

## ARTICLE 6

### Variances and Administrative Appeal

*[Amended May 27, 2014 per Ord. 2014-O-03]*

*[Amended Oct. 19, 2015 per Ord. 2015-O-21, ZTA-2015-03]*

*[Amended Jan. 5, 2021 per Ord. 2021-O-01, ZTA-2020-04]*

#### 6.1 Variances

- 6.1-1 **PURPOSE.** The variance process administered by the Board of Adjustment is intended to provide limited relief from the requirements of this Ordinance in those cases where strict application of a particular requirement will create a practical difficulty or unnecessary hardship prohibiting the use of land in a manner otherwise allowed under this Ordinance. It is not intended that variances be granted merely to remove inconveniences or financial burdens that the requirements of this Ordinance may impose on property owners in general or to increase the profitability of a proposed development. Rather, it is intended to provide relief where the requirements of this Ordinance render the land difficult or impossible to use because of some unique physical attribute of the property itself or some other factor unique to the property for which the variance is requested.
- 6.1-2 **PROVISIONS THAT MAY NOT BE VARIED BY THE BOARD OF ADJUSTMENT.** In no event shall the Board of Adjustment grant a variance:
- A. That creates any change in permitted uses within a zoning district.
  - B. With respect to any special use permit or conditional district zoning ordinance adopted pursuant to this Ordinance.
  - C. Which would modify, alter, change, or suspend the special standards and/or conditions set forth in Article 10 of this Ordinance for a use with additional standards.
  - D. Which would permit a use or density not otherwise permitted in the district in which the property is located.
  - E. Which would permit a non-conforming use of land, buildings, or structures.
  - F. Which would permit the creation of a non-conforming lot.
  - G. Which would conflict with the North Carolina State Building Code, the North Carolina Fire Prevention Code, or any other codes of the State of North Carolina unless otherwise authorized by laws and/or regulations.
- 6.1-3 **APPLICATION.** The following process shall be followed in applying for a variance:
- A. An application for a variance shall be filed only by the owner of the land affected by the variance or an agent specifically authorized in writing by the owner to file such application.
  - B. Before filing the application, the applicant shall meet with the Planning, Zoning and Subdivision Administrator to discuss the proposed variance and to become more familiar with the applicable requirements and the variance process.
  - C. An application for a variance shall be filed with the Planning, Zoning and Subdivision Administrator on a form provided by the Planning, Zoning and Subdivision Administrator and contain the information and plans required on the application form.
  - D. The application shall be accompanied by a fee as required by the City of Creedmoor.
  - E. Once the application is accepted as complete by the Planning, Zoning and Subdivision Administrator, the request shall be scheduled for consideration at an evidentiary hearing by the Board of Adjustment.
- 6.1-4 **ACTION BY THE BOARD OF ADJUSTMENT & QUASI-JUDICIAL PROCEDURE.** The following action shall be taken by the Board of Adjustment, the Planning, Zoning and Subdivision Administrator or his/her designee, and the Clerk to the Board of Adjustment upon receipt of the completed application, per G.S. 160D-406(a):
- A. **SCHEDULING HEARING.** An evidentiary hearing shall be held on the requested variance within forty-five (45) days of receipt of a complete application.

- B. MAILED NOTICE. Notice of the evidentiary hearing shall be given by mail to:
1. the person or entity whose variance application or request is the subject of the hearing;
  2. the owner of the property that is the subject of the hearing if the owner did not initiate the hearing;
  3. the owners of all parcels of land abutting the parcel of land that is the subject of the hearing; and
  4. to any other person who makes a written request for such notice at least ten (10) days prior to the date of the hearing.

The notice must be deposited in the mail at least ten (10) days, but not more than twenty-five (25) days, prior to the date of the hearing, per G.S. 160D-406(b).

- C. POSTED NOTICE. A public notice sign for the evidentiary hearing shall be prominently posted on the subject property or an adjacent street or highway right-of-way at least ten (10) days, but not more than twenty-five (25) days, prior to the date of the hearing.
- D. CONTINUED HEARINGS. The Board of Adjustment may continue an evidentiary hearing without additional public notice if the time, date, and place of the continued hearing is announced at a duly noticed and convened hearing. If an evidentiary hearing is set for a given date and a quorum of the Board is not then present, the hearing shall be continued until the next regular Board of Adjustment meeting without further advertisement, per G.S. 160D-406(b).
- E. ADMINISTRATIVE MATERIALS. The Planning, Zoning and Subdivision Administrator or staff to the Board of Adjustment shall transmit to the Board all applications, reports, and written materials relevant to the matter being considered. The administrative materials may be distributed to the Board of Adjustment members prior to the hearing if at the same time they are distributed to the Board a copy is also provided to the applicant and to the landowner of the property that is the subject of the evidentiary hearing if that person is not the applicant. The administrative materials shall become part of the hearing record. The administrative materials may be provided in written or electronic form. Objections to inclusion or exclusion of administrative materials may be made before or during the hearing. Rulings on unresolved objections shall be made by the Board of Adjustment at the hearing, per G.S. 160D-406(c).
- F. PRESENTATION OF EVIDENCE AND OBJECTIONS. The applicant, the City of Creedmoor, and any person who would have standing to appeal the decision under G.S. 160D-1402(c) shall have the right to participate as a party at the evidentiary hearing, including presenting evidence, cross-examining witnesses, objecting to evidence, and making legal arguments. Other witnesses may present competent, material, and substantial evidence that is not repetitive as allowed by the Board of Adjustment. Even if there is no objection before the Board of Adjustment, opinion testimony from a lay witness shall not be considered competent evidence for technical matters such as property value and traffic impacts, per S.L. 2019-111, §1.9. Objections regarding jurisdictional and evidentiary issues, including, but not limited to, the timeliness of an appeal or the standing of a party, may be made to the Board of Adjustment. The Board chair shall rule on any objections, and the chair's rulings may be appealed to the full Board. These rulings are also subject to judicial review pursuant to G.S. 160D-1402. Objections based on jurisdictional issues may be raised for the first time on judicial review, per G.S. 160D-406(d).
- G. OATHS. The chair of the Board of Adjustment 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, per G.S. 160D-406(f).
- H. SUBPOENAS. The Board of Adjustment while making a quasi-judicial decision under this Article 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, the applicant, the City of Creedmoor, and any person with standing under G.S. 160D-1402(c) 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 she or he 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 immediately appealed to the full Board of Adjustment. If a person fails or refuses to obey a subpoena issued pursuant to this section, the Board 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, per G.S. 160D-406(g).

- I. VOTING. The concurring vote of four-fifths (4/5) of the members of the Board of Adjustment 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 section, vacant positions on the Board of Adjustment and members who are disqualified from voting on a quasi-judicial matter under G.S. 160D-109(d) 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. Denial of a variance request requires only a simple majority.
- J. DECISIONS. The Board of Adjustment shall determine contested facts and make its decision within a reasonable time. When hearing an appeal, the Board 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. 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, reflect the Board's determination of contested facts and their application to the applicable standards, and be approved by the Board and 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 of Adjustment. The decision of the Board shall be delivered within a reasonable time by personal delivery, electronic mail, or first-class mail to the applicant, landowner, and 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 to the City of Creedmoor that proper notice of the decision has been made, and the certificate shall be deemed conclusive in the absence of fraud.

After conducting the evidentiary hearing, the Board of Adjustment shall:

- 1. Grant the variance request, provided all four findings listed under Section 6.1-6 Standards of Review are individually confirmed and approved; or
- 2. Deny the request based on failure to confirm and approve all four findings required under Section 6.1-6 of this Ordinance.

Any approval or denial of the request shall be accompanied by, in writing, such findings of fact and conclusions of law which shall demonstrate that the variance meets or does not meet each of the standards set forth in Section 6.1-6 of this Ordinance.

6.1-5 CONDITIONS. Appropriate conditions, which must be reasonably related to the condition or circumstance that results in the need for the variance, may be attached to any approval granted by the Board of Adjustment.

6.1-6 STANDARDS OF REVIEW. The Board of Adjustment's decision shall be based upon competent, material and substantial evidence. When unnecessary hardships result from carrying out the strict letter of the Creedmoor Development Ordinance, the Board of Adjustment shall vary any of the provisions of the Ordinance upon demonstration of the following variance standards. No change in permitted uses may be authorized by a variance. The Board of Adjustment shall not grant a variance until it makes each of the following findings:

- A. Unnecessary hardship would result from the strict application of the Ordinance. (NOTE: It shall not be necessary to demonstrate, in the absence of a variance, that no reasonable use can be made of the property.);

- B. The hardship results from conditions that are peculiar to the property such as location, size or topography. (NOTE: 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. A variance may be granted when necessary and appropriate to make reasonable accommodation under the Federal Fair Housing Act for a person with a disability.);
  - C. The hardship did not result from actions taken by the applicant or the property owner. (NOTE: 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.); and
  - D. 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.
- 6.1-7 EFFECTIVE DATE OF DECISION. Any decision made by the Board of Adjustment regarding a variance shall be reduced to writing and reflect the Board’s decision on contested facts and their application to the applicable standards. The written decision shall be signed by the Chair and shall be filed with the City Clerk. The effective date of the decision shall be the date it is filed with the City Clerk. The decision shall be delivered by the Planning, Zoning and Subdivision Administrator or her or his designee via 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 close of the public hearing on the case. The person making such deliveries shall certify that the deliveries have been made.
- Following the effective date of decision of the Board of Adjustment, the following actions may be taken:
- A. After the Board of Adjustment approves a variance, the applicant shall follow all appropriate procedures set forth in this ordinance for the receipt of permits, certificates, and other approvals necessary in order to proceed with development.
  - B. After the denial of the variance request, the applicant may make application for a rehearing in accordance with Board of Adjustment’s bylaws.
- 6.1-8 DURATION. The variance may be issued for a limited duration only. Unless otherwise specified, construction and/or operation shall be commenced within twenty-four (24) months of the date of issuance of a variance, or the variance shall become void.
- 6.1-9 APPEALS. An appeal from any decision of the Board of Adjustment may be made by an aggrieved party and shall be made to the Superior Court of Granville County in the nature of certiorari, pursuant to G.S. 160D-1402(j). Any such petition to the Superior Court shall be filed by the later of thirty (30) days after the decision becomes effective or after a written copy of the decision is delivered to the applicant, property owner, and to any other person who has submitted a written request for a copy of the decision, prior to the date the decision becomes effective. Appeals in the nature of certiorari shall be made as provided for in G.S. 160D-1402. When first class mail is used to deliver the notice, three (3) days shall be added to the time to file the petition.

**6.2 Appeals of Administrative Decisions**

- 6.2-1 PURPOSE. Appeals to the Board of Adjustment from the decisions of the Planning, Zoning and Subdivision Administrator of the City of Creedmoor are permitted as provided for in this section.
- 6.2-2 DECISIONS THAT MAY BE APPEALED. Any final and binding order, requirement, or determination made in writing by an administrative officer charged with enforcing the provisions of the Creedmoor Development Ordinance may be appealed to the Board of Adjustment. Any such decision shall be given to the owner of the property that is subject to the decision and to the party who sought the decision, if different than the property owner. Said notice shall be delivered by personal delivery, electronic mail or by first-class mail.
- 6.2-3 PARTIES WHO MAY FILE AN APPEAL. Any person who has standing under G.S. 160D-1402(c) or the City of Creedmoor may bring an appeal to the Board of Adjustment.

- 6.2-4 PERIOD TO FILE AN APPEAL. The property owner or other party with standing shall file the appeal by the later of thirty (30) days after the decision becomes effective or after a written copy of the decision is delivered to the applicant, property owner, or other party. When first-class mail is used to deliver notice of the administrative decision, three (3) days shall be added to the time to file the appeal petition. Any other person with standing to appeal has thirty (30) days from receipt from any source of actual or constructive notice of the determination within which to file an appeal.
- 6.2-5 CONSTRUCTIVE NOTICE. It is conclusively presumed that all persons with standing to appeal have constructive notice of the decision from the date a sign providing notice that a determination has been made is prominently posted on the property that is the subject of the zoning determination, such sign containing the words "Zoning Decision" in letters at least six (6) inches high and identifying the means to contact a Creedmoor City official for information about the decision, with said sign being posted for a minimum of ten (10) days. Posting of the sign is the responsibility of the landowner, applicant, or person who sought the determination. Posting of signs is not the only form of constructive notice. Verification of the posting shall be provided to the City of Creedmoor staff member responsible for the zoning determination. Posting of constructive notice signs is not required by State law, per G.S. 160D-403(b), and owner(s) of a property subject to a zoning determination have the option to post a sign on the subject property to establish constructive notice.
- 6.2-6 FILING OF APPEAL.
- A. The appeal shall be filed with the Creedmoor City Clerk on an application form provided by him/her and contain the information as required on the application form.
  - B. The appeal application shall be accompanied by a fee as established by the City of Creedmoor.
  - C. Upon acceptance of the appeal application by the Creedmoor City Clerk the appeal shall be scheduled for consideration by the Board of Adjustment within forty-five (45) days of the date of submittal of a complete application. Notwithstanding, the appellant can apply for an expedited hearing to occur within fifteen (15) days of such filing as provided in Subsection D below.
  - D. The filing of an appeal shall stay enforcement of the action appealed and pause the accrual of any fines assessed unless the Planning, Zoning and Subdivision Administrator 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 and property or because the violation is transitory in nature, a stay would seriously interfere with enforcement of the ordinance. In such case, enforcement proceedings shall not be stayed except by a restraining order granted by the Superior Court of Granville County on notice to the administrative official from whom the appeal is taken, with due cause shown. If enforcement proceedings are not stayed, the appellant may file for an expedited hearing of the appeal to occur within fifteen (15) days after such request is filed.
- 6.2-7 ACTION BY THE BOARD OF ADJUSTMENT.
- A. Upon receiving the appeal application, the Board of Adjustment shall hold an evidentiary hearing on the appeal. Notice of the hearing and quasi-judicial procedures shall be as provided in Section 6.1-4. The City of Creedmoor staff member whose decision is being appealed shall transmit to the Board of Adjustment all documents and exhibits constituting the record upon which the action appealed from is being taken. Said information shall also be provided to the applicant and to the owner of the property that is subject to the appeal, if such person(s) is not the applicant.
  - B. The evidentiary hearing shall be conducted in accordance with the by-laws of the Board of Adjustment and in accordance with the North Carolina General Statutes. All persons providing evidence at the hearing shall be sworn in by either the Chair or the Clerk to the Board. The official who made the decision that is being appealed or the person currently occupying that position, if the decision maker is no longer employed by the City of Creedmoor, 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 evidentiary hearing,

per G.S. 160D-406(e).

1. Either at the meeting at which the evidentiary hearing has been closed or at a subsequent or continued meeting to be held within thirty (30) days of the close of the evidentiary hearing, the Board of Adjustment shall adopt an order reversing, affirming, wholly or partly, or modifying the contested action. The Board of Adjustment's decision shall be based upon competent, material and substantial evidence.
2. The Board of Adjustment shall not reverse or modify the contested action unless it finds that the administrative officer erred in the application or interpretation of the requirements of this Ordinance.
3. The Board of Adjustment shall not reverse or modify the contested action unless there is a concurring vote of a majority of the Board's members [i.e., three (3) voting members]. For the purposes of this section, vacant positions and members of the Board who are disqualified from voting on the hearing decision shall not be considered "Board members" for calculation of the majority if there are no qualified alternate Board members available to take the place of such members.
4. The parties to an appeal may agree to mediation or other forms of alternative dispute resolution.
5. Any decision made by the Board of Adjustment regarding an appeal shall be reduced to writing and reflect the Board's decision of contested facts and their application to the applicable standards. The written decision shall be signed by the Chair and shall be filed with the City Clerk. The effective date of the decision shall be upon the date it is filed with the City Clerk. The decision shall be delivered by the Administrator or her/his designee via 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 close of the public hearing on the case. The person making such deliveries shall certify that the deliveries have been made.

6.2-8 EFFECT OF REVERSAL OR MODIFICATION. In the event that the Board of Adjustment reverses or modifies the contested action, all subsequent actions taken by administrative officers with regard to the subject matter shall be in accordance with the reversal or modification granted by the Board of Adjustment unless an appeal is taken on the Board's decision.

6.2-9 APPEAL FROM BOARD OF ADJUSTMENT. An appeal from any decision of the Board of Adjustment may be made by an aggrieved party and shall be made to the Superior Court of Granville County in the nature of certiorari, per G.S. 160D-1402(j). Any such petition to the Superior Court shall be filed by the later of thirty (30) days after the decision becomes effective or after a written copy of the decision is delivered to the applicant, property owner, and to any other person who has submitted a written request for a copy of the decision, prior to the date the decision becomes effective. Appeals in the nature of certiorari shall be made as provided for in G.S. 160D-1402. Said decision shall be delivered by personal delivery, electronic mail, or by first class mail. When first class mail is used to deliver the notice, three (3) days shall be added to the time to file the petition.