



Overhaul of North Carolina Board of Adjustment Law to Take Effect October 1, 2013

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Many North Carolina counties and cities rely on their Boards of Adjustment to review petitioners' applications for variances, special use permits, and appeals of land use ordinance interpretations.

Recently enacted legislation makes several changes to the Board of Adjustment's decision-making process. Session Law 2013-126 (House Bill 276), which becomes effective as of October 1, 2013, revises--and in some cases rewrites--the board of adjustment enabling statutes codified at N.C. Gen. Stat. §§ 160A-388 (for cities) & 153A-345 (for counties).

Under existing law, special and conditional use permits, appeals in the nature of certiorari, and variances require an affirmative 4/5ths vote of the Board. Practitioners often refer to this as the "super-majority rule." After October 1, 2013, only variance approvals will remain subject to the super majority rule.

A brief historical review helps explain the lawmakers' distinction between variances and other Board matters. North Carolina modeled its enabling statutes after New York City's 1916 Board of Adjustment ordinance. Variances were the centerpiece of both legislative enactments. A variance may only be granted where a petitioner demonstrates an exception to the zoning ordinance is required to avoid unnecessary hardship with respect to a particular property. Years after the initial adoption of the enabling statutes, the North Carolina legislature added special and conditional use permits as matters that could be considered by a Board of Adjustment. The outcome of a special or conditional use permit application turns upon the applicant's ability to show the existence of certain enumerated facts, rather than persuading the Board to grant an exception to the existing ordinance. Lawmakers determined that a simple Board majority could make such factual determinations. Similarly, in the case of an appeal, lawmakers concluded that a simple Board majority could resolve questions regarding interpretation and application of an ordinance without placing the public interest at risk.

Variance law did not, however, escape legislative attention. The seemingly redundant "unnecessary

hardship or practical difficulty? language has been pared down to a simple "unnecessary hardship" test. In practice, North Carolina courts rarely, if ever, distinguished between the two variance standards.

One other change to variance law is particularly noteworthy. Lawmakers have eliminated the formidable requirement that a petitioner demonstrate that, in the absence of a variance, no reasonable use could be made of the property. Boards of Adjustment often struggled with this standard when a petitioner sought a variance from a residential building set-back or other "area requirement" of a zoning ordinance. Oftentimes the property could still be used for residential purposes. A literal application of the standard would, however, preclude the issuance of a variance in such cases. Other changes to the variance statutes are largely codifications of existing case law.

While not as attention-grabbing as the abolition of the super-majority rule and revamping of variance standards, S.L. 2013-126 also makes several technical, procedural, and syntax changes. These will provide greater clarity to zoning officers, land use practitioners, developers, and land owners alike. For instance, S.L. 2013-126 provides procedural clarifications regarding standing, sets deadlines relating to an appeal, identifies those entitled to notice, and establishes the procedure for production of the Board's record. S.L. 2013-126 also codifies the familiar "competent, material, and substantial evidence" standard of review for quasi-judicial proceedings and requires all Board decisions to be in writing signed by the chair.

While new questions will undoubtedly arise as practitioners and local governments transition to the new law, these comprehensive changes to North Carolina's enabling statutes should be welcomed as a long-overdue overhaul of board of adjustment law.

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