

ARTICLE XII Board of Adjustment

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 (2) alternate members. Members of the Board of Adjustment shall be appointed by the Board of Commissioners of the City of Mount Airy. Terms are staggered so that some terms expire each year. 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 four-fifths (4/5ths) 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. 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.

The Chair of the Board of Adjustment, or in his/her absence the acting Chair, 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.

12.2 Proceedings of the Board of Adjustment

The Board of Adjustment shall elect a Chair and a Vice-Chair 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 Chapter 160D of the General Statutes of North Carolina. Meetings of the board shall be held at the call of the Chair

and at such other times as the board may determine. The Chair, or in his absence the Vice-Chair, may administer oaths and compel the attendance of witnesses by Subpoena. All meetings of the board shall be open to the public.

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.

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.

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. Special Use Permits

To hear and decide, in particular cases, and subject to appropriate conditions and safeguards, permits for special uses as authorized by Article VI. In granting a Special Use Permit, the board shall make the following affirmative findings:

1. The use requested is among those listed as an eligible special use in the zoning district in which the subject property is located.
2. That the special 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 special use meets all required conditions and specifications;
4. That the special 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 special 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 Special Use Permit 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 forty-five (45) days of the filing of the application to the Board of Adjustment.

In granting a Special 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 Special Use Permit, otherwise the Permit shall be denied. Any Special 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 Special Use Permit, after a public hearing and subject to the same consideration as provided for in this Article for the original issuance of Special Use Permit.

No proposal to amend or change any Special 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

When unnecessary hardships would result from carrying out the strict letter of the Zoning Ordinance, the Board of Adjustment shall vary any of the provisions of the Ordinance upon a showing of all of the following:

1. 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.
2. 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 public, may not be the basis for granting a Variance.
3. 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.

4. 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 a Variance. Appropriate conditions may be imposed on any Variance, provided that the conditions are reasonably related to the Variance.

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

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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 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 Clearance 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, twelve (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.

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

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decision of said board shall be subject to review by certiorari as provided by law.