



TOWN OF KURE BEACH
BOARD OF ADJUSTMENT
Annual Organizational Meeting
Tuesday, January 28, 2020 6:30pm

- I. Call to Order
- II. Adoption of Agenda
- III. Approval of Minutes: May 28, 2019
- IV. Old Business
- V. New Business
 - a. Election of Chairman and Vice Chair positions
 - b. 2019 Annual Report
 - c. Training with Attorney Eldridge regarding legislative updates
- VI. Adjournment



Town of Kure Beach
BOARD OF ADJUSTMENT
MINUTES

Regular Meeting
Tuesday, May 28, 2019, 6:30pm

MEMBERS IN ATTENDANCE:

Harry Humphries, Chairperson
Peter Boulter
Tony Garibay
Connie Mearkle

MEMBERS ABSENT:

Anne Brodsky, Vice Chairperson
Bryant Bass
Randy McNeely

STAFF ATTENDANCE:

James Eldridge, BOA Attorney
Nancy Avery, Town Clerk

1. CALL TO ORDER:

Chairman Humphreys called the meeting to order at 7:03 p.m.

2. ADOPTION OF AGENDA

MOTION: Member Garibay moved to adopt the agenda as presented

SECOND: Member Mearkle

VOTE: Unanimous

3. APPROVAL OF MINUTES: 2/26/2019

MOTION: Member Garibay moved to approve the minutes from February 26, 2019 as presented

SECOND: Member Mearkle

VOTE: Unanimous

4. OLD BUSINESS:

None

5. NEW BUSINESS:

- Training

Attorney Eldridge gave a training session on the rules and procedures to the committee Members present.

6. ADJOURNMENT:

MOTION Member Garibay moved to adjourn the meeting at 8:00 p.m.

SECOND: Member Mearkle

VOTE: Unanimous

Chairman, Harry Humphries

Attest: Town Clerk, Mandy Sanders

NOTE: These minutes reflect items considered and actions taken by the Board of Adjustment Committee and should not be considered a transcript of the meeting. An audio recording of the entire meeting can be found on the Town of Kure Beach website



TO: Kure Beach Town Council
FROM: Kure Beach Board of Adjustment
DATE: January 28, 2020
SUBJECT: 2019 Annual Report

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As required by the Board of Adjustment Rules of Procedure, Section VII, the following information is provided.

#### **TERMS AND POSITIONS**

- a. Member Harry Humphries was elected Chairman and Member Ann Brodsky was elected Vice Chair.
- b. Council approved the appointment of Connie Mearkle as an alternate member
- c. Council approved the resignation of Tony Garibay at the November 20, 2019 meeting as a full member
- d. The BOA currently stands at five (5) regular members with two (2) alternates positions. Need to currently fill the alternate position.

#### **TRAINING**

- The BOA scheduled one training session during 2019 which was presented by James Eldridge, Esq., BOA attorney on May 28, 2019

#### **CASES**

- No cases were submitted to the BOA for hearing during 2019.

Respectfully submitted,

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Harry Humphries  
Chairman, Board of Adjustment

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## MEMORANDUM

**TO: KURE BEACH BOARD OF ADJUSTMENT**  
**FROM: JAMES E. ELDRIDGE**  
**DATE: JANUARY 24, 2020**  
**RE: LEGISLATIVE UPDATE**

## INTRODUCTION

During its most recent session, the North Carolina General Assembly enacted SL 2019-111 consisting of: i) legislative revisions to land development statutes effective July 2019 (hereinafter “Part One Changes”) and ii) a consolidation and recodification of city and county land development statutes into a new Chapter 160D (hereinafter “Part Two Changes”) which will become effective January 1, 2021 so local governments have time to amend their land development regulations to conform to the statutory changes.

Both the Part One and Part Two Changes include several provisions affecting quasi-judicial rights and procedures. This memorandum summarizes the applicable Part One Changes.

## DISCUSSION

### 1. Appeals of Vested Rights Claims.

Section 1.7 (attached) of Part One sets forth a new statute, G.S. § 160A-393.1, providing that, *inter alia*, a person claiming a statutory or common law vested right may submit information to the zoning administrator and request a determination as to whether such a vested right exists. The new statute provides that the determination can be appealed to a Board of Adjustment (hereinafter, the “Board”) which shall review the question of whether a vested right exists *de novo* (the same as if it had not been decided before).

In lieu of appealing the question of a vested right to the Board, the claimant may bring a civil action, seeking injunctive/declaratory relief and damages, if the determination is claimed to be unconstitutional, ultra vires, preempted, or a taking. In such a action, there is

the significant risk that a court may, and under certain conditions, is *required* under Section 1.11 (attached) of Part One, to award attorneys' fees and costs to the successful appealing party and against the local government. Appeals of ordinance interpretations must still come before the Board before petitioning for judicial review.

2. Appeals and Court Procedures.

G.S. § 160A-393.1 also sets forth a one (1) year statute of limitations for commencing the civil action discussed above and provides criteria for determining if a person has standing to commence such an action. There is standing when:

1. The party has an ownership, leasehold, or easement interest in or an option/contract to purchase the subject property.
2. The party was an applicant for a development permit before the decision-making board whose decision is being appealed.
3. The party was an applicant for a development permit who has been aggrieved by a final and binding decision by an administrative official charged with applying or enforcing a land development regulation.

Section 1.9 (attached) of Part One revises G.S. § 160A-393 (reviewed in the last training session) governing judicial review of quasi-judicial decisions. Under the previous version of the statute, the court had discretionary authority to supplement the record of the decision-making board. The revised statute now requires the court to supplement the record if the petition for review raises questions of standing, conflicts of interest, constitutional violations, or actions in excess of governmental authority.

G.S. § 160A-393 has also been revised to provide that, even if there was no objection before the decision-making board to property value or traffic impact-related opinion evidence from a lay witness, such evidence is nonetheless conclusively incompetent.

**CONCLUSION**

The Board should consider and apply these effective changes. Chapter 160D changes affecting quasi-judicial procedures will be discussed in a future memorandum.



**SECTION 1.7.** Part 3 of Article 19 of Chapter 160A of the General Statutes is amended by adding a new section to read:

**"§ 160A-393.1 Civil action for declaratory relief, injunctive relief, other remedies; joinder of complaint and petition for writ of certiorari in certain cases.**

(a) **Review of Vested Rights Claim.** – A person claiming a statutory or common law vested right may submit information to substantiate that claim to the zoning administrator or other officer designated by a land development regulation, who shall make an initial determination as to the existence of the vested right. The zoning administrator's or officer's determination may be appealed under G.S. 160A-388(b1). On appeal, the question of law regarding the existence of a vested right shall be reviewed de novo. In lieu of an appeal under G.S. 160A-388(b1), a person claiming a vested right may bring an original civil action as provided by subsection (b) of this section.

(b) **Civil Action.** – Except as otherwise provided in this section for claims involving questions of interpretation, in lieu of any remedies available under G.S. 160A-388(b1), a person with standing, as defined in subsection (c) of this section, may bring an original civil action seeking declaratory relief, injunctive relief, damages, or any other remedies provided by law or equity, in superior court or federal court to challenge the enforceability, validity, or effect of a local land development regulation for any of the following claims:

- (1) The ordinance, either on its face or as applied, is unconstitutional.
- (2) The ordinance, either on its face or as applied, is ultra vires, preempted, or otherwise in excess of statutory authority.
- (3) The ordinance, either on its face or as applied, constitutes a taking of property.

If the decision being challenged is from an administrative official charged with enforcement of a local land development regulation, the party with standing must first bring any claim that the ordinance was erroneously interpreted to the applicable board of adjustment pursuant to G.S. 160A-388(b1). An adverse ruling from the board of adjustment may then be challenged in an action brought pursuant to this subsection with the court hearing the matter de novo together with any of the claims listed in this subsection.

(c) **Standing.** – Any of the following criteria shall provide standing to bring an action under this section:

- (1) The person has an ownership, leasehold, or easement interest in, or possesses an option or contract to, purchase the property that is the subject matter of a final and binding decision made by an administrative official charged with applying or enforcing a land development regulation.
- (2) The person was a development permit applicant before the decision-making board whose decision is being challenged.
- (3) The person was a development permit applicant who is aggrieved by a final and binding decision of an administrative official charged with applying or enforcing a land development regulation.

Subject to the limitations in the State and federal constitutions and State and federal case law, an action filed under this section shall not be rendered moot, if during the pendency of the action, the aggrieved person loses the applicable property interest as a result of the local government action being challenged and exhaustion of an appeal described herein is required for purposes of preserving a claim for damages under G.S. 160A-393.1.

(d) Time for Commencement of Action. – Any action brought pursuant to this section shall be commenced within one year after the date on which written notice of the final decision is delivered to the aggrieved party by personal delivery, electronic mail, or by first-class mail.

(e) Joinder. – An original civil action authorized by this section may, for convenience and economy, be joined with a petition for writ of certiorari and decided in the same proceedings. For the claims raised in the original civil action, the parties shall be governed by the Rules of Civil Procedure. The record of proceedings in the appeal pursuant to G.S. 160A-393 may not be supplemented by discovery from the civil action unless supplementation is otherwise allowed under G.S. 160A-393(j). The standard of review in the original civil action for the cause or causes of action pled as authorized by subsection (b) of this section shall be de novo. The standard of review of the petition for writ of certiorari shall be as established in G.S. 160A-393(k).

(f) For the purposes of this section, the definitions in G.S. 143-755 shall apply."



**SECTION 1.9.** G.S. 160A-393 reads as rewritten:

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

...

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

- (1) Any person meeting any of the following criteria:
  - a. Has an ownership interest in the property that is the subject of the decision being appealed, a leasehold interest in the property that is the subject of the decision being appealed, or an interest created by easement, restriction, or covenant in the property that is the subject of the decision being appealed.
  - b. Has an option or contract to purchase the property that is the subject of the decision being appealed.
  - c. Was an applicant before the decision-making board whose decision is being appealed.
- (2) Any other person who will suffer special damages as the result of the decision being appealed.
- (3) An incorporated or unincorporated association to which owners or lessees of property in a designated area belong by virtue of their owning or leasing property in that area, or an association otherwise organized to protect and foster the interest of the particular neighborhood or local area, so long as at least one of the members of the association would have standing as an individual to challenge the decision being appealed, and the association was not created in response to the particular development or issue that is the subject of the appeal.
- (4) A city whose decision-making board has made a decision that the council believes improperly grants a variance from or is otherwise inconsistent with the proper interpretation of an ordinance adopted by that council.

Subject to the limitations in the State and federal constitutions and State and federal case law, an action filed under this section shall not be rendered moot, if during the pendency of the action, the aggrieved person loses the applicable property interest as a result of the local government action being challenged and exhaustion of an appeal described herein is required for purposes of preserving a claim for damages under G.S. 160A-393.1.

...

(j) Hearing on the Record. – The court shall hear and decide all issues raised by the petition by reviewing the record submitted in accordance with subsection ~~(h)~~(i) of this section. **Except that the court may, in its discretion, shall allow the record to be supplemented** with affidavits, testimony of witnesses, or documentary or other evidence if, and to the extent that, the record is not adequate to allow an appropriate determination ~~petition raises any of the following issues:~~ issues, in which case the rules of discovery set forth in the North Carolina Rules of Civil Procedure shall apply to the supplementation of the record of said issues:

- (1) Whether a petitioner or intervenor has standing.
- (2) Whether, as a result of impermissible conflict as described in 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.

- (3) Whether the decision-making body erred for the reasons set forth in sub-subdivisions a. and b. of subdivision (1) of subsection (k) of this section.
- (k) Scope of Review. –
- (1) When reviewing the decision of a decision-making board under the provisions of this section, the court shall ensure that the rights of petitioners have not been prejudiced because the decision-making body's findings, inferences, conclusions, or decisions were:
- a. In violation of constitutional provisions, including those protecting procedural due process rights.
  - b. In excess of the statutory authority conferred upon the ~~city~~city, including preemption, or the authority conferred upon the decision-making board by ordinance.
  - c. Inconsistent with applicable procedures specified by statute or ordinance.
  - d. Affected by other error of law.
  - e. Unsupported by ~~substantial competent~~competent, material, and substantial evidence in view of the entire record.
  - f. Arbitrary or capricious.
- (2) When the issue before the court is one set forth in sub-subdivisions a. through d. of subdivision (1) of this subsection, including whether the decision-making board erred in interpreting an ordinance, the court shall review that issue de novo. The court shall consider the interpretation of the decision-making board, but is not bound by that interpretation, and may freely substitute its judgment as appropriate. Whether the record contains competent, material, and substantial evidence is a conclusion of law, reviewable de novo.
- (3) The term "competent evidence," as used in this subsection, shall not preclude reliance by the decision-making board on evidence that would not be admissible under the rules of evidence as applied in the trial division of the General Court of Justice if (i) except for the items noted in sub-subdivisions a., b., and c. of this subdivision that are conclusively incompetent, the evidence was admitted without objection or (ii) the evidence appears to be sufficiently trustworthy and was admitted under such circumstances that it was reasonable for the decision-making board to rely upon it. The term "competent evidence," as used in this subsection, ~~shall~~shall, regardless of the lack of a timely objection, not be deemed to include the opinion testimony of lay witnesses as to any of the following:
- a. The use of property in a particular way would affect the value of other property.
  - b. The increase in vehicular traffic resulting from a proposed development would pose a danger to the public safety.
  - c. Matters about which only expert testimony would generally be admissible under the rules of evidence.

(l) Decision of the Court. – Following its review of the decision-making board in accordance with subsection (k) of this section, the court may affirm the decision, reverse the decision and remand the case with appropriate instructions, or remand the case for further

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

- (1) If the court concludes that the error committed by the decision-making board is procedural only, the court may remand the case for further proceedings to correct the procedural error.
- (2) If the court concludes that the decision-making board has erred by failing to make findings of fact such that the court cannot properly perform its function, then the court may remand the case with appropriate instructions so long as the record contains substantial competent evidence that could support the decision below with appropriate findings of fact. However, findings of fact are not necessary when the record sufficiently reveals the basis for the decision below or when the material facts are undisputed and the case presents only an issue of law.
- (3) If the court concludes that the decision by the decision-making board is not supported by substantial competent evidence in the record or is based upon an error of law, then the court may remand the case with an order that directs the decision-making board to take whatever action should have been taken had the error not been committed or to take such other action as is necessary to correct the error. Specifically:
  - a. If the court concludes that a permit was wrongfully denied because the denial was not based on substantial competent evidence or was otherwise based on an error of law, the court ~~may shall~~ remand with instructions that the permit be issued, subject to ~~reasonable and appropriate conditions~~ any conditions expressly consented to by the permit applicant as part of the application or during the board of adjustment appeal or writ of certiorari appeal.
  - b. If the court concludes that a permit was wrongfully issued because the issuance was not based on substantial competent evidence or was otherwise based on an error of law, the court may remand with instructions that the permit be revoked.
  - c. If the court concludes that a zoning board decision upholding a zoning enforcement action was not supported by substantial competent evidence or was otherwise based on an error of law, the court shall reverse the decision.



**SECTION 1.11.** G.S. 6-21.7 reads as rewritten:

**"§ 6-21.7. Attorneys' fees; cities or counties acting outside the scope of their authority.**

In any action in which a city or county is a party, upon a finding by the court that the city or county acted outside the scope of its legal authority, violated a statute or case law setting forth unambiguous limits on its authority, the court may **shall award** reasonable attorneys' fees and costs to the party who successfully challenged the city's or county's action, provided that if the court also finds that the city's or county's action was an abuse of its discretion, the court shall award attorneys' fees and costs. action. In any action in which a city or county is a party, upon finding by the court that the city or county took action inconsistent with, or in violation of, G.S. 160A-360.1, 153A-320.1, or 143-755, the court shall award reasonable attorneys' fees and costs to the party who successfully challenged the local government's failure to comply with any of those provisions. In all other matters, the court may award reasonable attorneys' fees and costs to the prevailing private litigant. For purposes of this section, "unambiguous" means that the limits of authority are not reasonably susceptible to multiple constructions."