

**ORDINANCE AMENDING BOARD OF PLANNING AND ADJUSTMENT
OF THE TOWN OF BOILING SPRINGS CODE OF ORDINANCES
ORDINANCE NO. 140401.01**

BE IT ORDAINED by the Board of Commissioners of the Town of Boiling Springs, North Carolina assembled this the 1st day of April, 2014.

Part. 1 That the Board of Planning and Adjustments Chapters 151.170 – 151.177 of the Zoning Ordinance is hereby amended to read as follows:

BOARD OF PLANNING AND ADJUSTMENT

§ 151.170 ESTABLISHMENT OF BOARD OF PLANNING AND ADJUSTMENT.

(A) A Board of Planning and Adjustment is hereby established. The Board shall consist of nine members. Five members shall be residents of the town and shall be appointed by the Town Board of Commissioners and four members, who shall be residents of the Area of Extraterritorial Jurisdiction, shall be appointed by the Cleveland County Board of Commissioners upon recommendation by the Town Board of Commissioners. All members shall serve terms of three years, except for the initial appointments where three members shall be appointed for one year terms, three members shall be appointed for two year terms and three members shall be appointed for three year terms. Vacancies shall be filled for the unexpired portions of the terms in the same manner as the initial appointment. The term for each appointed member shall begin on the effective date of the adoption of this chapter. Members may be appointed for any number of successive terms. All members shall vote on all matters except as otherwise provided for in this subchapter.

(B) The Board shall meet within 30 days after appointment and elect a Chair and Vice-Chair and create and fill such offices as it may deem necessary. The term of the offices of Chair and Vice-Chair shall be one year, with eligibility for re-election. The Board may adopt rules of procedure not in conflict with this and any other town regulations or policies. The Board shall keep a record of its members' attendance and of its actions, which record shall be a public record. Such records shall be submitted to the Town Administrator and shall be on file at the town offices for public inspection.

(C) Regular attendance and interest shall be considered prerequisites of membership on the Board of Planning and Adjustment. Failure to attend three consecutive meetings or four meetings in any 12 month period shall be considered as a resignation from the Board unless the Board determines by majority vote that good and sufficient reason has been given for the member's absence.

(D) The Board of Planning and Adjustment is created to carry out the powers and duties of the Planning Board as provided for in G.S. § 160A-361 and the Board of Adjustment as provided for in G.S. § 160A-388 and to carry out the powers and duties of the Planning Board

and the Board of Adjustment as provided for in this chapter; Chapter 150; and any other regulations or policies of the town. In carrying out its function as a Board of Adjustment, the Board of Planning and Adjustment shall be bound by its rules of procedure and §§ 151.171 - 151.177. In carrying out its function as a Planning Board, the Board of Planning and Adjustment shall be bound by its rules of procedure and by §§ 151.178 and 151.179.
(Ord. 011106.1, passed 11-6-01)

§ 151.171 BOARD OF ADJUSTMENT; COMPOSITION.

When acting as a Board of Adjustment the Board shall consist of five regular members and four alternate members. The Chair and Vice-Chair of the Board of Planning and Adjustment shall serve as regular members of the Board of Adjustment and serve as Chair and Vice-Chair respectively, of the Board of Adjustment. The Chair shall appoint three additional members from the remaining seven members of the Board of Planning and Adjustment to serve as regular members and the remaining four members shall serve as alternate members. At all times, however, at least two Area of Extraterritorial Jurisdiction members shall serve as regular members of the Board of Adjustment.
(Ord. 011106.1, passed 11-6-01)

§ 151.172 RULES OF CONDUCT.

Members of the Board may be removed by the Board of Commissioners for cause, including violation of the rules stated below:

(A) A member of any board exercising quasi-judicial functions pursuant to this Chapter 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 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. A board member shall have a "financial interest" in a case when a decision in the case will (1) cause the member or the member's spouse to experience a direct financial benefit or loss, or (2) will cause a business in which the member or the member's spouse owns any interest to experience a direct financial benefit or loss. A board member shall have a "close familial relationship" in a case when it involves a member of the Board member's immediate family (such as parent, spouse or child). 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.

(B) No Board member shall discuss any quasi-judicial case prior to the public hearing on that case; provided however, that members may receive and/or seek factual information on that case from the Zoning Administrator prior to the hearing.

(C) Members of the Board shall not express individual opinions on the proper judgment of any quasi-judicial case prior to its determination on that case.

(D) Members of the Board shall give notice to the Chair at least 48 hours prior to the hearing of any potential conflict of interest, which the member has in a particular case before the board.

(Ord. 011106.1, passed 11-6-01; Am. Ord. passed 4-10-06)

§ 151.173 PROCEEDINGS OF THE BOARD OF ADJUSTMENT.

(A) The Board shall adopt rules and by-laws in accordance with the provisions of this chapter and of G.S. Article 19, Chapter 160A. Regular meetings of the Board shall be held as established in the by-laws and at such other times as the Board may determine. The Chair of the Board or any member acting as Chair and the clerk to the Board are authorized 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. All meetings of the Board shall be open to the public.

(B) The Chair of the Board of Adjustment, or in the Chair's absence the Vice-Chair, may appoint alternates to sit for any regular members in case of the absence or temporary disqualification of any regular members or to fill a vacancy pending appointment of a member. In such case the alternate members shall have the same powers and duties of the regular members they are replacing during such time. In no case, however, shall more than five regular members or combination of regular members and the alternate members be empowered to participate officially in any meeting or hearing, including asking questions of witnesses or engaging in deliberation of the case, make motions or to vote on any matter that comes before the Board involving the Zoning Code.

§ 151.174 HEARING PROCEDURES.

(A) The Board of Adjustment shall follow quasi-judicial procedures when deciding appeals, requests for vested rights, requests for variances, 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. No matter to be heard by the Board of Adjustment shall be placed on the Board's agenda unless a completed application has been filed with the Zoning Administrator at least 14 days prior to the meeting date. At the hearing, any party may appear in person or by agent or attorney.

(Ord. 011106.1, passed 11-6-01)

(B) 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, including those located across a right-of-way; and to any other persons entitled to receive notice as provided by the zoning ordinance. In the absence of evidence to the contrary, the town may rely on the county tax listing to determine owners of property entitled to mailed notice. The notice shall be deposited in the mail at least 10 but not more than 25 days prior to the date of the public hearing. Within that same time period, the town shall also prominently post a notice of the hearing on the site that is the subject of the hearing on an adjacent street or highway right-of-way.

(C) The Board of 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 subpoena be obeyed, and the court shall have jurisdiction to issue these orders after notice to all proper parties.

(D) All persons who present evidence or speak to the Board of Adjustment, shall be sworn. The Chair of the Board or any member acting as Chair and the clerk to the Board are authorized 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.

(E) The concurring vote of four-fifths of the Board shall be necessary to 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" for calculation of the requisite majority if there are no qualified alternates to take the place of such members. In other Board business, such as procedural and by-law matters, a simple majority of those present and voting shall be required to pass on any matter. A quorum of five of the total nine regular members shall be required to act on general Board business whereas a quorum of four of the five regular members, or any combination of four regular members or alternate members sitting as regular members, shall be required to act on any matter involving the Zoning Code.

§ 151.175 POWERS AND DUTIES OF THE BOARD OF ADJUSTMENT.

The Board of Adjustment shall have the following powers and duties.

(A) Administrative review. To hear and decide 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, determination made by the Zoning Administrator in the enforcement of this chapter. The Board of Adjustment may hear appeals arising out of any other ordinance that regulates land use or development. No matter to be heard by the Board of Adjustment shall be placed on the Board's agenda unless a completed application has been filed with the Zoning Administrator at least 14 days prior to the meeting date. The Board shall hear and decide appeals of decisions pursuant to all of the following:

(1) Any person who has standing under G.S. 160A-393(d) or the town may appeal a decision to the Board of Adjustment. An appeal is taken by filing a notice of appeal with the town 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 Town 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.

(Ord. 011106.1, passed 11-6-01)

(B) Zoning permit with vested rights. To hear and decide zoning permits with vested rights in accordance with § 151.203.

(C) Variances. When unnecessary hardships would result from carrying out the strict letter of the Zoning Ordinance, the Board of Adjustment 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.

No change in permitted uses may be authorized by variance. 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.

(D) Conditional Use Permits. To hear and decide, in particular cases permits for conditional uses in accordance with standards and procedures as specified below and as authorized by Appendices A and B. In granting a Conditional Use Permit the Board shall make the following affirmative findings:

(1) The use requested is among those listed as an eligible Conditional Use in the district in which the subject property is located;

(2) That the Conditional Use will not materially endanger the public health or safety if located where proposed and developed according to the plan as proposed;

(3) That the Conditional Use meets all required conditions and specifications; and that satisfactory provision and arrangement has been made for at least the following, where applicable.

(a) Satisfactory ingress and egress to property and proposed structures thereon, with particular reference to automotive and pedestrian safety and convenience, traffic flow and control.

(b) Provision of off-street parking and loading areas where required, with particular attention to the items in subsection (a) above, and the economic, noise, glare and odor effects of the conditional use on adjoining properties in the area.

(c) Adequate and proper utilities, with reference to locations, availability and compatibility.

(d) Buffering, with reference to type, location and dimensions.

(e) Signs, if any, and proposed exterior lighting, with reference to glare, traffic safety, economic effect and compatibility and harmony with properties in the district.

(f) Playgrounds, open spaces, yards, landscaping, access ways, pedestrian ways, with reference to location, size and suitability.

(g) Buildings and structures, with reference to location, size and use.

(h) Hours of operation, with particular reference to protecting and maintaining the character of the neighborhood.

(4) That the Conditional Use will not substantially injure the value of adjoining or abutting property, or that the use is a public necessity; and,

(5) That the location and character of the Conditional Use if developed according to the plan as proposed will be in harmony with the area in which it is to be located and in general conformity with the plan of development of the town and its environs.

(E) In granting a Conditional Use Permit, the Board may impose reasonable and appropriate conditions upon such permit as it may deem necessary in order that the purpose and intent of this chapter are served, public welfare secured and substantial justice done. If all requirements and conditions are accepted by the applicant, the Board shall authorize the issuance of the Conditional Use Permit, otherwise the permit shall be denied. Any Conditional Use Permit so authorized shall be perpetually binding upon the property included in such permit unless subsequently changed or amended by the Board, as provided for in this subchapter.

(F) The Board may change or amend any Conditional Use Permit, after a public hearing and subject to the same consideration as provided for in this subchapter for the original issuance of Conditional Use Permit.

(G) No proposal to amend or change any Conditional Use Permit shall be considered within three months of the date of the original authorization of such permit or within three months of hearing of any previous proposal to amend or change any such permit.

(H) Change of kind of non-conforming use. The Board may permit change in use from one nonconforming use to another as provided for in § 161.166.
(Ord. 011106.1, passed 11-6-01)

151.176 QUASI-JUDICIAL DECISIONS AND JUDICIAL REVIEW.

(A) 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. 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.

(B) Every quasi-judicial decision 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 after a written copy thereof is given in accordance with subdivision (A) above of this section. When first-class mail is used to deliver notice, three days shall be added to the time to file the petition.
(Ord. 011106.1, passed 11-6-01)

§ 151.177 PLANNING BOARD - COMPOSITION.

When acting as a Planning Board, five of the nine members of the Board of Planning and Adjustment shall constitute a quorum and a simple majority of those voting shall be required to act favorably on any matter that comes before the Planning Board.
(Ord. 011106.1, passed 11-6-01)

Part 2. This Ordinance shall become effective upon its adoption by the Board of Commissioners of the Town of Boiling Springs, North Carolina.

Adopted this the 6th day of May, 2014.