



LINCOLN COUNTY PLANNING & INSPECTIONS DEPARTMENT
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To: Board of Commissioners
Planning Board

From: Randy Hawkins, Zoning Administrator

Date: August 20, 2013

Re: UDO Proposed Amendments #2013-1
Planning and Inspections Department, applicant

The following information is for use by the Lincoln County Board of Commissioners and the Planning Board at their joint meeting/public hearing on September 9, 2013.

This is a proposal to amend Sections 9.11, 9.18 and 9.19 of the Lincoln County Unified Development Ordinance to make them consistent with new state legislation concerning quasi-judicial zoning cases (conditional use permits, variances and appeals).

Among the more significant changes required by the new law:

1) Amending Section 9.18.6.B to revise the findings of fact that must be made to approve a variance.

2) Amending Section 9.19.6.C to reduce the requirement for a successful appeal of an administrative decision from a four-fifths vote to a simple majority.

These proposed amendments stem from Session Law 2013-126, "An Act to Clarify and Modernize Statutes Regarding Zoning Boards of Adjustment," which was unanimously approved by the N.C. House and Senate and signed into law by Gov. Pat McCrory. It takes effect October 1.

The bill originated as a proposal from the North Carolina Bar Association. It was drafted by committees of attorneys with experience representing developers, local governments and neighbors in zoning cases. Input was obtained from key interest groups, including the N.C. Homebuilders Association, the N.C. Chapter of the American Planning Association, the N.C. Association of Zoning Officials, the N.C. Association of County Commissioners and the N.C. League of Municipalities.

The legislation simplifies the statutes' organization, clarifies the language, incorporates uniform notice requirements, and updates the provisions for judicial review of decisions.

Following are the affected sections, with the text proposed to be deleted shown as struck through and the proposed new text underlined. A copy of Session Law 2013-16 is also included.

UDO Proposed Amendments #2013-1

§9.11. Conditional Use Review

§9.11.1. Applicability

- A. Conditional uses within each general use district are uses that may or may not be appropriate in a particular district, depending of the location, the scale or size of the use, or other factors requiring individual review by the Planning Board and Board of Commissioners.
- B. A conditional use permit shall be required for all conditional uses as set forth in the Permitted Land Use Table (see §2.2.1). A development comprised of uses regulated by separate rows on the table shall be reviewed using the most restrictive process from among the proposed uses.
- C. Where a use requiring approval as a conditional use lies on a separate legal parcel, only the building containing the use and its separate parcel shall be subject to conditional use review, not the entire project. However, where the separate legal parcel is an outparcel, the application shall describe the relationship of the outparcel to the remaining site.
- D. Notwithstanding the provisions of §2.2 to the contrary, land uses owned by Lincoln County shall not be subject to the conditional use review requirements of this section. Public facilities, major and minor utilities and other land uses owned by Lincoln County shall be considered Permitted Uses.

§9.11.2 Pre-application Conference

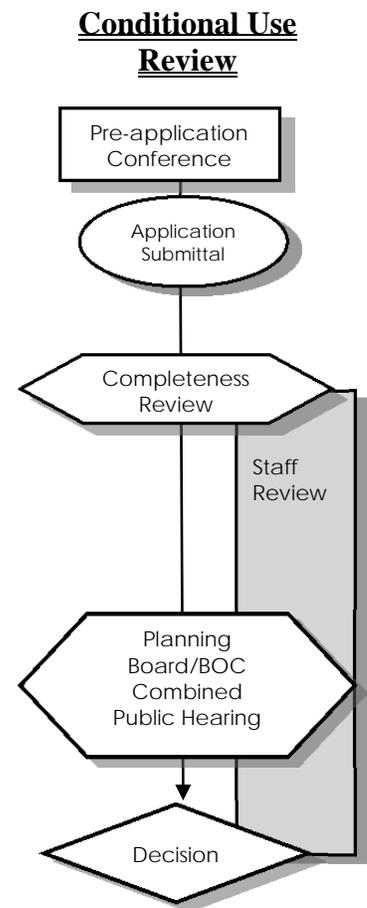
All applicants seeking conditional use approval shall schedule a pre-application conference with the Director, in accordance with §9.2.1.

§9.11.3. Application Requirements

- A. Concurrent with a request for a conditional use permit, an applicant shall submit a site plan for review and approval.
- B. An application for a conditional use permit shall be submitted in accordance with §9.2.2, Application Requirements.

§9.11.4. Notice and Public Hearings

The County shall hold all required public hearings and give notice in accordance with §9.2.3, Notice and Public Hearings.



§9.11.5. Action by Director

- A. Upon submission of a completed application, the Director shall review the request and associated site plan for consistency with the requirements of this UDO.
- B. Upon completion of the technical review, the Director shall prepare a report that reviews the request in accordance with the adopted plans and policies of the County, and the general requirements of this UDO. The report, site plan and any related application materials shall be forwarded to the Planning Board.

§9.11.6. Action by Planning Board

- A. After considering the Director's comments, the Planning Board shall recommend approval or disapproval of the conditional use request and associated site plan. If no recommendation is received from the Planning Board within 30 days of referral of the request to the Planning Board, the Board of Commissioners may proceed in its consideration of the request without the Planning Board's recommendation.
- B. Requests requiring revisions shall be returned to the Planning Board within 90 days or the request shall be considered withdrawn. One extension period may be granted by the Planning Board.

§9.11.7. Action by Board of Commissioners

- A. Before taking action on the conditional use request, the Board of Commissioners shall consider the recommendations of the Planning Board. The Board of Commissioners shall determine contested facts and make its decision within a reasonable time. Every decision shall be based upon competent, material, and substantial evidence in the record. Each decision shall be reduced to writing and reflect the board's determination of contested facts and their application to the applicable standards.
- B. The Board of Commissioners may approve the request, deny the request, or send the request back to the Planning Board for additional consideration. The concurring vote of a majority of the members shall be required to approve a request. For the purposes of this subsection, vacant positions on the board and member who are disqualified from voting on a quasi-judicial matter shall not be considered members of the board for calculation of the requisite majority.
- C. The written decision shall be signed by the chair or other duly authorized member of the board. The decision is effective upon filing the written decision with the clerk to the board. The decision 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.

§9.11.8. Findings of Fact Required

No conditional use permit shall be approved unless the following findings are made concerning the application:

- A. The use will not materially endanger the public health or safety if located where proposed and developed according to plan;

- B. The use meets all required conditions and specifications;
- C. The use will not substantially injure the value of adjoining or abutting property unless the use is a public necessity;
- D. The location and character of the use, if developed according to the plan as submitted and approved, will be in harmony with the area in which it is to be located and will be in general conformity with the approved Land Development Plan for the area in question; and
- E. For SNIA's approved pursuant to §7.3.4.B, §7.3.4.C, and §7.3.4.E, the proposed development shall be found to substantially increase the ad valorem tax base of the County or otherwise significantly promote or expand economic development and/or job opportunities available to Lincoln County residents.

§9.11.9. Additional Conditions

- A. In granting approval of a conditional use permit, the Board of Commissioners may impose reasonable and appropriate conditions which serve to assure that the required findings are upheld. Such conditions may include, but are not limited to, right-of-way or easement dedication; recreation and open space, or buffer provision; limitation in scale, intensity, or hours of operation; and other reasonable restrictions.
- B. Any additional condition approved by the Board of Commissioners shall become a part of the permit and be of equal importance in the responsibility of the applicant or subsequent assigns to adhere to its terms.
- C. Conditions of approval may include a requirement that the applicant submit an annual statement of compliance detailing how the applicant has complied with terms of the permit, including a detailed and specific report on steps taken in the prior year to comply with other applicable local, State and Federal requirements and laws. The Director shall review and approve such annual statement where the applicant is continuing to comply with the applicable requirements of the conditional use permit. Where the Director determines that the applicant is in violation of any requirement of this UDO or conditions of approval, the Director shall refer the permit to the Board of Commissioners for review.

§9.11.10. Modifications to Approved Conditional Use Permit

A. Minor Deviations

The Director is authorized to approve minor deviations to a conditional use permit, if such change is not contrary to the approving action of the Board of Commissioners, but shall not have the authority to approve substantial deviations as set forth below.

B. Substantial Deviations

Any deviation requiring evidentiary support in addition to that presented at a public hearing on applications for the original permit shall constitute a substantial deviation. Before making a determination as to whether a proposed action is a minor deviation or a substantial deviation, the Director shall review the record of the proceedings on the original application. Substantial deviations shall include the following:

1. A change in the boundaries of the approved site;

2. A change from the approved use;
3. An increase of five percent or more in the approved floor area, unless proposed addition is 500 square feet of floor area or less, whether such addition is proposed at one time or over an extended period of time;
4. An increase of five percent or more in the number of approved parking spaces, unless the proposed addition is ten or fewer spaces, whether such addition is proposed at one time or over an extended period of time;
5. Substantial change in the location of principal or accessory structures;
6. Structural alterations significantly affecting the basic size, form; style, ornamentation, and appearance of principal or accessory structures as shown on the approved site plan;
7. Substantial changes in pedestrian or vehicular access or circulation; and
8. Substantial change in the amount or location of landscape screens.

C. If a proposed amendment deviates substantially from the approved conditional use permit, the approved conditional use permit shall be amended in accordance with the procedure and standards which governed its approval.

§9.11.11. Effect of Decision

- A. If the Board of Commissioners votes to deny an application, there may be no subsequent application for the same or similar use submitted by any party for any part of the subject property until 12 months have elapsed from the date of denial. If the Board of Commissioners votes to approve an application, the notice of permit shall be recorded in the Lincoln County Register of Deeds office. This waiting period shall not be applicable where the application for a conditional use permit is substantially different from the original application. The term "substantially different" as herein applied shall mean:
1. The proposed principal use is a different classification than the use contained in the original application; or
 2. The gross floor area of the proposed development is 50 percent or more smaller than contained in the original application.
- B. The conditional use permit and additional conditions, if applicable, shall run with the land and shall be binding on the original applicant as well as any successors, assigns, and heirs.

§9.11.12. Period of Validity

- A. An approved conditional use permit shall expire 12 months from the date of approval unless the proposed development is pursued as set forth in one of the following alternatives:
1. A complete building permit application has been submitted and remains valid.
 2. Where more than one building is to be built, the applicant may submit a series of building permit applications. The first application shall be submitted within 12 months from the date approval was granted. Each subsequent application shall be submitted within 180 days from the date of issuance of a certificate of occupancy for the previous building; or

3. If no building permit is required, a certificate of occupancy has been issued.
- B. Once the appropriate permit has been issued, the conditional use permit shall remain in force unless the use, construction, or activity ceases for a period of 12 consecutive months. In such instance the conditional use permit shall become void. If a conditional use is determined by the Director to be void, such determination shall be transmitted in writing to the applicant.

§9.11.13 Building Permit/Certificate of Occupancy

- A. No building permit or certificate of occupancy shall be issued until the required site plan of the proposed use or development has been approved by the Board of Commissioners.
- B. In order to secure a vested right for a site plan, the applicant must submit a site-specific development plan in accordance with §9.20.

§9.11.14. Revocation of a Conditional Use Permit

- A. If any conditions of a conditional use permit or other requirements of this UDO are violated, the County may revoke the permit.
- B. Revocation may occur after a quasi-judicial hearing is conducted by the Board of Commissioners.
- C. Upon a four-fifths vote, the Board of Commissioners shall revoke the permit, and notice of such revocation shall be recorded in the Lincoln County Register of Deeds office.
- D. Violations of conditions of a conditional use permit shall be considered a violation of this UDO and thereby subject to the provisions of Article 11, Enforcement.

§9.11.15. Coordination with Variances

Applications for variances may be submitted concurrently with a request for a conditional use permit. The conditional use permit request shall be considered first (including any site plan), and where it is denied, the variance request shall be null and void.

§9.11.16. Coordination with Rezoning

An application for a conditional use permit may be reviewed concurrently with a rezoning application. However, a decision shall be rendered first for any rezoning and then subsequently for any conditional use permit.

§9.11.17. Appeal to Court

Any decision by the Board of Commissioners ~~may be appealed within 30 days of the decision in accordance with G.S. §153-345.~~ 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 a written copy thereof is given in accordance with §9.18.6.A.7. When first-class mail is used to deliver notice, three days shall be added to the time to file the petition.

§9.18. Variance

§9.18.1 Applicability

- A. The Board of Adjustment may vary certain requirements of this UDO that will not be contrary to the public interest, where, owing to special conditions, a ~~literal enforcement~~ a strict application of the provisions of this UDO, will, in an individual case, result in ~~practical difficulty or unnecessary hardship~~. The Board of Adjustment shall ensure that the spirit of this UDO shall be observed, public safety and welfare secured, and substantial justice done.
- B. ~~The existence of a nonconforming use of neighboring land, building, or structure in the same district, or of permitted or nonconforming uses in other districts, shall not constitute a reason for the requested variance.~~ No change in permitted uses may be authorized by variance.

§9.18.2. Application Requirements

An application for a variance shall be submitted in accordance with §9.2.2, Application Requirements.

§9.18.3. Notice and Public Hearings

The County shall hold all required public hearings and give notice in accordance with §9.2.3, Notice and Public Hearings.

§9.18.4. Burden of Proof

The applicant seeking the variance shall have the burden of presenting evidence sufficient to allow the Board of Adjustment to reach the conclusions set forth below as well as the burden of persuasion on those issues.

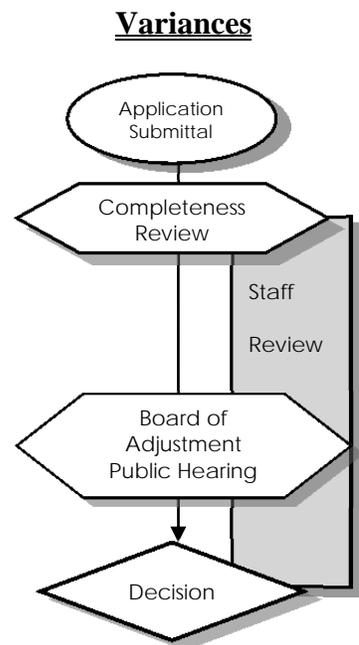
§9.18.5 Action by Director

The Director shall provide the Board of Adjustment with a copy of the application and all relevant materials pertaining to the request.

§9.18.6. Action by Board of Adjustment

A. Procedure

1. The Board of Adjustment may approve the request, deny the request, or continue the request.
2. ~~Each decision shall be accompanied by a finding of fact that specifies the reason for the decision.~~ The Board of Adjustment shall determine contested facts and make its decision within a reasonable time. Every decision shall be based upon competent, material, and substantial evidence in the record. Each decision shall be reduced to writing and reflect the board's determination of contested facts and their application to the applicable standards.
3. If a motion to approve a variance if made, or fails to receive approval by four-fifths of the members eligible to vote, the variance shall be denied.



4. In approving the variance, the Board of Adjustment may prescribe reasonable and appropriate conditions which will ensure that the use will be compatible with adjacent properties and will not alter the character of the neighborhood.
5. Conditions may be imposed by the Board of Adjustment regarding the location, character, and other features of the proposed building or use as may be deemed by the Board of Adjustment to protect property values and general welfare of the neighborhood. Nonconformance with such conditions and safeguards, when part of the terms under which the variance is granted, shall be deemed a violation of this UDO.
6. The presence of other nonconforming or conforming uses of land or structures in the same or other districts shall not be considered grounds for the granting of a variance.
7. The written decision shall be signed by the chair or other duly authorized member of the board. The decision is effective upon filing the written decision with the clerk to the board. The decision 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 require to provide notice shall certify that proper notice has been made.

B. Findings of Fact

No variance shall be approved by the Board of Adjustment unless all of the following findings are made:

1. ~~There are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the UDO;~~ 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. ~~That the variance is in harmony with the general purpose and intent of this UDO and preserves its spirit;~~ 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. ~~That in the granting of the variance, the public safety and welfare have been assured and substantial justice has been done; and~~ 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. ~~That the reasons set forth in the application justify the granting of a variance, and that the variance is the minimum one that will make possible the reasonable use of land or structures.~~ 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. Watershed Protection Variance

In addition to the other requirements of this §9.18, petitions for variance to the standards of §7.3, Watershed Protection, shall comply with the following:

1. Minor Variances

Minor variances shall include petitions for the reduction of any standard of §7.3, Watershed Protection, by a factor of less than ten percent, except residential density or impervious surface area.

2. Major Variances

(a) Petitions for the reduction of any standard of §7.3, Watershed Protection, by a factor of ten percent or more; and

(b) Petitions to increase residential density or impervious surface area.

3. Approval Procedures

(a) Prior to the Board of Adjustment meeting, the Director shall notify in writing to the clerks of all local governments having jurisdiction within that watershed of the variance being requested. Written responses from any of these local governments shall become a permanent part of the records.

(b) Minor variances shall be approved by the Board of Adjustment in accordance with paragraphs §9.18.2 through §9.18.6 above.

(c) Major variances shall comply with paragraphs §9.18.2 through §9.18.6 above except that:

(a) A decision by the Board of Adjustment to approve a major variance shall be advisory only. The Director shall, within 30 days, forward a record of the Board of Adjustment hearing, findings, and conclusions to the North Carolina Environmental Management Commission or other appropriate State agency for final decision.

(b) The Board of Adjustment may advise approval of a major variance petition upon satisfying the findings of paragraph 0 above, or upon the finding that significant community economic or social benefit would be derived from the granting of the variance.

§9.18.7 Appeal to Court

Any decision by the Board of Adjustment ~~may be appealed within 30 days of the decision in accordance with G.S. § Chapter 7A.~~ shall be subject to review by the superior court by proceedings in the nature of certiorari pursuant to G.S. 160A-93. 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 a written copy thereof is given in accordance with §9.18.6.A.7. When first-class mail is used to deliver notice, three days shall be added to the time to file the petition.

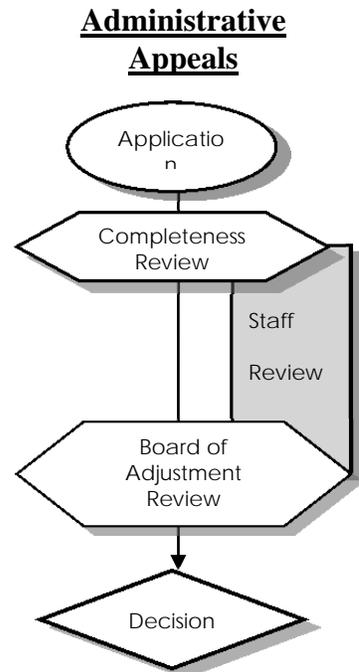
§9.19. Administrative Appeals

§9.19.1 Applicability

An appeal by any person aggrieved by a final order, interpretation or decision of the Planning Board, Historic Committee, the Director or other administrator of this UDO in regard to the provisions of this UDO may be taken to the Board of Adjustment. The Board of Adjustment shall hear and decide appeals of decisions of administrative officials charged with enforcement of this UDO. Any person who has standing under G.S. 160A-393(d) or the County may appeal a decision to the Board of Adjustment. The official who made the decision shall give written notice 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 decision shall be delivered by personal delivery, electronic mail, or by first-class mail.

§9.19.2. Application Requirements

- A. An appeal of an administrative decision shall be taken by filing a written notice of appeal specifying the grounds for the appeal with the Director and the Board of Adjustment.
- B. An application for appeal of an administrative decision shall be submitted in accordance with §9.2.2, Application Requirements.
- C. A notice of appeal of an administrative decision shall be considered filed when a complete application is delivered to the Director. The date and time of filing shall be entered on the notice.



§9.19.3 Deadline for Submission of Application

An appeal of an administrative decision shall be filed with the Board of Adjustment within 30 days of receipt of the decision. The owner or other party shall have 30 days from the receipt of the written notice within which to file an appeal. Any other person with standing to appeal shall have 30 days from receipt of any source of actual or construction 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 10 days. Posting of signs is not the only form of constructive notice. Any such posting shall be the responsibility of the landowner or applicant. Verification of the posting shall be provided to the official who made the decision. Posting of signs shall not be required.

§9.19.4. Notice and Public Hearings

The County shall hold all required public hearings and give notice in accordance with §9.2.3, Notice and Public Hearings.

§9.19.5. Action by ~~Director~~ Administrative Official

~~The Director shall transmit to the Board of Adjustment all the papers constituting the record upon which the appealed action was taken. The official 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 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. The official who made the decision shall be present at the hearing at a witness.~~

§9.19.6. Action by Board of Adjustment

- A. ~~The Board of Adjustment may reverse or affirm (wholly or partly) or may modify the appealed approval, requirement, decision, or determination and shall make any requirement, decision or determination that is deemed necessary. To this end, the Board of Adjustments shall have all the powers of the officer from whom the appeal is taken. The Board of Adjustment may reverse or affirm, wholly or partly, and may modify the decision appealed form 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. The board shall determine contested facts and make its decision within a reasonable time. Every decision shall be based upon competent, material, and substantial evidence in the record. Each decision shall be reduced to writing and reflect the board's determination of contested facts and their application to the applicable standards.~~
- B. 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.
- C. If a motion to reverse or modify is not made, or fails to receive approval by ~~four-fifths~~ a majority of the members eligible to vote, then the appeal shall be denied. 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.
- D. The written decision shall be signed by the chair or other duly authorized member of the board. The decision is effective upon filing the written decision with the clerk to the board. The decision 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 require to provide notice shall certify that proper notice has been made.

§9.19.7. Effect of Appeal

- A. ~~An appeal shall stay all proceedings in furtherance of the action appealed, unless the administrative official from who the appeal is taken certifies to the Board of Adjustment that, because of facts stated in the certificate, a stay would, in their opinion, cause imminent peril to life or property or that because the violation is transitory in nature a stay would seriously interfere with the effective enforcement of this UDO. In that case, proceedings shall not be stayed except by order of the~~

Board of Adjustment or a court, issued on application of the party seeking the stay, for due cause shown, after notice to the administrative official. An appeal of a notice of violation or other enforcement order stays enforcement of the action appealed from unless the official who made the decision 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 this UDO. 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 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 this UDO 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 may grant a stay of a final decision of permit applications or building permits affected by the issue being appealed.

- B.** An appeal shall not stop action lawfully approved (including construction activities authorized by a building permit); only actions presumed in violation of this UDO are stayed.

9.19.8. Appeal to Court

Any decision by the Board of Adjustment may be appealed within 30 days of the decision in accordance with G.S. § Chapter 7A, shall be subject to review by the superior court by proceedings in the nature of certiorari pursuant to G.S. 160A-93. 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 a written copy thereof is given in accordance with §9.19.6.D. When first-class mail is used to deliver notice, three days shall be added to the time to file the petition.

**GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2013**

**SESSION LAW 2013-126
HOUSE BILL 276**

**AN ACT TO CLARIFY AND MODERNIZE STATUTES REGARDING ZONING BOARDS OF
ADJUSTMENT.**

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 160A-388 reads as rewritten:

"§ 160A-388. Board of adjustment.

(a) Composition and Duties. – ~~The city council zoning or unified development ordinance may provide for the appointment and compensation of a board of adjustment consisting of five or more members, each to be appointed for three years. In appointing the original members of such board, members or in the filling of vacancies caused by the expiration of the terms of existing members, the city council may appoint certain members for less than three years to the end so that thereafter the terms of all members shall not expire at the same time. The council may, in its discretion, may appoint and provide compensation for alternate members to serve on the board in the absence or temporary disqualification of any regular member or to fill a vacancy pending appointment of a member. Alternate members shall be appointed for the same term, at the same time, and in the same manner as regular members. Each alternate member, while attending any regular or special meeting of the board and member serving on behalf of any regular member, shall have and may exercise member has all the powers and duties of a regular member. A city The ordinance may designate a planning board or governing board to perform any or all of the duties of a board of adjustment in addition to its other duties.~~ duties and may create and designate specialized boards to hear technical appeals.

(a1) Provisions of Ordinance. – The zoning or unified development ordinance may provide that the board of adjustment hear and decide special and conditional use permits, requests for variances, and appeals of decisions of administrative officials charged with enforcement of the ordinance. As used in this section, the term "decision" includes any final and binding order, requirement, or determination. The board of adjustment shall follow quasi-judicial procedures when deciding appeals and requests for variances and special and conditional use permits. The board shall hear and decide all matters upon which it is required to pass under any statute or ordinance that regulates land use or development.

(a2) Notice of Hearing. – Notice of hearings conducted pursuant to this section shall be mailed to the person or entity whose appeal, application, or request is the subject of the hearing; to the owner of the property that is the subject of the hearing if the owner did not initiate the hearing; to the owners of all parcels of land abutting the parcel of land that is the subject of the hearing; and to any other persons entitled to receive notice as provided by the zoning or unified development ordinance. 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.

(b) ~~A zoning ordinance or those provisions of a unified development ordinance adopted pursuant to the authority granted in this Part shall provide that the board of adjustment shall hear and decide appeals from and review any order, requirement, decision, or determination made by an administrative official charged with the enforcement of that ordinance. An appeal may be taken by any person aggrieved or by an officer, department, board, or bureau of the city. Appeals shall be taken within times prescribed by the board of adjustment by general rule, by filing with the officer from whom the appeal is taken and with the board of adjustment a notice of appeal, specifying the grounds~~

~~thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken. An appeal stays all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board of adjustment, after notice of appeal has been filed with him, that because of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property or that because the violation charged is transitory in nature a stay would seriously interfere with enforcement of the ordinance. In that case proceedings shall not be stayed except by a restraining order, which may be granted by the board of adjustment or by a court of record on application, on notice to the officer from whom the appeal is taken and on due cause shown. The board of adjustment shall fix a reasonable time for the hearing of the appeal, give due notice thereof to the parties, and decide it within a reasonable time. The board of adjustment may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination appealed from, and shall make any order, requirement, decision, or determination that in its opinion ought to be made in the premises. To this end the board shall have all the powers of the officer from whom the appeal is taken.~~

(b1) Appeals. – The board of adjustment shall hear and decide appeals decisions of administrative officials charged with enforcement of the zoning or unified development ordinance and may hear appeals arising out of any other ordinance that regulates land use or development, pursuant to all of the following:

- (1) 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.
- (2) The official who made the decision shall give written notice 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.
- (3) The owner or other party shall have 30 days from receipt of the written notice within which to file an appeal. Any other person with standing to appeal shall have 30 days from receipt from any source of actual or constructive notice of the decision within which to file an appeal.
- (4) 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 10 days. Posting of signs is not the only form of constructive notice. Any such posting shall be the responsibility of the landowner or applicant. Verification of the posting shall be provided to the official who made the decision. Absent an ordinance provision to the contrary, posting of signs shall not be required.
- (5) The official who made the decision shall transmit to the board all documents and exhibits constituting the record upon which the action appealed from is taken. The official 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.
- (6) An appeal of a notice of violation or other enforcement order stays enforcement of the action appealed from unless the official who made the decision 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 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 may grant a

stay of a final decision of permit applications or building permits affected by the issue being appealed.

- (7) Subject to the provisions of subdivision (6) of this subsection, the board of adjustment shall hear and decide the appeal within a reasonable time.
- (8) 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 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.
- (9) When hearing an appeal pursuant to G.S. 160A-400.9(e) 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).
- (10) The parties to an appeal that has been made under this subsection may agree to mediation or other forms of alternative dispute resolution. The ordinance may set standards and procedures to facilitate and manage such voluntary alternative dispute resolution.

(c) Special and Conditional Use Permits. – The zoning ordinance may provide that the board of adjustment may permit special exceptions to the zoning regulations in specified classes of cases or situations as provided in subsection (d) of this section, not including variances in permitted uses, and that the board may use hear and decide special and conditional use permits, all to be permits in accordance with the principles, conditions, safeguards, standards and procedures specified in the ordinance. Reasonable and appropriate conditions may be imposed upon these permits. The ordinance may also authorize the board to interpret zoning maps and pass upon disputed questions of lot lines or district boundary lines and similar questions as they arise in the administration of the ordinance. The board shall hear and decide all matters referred to it or upon which it is required to pass under any zoning ordinance.

(d) Variances. – When practical difficulties or unnecessary hardships would result from carrying out the strict letter of a zoning ordinance, the board of adjustment shall have the power to vary or modify any of the regulations or provisions of the ordinance so that 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-spirit, purpose, and intent of the ordinance shall be observed, ordinance, such that public safety and welfare secured, safety is secured, and substantial justice done-is achieved.

No change in permitted uses may be authorized by variance. Appropriate conditions, which must be reasonably related to the condition or circumstance that gives rise to the need for a variance, may be imposed on any approval issued by the board. Appropriate conditions may be imposed on any variance, provided that the conditions are reasonably related to the variance. Any other ordinance that regulates land use or development may provide for variances consistent with the provisions of this subsection.

(e) Voting. –

- (1) The concurring vote of four-fifths of the members of the board shall be necessary to reverse any order, requirement, decision, or determination of any administrative official charged with the enforcement of an ordinance adopted pursuant to this Part,

~~or to decide in favor of the applicant any matter upon which it is required to pass under any ordinance, or to grant a variance from the provisions of the ordinance. grant a variance. A majority of the members shall be required to decide any other quasi-judicial matter or to determine an appeal made in the nature of certiorari. 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" members of the board for calculation of the requisite supermajority majority if there are no qualified alternates available to take the place of such members.~~

(e1) 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, or a financial interest in the outcome of the matter. 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.

(e2) Quasi-Judicial Decisions and Judicial Review. –

(1) 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. 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.

(2) Every quasi-judicial decision of the board shall be subject to review by the superior court by proceedings in the nature of certiorari. Any certiorari pursuant to G.S. 160A-393. A petition for review by the superior court shall be filed with the clerk of superior court within by the later of 30 days after the decision of the board is filed in such office as the ordinance specifies, is effective or after a written copy thereof is given in accordance with subdivision (1) of this subsection. When first-class mail is used to deliver notice, three days shall be added to the time to file the petition delivered to every aggrieved party who has filed a written request for such copy with the secretary or chairman of the board at the time of its hearing of the case, whichever is later. The decision of the board may be delivered to the aggrieved party either by personal service or by registered mail or certified mail return receipt requested.

(f) Oaths. – The chairman chair of the board of adjustment or any member temporarily acting as chairman, chair and the clerk to the board are authorized in his official capacity 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.

(g) Subpoenas. – The board of adjustment 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 order subpoena be obeyed, and the court shall have jurisdiction to issue these orders

~~after notice to all proper parties. No testimony of any witness before the board of adjustment pursuant to a subpoena issued in exercise of the power conferred by this subsection may be used against the witness in the trial of any civil or criminal action other than a prosecution for false swearing committed on the examination. Any person who, while under oath during a proceeding before the board of adjustment, willfully swears falsely, is guilty of a Class 1 misdemeanor."~~

SECTION 2.(a) G.S. 160A-388(e1) is recodified as G.S. 160A-388(e)(2).

SECTION 2.(b) G.S. 160A-388(e)(2), as recodified by Section 2(a) of this act, reads as rewritten:

"(2) A member of ~~the any 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~~ violations of due process 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, or a financial interest in the outcome of the matter. 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."

SECTION 3.(a) G.S. 153A-345 is repealed except that any local modification to that section in effect on September 30, 2013, shall be treated as a local modification to G.S. 160A-388 from October 1, 2013, through June 30, 2015.

SECTION 3.(b) Article 18 of Chapter 153A of the General Statutes is amended by adding a new section to read:

"§ 153A-345.1. Board of adjustment.

(a) The provisions of G.S. 160A-388 are applicable to counties.

(b) For the purposes of this section, as used in G.S. 160A-388, the term "city council" is deemed to refer to the board of county commissioners, and the terms "city" or "municipality" are deemed to refer to the county.

(c) If a board of county commissioners does not zone the entire territorial jurisdiction of the county, each designated zoning area shall, if practicable, have at least one resident as a member of the board of adjustment; otherwise, the provisions of G.S. 153A-25 regarding qualifications for appointive office shall apply to board of adjustment appointments."

SECTION 4. G.S. 160A-381(c) reads as rewritten:

"(c) The regulations may also provide that the board of adjustment, the planning board, or the city council may issue special use permits or conditional use permits in the classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified therein and may impose reasonable and appropriate conditions and safeguards upon these permits. When deciding special use permits or conditional use permits, the city council or planning board shall follow quasi-judicial procedures. Notice of hearings on special or conditional use permit applications shall be as provided in G.S. 160A-388(a2). No vote greater than a majority vote shall be required for the city council or planning board to issue such permits. For the purposes of this section, 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. Every such decision of the city council or planning board shall be subject to review of the superior court in the nature of certiorari in accordance with G.S. 160A-388.

Where appropriate, such conditions may include requirements that street and utility rights-of-way be dedicated to the public and that provision be made of recreational space and facilities."

SECTION 5. G.S. 153A-340(c1) reads as rewritten:

"(c1) The regulations may also provide that the board of adjustment, the planning board, or the board of commissioners may issue special use permits or conditional use permits in the classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified therein and may impose reasonable and appropriate conditions and safeguards upon these permits. Where appropriate, the conditions may include requirements that street and utility rights-of-way be dedicated to the public and that recreational space be provided. When deciding special use permits or conditional use permits, the board of county commissioners or planning board shall follow quasi-judicial procedures. Notice of hearings on special or conditional use permit

applications shall be as provided in G.S. 160A-388(a2). No vote greater than a majority vote shall be required for the board of county commissioners or planning board to issue such permits. For the purposes of this section, 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. Every such decision of the board of county commissioners or planning board shall be subject to review of the superior court in the nature of certiorari consistent with G.S. 153A-345."

SECTION 6. G.S. 153A-44 reads as rewritten:

"§ 153A-44. Members excused from voting.

The board may excuse a member from voting, but only upon questions involving the member's own financial interest or official conduct or on matters on which the member is prohibited from voting under G.S. 14-234, 153A-340(g), or ~~153A-345(e1), 160A-388(e)(2).~~ For purposes of this section, the question of the compensation and allowances of members of the board does not involve a member's own financial interest or official conduct."

SECTION 7. G.S. 153A-336(a) reads as rewritten:

"(a) When a subdivision ordinance adopted under this Part provides that the decision whether to approve or deny a preliminary or final subdivision plat is to be made by a board of commissioners or a planning board, other than a planning board comprised solely of members of a county planning staff, and the ordinance authorizes the board of commissioners or planning board to make a quasi-judicial decision in deciding whether to approve the subdivision plat, then that quasi-judicial decision of the board of commissioners or planning board shall be subject to review by the superior court by proceedings in the nature of certiorari. The provisions of G.S. 153A-340(f), ~~153A-345 (e2), 160A-388(e2)(2),~~ and 153A-349 shall apply to those appeals."

SECTION 8. G.S. 153A-340(c1) reads as rewritten:

"(c1) The regulations may also provide that the board of adjustment, the planning board, or the board of commissioners may issue special use permits or conditional use permits in the classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified therein and may impose reasonable and appropriate conditions and safeguards upon these permits. Where appropriate, the conditions may include requirements that street and utility rights-of-way be dedicated to the public and that recreational space be provided. When deciding special use permits or conditional use permits, the board of county commissioners or planning board shall follow quasi-judicial procedures. No vote greater than a majority vote shall be required for the board of county commissioners or planning board to issue such permits. For the purposes of this section, 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. Every such decision of the board of county commissioners or planning board shall be subject to review of the superior court in the nature of certiorari consistent with ~~G.S. 153A-345, G.S. 160A-388.~~"

SECTION 9. G.S. 153A-349(c) is repealed.

SECTION 10. G.S. 153A-349.8(c) reads as rewritten:

"(c) If the developer fails to cure the material breach within the time given, then the local government unilaterally may terminate or modify the development agreement; provided, the notice of termination or modification may be appealed to the board of adjustment in the manner provided by ~~G.S. 153A-345(b), G.S. 160A-388(b1).~~"

SECTION 11. G.S. 160A-75 reads as rewritten:

"§ 160A-75. Voting.

No member shall be excused from voting except upon matters involving the consideration of the member's own financial interest or official conduct or on matters on which the member is prohibited from voting under G.S. 14-234, 160A-381(d), or ~~160A-388(e1), 160A-388(e)(2).~~ In all other cases, a failure to vote by a member who is physically present in the council chamber, or who has withdrawn without being excused by a majority vote of the remaining members present, shall be recorded as an affirmative vote. The question of the compensation and allowances of members of the council is not a matter involving a member's own financial interest or official conduct.

An affirmative vote equal to a majority of all the members of the council not excused from voting on the question in issue, including the mayor's vote in case of an equal division, shall be required to adopt an ordinance, take any action having the effect of an ordinance, authorize or commit the expenditure of public funds, or make, ratify, or authorize any contract on behalf of the city. In addition, no ordinance nor any action having the effect of any ordinance may be finally adopted on

the date on which it is introduced except by an affirmative vote equal to or greater than two thirds of all the actual membership of the council, excluding vacant seats and not including the mayor unless the mayor has the right to vote on all questions before the council. For purposes of this section, an ordinance shall be deemed to have been introduced on the date the subject matter is first voted on by the council."

SECTION 12. G.S. 160A-377(a) reads as rewritten:

"(a) When a subdivision ordinance adopted under this Part provides that the decision whether to approve or deny a preliminary or final subdivision plat is to be made by a city council or a planning board, other than a planning board comprised solely of members of a city planning staff, and the ordinance authorizes the council or planning board to make a quasi-judicial decision in deciding whether to approve the subdivision plat, then that quasi-judicial decision of the council or planning board shall be subject to review by the superior court by proceedings in the nature of certiorari. The provisions of G.S. 160A-381(c), ~~160A-388(e2)~~, 160A-388(e2)(2), and 160A-393 shall apply to those appeals."

SECTION 13. G.S. 160A-393(c)(3) reads as rewritten:

"(3) Set forth with particularity the allegations and facts, if any, in support of allegations that, as the result of impermissible conflict as described in ~~G.S. 160A-388(e1)~~, G.S. 160A-388(e)(2), or locally adopted conflict rules, the decision-making body was not sufficiently impartial to comply with due process principles."

SECTION 14. G.S. 160A-393(j)(2) reads as rewritten:

"(2) Whether, as a result of impermissible conflict as described in ~~G.S. 160A-388(e1)~~, G.S. 160A-388(e)(2), or locally adopted conflict rules, the decision-making body was not sufficiently impartial to comply with due process principles."

SECTION 15. This act becomes effective October 1, 2013, and applies to actions taken on or after that date by any board of adjustment.

In the General Assembly read three times and ratified this the 10th day of June, 2013.

s/ Daniel J. Forest
President of the Senate

s/ Thom Tillis
Speaker of the House of Representatives

s/ Pat McCrory
Governor

Approved 4:20 p.m. this 19th day of June, 2013



LINCOLN COUNTY PLANNING & INSPECTIONS DEPARTMENT

302 NORTH ACADEMY STREET, SUITE A, LINCOLNTON, NORTH CAROLINA 28092
704-736-8440 OFFICE 704-736-8434 INSPECTION REQUEST LINE 704-732-9010 FAX

Zoning Amendment Staff's Proposed Statement of Consistency and Reasonableness

Case No. **UDO Proposed Amendments #2013-1**
Applicant **Planning and Inspections Department**
Proposed amendment **Amend Sections 9.11, 9.18 and 9.19 of the Unified Development Ordinance to make them consistent with new state legislation concerning quasi-judicial zoning cases**

This proposed amendment **is consistent** with the Lincoln County Comprehensive Land Use Plan and other adopted plans in that: **The Land Use Plan recognizes the state's authority to set requirements for zoning decisions.**

This proposed amendment **is reasonable and in the public interest** in that: **It will make the Unified Development Ordinance consistent with new state legislation that was unanimously enacted after it was drafted by the North Carolina Bar Association with input from key interest groups, including local governments, builders and planners.**



UDO Text Amendment Application

Lincoln County Planning and Inspections Department
Zoning Administrator
302 N. Academy St., Suite A, Lincolnton, NC 28092
Phone: (704) 736-8440 Fax: (704) 732-9010

Part I

Applicant Name Lincoln County Planning and Inspections Department

Applicant Address 302 N. Academy St., Suite A, Lincolnton, NC 28092

Applicant Phone Number (704) 748-1507

Part II

Briefly describe the proposed text amendments.

Amend Sections 9.11, 9.18 and 9.19 of the Lincoln County Unified Development Ordinance to make them consistent with new state legislation concerning quasi-judicial zoning cases.

I hereby certify that all of the information provided for this application and attachments is true and correct to the best of my knowledge.

Randy Hawley
Applicant

July 26, 2013
Date