of a variance will not result in increased [flood heights, additional threats to public safety, extraordinary public expense, create] nuisance, cause fraud on or victimization of the public, or conflict with existing local laws or ordinances.
6. Any applicant to whom a variance is granted shall be given written notice specifying the difference between the base flood elevation and the elevation to which the structure is to be built and stating that the cost of flood insurance will be commensurate with the increased risk resulting from the reduced lowest flood elevation. Such notification shall be maintained with a record of all variance actions.
7. The Administrator shall maintain the records of all appeal actions and report any variances to the Federal Emergency Management Agency upon request.
- I. Act on Appeals in the Historic Landmarks and Preservation Overlay District. The Board shall have the following specific powers and duties in the Historic Landmarks and Preservation Overlay District:
1. Restoration or Reconstruction. Where it is found by the Historic Preservation Commission that an application for a zoning permit covers activity constituting an authentic restoration or reconstruction in the same location as the original location and in the original conformation of a structure of historic and/or architectural significance to the Historic Landmark or District, such activity may be approved by the Board of Adjustment following approval by the Historic Preservation Commission, even though it does not meet dimensional regulations.

The Board of Adjustment, in approving such authentic reconstruction or restoration, may attach reasonable and appropriate conditions to the approval, such that the public health, safety and general welfare shall be protected.

In addition to any other condition the Board of Adjustment may make regarding such authorization, any items restored, reconstructed, or maintained on, over, or within a public sidewalk, public alley area, or other public way shall be the

responsibility of the owner, his heirs and assigns. The owner's restoration, reconstruction, or maintenance of any such item within such area shall constitute the owner's agreement to protect and hold the City of Mount Airy blameless against any and all liability, cost, damage, or expense suffered by the City of Mount Airy as a result of or growing out of the restoration, reconstruction, or maintenance thereof. Such items, so approved may be lawfully restored, reconstructed, or maintained. Any such items projecting onto the vehicular travel way of a street or alley shall be, at its lowest point, 12 feet above the travel way.

2. Parking Waiver. Where the Historic Preservation Commission, in considering an application for a Certificate of Appropriateness, shall make a written finding that the number of off-street parking spaces required by this ordinance for the building or structure for which a building permit is requested would render the building incongruous with the historic aspects of the landmark or district it shall recommend to the Board of Adjustment a waiver, in part or in whole, of the off-street parking requirements. The Board of Adjustment may authorize a lesser number of off-street parking spaces provided (a) the Board finds that the lesser number of off-street parking spaces will not create problems due to increased on-street parking, and (b) will not constitute a threat to the public safety.
3. Appeal From Granting or Denial of Certificate of Appropriateness. An appeal may be taken to the Board of Adjustment from the Commission's action in granting or denying an application for a Certificate of Appropriateness. Such appeal may be taken by any aggrieved party, shall be taken within times prescribed by the Historic Preservation Commission by general rule, and shall be in the nature of certiorari.

Any appeal from the Board of Adjustment's decision in any case shall be heard by the Superior Court of Surry County.

## **Section 12.6            Appeals from the Board of Adjustment**

Any person or persons, jointly or severally, aggrieved by any decision of the Board, any taxpayer, or any officer, department, board or bureau of the jurisdiction of this Ordinance may, within thirty (30) days after the filing of the decision in the office of the Board, but not thereafter, present to a court of competent jurisdiction a petition duly verified setting forth that such decision is illegal, in whole or part, specifying the ground of illegality, whereupon such decision of said Board shall be subject to review by certiorari as provided by law.