

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2007

S

1

SENATE BILL 212

Short Title: Land-Use Permit Appeals. (Public)

Sponsors: Senators Kinnaird; and Clodfelter.

Referred to: Judiciary I

February 20, 2007

1 A BILL TO BE ENTITLED
2 AN ACT TO CLARIFY THE LAW REGARDING APPEALS OF QUASI-JUDICIAL
3 DECISIONS MADE UNDER ARTICLE 19 OF CHAPTER 160A AND ARTICLE
4 18 OF CHAPTER 153A OF THE GENERAL STATUTES.

5 The General Assembly of North Carolina enacts:

6 SECTION 1.(a) Article 19 of Chapter 160A of the General Statutes is
7 amended by adding a new section to read:

8 "**§ 160A-393. Appeals in the nature of certiorari.**

9 (a) Applicability. – This section applies to appeals to superior court by
10 proceedings in the nature of certiorari authorized under the provisions of this Article.

11 (b) Filing the Petition. – An appeal in the nature of certiorari shall be initiated by
12 filing with the superior court a petition for writ of certiorari. The petition shall state the
13 facts that demonstrate that the petitioner has standing to seek review and shall set forth
14 the grounds upon which the petitioner contends that an error was made as well as the
15 relief the petitioner seeks. The facts in support of allegations that the votes of one or
16 more members of the decision-making body were affected by impermissible bias or
17 conflict of interest shall be set forth with particularity.

18 (c) Standing. – A petition may be filed under this section only by a person who
19 has standing to challenge the decision being appealed. A person has standing if a
20 reasonable person in the position of the person seeking to challenge the decision could
21 reasonably conclude that the use of the property authorized by the decision would be
22 likely to adversely affect the interests of that person in some real, substantial, and
23 concrete way that is demonstrably different in nature or degree than the manner in
24 which the decision affects members of the general public. Without limiting the
25 generality of the foregoing, the following principles shall apply in determining whether
26 a petitioner has standing:

27 (1) If the decision being appealed involves a denial of a permit request, a
28 denial of a variance, or a determination that property is being used in
29 violation of an ordinance adopted under this Article, then any person

1 with an ownership or leasehold interest in the property in question, as
2 well as the applicant for the permit or the variance (if different than the
3 owner), has standing to file a petition.

4 (2) If the decision being appealed involves the issuance of a permit, the
5 granting of a variance, or a determination that property is being used in
6 conformity with an ordinance adopted under this Article, then the
7 following persons shall have standing to file a petition, so long as they
8 satisfy the general criteria set forth at the beginning of this subsection:

9 a. Any person who resides or owns property in such close
10 proximity to the property that is the subject of the decision that
11 the use of the property authorized by the decision would
12 adversely affect that person's use or enjoyment of his or her
13 residence or property or would adversely affect the value of that
14 property.

15 b. Any person whose economic interests are directly threatened by
16 the use authorized by the decision.

17 c. A property owners', neighborhood, or similar civic association
18 if any of its members would have standing to challenge the
19 decision as an individual, the interests sought to be protected
20 are germane to the association's purpose, and neither the claim
21 asserted nor the relief requested requires the participation of
22 individual members who would have standing.

23 For purposes of this subsection, the term "person" refers to any legal entity
24 authorized to bring suit in his, her, or its own name, and the term "owner" refers to any
25 person having an ownership interest in property.

26 (d) Respondent. – The respondent named in the petition shall be the city whose
27 council, board of adjustment, planning board, or other body made the decision that is
28 being appealed. If the petitioner is not the applicant before the council, board of
29 adjustment, or planning board whose decision is being appealed, the petitioner shall
30 name that applicant as a respondent. Any petitioner may, but need not, also name as a
31 respondent any person who participated in the hearing before the council, board of
32 adjustment, or planning board.

33 (e) Writ of Certiorari. – Upon filing the petition, the petitioner shall present the
34 petition and a proposed writ of certiorari to the clerk of court of the county in which the
35 matter arose. The writ shall direct the respondent city to prepare and certify to the court
36 the record of proceedings below within a specified date. The writ shall also direct that
37 the petitioner shall serve the petition and the writ upon each respondent named therein
38 in the manner provided for service of a complaint under Rule 4j of the Rules of Civil
39 Procedure. No summons shall be issued. The clerk shall issue the writ without notice to
40 the respondent or respondents if the petition has been properly filed and the writ is in
41 proper form. A copy of the executed writ shall be filed with the court.

42 (f) Answer to the Petition. – The respondent may, but need not, file an answer to
43 the petition, except that, if the respondent contends that any petitioner lacks standing to

1 bring the appeal, that contention must be set forth in an answer served on all petitioners
2 at least 30 days prior to the hearing on the petition.

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

6 (1) If the petitioner is not the applicant before the council, board of
7 adjustment, or planning board whose decision is being appealed and
8 the petitioner fails to name the applicant as a respondent, then the
9 applicant may intervene as a matter of right.

10 (2) Except as otherwise stated in subdivision (1) of this subsection, an
11 intervenor must demonstrate that a reasonable person in the position of
12 the intervenor could reasonably believe that the outcome of the appeal
13 could adversely affect the interests of that person in some real,
14 substantial, and concrete way that is demonstrably different in nature
15 or degree than the manner in which the decision affects members of
16 the general public.

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

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

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

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

40 (3) Whether the decision-making body erred for the reasons set forth in
41 sub-subdivisions a. and b. of subdivision (1) of subsection (j) of this
42 section.

43 (j) Scope of Review. –

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

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

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

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

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

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

37 **SECTION 1.(b)** Article 18 of Chapter 153A of the General Statutes is
38 amended by adding a new section to read:

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

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

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

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

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

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

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

28 **SECTION 2.(b)** Article 18 of Chapter 153A of the General Statutes is
29 amended by adding a new section to read:

30 **"§ 153A-336. Appeals of decisions on subdivision plats.**

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

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

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

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

13 **SECTION 3.** This act becomes effective January 1, 2008, and applies to
14 actions filed on or after that date.