

AN ORDINANCE TO AMEND APPENDIX A "LAND USE" OF THE CODE OF ORDINANCES OF THE CITY OF NEW BERN

THAT WHEREAS, the Planning and Zoning Board of the City of New Bern unanimously recommends that certain amendments be made to Appendix A "Land Use" of the Code of Ordinances of the City of New Bern; and

WHEREAS, the City's development services staff further recommends approval of said proposed amendments; and

WHEREAS, the Board of Alderman of the City of New Bern deems it advisable and in the public interest to effect said revisions to Appendix A "Land Use" of the Code of Ordinances of the City of New Bern.

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF ALDERMEN OF THE CITY OF NEW BERN:

SECTION 1. That Part III. "Board of Adjustment" of Article III "Administrative Mechanisms" of Appendix A "Land Use" of the Code of Ordinance of the City of New Bern be and the same is hereby amended by deleting Part III. "Board of Adjustment" in its entirety and inserting in its stead the following:

"BOARD OF ADJUSTMENT"

Section 15-31. Appointment and terms of board of adjustment.

(a) There shall be a board of adjustment consisting of ten regular members and three alternate members. No more than nine regular members, appointed by the board of aldermen, shall reside within the city. At least one regular member, appointed by the Craven County board of commissioners, shall reside within the city's extraterritorial planning area. If the Craven County board of commissioners fails to make an appointment within 90 days after receiving a notification from the city requesting that an appointment be made, the board of aldermen may make the appointment. Upon expansion or reduction of the city's extraterritorial planning area, the board of aldermen shall review the impact of such change on the extraterritorial membership of the board of adjustment and, if necessary, make appropriate adjustments in the number of extraterritorial members. Members may be removed by the appointing authority at any time for failure to attend three consecutive meetings without excuse or for missing more than 30 percent of the meetings within any 12-month period, or for other good cause related to performance of duties. Because the board of adjustment is a "quasi-judicial" administrative body that operates between the enforcement officers and the courts, members shall have the ability to read and understand complex land ownership and development issues. Members should have backgrounds related to land ownership and development issues (i.e., law, real estate, banking, building, environmental groups, governmental agencies, community organizations, etc.).

(b) Board of adjustment members shall be appointed for three-year staggered terms, but members may continue to serve until their successors have been appointed. Initially, three regular members and one alternate member shall be appointed for one-year terms. Three regular members and one alternative member shall be appointed for two-year terms, and four regular members and one alternate member shall be appointed for three-year terms. Vacancies may be filled for the unexpired terms only.

(c) Membership appointments shall be limited to two successive terms for regular members and two successive terms for alternate members.

(d) All regular members may participate in and vote on all issues before the board. Alternate members shall only serve in the absence of regular members, and shall have all the powers and duties of a regular member.

Section 15-32. Powers and duties of board of adjustment.

(a) The board of adjustment shall hear and decide:

(1) Appeals from any order, decision, requirement, or interpretation made by the zoning administrator, as provided in section 15-91;

(2) Appeals from any order of the building inspector;

(3) Appeals from any decision granting or denying any certificate of appropriateness made by the historic preservation commission, as provided in section 15-428(k);

(4) Applications for special use permits, as provided in section 15-46;

(5) Applications for variances, as provided in section 15-92;

(6) Questions involving interpretations of the zoning map, including disputed district boundary lines and lot lines, as provided in section 15-93; and

(7) Any other matter the board is required to act upon by any other city ordinance.

(b) The board of adjustment may adopt rules and regulations governing its procedures and operations not inconsistent with the provisions of this ordinance.

Section 15-33. Meetings of the board of adjustment.

(a) The board of adjustment shall establish a regular meeting schedule, and shall meet frequently enough so that it can take action in conformity with section 15-65.

(b) The board shall conduct its meetings in accordance with the quasi-judicial procedures set forth in articles IV, V, and VI.

(c) All meetings of the board of adjustment shall be open to the public, and the agenda for each board meeting shall be made available in advance of the meeting.

Section 15-34. Quorum.

A quorum for the board of adjustment shall consist of eight members. A quorum is necessary for the board to take official action.

Section 15-35. Board of adjustment officers.

(a) The board of adjustment shall elect one of its members to serve as chairman who shall preside over the board's meetings and one member to serve as vice-chairman. The persons so elected shall serve a term of one year or until their terms expire, whichever comes first. The chairman may succeed himself or herself.

(b) The chair, vice chair, any member temporarily acting as chair, or the clerk to the board may administer oaths to witnesses coming before the board of adjustment. Any person who, while under oath during a proceeding before the board of adjustment, willfully swears falsely is guilty of a Class 1 misdemeanor.

(c) The chair and vice-chair may take part in all deliberations and vote on all issues.

(d) The zoning administrator, or his designee, shall serve as the clerk to the board of adjustment. The clerk shall not have voting privileges.

Section 15-36. Voting.

(a) The concurring vote of four-fifths of the members of the board of adjustment shall be necessary to grant a variance.

(b) 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.

(c) Once a member is physically present at a board meeting, any subsequent failure to vote shall be recorded as an affirmative vote unless the member has been excused in accordance with subsection(d),

(d) 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, a financial interest in the outcome of the matter, or having standing under G.S. 160A-393(d) to appeal the decision

upon which he or she is voting. 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.

(e) A roll call vote shall be taken upon the request of any member."

SECTION 2. That Article V. "Appeals, Variances, Interpretations" of Appendix A "Land Use" of the Code of Ordinance of the City of New Bern be and the same is hereby amended by deleting Article V. "Appeals, Variances, Interpretations" in its entirety and inserting in its stead the following:

"ARTICLE V. APPEALS, VARIANCES, INTERPRETATIONS"

Section 15-91. Appeals.

The board of adjustment shall hear and decide upon appeals from, and shall review any final, written decision or order made by the zoning administrator, or his or her designee, and shall hear and decide upon appeals as provided in section 15-32. The appeal request shall be subject to all of the following:

(a) Any person who has standing under G.S. 160A-393(d), or the city may appeal a decision to the board of adjustment. An appeal is taken by filing a notice of appeal with the city clerk. The notice of appeal shall state the grounds for the appeal.

(b) The zoning administrator, or his or her designee, or board making the decision shall give written notice of such decision 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 thirty (30) days from receipt of the written notice within which to file an appeal. Any other person with standing to appeal shall have thirty (30) days from receipt from any source of actual or constructive notice of the decision within which to file an appeal. It shall be conclusively presumed that all persons with standing to appeal have constructive notice of the decision from the date a sign containing the words "Zoning Decision" or "Subdivision Decision" in letters at least six inches high and identifying the means to contact an official for information about the decision is prominently posted on the property that is the subject of the decision, provided the sign remains on the property for at least ten (10) days. Posting of signs is not the only form of constructive notice. Any such posting may be done at the landowner's or applicant's discretion, and shall be the responsibility of the landowner or applicant. Verification of the posting shall be provided to the official or board who made the decision.

(d) The zoning administrator, or his or her designee, or the board who made the decision shall transmit to the board of adjustment all documents and exhibits constituting the record upon which the action appealed from is taken. The official or board shall also provide a copy of the record to the appellant and to the owner of the property that is the subject of the appeal if 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 zoning administrator, or his or her designee, certifies to the board of adjustment after notice of appeal has been filed that because of the facts stated in an 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 fifteen (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 of adjustment 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 subsection (e), 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 of adjustment 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 section 15-428(k), 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).

Section 15-92. Variances.

(a) An application for a variance shall be submitted to the board of adjustment by filing a copy of the application with the zoning administrator. Applications shall be handled in the same manner as applications for special use permits in conformity with the provisions of section 15-48, 15-49 and 15-54.

(b) When unnecessary hardships would result from carrying out the strict letter of the land use 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 general 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.

(c) No change in permitted uses may be authorized by variance.

(d) The board of adjustment may impose appropriate conditions on any variance, provided that the conditions are reasonably related to the variance.

(e) A variance may be issued for an indefinite duration or for a specified duration only.

(f) The nature of the variance and any conditions attached to it shall be entered on the face of the zoning permit (or the zoning permit may simply note the issuance of the variance and refer to the written record of the variance for further information). All such conditions are enforceable in the same manner as any other applicable requirement of this ordinance.

(g) In granting a variance, the board of adjustment must vote affirmatively on each of the four (4) required findings stated in subsection (b). Insofar as practicable, a separate motion to make an affirmative finding on each of the requirements set forth in subsection (b) shall include a statement of the specific reasons or findings of fact supporting each motion.

(h) A motion to deny the variance may be made on the basis that any one or more of the four (4) criteria set forth in subsection (b) is not satisfied or that the application is incomplete. Such a motion shall include a statement of the specific reasons or findings of fact that support it.

Section 15-93. Interpretations.

(a) The zoning administrator is authorized to interpret the official zoning map and to pass upon disputed questions of lot lines or district boundary lines and similar questions. If such questions arise in the context of an appeal from a decision of the zoning administrator, they shall be handled as provided in section 15-91.

(b) A written request for a map interpretation shall be submitted to the zoning administrator (or board of adjustment in cases of appeal by filing a copy of the application with the zoning administrator). The written request or application in the case of appeal shall contain sufficient information to enable the zoning administrator or board to make the necessary interpretation.

(c) Where uncertainty exists as to the boundaries of districts as shown on the official

zoning map, the following rules shall apply:

(1) Boundaries indicated as approximately following the centerlines of alleys, streets, highways, streams, or railroads shall be construed to follow such centerlines.

(2) Boundaries indicated as approximately following lot lines, city limits or extraterritorial boundary lines shall be construed as following such lines, limits or boundaries.

(3) Boundaries indicated as following shorelines shall be construed to follow such shorelines and in the event of change in the shoreline shall be construed as following such changed shorelines.

(4) Where distances are not specifically indicated on the official zoning map, the boundary shall be determined by measurement, using the scale of the official zoning map. Where a zoning district boundary divides a lot, the zoning district that occupies the majority of the lot shall be considered the zoning district for the entire lot. Said district boundary shall be interpreted to follow lot lines.

(5) Where any street or alley is hereafter officially closed, the regulation applicable to each parcel of abutting property shall apply to that portion of such street or alley added thereto by virtue of such closing.

Section 15-94. Requests to be heard expeditiously.

As provided in sections 15-65 and 15-91(f), the board of adjustment shall hear and decide all appeals, variance requests, and requests for interpretations as expeditiously as possible, consistent with the need to follow a regularly established meeting schedule, follow agenda procedures, provide notice in accordance with article VI, and obtain the necessary information to make sound decisions.

Section 15-95. Burden of proof in appeals and variances.

(a) When an appeal is taken to the board of adjustment in accordance with section 15-91, other than an appeal pursuant to section 15-428(k), the zoning administrator shall have the initial burden of presenting to the board sufficient evidence and argument to justify the order or decision appealed from. The burden of presenting evidence and argument to the contrary then shifts to the appellant, who shall also have the burden of persuasion.

(b) The burden of presenting evidence sufficient to allow the board of adjustment to reach the conclusions set forth in subsection 15-92(b), as well as the burden of persuasion on those issues, remains with the applicant seeking the variance.

Section 15-96. Board action on appeals and variances.

(a) With respect to appeals, a motion to reverse, affirm, or modify the order, requirement, decision, or determination appealed from shall include, insofar as practicable, a statement of the specific reasons or findings of fact that support the motion. If such a motion is not made or fails to receive the votes necessary for adoption then the stated decision of the

zoning administrator shall stand.

(b) In granting a variance, the board must vote affirmatively by a four-fifths majority pursuant to section 15-36 to all of the four required findings stated in subsection 15-92(b). Insofar as practicable, a motion to make an affirmative finding on each of the requirements set forth in subsection 15-92(b) shall include a statement of the specific reasons for findings of fact supporting such motion.

(c) A motion to deny a variance may be made on the basis that any one or more of the three criteria set forth in subsection 15-92(b) is not satisfied or that the application is incomplete. Insofar as practicable, such a motion shall include a statement of the specific reasons or findings of fact that support it.

(d) As to any matter other than granting a variance, if a motion to reverse or modify is not made or fails to receive the requisite votes necessary for adoption then the initial decision shall stand.

Sections 15-97—15-100. Reserved.”

SECTION 3. That Article VI. “Hearing Procedures for Appeals and Applications” of Appendix A “Land Use” of the Code of Ordinance of the City of New Bern be and the same is hereby amended by deleting Article VI. “Hearing Procedures for Appeals and Applications” in its entirety and inserting in its stead the following:

“HEARING PROCEDURES FOR APPEALS AND APPLICATIONS

Section 15-101. Hearing required on appeals and applications.

(a) Before making a decision on an appeal, or an application for a variance, special use permit, or a petition from the planning staff to revoke a special use permit, the board of adjustment shall hold a hearing on the appeal or application.

(b) Subject to subsection (c), the hearing shall be subject to the provisions of G.S. sections 143-318.9 through 143-318.18. Any person who has standing, or would have standing under G.S. 160A-393(d), or the city shall be given an opportunity to participate in the appeal or application to present evidence and arguments and ask questions of persons who testify. Such persons may be represented by counsel.

(c) The board of adjustment may place reasonable and equitable limitations on the presentation of evidence and arguments and the cross examination of witnesses so that the matter at issue may be heard and decided without undue delay.

(d) The board of adjustment may continue the hearing until a subsequent meeting and may keep the hearing open to take additional information up to the point a final decision is made.

Section 15-102. Notice of hearing.

The zoning administrator shall give notice of any hearing required by section 15-101 as follows:

- (a) Notice of hearings shall be mailed to:
 - (1) the person or entity whose appeal, application, or request is the subject of the hearing;
 - (2) the owner of the property that is the subject of the hearing if the owner did not initiate the hearing;
 - (3) the owners of all parcels of land abutting the parcel of land this is the subject of the hearing, and to all owners of parcels of land within 100 feet of the lot or parcel of land that is the subject of the hearing; and
 - (4) to any other person who makes a written request for such notice.
- (b) 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.
- (c) In the case of conditional use permits, notice shall be given to other potentially interested persons by publishing a notice in the local newspaper with the greatest circulation one time not less than ten (10) calendar nor more than 25 calendar days prior to the hearing.
- (d) The notice required by this section shall state the date, time and place of the hearing, reasonably identify the lot or parcel of land that is the subject of the application or appeal, and give a brief description of the action requested or proposed.

Section 15-103. Evidence, findings, and written decision.

- (a) The provisions of this section apply to all hearings for which a notice is required by section 15-102.
- (b) All persons who intend to present evidence in relation to appeals, variances, or permits shall be sworn. 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.

(c) 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.

(d) 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 or such other office or official as the ordinance specifies. 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.

Section 15-104. Modification of application at hearing.

(a) In response to questions or comments by persons appearing at the hearing or to suggestions or recommendations by the board of aldermen, planning and zoning board, or board of adjustment, the applicant may agree to modify his application, including the plans and specifications submitted.

(b) Unless such modifications are so substantial or extensive that the board cannot reasonably be expected to perceive the nature and impact of the proposed changes without revised plans before it, the board may approve the application with the stipulation that the permit will not be issued until plans reflecting the agreed upon changes are submitted and approved by the planning staff.

Section 15-105. Record.

(a) A record of all hearings required by section 15-101 shall be made by a court reporter or by electronic means. Accurate minutes shall also be kept of all such proceedings.

(b) All documentary evidence presented at a hearing as well as all other types of physical evidence shall be made a part of the record of the proceedings. With the approval of the parties, copies may be submitted for the originals. Such evidence shall be kept by the city for at least five years; provided, however, such evidence shall be disposed of by agreement of the parties or by the rendering of a final decision by the court.

Section 15-106 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.

Section 15-107. Appeals of quasi-judicial decisions.

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 section 15-103. When first-class mail is used to deliver notice, three days shall be added to the time to file the petition.

Sections 15-108—15-110. Reserved.”

SECTION 4. This ordinance shall be effective from and after the date of its adoption.

ADOPTED THIS 8th DAY OF July, 2014


MAYOR


CITY CLERK



MEMORANDUM

TO: Mayor Outlaw and Board of Aldermen

FROM: Kevin Robinson, AICP
City Planner

DATE: July 1, 2014

SUBJECT: Call for Public Hearing to Amend Appendix A "Land Use" of the Code of Ordinances

Background

At its June 3rd, 2014 regular meeting, the Planning and Zoning Board unanimously voted to recommend approval of the City of New Bern's request to amend sections of the Land Use Ordinance, primarily related the Board of Adjustment. The purpose of the proposed revisions to Sections 15-31 through 15-36, 15-91 through 15-96 and 15-107 is to adopt State Statute and otherwise amend the roles of the Board of Adjustment and processes for hearing various cases. The following is a summary of the proposed amendment sections:

Sec. 15-31. Appointment and terms of board of adjustment – Clarifies the role of alternate members.

Sec. 15-32. Powers and Duties of Board of Adjustment – Includes appeals of decisions by building inspector and HPC.

Section 15-33. Meetings of the board of adjustment – Removes extraneous language already included in subsequent sections.

Section 15-34. Quorum – No change to text.

Section 15-35. Board of adjustment officers – Change in titles of officers and includes language on misdemeanors for giving false statements.

Section 15-36. Voting – Changes the required vote to 4/5ths for all variances and simple majority for all other items (per state statute. Also expands upon ex parte communications and conflicts of interest.

Section 15-91. Appeals – Expands upon appeal process including defining standing, stays of enforcement, additional time to file appeal (per state statute), notification of decision, testimony provided and provisions appeals of HPC decisions.

Section 15-92. Variances – Further defines the process for determinations of variance requests and includes additionally required findings.

Section 15-93. Interpretations – No change to text.

Section 15-94. Requests to be heard expeditiously – No change to text.

Section 15-95. Burden of proof in appeals and variances – Makes provision for already accept method of burden of proof in the appeal of an HPC decision.

Section 15-96. Board action on appeals and variances – Language removed on required votes so as to be consistent with previous section 15-36.

Section 15-101. Hearing required on appeals and applications – Removes conditional use permit language as BofAdj doesn't hear them and clarifies standing requirement.

Section 15-102. Notice of hearing – Provides consistency with previously approved "notification" amendments and state statute.

Section 15-103. Evidence, findings, and written decision – Provides for misdemeanor for willfully giving false statements (per state statute), reasonable time to conduct hearing and evidence to be provided, and method for formal notification of decision.

Section 15-104. Modification of application at hearing – No change to text.

Section 15-105. Record – No change to text.

Section 15-106. ~~Written decision. Subpoenas~~ – New section which lays out the Chair's authority to subpoena witnesses and evidence.

Section 15-107. Appeals of quasi-judicial decisions – New section which lays out the process for appealing quasi-judicial decisions to the courts.

Recommendation

The Board of Aldermen is requested to consider the full text of the items summarized above and approve the Land Use Ordinance text amendments to sections related to Board of Adjustment composition and hearing and voting procedures.

Please contact me at 639-7583 should you have questions or need additional information.

Attachments

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27 of commissioners, shall reside within the city’s extraterritorial planning area. If the Craven
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29 notification from the city requesting that an appointment be made, the board of aldermen may
30 make the appointment. Upon expansion or reduction of the city’s extraterritorial planning area,
31 the board of aldermen shall review the impact of such change on the extraterritorial membership
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33 extraterritorial members. Members may be removed by the appointing authority at any time for
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93 **Section ~~15-33.~~ 15-34. Quorum.**
94

95 A quorum for the board of adjustment shall consist of eight members. A quorum is
96 necessary for the board to take official action.
97

98 **Section 15-35. Board of adjustment officers.**
99

100 (a) The board of adjustment shall elect one of its members to serve as chairman who
101 shall preside over the board's meetings and one member to serve as vice-chairman. The persons
102 so elected shall serve a term of one year or until their terms expire, whichever comes first. The
103 chairman may succeed himself or herself.
104

105 (b) The chairman, vice chair, or any member temporarily acting as chairman, or the
106 clerk to the board may administer oaths to witnesses coming before the board of adjustment.
107 Any person who, while under oath during a proceeding before the board of adjustment, willfully
108 swears falsely is guilty of a Class 1 misdemeanor.
109

110 (c) The chairman and vice-chairman may take part in all deliberations and vote on all
111 issues.
112

113 (d) The zoning administrator, or his designee, shall serve as the secretary of clerk to
114 the board of adjustment. The secretary clerk shall not have voting privileges.
115

116 **Section ~~15-34.~~ 15-36. Voting.**
117

118 ~~(a) The concurring vote of three-fifths of the members of the board of adjustment~~
119 ~~shall be necessary to issue a special use permit in accordance with section 15-54. The concurring~~
120 ~~vote of four-fifths of the members shall be necessary to reverse any order, requirement, decision,~~
121 ~~or determination of the zoning administrator or the city building inspector, or to grant a variance~~
122 ~~from the provisions of this ordinance. All other actions of the board of adjustment shall be taken~~
123 ~~by majority vote, a quorum being present.~~
124

125 (a) The concurring vote of four-fifths of the members of the board of adjustment shall
126 be necessary to grant a variance.
127

128 (b) A majority of the members shall be required to decide any other quasi-judicial
129 matter, or to determine an appeal made in the nature of certiorari. For the purposes of this
130 subsection, vacant positions on the board and members who are disqualified from voting on a
131 quasi-judicial matter shall not be considered members of the board for calculation of the requisite
132 majority if there are no qualified alternates available to take the place of such members.
133

134 ~~(b)(c)~~ Once a member is physically present at a board meeting, any subsequent failure to
135 vote shall be recorded as an affirmative vote unless the member has been excused in accordance

with subsection (e)(d), or has been allowed to withdraw from the meeting in accordance with subsection (d).

(d) 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, a financial interest in the outcome of the matter, or having standing under G.S. 160A-393(d) to appeal the decision upon which he or she is voting. 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.

(e) A member may be excused from voting on a particular issue by majority vote of the remaining members present under the following circumstances:

(1) If the member has a direct financial interest in the outcome of the matter at issue; or

(2) If the matter at issue involves the member's own official conduct; or

(3) If participation in the matter might violate the letter or spirit of a member's code of professional responsibility; or

(4) If a member has such close personal ties to the applicant that the member cannot reasonably be expected to exercise sound judgment in the public interest.

(d) A member may be allowed to withdraw from the entire remainder of a meeting by majority vote of the remaining members present for any good and sufficient reason other than the member's desire to avoid voting on matters to be considered at the meeting.

(e) A motion to allow a member to be excused from voting or excused from the remainder of the meeting is in order only if made by or at the initiative of the member directly affected.

(f)(e) A roll call vote shall be taken upon the request of any member."

SECTION 2. That Article V. "Appeals, Variances, Interpretations" of Appendix A "Land Use" of the Code of Ordinance of the City of New Bern be and the same is hereby amended by deleting Article V. "Appeals, Variances, Interpretations" in its entirety and inserting in its stead the following:

"ARTICLE V. APPEALS, VARIANCES, INTERPRETATIONS

Section 15-91. Appeals.

180 ~~(a) An appeal from any final order or decision of the zoning administrator may be~~
181 ~~taken to the board of adjustment by any person aggrieved or by an officer, department, board, or~~
182 ~~bureau of the city. An appeal is taken by filing with the zoning administrator and the board of~~
183 ~~adjustment, a written notice of appeal specifying the grounds therefor. A notice of appeal shall be~~
184 ~~considered filed with the zoning administrator and the board of adjustment when delivered in a~~
185 ~~form deemed complete and acceptable to the zoning administrator. The date and time of filing~~
186 ~~shall be entered on the notice by the zoning administrator.~~

187
188 The board of adjustment shall hear and decide upon appeals from, and shall review any
189 final, written decision or order made by the zoning administrator, or his or her designee, and shall
190 hear and decide upon appeals as provided in section 15-32. The appeal request shall be subject
191 to all of the following:

192
193 (a) Any person who has standing under G.S. 160A-393(d), or the city may appeal a
194 decision to the board of adjustment. An appeal is taken by filing a notice of appeal with the city
195 clerk. The notice of appeal shall state the grounds for the appeal.

196
197 (b) The zoning administrator, or his or her designee, or board making the decision
198 shall give written notice of such decision to the owner of the property that is the subject of the
199 decision and to the party who sought the decision, if different from the owner. The written notice
200 shall be delivered by personal delivery, electronic mail, or by first-class mail.

201
202 (c) The owner or other party shall have thirty (30) days from receipt of the written
203 notice within which to file an appeal. Any other person with standing to appeal shall have thirty
204 (30) days from receipt from any source of actual or constructive notice of the decision within
205 which to file an appeal. It shall be conclusively presumed that all persons with standing to appeal
206 have constructive notice of the decision from the date a sign containing the words "Zoning
207 Decision" or "Subdivision Decision" in letters at least six inches high and identifying the means
208 to contact an official for information about the decision is prominently posted on the property
209 that is the subject of the decision, provided the sign remains on the property for at least ten (10)
210 days. Posting of signs is not the only form of constructive notice. Any such posting may be done
211 at the landowner's or applicant's discretion, and shall be the responsibility of the landowner or
212 applicant. Verification of the posting shall be provided to the official or board who made the
213 decision.

214
215 (d) The zoning administrator, or his or her designee, or the board who made the
216 decision shall transmit to the board of adjustment all documents and exhibits constituting the
217 record upon which the action appealed from is taken. The official or board shall also provide a
218 copy of the record to the appellant and to the owner of the property that is the subject of the
219 appeal if the appellant is not the owner.

220
221 (e) An appeal of a notice of violation or other enforcement order stays enforcement
222 of the action appealed from unless the zoning administrator, or his or her designee, certifies to
223 the board of adjustment after notice of appeal has been filed that because of the facts stated in an
224 affidavit, a stay would cause imminent peril to life or property or because the violation is
225 transitory in nature, a stay would seriously interfere with enforcement of the ordinance. In that
226 case, enforcement proceedings shall not be stayed except by a restraining order, which may be

227 granted by a court. If enforcement proceedings are not stayed, the appellant may file with the
228 official a request for an expedited hearing of the appeal, and the board of adjustment shall meet
229 to hear the appeal within fifteen (15) days after such a request is filed. Notwithstanding the
230 foregoing, appeals of decisions granting a permit or otherwise affirming that a proposed use of
231 property is consistent with the ordinance shall not stay the further review of an application for
232 permits or permissions to use such property; in these situations the appellant may request and the
233 board of adjustment may grant a stay of a final decision of permit applications or building
234 permits affected by the issue being appealed.

236 (f) Subject to the provisions of subsection (e), the board of adjustment shall hear and
237 decide the appeal within a reasonable time.

239 (g) The official who made the decision shall be present at the hearing as a witness.
240 The appellant shall not be limited at the hearing to matters stated in the notice of appeal. If any
241 party or the city would be unduly prejudiced by the presentation of matters not presented in the
242 notice of appeal, the board of adjustment shall continue the hearing. The board of adjustment
243 may reverse or affirm, wholly or partly, or may modify the decision appealed from and shall
244 make any order, requirement, decision, or determination that ought to be made. The board shall
245 have all the powers of the official who made the decision.

247 (h) When hearing an appeal pursuant section 15-428(k), or any other appeal in the
248 nature of certiorari, the hearing shall be based on the record below and the scope of review shall
249 be as provided in G.S. 160A-393(k).

251 ~~(b) — An appeal must be taken within ten calendar days after the date of the decision or~~
252 ~~order appealed from, unless the board of adjustment shall by general rule prescribe a different~~
253 ~~time as permitted by G.S. 160A-388(b).~~

255 ~~(c) — Whenever an appeal is filed, the zoning administrator shall forthwith transmit to~~
256 ~~the board of adjustment all the papers constituting the record of the action from which an appeal~~
257 ~~is being taken.~~

259 ~~(d) — An appeal stays all actions by the zoning administrator seeking enforcement of, or~~
260 ~~compliance with, the order or decision appealed from, unless the zoning administrator certifies to~~
261 ~~the board of adjustment that (because of facts stated in the certificate) a stay would, in his~~
262 ~~opinion, cause imminent peril to life or property. In that case, proceedings shall not be stayed~~
263 ~~except by a restraining order, which may be granted by the board of adjustment or by a court of~~
264 ~~record on application, on notice to the officer from whom the appeal is taken, and on due cause~~
265 ~~shown. The board of adjustment shall fix a reasonable time for hearing of the appeal, give due~~
266 ~~notice thereof to the parties, and decide it within a reasonable time.~~

268 ~~(e) — The board of adjustment may reverse or affirm (wholly or partly) or may modify~~
269 ~~the order, requirement, decision or determination appealed from and shall make any order,~~
270 ~~requirement, decision, or determination that in its opinion ought to be made in the case before it.~~
271 ~~To this end, the board shall have all the power of the officer from whom the appeal is taken.~~

273 ~~(f) A motion to reverse, affirm, or modify the order, requirement, decision, or~~

determination appealed from shall include, insofar as practicable, a statement of the specific reasons or findings of fact that support the motion.

Section 15-92. Variances.

(a) An application for a variance shall be submitted to the board of adjustment by filing a copy of the application with the zoning administrator in the planning and inspections department. Applications shall be handled in the same manner as applications for special use permits in conformity with the provisions of section 15-48, 15-49 and 15-54.

(b) A variance may be granted by the board of adjustment if it concludes:

(1) That there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the ordinance;

(2) That the variance is in harmony with the general purpose and intent of the ordinance and preserves its spirit; and

(3) That in the granting of the variance the public safety and welfare have been assured and substantial justice has been done. It may reach these conclusions if it finds facts that support the following:

(i) If the applicant complies with the provisions of the ordinance, the property owner can secure no reasonable return from, or make no reasonable use of, his property; and

(ii) That the hardship results from the application of the ordinance to his property; and

(iii) That the hardship of which he complains is suffered by his property directly, i.e., his land, buildings, or structures, rather than the applicant's personal circumstances; and

(iv) That the hardship is unique, or nearly so, rather than one shared by many surrounding properties; and

(v) That the hardship is not the result of the applicant's own action; and

(vi) That the variance will neither result in the extension of a nonconforming situation in violation of article VIII nor authorize the initiation of a nonconforming use of land.

(b) When unnecessary hardships would result from carrying out the strict letter of the land use 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 general 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.

(c) No change in permitted uses may be authorized by variance.

~~(e) In granting variances, the board of adjustment may impose such reasonable conditions as will ensure that the use of the property to which the variance applies will be as compatible as practicable with the surrounding properties.~~

(d) The board of adjustment may impose appropriate conditions on any variance, provided that the conditions are reasonably related to the variance.

~~(d)(e)~~ A variance may be issued for an indefinite duration or for a specified duration only.

~~(e)(f)~~ The nature of the variance and any conditions attached to it shall be entered on the face of the zoning permit (or the zoning permit may simply note the issuance of the variance and refer to the written record of the variance for further information). All such conditions are enforceable in the same manner as any other applicable requirement of this ordinance.

~~(f)(g)~~ In granting a variance, the board of adjustment must vote affirmatively on each of the ~~three~~ four (4) required findings stated in subsection (b). Insofar as practicable, a separate motion to make an affirmative finding on each of the requirements set forth in subsection (b) shall include a statement of the specific reasons or findings of fact supporting each motion.

~~(g)(h)~~ A motion to deny the variance may be made on the basis that any one or more of the ~~three~~ four (4) criteria set forth in subsection (b) is not satisfied or that the application is incomplete. Such a motion shall include a statement of the specific reasons or findings of fact that support it.

Section 15-93. Interpretations.

(a) The zoning administrator is authorized to interpret the official zoning map and to pass upon disputed questions of lot lines or district boundary lines and similar questions. If such

questions arise in the context of an appeal from a decision of the zoning administrator, they shall be handled as provided in section 15-91.

(b) A written request for a map interpretation shall be submitted to the zoning administrator (or board of adjustment in cases of appeal by filing a copy of the application with the zoning administrator). The written request or application in the case of appeal shall contain sufficient information to enable the zoning administrator or board to make the necessary interpretation.

(c) Where uncertainty exists as to the boundaries of districts as shown on the official zoning map, the following rules shall apply:

(1) Boundaries indicated as approximately following the centerlines of alleys, streets, highways, streams, or railroads shall be construed to follow such centerlines.

(2) Boundaries indicated as approximately following lot lines, city limits or extraterritorial boundary lines shall be construed as following such lines, limits or boundaries.

(3) Boundaries indicated as following shorelines shall be construed to follow such shorelines and in the event of change in the shoreline shall be construed as following such changed shorelines.

(4) Where distances are not specifically indicated on the official zoning map, the boundary shall be determined by measurement, using the scale of the official zoning map. Where a zoning district boundary divides a lot, the zoning district that occupies the majority of the lot shall be considered the zoning district for the entire lot. Said district boundary shall be interpreted to follow lot lines.

(5) Where any street or alley is hereafter officially closed, the regulation applicable to each parcel of abutting property shall apply to that portion of such street or alley added thereto by virtue of such closing.

Section 15-94. Requests to be heard expeditiously.

As provided in sections 15-65 and 15-91(f), the board of adjustment shall hear and decide all appeals, variance requests, and requests for interpretations as expeditiously as possible, consistent with the need to follow a regularly established meeting schedule, follow agenda procedures, provide notice in accordance with article VI, and obtain the necessary information to make sound decisions.

Section 15-95. Burden of proof in appeals and variances.

(a) When an appeal is taken to the board of adjustment in accordance with section 15-91, other than an appeal pursuant to section 15-428(k), the zoning administrator shall have the initial burden of presenting to the board sufficient evidence and argument to justify the order or decision appealed from. The burden of presenting evidence and argument to the contrary then shifts to the appellant, who shall also have the burden of persuasion.

(b) The burden of presenting evidence sufficient to allow the board of adjustment to reach the conclusions set forth in subsection 15-92(b), as well as the burden of persuasion on those issues, remains with the applicant seeking the variance.

Section 15-96. Board action on appeals and variances.

(a) With respect to appeals, a motion to reverse, affirm, or modify the order, requirement, decision, or determination appealed from shall include, insofar as practicable, a statement of the specific reasons or findings of fact that support the motion. If such a motion is not made or fails to receive the ~~eight~~ votes necessary for adoption (~~see section 15-34~~), then the stated decision of the zoning administrator shall stand.

(b) In granting a variance, the board must vote affirmatively by a four-fifths majority pursuant to section 15-36 (~~by a four-fifths majority, see section 15-34~~) to all of the ~~four~~ three required findings stated in subsection 15-92(b). Insofar as practicable, a motion to make an affirmative finding on each of the requirements set forth in subsection 15-92(b) shall include a statement of the specific reasons for findings of fact supporting such motion.

(c) A motion to deny a variance may be made on the basis that any one or more of the three criteria set forth in subsection 15-92(b) is not satisfied or that the application is incomplete. Insofar as practicable, such a motion shall include a statement of the specific reasons or findings of fact that support it.

(d) ~~As to any matter other than granting a variance, if a motion to reverse or modify is not made or fails to receive the four-fifths requisite votes necessary for adoption (see section 15-34), then the initial decision of the zoning administrator shall stand.~~

Sections 15-97—15-100. Reserved.”

SECTION 3. That Article VI. “Hearing Procedures for Appeals and Applications” of Appendix A “Land Use” of the Code of Ordinance of the City of New Bern be and the same is hereby amended by deleting Article VI. “Hearing Procedures for Appeals and Applications” in its entirety and inserting in its stead the following:

“HEARING PROCEDURES FOR APPEALS AND APPLICATIONS

Section 15-101. Hearing required on appeals and applications.

(a) Before making a decision on an appeal, or an application for a variance, special use permit, ~~or conditional use permit~~, or a petition from the planning staff to revoke a special use permit ~~or conditional use permit~~, the board of adjustment ~~or the board of aldermen, as the case may be~~, shall hold a hearing on the appeal or application.

(b) Subject to subsection (c), ~~the hearing shall be open to the public the hearing shall be subject to the provisions of G.S. sections 143-318.9 through 143-318.18. and all persons~~

455 ~~interested in the outcome of the appeal or application~~ Any person who has standing, or would
456 have standing under G.S. 160A-393(d), or the city shall be given an opportunity to participate in
457 the appeal or application to present evidence and arguments and ask questions of persons who
458 testify. Such persons may be presented [represented] by counsel.

459
460 (c) The board of adjustment ~~or board of aldermen~~ may place reasonable and equitable
461 limitations on the presentation of evidence and arguments and the cross examination of witnesses
462 so that the matter at issue may be heard and decided without undue delay.

463
464 (d) The board of adjustment may continue the hearing until a subsequent meeting and
465 may keep the hearing open to take additional information up to the point a final decision is made.

466
467 **Section 15-102. Notice of hearing.**

468
469 The zoning administrator shall give notice of any hearing required by section 15-101 as
470 follows:

471
472 ~~(a) Notice shall be given to the appellant or applicant and any other person who~~
473 ~~makes a written request for such notice by mailing to such persons a written notice no later than~~
474 ~~seven (7) calendar days before the hearing.~~

475
476 (a) Notice of hearings shall be mailed to:

477
478 (1) the person or entity whose appeal, application, or request is the subject of
479 the hearing;

480
481 (2) the owner of the property that is the subject of the hearing if the owner did
482 not initiate the hearing;

483
484 (3) the owners of all parcels of land abutting the parcel of land this is the
485 subject of the hearing, and to all owners of parcels of land within 100 feet of the lot or parcel of
486 land that is the subject of the hearing; and

487
488 (4) to any other person who makes a written request for such notice.

489
490 ~~(b) With respect to hearings on matters other than conditional use permits, notice~~
491 ~~shall be given to neighboring property owners by mailing a written notice no later than seven (7)~~
492 ~~before the hearing to those persons who own property located within 100 feet of the lot that is the~~
493 ~~subject of the application or appeal. With respect to hearings on the issuance or revocation of~~
494 ~~conditional use permits, notice shall be given to neighboring property owners by mailing a~~
495 ~~written notice no later than seven (7) days before the hearing to those persons who own property~~
496 ~~located within 100 feet of the lot that is the subject of the conditional use permit. In all cases, the~~
497 ~~applicant shall provide stamped, addressed envelopes of neighboring property owners to the~~
498 ~~zoning administrator. Notice shall also be given by prominently posting signs in the vicinity of~~
499 ~~the property that is the subject of the proposed action. Such signs shall be posted no less than~~
500 ~~seven (7) calendar days prior to the hearing.~~

502 (b) In the absence of evidence to the contrary, the city may rely on the county tax
503 listing to determine owners of property entitled to mailed notice. The notice must be deposited
504 in the mail at least 10 days, but not more than 25 days, prior to the date of the hearing. Within
505 that same time period, the city shall also prominently post a notice of the hearing on the site that
506 is the subject of the hearing or on an adjacent street or highway right-of-way.

507
508 (c) In the case of conditional use permits, notice shall be given to other potentially
509 interested persons by publishing a notice in the local newspaper with the greatest circulation one
510 time not less than ten (10) calendar nor more than 25 calendar days prior to the hearing.

511
512 (d) The notice required by this section shall state the date, time and place of the
513 hearing, reasonably identify the lot or parcel of land that is the subject of the application or
514 appeal, and give a brief description of the action requested or proposed.

515
516 **Section 15-103. Evidence, findings, and written decision.**

517
518 (a) The provisions of this section apply to all hearings for which a notice is required
519 by section 15-102.

520
521 (b) All persons who intend to present evidence in relation to appeals, variances, or
522 permits shall be sworn. The chair of the board or any member acting as chair, and the clerk to
523 the board are authorized to administer oaths to witnesses in any matter coming before the board.
524 Any person who, while under oath during a proceeding before the board of adjustment, willfully
525 swears falsely is guilty of a Class 1 misdemeanor.

526
527 ~~(c) All findings and conclusions necessary to the issuance or denial of the requested~~
528 ~~permit or appeal shall be based upon competent, material, and substantial evidence.~~

529
530 (c) The board shall determine contested facts and make its decision within a
531 reasonable time. Every quasi-judicial decision shall be based upon competent, material, and
532 substantial evidence in the record.

533
534 (d) Each quasi-judicial decision shall be reduced to writing and reflect the board's
535 determination of contested facts and their application to the applicable standards. The written
536 decision shall be signed by the chair or other duly authorized member of the board. A quasi-
537 judicial decision is effective upon filing the written decision with the clerk to the board or such
538 other office or official as the ordinance specifies. The decision of the board shall be delivered by
539 personal delivery, electronic mail, or by first-class mail to the applicant, property owner, and to
540 any person who has submitted a written request for a copy, prior to the date the decision becomes
541 effective. The person required to provide notice shall certify that proper notice has been made.

542
543 **Section 15-104. Modification of application at hearing.**

544
545 (a) In response to questions or comments by persons appearing at the hearing or to
546 suggestions or recommendations by the board of aldermen, planning and zoning board, or board
547 of adjustment, the applicant may agree to modify his application, including the plans and

specifications submitted.

(b) Unless such modifications are so substantial or extensive that the board cannot reasonably be expected to perceive the nature and impact of the proposed changes without revised plans before it, the board may approve the application with the stipulation that the permit will not be issued until plans reflecting the agreed upon changes are submitted and approved by the planning staff.

Section 15-105. Record.

(a) A record of all hearings required by section 15-101 shall be made by a court reporter or by electronic means. Accurate minutes shall also be kept of all such proceedings.

(b) All documentary evidence presented at a hearing as well as all other types of physical evidence shall be made a part of the record of the proceedings. With the approval of the parties, copies may be submitted for the originals. Such evidence shall be kept by the city for at least five years; provided, however, such evidence shall be disposed of by agreement of the parties or by the rendering of a final decision by the court.

Section 15-106. ~~Written decision.~~ Subpoenas

~~(a) Any decision made by the board of adjustment or board of aldermen regarding an appeal, or variance, or issuance or revocation of a conditional use permit or special use permit shall be reduced to writing and served upon the applicant or appellant within ten calendar [days] of the decision as required by law and all other persons who request a copy at the hearing or who make a written request for a copy.~~

~~(b) In addition to a statement of the board's ultimate disposition of the case and any other information deemed appropriate, the written decision shall state the board's findings and conclusions, as well as supporting reasons or facts, whenever this ordinance requires the same as a prerequisite to taking action.~~

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.

Section 15-107. Appeals of quasi-judicial decisions.

