

**Buncombe County Planning Board  
October 3, 2016**

The Buncombe County Planning Board met on October 3, 2016 in the meeting room at 30 Valley Street. Members present were Gene Bell, Nancy Waldrop, Joan Walker, Dusty Pless, Thad Lewis, and David Rittenberg. Also present were Michael Frue, Staff Attorney; Jon Creighton, Planning Director; and Gillian Phillips and Shannon Capezzali, Planning staff.

**Call to Order**

Gene Bell called the meeting to order at 9:32 am.

**Approval of Agenda**

Dusty Pless made a motion to approve the agenda. The motion was seconded by Thad Lewis and passed unanimously.

**Approval of Minutes (September 19, 2016)**

Nancy Waldrop made a motion to approve the September 19, 2016 minutes. The motion was seconded by Dusty Pless and passed unanimously.

**Public Hearings**

**ZPH2016-00043:** *proposed modifications pursuant to recent changes enacted by the North Carolina General Assembly and a recent court decision regarding quasi-judicial proceedings as follows:*

1. *Modify Chapter 58, Article II of the Buncombe County Code of Ordinances (Planning Board) to clarify Planning Board composition and vacancies; organization, rules, meetings, and records; powers and duties; and to add the following sections: rules of conduct; regular business; quasi-judicial hearings; and quasi-judicial decisions and judicial review.*
2. *Modify Chapter 70, Sec. 70-10 and Sec. 70-41 of the Buncombe County Land Development and Subdivision Ordinance to clarify standards for variances and phased development.*
3. *Modify Chapter 78, Sec. 78-623 of the Zoning Ordinance of Buncombe County to clarify procedures for filing of decisions.*

Gillian Phillips provided an overview of the proposed text amendments to Chapters 58, 70, and 78. Changes affect how the Planning Board votes on variances, and brings subdivision variance sections into alignment with zoning requirements. Changes also affect how public hearings are conducted, and advertising to the public. These changes are in response to a recent court case with the City of Asheville. Variances and certain types of appeals are heard at a quasi-judicial hearing.

1. *Modify Chapter 58, Article II.* The Board was provided with the proposed language prior to the meeting (Attachment A). Chairman Bell asked for public comment. There being no one wishing to comment, Gene Bell made a motion to approve the revisions to the text of Chapter 58, Article II. The motion was seconded by Thad Lewis and passed unanimously.
2. *Modify Chapter 70, Sec. 70-10 and Sec. 70-41.* The Board was provided with the proposed language prior to the meeting (Attachment B). Chairman Bell asked for public comment. There being no one wishing to comment, David Rittenberg made a motion to approve the revisions to the text of Chapter 70. The motion was seconded by Joan Walker and passed unanimously.

3. *Modify Chapter 78, Sec. 78-623.* The Board was provided with the proposed language prior to the meeting (Attachment C). Chairman Bell asked for public comment. There being no one wishing to comment, Joan Walker made a motion to approve the revisions to the text of Chapter 78 with the consistency statement provided in Attachment D. The motion was seconded by Thad Lewis and passed unanimously.

**Public Comment**

There was no public comment.

**Adjourn**

The meeting was adjourned at 9:42 a.m.

**Sec. 70-10. - Variances.**

The purpose of a variance is to provide relief when a strict application of these regulations would impose unusual practical difficulties or unnecessary physical hardships on the applicant. A variance may also be proper when environmental concerns are viewed in light of the spirit and intent of the planning ordinances. The planning board is responsible for considering applications for variances. The variance request must specify which requirements are to be varied from and must specify alternative methods to be used. An application for a variance shall be with the planning department. A request in complete form shall be received no less than 30 days prior to the planning board meeting at which the request will be heard.

~~A variance may also be proper when environmental concerns are viewed in light of the spirit and intent of the planning ordinances. Such request may be made by the applicant or any member of the planning board. Upon motion of any member of the planning board the 30 day requirement may be waived. Variances will not ordinarily be granted if the special circumstances on which the applicant relies are a result of the actions of the applicant or owner or previous owners.~~

~~Reasonable conditions may be imposed in connection with a variance as deemed necessary to protect the best interests of the surrounding property or neighborhood, and otherwise secure the purpose and requirements of this chapter.~~

~~Variances may be granted in the sole discretion of the planning board for any subdivision plan only if all three expressly written findings below are made:~~

- ~~(1) That a strict or literal interpretation and enforcement of the specified standard or requirement would result in practical difficulty, unnecessary hardship or adverse environmental impact; and~~
- ~~(2) That the granting of the variance will not be detrimental to the public health, safety or welfare; and~~
- ~~(3) That the granting of the variance would support general objectives contained within this chapter.~~

~~When unnecessary hardships would result from carrying out the strict letter of the subdivision ordinance, the planning board shall vary any of the provisions of the ordinance upon a showing of all of the following:~~

- ~~(1) Unnecessary hardship would result from the strict application of the ordinance. It shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property.~~
- ~~(2) The hardship results from conditions that are peculiar to the property, such as location, size, or topography. Hardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the neighborhood or the general public, may not be the basis for granting a variance.~~
- ~~(3) The hardship did not result from actions taken by the applicant or the property owner. The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship.~~

(4) The requested variance is consistent with the spirit, purpose, and intent of the ordinance, such that public safety is secured, and substantial justice is achieved.

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.

The planning board shall make a finding, and written notice of the decision shall be prepared as prescribed in Ch. 58 of the Buncombe County Code of Ordinances. In granting any variance, the planning board may prescribe appropriate conditions and safeguards in conformity with this article. Violation of such conditions and safeguards, when made a part of the terms under which the variance is granted, shall be deemed a violation of this article and punishable as described in the Buncombe County Code of Ordinances and North Carolina law.

Variances shall expire if development or building activity is not initiated within ~~one~~ two years of the approval date. A single extension may be granted, upon receiving a written request from the applicant before the expiration of the approval, by the planning board when reasonable cause is shown. When any preliminary plan approval expires, any and all variance approvals shall also expire.

#### **Sec. 70-41. Phased development.**

If a subdivider proposes that a subdivision will be constructed in phases, the following procedure shall apply:

(1) No master plan shall be filed as part of a subdivision plan or preliminary plan unless it includes at least one phase of a multi-phase development intended for immediate development, or constitutes the master plan for the entire development intended to be developed immediately.

(2) A master plan showing the entire proposed subdivision and the phases of subdivision, proposed density, proposed type and location of utilities, and proposed development timetable shall be submitted to the planning department staff for review. Approval of a master plan by planning department staff or by the planning board as part of the preliminary plan application process for a subdivision shall not constitute approval of the preliminary plan nor shall such approval of a master plan be considered as an acceptance of a preliminary plan, in whole or in part.

(3) Subdividers of phased developments are hereby put on notice that the terms and conditions of the land development and subdivision ordinance of Buncombe County, North Carolina will change from time to time. Plans submitted to the planning department for review within 30 days of the next scheduled meeting of the planning board that comply with all the specifications and standards of the ordinance for any and all phases of the proposed development shall be deemed to have a vested right pursuant to North Carolina General Statutes to continue under the terms and conditions of the ordinance as written on the date said plans were submitted.

(4) Each phase of subdivision shall be preceded by submission and approval of a preliminary plat.

(5) As each phase is completed, a final as-built plan and final recordable plat must be submitted and approved for that phase, prior to the sale or conveyance of any lot in that phase.

**ARTICLE II. - PLANNING BOARD**

FOOTNOTE(S):

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**State Law reference**— Authority to create a planning agency, G.S. 153A-321.

**Sec. 58-11. - Creation.**

The board of commissioners hereby establish the county ~~planning board~~ Planning Board under the authority granted in G.S. 153A-321 and G.S. 153A-322.

(Ord. No. 20272, § 1, 9-7-93)

**Sec. 58-12. - Composition and vacancies.**

The county ~~planning board~~ Planning Board, referred to in this article as the ~~planning board~~ Planning Board, shall consist of nine members. A quorum shall consist of five (5) Planning Board members. A record of members present should be maintained. All ~~planning board~~ Planning Board members shall be citizens and residents of the county, and shall be appointed by the board of commissioners. ~~The initial m~~ Members of the county ~~planning board~~ Planning Board shall serve staggered terms. New appointments for terms of three years shall be made. Vacancies ~~occurring for reasons other than expiration of appointed terms~~ shall be filled as they occur by the board of commissioners for the period of the unexpired term. ~~Regular attendance of the planning board's meetings is considered a prerequisite for the maintenance of membership on the board.~~

(Ord. No. 20272, § 2, 9-7-93; Ord. No. 96-6-10, § 1, 6-18-96)

**Sec. 58-13. - Organization; rules; meetings; records.**

~~Within 30 days after appointment, the planning board shall meet and elect a chairperson, vice-chairperson, secretary, and create and fill other offices as it may determine.~~ The Planning Board shall annually elect a Chair and a Vice-Chair from among its members. The term of the ~~chairperson~~ Chair and other officers shall be one year, with eligibility for reelection. The ~~planning board~~ Planning Board shall adopt bylaws and rules for transaction of its business and shall keep a record of its members' attendance, ~~and of its resolutions, discussions, findings and recommendations, which record shall be a public record.~~

The Planning Board shall hold at least one meeting monthly at a specified time and place and all of its meetings shall be open to the public. ~~There shall be a quorum of five planning board members for the purpose of taking any official action required by this article.~~ Special meetings of the Planning Board may be called at any time by the Chair or by request of four or more members of the Planning Board. At least 48 hours written notice of the time and place of meeting shall be given by the Chair to each member of the Planning Board. All Planning Board meetings are to be held in accordance with N.C. Gen. Stat. 143-318.9 et seq., commonly referred to as the Open Meeting Law.

Cancellation of meetings. Whenever there are no applications or other business for the Planning Board, or whenever so many regular members notify planning staff of their inability to attend such that a quorum will not be available, the Planning Director or his/her designee may dispense with a meeting by giving written or oral notice to all members.

The Planning Board shall keep minutes of its proceedings, showing the vote of each member upon every question, or if absent or failing to vote, indicating such fact, and also keep records of its examinations and other official actions.

(Ord. No. 20272, § 3, 9-7-93; Ord. No. 96-6-10, § 2, 6-18-96)

**Sec. 58-14. — Expenditures; incurring indebtedness; donations.**

The expenditures of the planning board, exclusive of gifts or grants, shall be within the amounts appropriated for the purpose by the board of commissioners, and no indebtedness for which the county shall be liable shall be contracted or incurred by the planning board unless an appropriation is made by the board of commissioners for such purpose, as authorized by law, and then only to the extent of such appropriation.

(Ord. No. 20272, § 4, 9-7-93)

**Sec. 58-15. - Powers and duties.**

The ~~planning board~~ Planning Board shall have the power to perform the following duties:

- (1) Make studies of the area within its jurisdiction.
- (2) Determine objectives to be sought in the development of the study area.
- (3) Prepare and adopt plans for achieving these objectives.
- (4) Develop and recommend policies, ordinances, administrative procedures and other means of carrying out plans in a coordinated and efficient manner.
- (5) Advise the board of commissioners concerning the use and amendment of means for carrying out plans.
- (6) Exercise any functions in the administration and enforcement of various means for carrying out plans that the board of commissioners may direct.
- (7) Perform any other related duties that the board of commissioners may direct.

(Ord. No. 20272, § 5, 9-7-93)

**Sec. 58-16. Rules of conduct.**

- (a) Members of the Planning Board may be removed by the board of commissioners for cause, including violation of the rules stated in this section.

- (b) Faithful attendance at meetings of the Planning Board and conscientious performance of the duties required of members of the Planning Board shall be considered a prerequisite of continuing membership on the Planning Board.
- (c) No Planning Board member shall accept any gift, whether in the form of a service, a loan, a thing of value, or a promise, from any person, firm, or corporation that, in the member's knowledge, is interested directly or indirectly in any manner whatsoever in business dealings with the county.
- (d) No Planning Board member shall accept any gift, favor, or thing of value that may tend to influence that Board member in the discharge of duties.
- (e) No Planning Board member shall grant any improper favor, service, or thing of value in the discharge of duties.
- (f) The Chair, or in his or her absence the Vice-Chair, may administer oaths and request the attendance of witnesses in accordance with N.C. Gen. Stat. 153A-345.1.
- (g) All regular members shall vote on any issue unless they have disqualified themselves for one or more of the reasons listed in this Article or as may be required by law. The concurring vote of four-fifths of the Board shall be necessary to grant a variance, or as otherwise required by law. In all other matters, the vote of a majority of the members present and voting shall decide issues before the Planning Board. For purposes of this article, 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 supermajority.

**Sec. 58-17. Regular business.**

(a) Order of business

1. The order of business at regular Planning Board meetings shall be as follows:

- a) Discussion/adjustment/approval of agenda
- b) Approval of minutes of previous meeting
- c) Business
- d) Discussions
- e) Public Comment
- f) Adjournment

The case before the Board shall be presented by staff and parties in interest shall have privileges of the floor as designated by the Chair.

2. The order of business at special meetings of the Planning Board shall be as follows:

- a) Business as announced in the notice of the special meeting
- b) Adjournment

3. Action by the Board:

The Board shall proceed by motion. Any member, including the Chair, may make a motion. All motions require a second before the motion can be discussed. A member may make only one motion at a time. A substantive motion is out of order while another substantive motion is pending. A motion shall be adopted by a majority of the votes cast. The Chair shall state the motion and then open the floor to Board members for debate. The Chair shall preside over the debate according to these general principles:

- a) The introducer (the member who makes the motion is entitled to speak first);
- b) A member who has not spoken on the issue shall be recognized before someone who has already spoken;
- c) To the extent possible, the debate shall alternate between opponents and proponents of the measure.

4. Procedural motions:

These procedural motions, and no others, shall be in order. All motions require a second before the motion can be discussed. Unless otherwise noted, each motion is debatable, may be amended, and requires a majority vote for adoption.

In order of priority (if applicable), the procedural motions are:

- a) To adjourn. The motion may be made at any time by a member of the Board and would require majority vote.
- b) To take a recess.
- c) Call to follow the agenda. The motion must be made at the first reasonable opportunity or it is waived.
- d) To suspend the rules. The motion requires a vote equal to a quorum.
- e) To divide a complex motion and consider it by paragraph.
- f) Call of the previous question. The motion is not in order until every member of the Board has had at least one opportunity to speak.
- g) To postpone to a certain time or day.
- h) To amend. An amendment to a motion must be germane to the subject matter of the motion, but it may achieve the opposite effect of the motion.
- i) To reconsider. The motion must be made by a member who voted with the prevailing side. The motion must be made at either the same meeting at which the original vote was taken or the next regular meeting. The motion cannot interrupt deliberation or a pending matter but is in order at any time before adjournment or the next regular meeting.
- j) To rescind or repeal.
- k) To ratify.
- l) Withdrawal of a motion. A motion may be withdrawn by the introducer at any time before a vote.

5. Reference to Robert's Rules of Order:

To the extent not provided for in these rules and to the extent that the reference does not conflict with the spirit of these rules, the Board shall refer to Robert's Rules of Order for unresolved procedural questions.

**Sec. 58-18. Quasi-Judicial hearings.** Quasi-Judicial hearings shall be conducted as follows:

(1) Appeals and hearings on variance requests. The Planning Board shall hear and decide all subdivision ordinance variance requests as well as appeals from any order, requirement, decision, or determination made by the subdivision administrator where such decision complies with one or more generally stated standards requiring a discretionary decision. The Planning Board will also hear appeals pursuant to any chapter or article of the Code of Ordinances for Buncombe County indicating that such appeals shall be heard by the Planning Board.

(2) A member of the Planning Board 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.

(3) No Planning Board member shall discuss any case with any parties thereto prior to the public hearing on that case; provided however, that a member may receive and/or seek information pertaining to the case from planning staff or any other member of the Planning Board.

(4) Members of the Planning Board shall not express individual opinions on the proper judgment of any case prior to its determination on that case.

(5) Procedure for filing appeals. All statute of limitations and procedures for filing an appeal or variance request to the Planning Board are set forth in N.C. Gen. Stat. 153A-345.1 or as amended.

(6) Conduct of hearing. Any party may appear in person or by agent as authorized by law or by attorney at the hearing. The order of business for the hearing shall be as follows:

- a. The Chair, or such person as he/she shall direct, shall give a preliminary statement of the case.
- b. The applicant shall present the argument in support of his application.
- c. Persons opposed to granting the application shall present the argument against the application.
- d. Both sides will be permitted to present rebuttals to opposing testimony.
- e. The Chair shall summarize the evidence, which has been presented, giving the parties opportunity to make objections or corrections.

Witnesses may be called and factual evidence may be submitted, but the Planning Board shall not be limited to consideration of only such evidence as would be admissible in a court of law. The Planning Board may view the property before arriving at a decision. All witnesses before the

Planning Board shall be placed under oath and an opposing party may cross examine them. The Procedural Motions as set forth above should govern action by the Planning Board.

**Sec. 58-19. Quasi-Judicial decisions and judicial review.**

(1) Hearings. All Planning Board hearings shall be conducted in accordance with N.C. Gen. Stat. §153A-345.1 or as amended.

(2) Decisions. All Planning Board decisions shall be made in accordance with N.C. Gen. Stat. §153A-345.1 or as amended.

(3) Filing of decisions. Decisions of the Planning Board are effective upon filing the written decision with the Planning Director or his/her designee following delivery of such decision 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. The person required to provide notice of the decision shall certify that proper notice has been made.

**Sec. 78-623. Appeals and applications.**

(a) *Appeals and Hearings.* The board of adjustment shall hear and decide all appeals from any order, requirement, decision, or determination made by the zoning administrator as well as appeals and requests for variances pursuant to any Chapter or Article of the Code of Ordinances for Buncombe County indicating that such appeals or requests for variances shall be heard by the board of adjustment, in which cases the requests for variances shall be treated as and may be referred to as appeals as set forth herein. In deciding appeals, it may hear both those based upon an allegedly improper or erroneous interpretation of this article and those based upon alleged hardship resulting from strict interpretation of this article.

(b) *Procedure for Filing Appeals.* All statute of limitations and procedures for filing an appeal to the Board of Adjustment are set forth in N.C. Gen. Stat. §153A-345.1 or as amended.

(c) *Hearings.* All board of adjustment hearings shall be conducted in accordance with N.C. Gen. Stat. §153A-345.1 or as amended.

(d) *Decisions.* All board of adjustment decisions shall be made in accordance with N.C. Gen. Stat. §153A-345.1 or as amended.

(e) *Filing of Decisions.* Decisions of the board of adjustment are effective upon filing the written decision with the Zoning Administrator or his/her designee following delivery of such decision 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. The person required to provide notice of the decision shall certify that proper notice has been made.

~~(e)~~ (f) *Expiration of Approval.* Unless otherwise specified, an order or decision of the board of adjustment granting a conditional use permit or variance shall expire if a building permit or certificate of occupancy for such use is not obtained within two years from the date of the signed order.