

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2007

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SENATE BILL 212  
Judiciary I (Civil) Committee Substitute Adopted 5/22/07

Short Title: Land-Use Permit Appeals.

(Public)

Sponsors:

Referred to:

February 20, 2007

A BILL TO BE ENTITLED

AN ACT TO CLARIFY THE LAW REGARDING APPEALS OF QUASI-JUDICIAL  
DECISIONS MADE UNDER ARTICLE 19 OF CHAPTER 160A AND ARTICLE  
18 OF CHAPTER 153A OF THE GENERAL STATUTES.

The General Assembly of North Carolina enacts:

**SECTION 1.(a)** Part 3 of Article 19 of Chapter 160A of the General Statutes  
is amended by adding a new section to read:

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

(a) Applicability. – This section applies to appeals of quasi-judicial decisions of  
decision-making boards when that appeal is to superior court and in the nature of  
certiorari as required by this Article.

(b) For purposes of this section, the following terms mean:

(1) Decision-making board. – A city council, planning board, board of  
adjustment, or other board making quasi-judicial decisions appointed  
by the city council under this Article.

(2) Person. – Any legal entity authorized to bring suit in the legal entity's  
name.

(c) Filing the Petition. – An appeal in the nature of certiorari shall be initiated by  
filing with the superior court a petition for writ of certiorari. The petition shall:

(1) State the facts that demonstrate that the petitioner has standing to seek  
review.

(2) Set forth the grounds upon which the petitioner contends that an error  
was made. The facts, if any, in support of allegations that the votes of  
one or more members of the decision-making board were affected by  
impermissible bias or conflict of interest shall be set forth with  
particularity.

(3) Set forth the relief the petitioner seeks.

1       (c) Standing. – A petition may be filed under this section only by a petitioner  
2 who has standing to challenge the decision being appealed. The following persons shall  
3 have standing to file a petition under this section:

4       (1) Any person meeting any of the following criteria:

5           a. Has an ownership interest, leasehold interest, or other interest  
6 created by easement, restriction, or covenant in the property that  
7 is the subject of the decision being appealed.

8           b. Has an option or contract to purchase the property that is the  
9 subject of the decision being appealed.

10          c. Was an applicant before the decision-making board whose  
11 decision is being appealed.

12       (2) Any person with an ownership interest or leasehold interest in property  
13 any portion of which is located within 100 feet of the boundary of the  
14 property that is the subject of the decision being appealed.

15       (3) Any other person who will suffer special damages as the result of the  
16 decision being appealed. For purposes of this subdivision, 'special  
17 damages' mean a substantial harm suffered by a person that is  
18 demonstrably different in nature or degree shared by the community as  
19 a whole.

20       (4) An association to which owners or lessees of property in a designated  
21 area belong by virtue of their ownership of property in that area or  
22 through the payment of regular dues, only if any of the members of the  
23 association would have standing as an individual to challenge the  
24 decision being appealed.

25       (d) Respondent. – The respondent named in the petition shall be the city whose  
26 decision-making board made the decision that is being appealed. If the petitioner is not  
27 the applicant before the decision-making board whose decision is being appealed, the  
28 petitioner shall also name that applicant as a respondent. Any petitioner may name as a  
29 respondent any person with an ownership or leasehold interest in the property that is the  
30 subject of the decision being appealed who participated in the hearing before the  
31 decision-making board.

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

41       (f) Answer to the Petition. – The respondent may, but need not, file an answer to  
42 the petition. Except, if the respondent contends that any petitioner lacks standing to  
43 bring the appeal, that contention must be set forth in an answer served on all petitioners  
44 at least 30 days prior to the hearing on the petition.

1       (g) Intervention. – Rule 24 of the Rules of Civil Procedure shall govern motions  
2 to intervene as a petitioner or respondent in an action initiated under this section with  
3 the following exceptions:

4           (1) Any person described in subdivision (c)(1) of this section may  
5 intervene as a matter of right.

6           (2) Any person, other than one who may intervene as a matter of right,  
7 who seeks to intervene as a petitioner must demonstrate that the person  
8 would have had standing to challenge the decision being appealed in  
9 accordance with subdivisions (c)(2) and (c)(3) of this section.

10          (3) Any person seeking to intervene as a respondent must demonstrate that  
11 the person would have had standing to file a petition in accordance  
12 with subsection (c) of this section if the decision-making board had  
13 made a decision that is consistent with the relief sought by the  
14 petitioner(s).

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

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

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

35           (2) Whether, as a result of impermissible conflict as described in  
36 G.S. 160A-381(d) or G.S. 160A-388(e1) or conflict of interest as  
37 described in G.S. 14-234, the decision-making body was not  
38 sufficiently impartial to comply with due process principles.

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

42       (j) Scope of Review. –

43           (1) When reviewing the decision of a decision-making board under the  
44 provisions of this section, the trial court shall ensure that the rights of

1           petitioners have not been prejudiced because the decision-making  
2           body's findings, inferences, conclusions, or decisions were:

3           a. In violation of constitutional provisions, including those  
4           protecting procedural due process rights.

5           b. In excess of the statutory authority conferred upon the city or  
6           the authority conferred upon the decision-making board by  
7           ordinance.

8           c. Inconsistent with applicable procedures specified by statute or  
9           ordinance.

10          d. Affected by other error of law.

11          e. Unsupported by substantial competent evidence in view of the  
12          entire record.

13          f. Arbitrary or capricious.

14          (2) When the issue before the trial court is whether the decision-making  
15          board erred in interpreting an ordinance, the trial court may review that  
16          issue de novo, and freely substitute its own judgment for that of the  
17          decision-making board.

18          (3) The term "competent evidence," as used in this subsection, shall not  
19          preclude reliance by the decision-making board on evidence that  
20          would not be admissible under the rules of evidence as applied in the  
21          trial division of the General Court of Justice if (i) the evidence was  
22          admitted without objection, or (ii) the evidence appears to be  
23          sufficiently trustworthy and was admitted under such circumstances  
24          that it was reasonable for the decision-making board to rely upon it.  
25          The term "competent evidence" shall not be deemed to include the  
26          opinion testimony of lay witnesses as to any of the following:

27          a. The use of property in a particular way would affect the value  
28          of other property.

29          b. The increase in vehicular traffic resulting from a proposed  
30          development would pose a danger to the public safety.

31          c. Matters about which only expert testimony would generally be  
32          admissible under the rules of evidence.

33          (k) Decision of the Trial Court. – Following its review of the decision-making  
34          board in accordance with subsection (j) of this section, the trial court may affirm the  
35          decision, reverse the decision and remand the case with appropriate instructions, or  
36          remand the case for further proceedings. If the court does not affirm the decision below  
37          in its entirety, then the court shall be guided by the following in determining what relief  
38          should be granted to the petitioners:

39                  (1) If the court concludes that the error committed by the decision-making  
40                  board is procedural only, the court may remand the case for further  
41                  proceedings to correct the procedural error.

42                  (2) If the court concludes that the decision-making board has erred by  
43                  failing to make findings of fact such that the court cannot properly  
44                  perform its function, then the court may remand the case with

1           appropriate instructions so long as the record contains substantial  
2           competent evidence that could support the decision below with  
3           appropriate findings of fact. However, findings of fact are not  
4           necessary when the record sufficiently reveals the basis for the  
5           decision below or when the material facts are undisputed and the case  
6           presents only an issue of law.

7           (3) If the court concludes that the decision by the decision-making board  
8           is not supported by substantial competent evidence in the record or is  
9           based upon an error of law, then the court may remand the case with  
10           an order that directs the decision-making board to take whatever action  
11           should have been taken had the error not been committed or to take  
12           such other action as is necessary to correct the error. Specifically:

13           a. If the court concludes that a permit was wrongfully denied  
14           because the denial was not based on substantial competent  
15           evidence or was otherwise based on an error of law, the court  
16           shall remand with instructions that the permit be issued.

17           b. If the court concludes that a permit was wrongfully issued  
18           because the issuance was not based on substantial competent  
19           evidence or was otherwise based on an error of law, the court  
20           shall remand with instructions that the permit be revoked.

21           (1) Ancillary Injunctive Relief. – Upon motion of a party to a proceeding under  
22           this section, and under appropriate circumstances, the trial court may issue an injunctive  
23           order requiring any other party to that proceeding to take certain action or refrain from  
24           taking action that is consistent with the court's decision on the merits of the appeal."

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

27           "**§ 153A-349. Appeals in the nature of certiorari.**

28           (a) Whenever appeals of quasi-judicial decisions of decision-making boards are  
29           to superior court and in the nature of certiorari as required by this Article, the provisions  
30           of G.S. 160A-393 shall be applicable to those appeals.

31           (b) For purposes of this section, as used in G.S. 160A-393, the term "city  
32           council" shall be deemed to refer to the "board of commissioners," and the term "city"  
33           shall be deemed to refer to the "county".

34           (c) For purposes of this section, the "impermissible conflict as described in  
35           G.S. 160A-381(d) or G.S. 160A-388(e1)" of G.S. 160A-393(i)(2) shall mean  
36           "impermissible conflict as described in G.S. 153A-340(g) or G.S. 153A-345(e1)".

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

39           "**§ 160A-377. Appeals of decisions on subdivision plats.**

40           (a) When a subdivision ordinance adopted under this Part provides that the  
41           decision whether to approve or deny a preliminary or final subdivision plat is to be  
42           made by a city council or a planning board, other than a planning board comprised  
43           solely of members of a city planning staff, and the ordinance authorizes the council or  
44           planning board to make a quasi-judicial decision in deciding whether to approve the

1 subdivision plat, then that quasi-judicial decision of the council or planning board shall  
2 be subject to review by the superior court by proceedings in the nature of certiorari. The  
3 provisions of G.S. 160A-381(c), 160A-388(e2), and 160A-393 shall apply to those  
4 appeals.

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

12 (c) For purposes of this section, an ordinance shall be deemed to authorize a  
13 quasi-judicial decision if either of the following apply:

14 (1) The city council or planning board is authorized to decide whether to  
15 approve or deny the plat based upon all of the following:

16 a. Whether the application complies with the specific  
17 requirements set forth in the ordinance.

18 b. Whether the application complies with one or more generally  
19 stated standards requiring a discretionary decision to be made  
20 by the city council or planning board.

21 (2) The city council or planning board is authorized to approve the  
22 subdivision plat subject to conditions that impose requirements or  
23 limitations on the subdivision in addition to those set forth in the  
24 ordinance."

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

27 **"§ 153A-336. Appeals of decisions on subdivision plats.**

28 (a) When a subdivision ordinance adopted under this Part provides that the  
29 decision whether to approve or deny a preliminary or final subdivision plat is to be  
30 made by a board of commissioners or a planning board, other than a planning board  
31 comprised solely of members of a county planning staff, and the ordinance authorizes  
32 the board of commissioners or planning board to make a quasi-judicial decision in  
33 deciding whether to approve the subdivision plat, then that quasi-judicial decision of the  
34 board of commissioners or planning board shall be subject to review by the superior  
35 court by proceedings in the nature of certiorari. The provisions of G.S. 153A-340(f),  
36 153A-345(e2), and 153A-349 shall apply to those appeals.

37 (b) When a subdivision ordinance adopted under this Part provides that a board  
38 of commissioners, planning board, or staff member is authorized to make only an  
39 administrative or ministerial decision in deciding whether to approve a preliminary or  
40 final subdivision plat, then any party aggrieved by that administrative or ministerial  
41 decision may seek to have the decision reviewed by filing an action in superior court  
42 seeking appropriate declaratory or equitable relief. Such an action must be filed within  
43 the time frame specified in G.S. 153A-340(f) for petitions in the nature of certiorari.

1 (c) For purposes of this section, an ordinance shall be deemed to authorize a  
2 quasi-judicial decision if either of the following apply:

3 (1) The city council or planning board is authorized to decide whether to  
4 approve or deny the plat based upon all of the following:

5 a. Whether the application complies with the specific  
6 requirements set forth in the ordinance.

7 b. Whether the application complies with one or more generally  
8 stated standards requiring a discretionary decision to be made  
9 by the city council or planning board.

10 (2) The city council or planning board is authorized to approve the  
11 subdivision plat subject to conditions that impose requirements or  
12 limitations on the subdivision in addition to those set forth in the  
13 ordinance."

14 **SECTION 3.** G.S. 63-34 reads as rewritten:

15 "**§ 63-34. Judicial review.**

16 (a) Any person aggrieved by any decision of the board of appeals, or any  
17 taxpayer, or any officer, department, board, or bureau of the political subdivision, may  
18 present to the superior court a verified petition setting forth that the decision is illegal, in  
19 whole or in part, and specifying the grounds of the illegality. Such petition shall be  
20 presented to the court within 30 days after the decision is filed in the office of the board.  
21 Such petition shall comply with the provisions of G.S. 160A-393.

22 ~~(b) Upon presentation of such petition the court may allow a writ of certiorari~~  
23 ~~directed to the board of appeals to review such decision of the board.~~ The allowance of  
24 the writ shall not stay proceedings upon the decision appealed from, but the court may,  
25 on application, on notice to the board and on due cause shown, grant a restraining order.

26 (c) The board of appeals shall not be required to return the original papers acted  
27 upon by it, but it shall be sufficient to return certified or sworn copies thereof or of such  
28 portions thereof as may be called for by the writ. The return shall concisely set forth  
29 such other facts as may be pertinent and material to show the grounds of the decision  
30 appealed from and shall be verified.

31 ~~(d) The court shall have exclusive jurisdiction to affirm, modify, or set aside the~~  
32 ~~decision brought up for review, in whole or in part, and if need be, to order further~~  
33 ~~proceedings by the board of appeals. The findings of fact by the board, if supported by~~  
34 ~~substantial evidence, shall be accepted by the court as conclusive, and no objection to a~~  
35 ~~decision of the board shall be considered by the court unless such objection shall have~~  
36 ~~been urged before the board, or if it was not so urged, unless there were reasonable~~  
37 ~~grounds for failure to do so.~~

38 (e) Costs shall not be allowed against the board of appeals unless it appears to  
39 the court that it acted with gross negligence, in bad faith, or with malice, in making the  
40 decision appealed from."

41 **SECTION 4.** G.S. 162A-93(b) reads as rewritten:

42 "(b) The provisions of subsection (a) shall not apply if the city council adopts an  
43 annexation ordinance including an area served by a district and finds, after a public  
44 hearing, that adequate fire protection cannot be provided in the area because of the level

1 of available water service. Notice of the public hearing shall be provided by first class  
2 mail to each affected customer and by publication in a newspaper having general  
3 circulation in the area, each not less than 10 days before the hearing. The clerk's  
4 certification of the mailing shall be deemed conclusive in the absence of fraud. Any  
5 resident of the annexed area aggrieved by such a finding of the council may file a  
6 petition for review in the superior court in the nature of **certiorari**, within 30 days after  
7 the finding. The petition for review in the nature of certiorari shall comply with  
8 G.S. 160A-393."

9           **SECTION 5.** This act becomes effective January 1, 2008, and applies to  
10 appeals filed on or after that date.