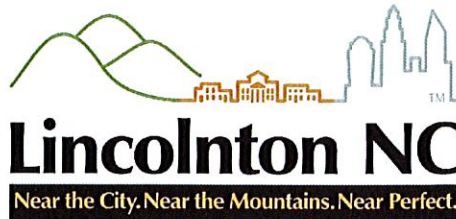


LINCOLN TON BOARD OF ADJUSTMENT
AGENDA
March 16, 2021
At 4:00 P.M. in City Council Chambers

1. Roll Call
2. Call to Order
3. Approval of minutes from the February 16, 2021 meeting
4. Updates to Rules of Procedure to conform to recently approved changes to the UDO
5. Adjournment



**CITY OF LINCOLNTON
BOARD OF ADJUSTMENT**

PO DRAWER 617, LINCOLNTON, NC 28092

www.ci.lincolnton.nc.us

BOARD MEMBERS: Gene Poinsette, Chair, poinsetteg@charter.net; Rebecca Abernethy, Vice- Chair, rabernethy21@bellsouth.net; Jerry Hoffman, (ETJ), ilskhoffman@charter.net; Stephen Silva, (ETJ), soundcity1@ymail.com; Jamel Farley, afarley2351@gmail.com; Greg McBryde, first alternate, Gregory.McBryde@gmail.com; Trent Mason, second alternate, trentonmason@gmail.com; Joy Smith, third alternate, joysmithmsnrn@gmail.com

Tuesday, February 16, 2021 Meeting

Present: Gene Poinsette, Rebecca Abernethy, Jamel Farley, Jerry Hoffman and Greg McBryde

Absent: Stephen Silva

Call to Order

Chairman Gene Poinsette called the meeting to order and recognized Stephen Silva was absent and that Greg McBryde was serving as first alternate for a quorum.

Approval of Minutes

Chairman Gene Poinsette asked the Board if there were any additions or corrections to the minutes of the January 19, 2021 meeting.

Motion: Jamel Farley made a motion to approve the minutes. Jerry Hoffman seconded. Motion carried unanimously.

Chairman Gene Poinsette asked the Board if there was any other business to be addressed, to which there was none.

Adjournment

Motion: Jamel Farley made a motion to adjourn. Greg McBryde seconded. Motion carried unanimously.

Jean Derby

MEMO TO: Board of Adjustment

FROM: City of Lincolnton Planning Staff

SUBJECT: Updates to Rules of Procedure for the Board of Adjustment to conform to recently approved changes to the UDO and as per Chapter 160.

DATE: March 16, 2021

Attached are proposed revisions to the Rules of Procedure for the Board of Adjustment to conform to recently approved changes to the UDO and in accordance with Chapter 160D. The following are the proposed changes:

1. The total number of members of the Board of Adjustment will go from 8 to 7.
2. The Board will include four regular members who live in the city and the ETJ member.
3. The number of alternate members will go from 3 to 2.
4. The conflict of interest provisions will be amended to conform to state statute as follows:
 - Members are to avoid conflicts of interest.
 - No participation or voting on quasi-judicial matters in a manner that would violate an affected person's 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. For purposes of this section, a “close familial relationship” means a spouse, parent, child, brother, sister, grandparent, or grandchild. The term includes the step, half, and in-law relationships.
5. The appeal provisions will be updated to conform to state statute.

6. A provision will be added to address participation of witnesses at hearings on quasi-judicial matters as follows:
 - The applicant and any person who would have standing to appeal the decision under state statute has the right to participate as a party at the evidentiary hearing.
 - Other witnesses may present competent, material, and substantial evidence that is not repetitive as allowed by the Board.
 - 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.
 - The Board chair's rules on any objections and the chair's rulings may be appealed to the full Board.
7. The voting requirement will be amended to conform to state statute by requiring a 4/5ths vote only for approval of a variance. Other quasi-judicial matters require a simple majority vote.

CHANGES TO BOARD OF ADJUSTMENT RULES OF PROCEDURE

	Current Rules of Procedure	Proposed Rules of Procedure
Total Number of Members	8	7
Make-up of Board	Five Regular Members	Four Regular Members Who Live in City and the ETJ Member
Number of Alternate Members	3	2
Conflict of Interest Provision	Members to avoid even the appearance of conflicts of interest. Members to disqualify themselves from any matter in which their impartiality might reasonably be questioned. Members to refrain from all participation in any matter in which they have any financial interest (direct or indirect), a personal bias or prejudice, or a personal or financial relationship with any of the parties or the parties' representative.	Members to avoid conflicts of interest. No participation or voting on quasi-judicial matters in a manner that would violate affected person's 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.
Procedure for Filing Appeals	Interested parties have 45 days to appeal after receipt of notice. 45 day deadline may be waived if appeal is about issuance of a zoning permit and the recipient of the zoning permit does not begin work within the 45 day period. In such cases, any appeal may be filed within 6 months of the issuance of the zoning permit.	Owner has 30 days to appeal after receipt of written notice. Other persons with standing to appeal have 30 days from receipt of actual or constructive notice. Notice given pursuant to relevant statute by 1st class mail is deemed received on the 3rd business day following deposit of the notice with USPS.
Participation of Witnesses at Hearing on Quasi-Judicial Matters		Applicant and persons with standing to appeal the decision under relevant statute has right to participate as a party at evidentiary hearing. Other witnesses may present competent, material, and substantial evidence that is not repetitive as allowed by the Board. Objections regarding jurisdictional and evidentiary issues, such as timeliness of an appeal or standing may be made to Board. Board chair rules on objections and chair's rulings may be appealed to full Board.
Voting on Quasi-Judicial Matters	4/5ths vote required for appeals of interpretation or to decide in favor of the applicant on any matter.	4/5ths vote required on variance. Simple majority vote required for other matters.

RULES OF PROCEDURE ZONING BOARD OF ADJUSTMENT LINCOLNTON, NORTH CAROLINA

I. GENERAL RULES

The Zoning Board of Adjustment (hereinafter referred to as the "Board") shall be governed by the terms of Chapter 160A, ~~Article 19, Part 3~~ **160D-302** of the General Statutes of North Carolina and by the City of Lincolnton Zoning Ordinance. All members of the Board shall thoroughly familiarize themselves with these laws.

II. OFFICERS AND DUTIES

A. APPOINTMENTS

~~(1) The Board of Adjustment shall consist of five (5) regular members and three (3) alternate members, appointed by the Lincolnton City Council and the Lincoln County Board of Commissioners. Annually, at the regular January meeting of the Board of Adjustment, the Chairperson shall appoint persons to the regular and alternate positions for one-year terms. Persons may be appointed to the same position for successive terms.~~

The Board shall consist of four regular members appointed by the City Council who reside inside the corporate limits of the city and one regular member appointed to the Board by the County Board of Commissioners as the representative of the extraterritorial jurisdiction, the extraterritorial representative being a resident of the area.

~~The alternate members of the Board shall~~ The Board will also include two alternate members who will be requested to attend all regular and special meetings and shall be able to cast a vote only when a regular member of the Board is absent or if it is determined that such Board member has a conflict of interest. Alternate members shall also be allowed to vote to adopt or amend these Rules of Procedure, to elect Board officers, or to make recommendations on Board replacements.

The following system shall be employed for using alternate members:

If an alternate member is needed to serve for a particular item and both members are present, the one with the most seniority (i.e., the one who has served on the Board of Adjustment the longest) shall be asked to serve. If only one alternate member is present, that member (irrespective of seniority) shall be asked to serve.

B. ELECTIONS

A chairperson and a Vice-Chairperson shall be elected by the entire Board membership. The Chairperson and Vice-Chairperson shall each be regular Board members. Each officer shall serve for a one (1) year term but may be elected by the Board membership for successive terms to the same office. Annually, at the regular meeting of the Board held in the month of January, a Chairperson and Vice-Chairperson shall be elected. Each officer shall serve until relieved of his/her duties as herein provided.

CDUTIES

The Chairperson shall decide upon all points of order and procedure, subject to these rules, unless directed otherwise by a majority of the Board in session at the time. The Vice-Chairperson shall serve as acting Chairperson in the absence of the Chairperson, and at such times he/she shall have the same powers and duties as the Chairperson.

The Chairperson shall preside at all Board of Adjustment meetings and shall have the duties normally conferred on such office. The Chairperson shall have the privilege of directing discussion on all matters before the board and, without limiting the amount of factual evidence brought before the Board, may place time limitations on individuals making presentations or giving testimony before the Board.

In the event of the absence of both the Chairperson and Vice-Chairperson from a meeting of the Board, the remaining members present may elect a temporary Chairperson for that meeting and proceed with the order of business.

B. SECRETARY

The City Council shall arrange to have secretarial duties performed for the Board of Adjustment. Said person(s) (hereafter referred to as the "Secretary"), subject to the direction of the Chairperson, shall take minutes and keep all records. The Secretary shall conduct all correspondence of the Board, arrange for all public notices required to be given, notify members of pending meetings and their agenda, notify parties to cases before the Board of its decision on such cases, and generally supervise the clerical work of the Board. The Secretary shall keep in a permanent volume the minutes of every meeting of the Board. These shall show the record of all important facts pertaining to each meeting and hearing, every resolution acted upon by the Board, and all votes of members of the Board upon any resolution or upon the final determination of any question, indicating the names of members absent or failing to vote. If the Secretary is chosen from outside the membership of the Board, he/she shall not be eligible to vote upon any matter. The minutes of the Board of Adjustment shall be kept in the Planning and Zoning Administrator's office and shall be available for public inspection during normal business hours.

III. RULES OF CONDUCT FOR MEMBERS

- A. Members of the Board may be removed for cause, including violation of these Rules.
- B. In order for the Board to carry out its duties and responsibilities, it is necessary for all members to attend the meetings. If any regular member is absent for three (3) consecutive meetings, the Chairperson may direct the Secretary to notify such member in writing of his/her absences. If such member fails to attend the next regular meeting, the Board of Adjustment by a majority vote of the remaining regular and alternate members, may request that the position be vacated and also request that a replacement be made.
- C. In order to preserve public confidence in the integrity of the governmental process, it shall be the duty of the members of the Zoning Board of Adjustment to avoid ~~even the appearance of~~ conflicts of interest. Therefore, members shall ~~disqualify themselves from any matter in which their impartiality might reasonably be questioned. Members shall therefore refrain from all participation in any matter in which they have any financial interest (direct or indirect), a personal bias or prejudice, or a personal or financial relationship with any of the parties or the parties' representative.~~ not participate in or vote on any quasi-judicial matter in a manner that would violate affected person's 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. For purposes of this section, a "close familial relationship" means a spouse, parent, child, brother, sister, grandparent, or grandchild. The term includes the step, half, and in-law relationships.
- D. A Board member who determines there exists a conflict of interest shall declare the existence of such conflict and shall remove him/herself from the meeting chamber when said matter is under consideration.
- E. Any Board member may seek an opinion from the city attorney as to the applicability of this section to a particular decision or set of facts.
- F. In order to ensure a fair and unbiased hearing on the record of all quasi-judicial matters, board members making quasi-judicial decisions shall refrain from discussion of such matters with the parties thereto other than through the formal hearing process.
- G. A challenge of the existence of a conflict of interest or a challenge of an undisclosed conflict of interest may be filed by any interested party with the Board. Such a challenge may be an appeal for a review of the finding of the Board or may be for the purpose of alleging an undeclared conflict of interest. Any challenge made to the Board shall be supported by competent evidence and shall be submitted to a properly

convened meeting of the Board. The Board shall hear all evidence and by majority vote of the membership present (excluding that member in question), shall make the final determination as to the existence of a conflict of interest. If the Board determines that a member has an impermissible conflict of interest pursuant to this section, that member is disqualified from all participation in the matter and must leave the meeting chamber.

- H. By majority vote the Board may seek the opinion of the city attorney as to the applicability of this section to a particular decision or set of facts.
- I. Withdrawal from participation in any matter is necessary only in those specific cases in which a conflict arises. There shall be no attempt to categorically exclude entire categories of considerations because of the business or profession with which a member is associated. The existence of conflicts of interest shall be determined on a case by case basis.

IV. MEETINGS

A. Regular Meetings

Regular meetings of the Board shall be held on the third Tuesday of each month at 4:00 P.M. at the Lincoln City Hall; provided that meetings may be held at any other convenient place in the City or its extraterritorial jurisdiction if directed by the Chairperson in advance of the meeting. Each member (including the alternate members) shall be notified of each meeting by the Secretary.

B. Special Meetings

Special meetings of the Board may be called at any time by the Chairperson. At least seven (7) days prior notice of the time and place of special meetings shall be given by the Secretary to each member of the Board including the alternate members.

C. Cancellation of Meetings

Whenever there are no appeals, applications for variances, or other business for the Board; or whenever so many regular and alternate members notify the Secretary of their inability to attend that a quorum will not be available, the Chairperson may dispense with a regular meeting by having the Secretary give written or oral notice to all regular and alternate members prior to the time set for the meeting. The Secretary or Planning and Zoning Administrator (or his/her designee) shall post notice at the meeting site that said meeting has been cancelled.

D. Voting

The Board shall not pass upon an appeal from a decision, order, requirement or determination of the Planning and Zoning Administrator; hear an application for a variance; change in nonconformity; or permission to erect certain temporary structures; or any other matter of a quasi-judicial nature when there are less than four (4) voting members present. No more than five (5) regular and alternate members may vote on any quasi-judicial matter. Voting on certain other procedural matters, as stated in Section II(A) (1), which are not of a quasi-judicial nature and which do not necessitate a public hearing shall include all regular and alternate members in attendance.

E. Conduct of Meetings

All meetings shall be open to the public. The order of business at regular meetings shall be as follows:

- (a) Roll Call
- (b) Approval of Minutes of Previous Meetings
- (c) Unfinished Business
- (d) Hearing and Determination of New Cases
- (e) Other New Business
- (f) Adjournment

V. APPEALS, APPLICATIONS, PUBLIC HEARINGS

A. Types of Appeals

The Board shall hear and decide all appeals from and review any order, requirement, decision, or determination made by the Planning and Zoning Administrator. In deciding appeals, it may hear both those based upon an allegedly improper or erroneous interpretation of the Ordinance and those based upon an alleged hardship resulting from strict interpretation of the Ordinance. ~~In addition, the Planning and Zoning Administrator may file an appeal with the Board in cases where an interpretation of the Ordinance is needed.~~

B. Procedure for Filing Appeals

~~No appeal shall be heard by the Board unless notice thereof is filed within forty five (45) days after the interested party or parties receive notice of the order, requirement, decision, or determination by the Planning and Zoning Administrator. The forty five (45) day deadline for filing an appeal may be waived in instances where the appeal is in regard to issuance of a zoning permit and the recipient of the zoning permit does not begin work within the forty five (45) day period. In such cases, any appeal may be brought within six (6) months of the issuance of the zoning permit. (A zoning permit remains valid for six months. If no work is commenced in that time frame, the permit becomes void.) The Planning and Zoning Administrator may file an appeal for an interpretation of the Ordinance at any time. All other applicants must file their applications for a hearing with the Planning and Zoning Administrator.~~

The owner or other party has 30 days from receipt of the written notice of the determination within which to file an appeal. Any other person with standing to appeal has 30 days from receipt from any source of actual or constructive notice of the determination within which to file an appeal. In the absence of evidence to the contrary, notice given pursuant to G.S. 160D-403(b) by first-class mail is deemed received on the third business day following deposit of the notice for mailing with the United States Postal Service. All applications shall be made upon the form furnished for that purpose, and all information required thereon shall be complete and all fees paid before an appeal shall be considered as having been filed.

C. Public Hearing Requirements

A public hearing conducted by the Board in a quasi-judicial manner shall be required to:

- (1) Decide all appeals or interpretations of the Zoning Ordinance;
- (2) Grant a variance to the terms of the Ordinance;
- (3) Grant a permit to allow for the replacement, change of use, or expansion of certain nonconformities;
- (4) Grant a permit for certain temporary structures and uses; and
- (5) Hear and decide all other matters of a quasi-judicial nature referred to it or upon which it is required to pass by the City of Lincolnton Zoning Ordinance.

F. Conduct of Public Hearing

Any party may appear in person or by agent or by attorney at the hearing. The order of business for hearings shall be as follows:

- (a) The Chairperson, 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/her application;
- (c) Persons opposed to granting the application shall present the argument against the application;
- (d) Other persons in favor of granting the application shall present the argument for the application;
- (e) Both sides will be permitted to present rebuttals to opposing testimony;
- (f) The applicant 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. Other witnesses may present competent, material, and substantial evidence that is not repetitive as allowed by the Board. 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. The Board chair shall rule on any objections, and the chair's rulings may be appealed to the full Board.
- (g) All persons giving testimony before the Board shall be placed under oath by the Chairperson (or his/her designee) and the Board or opposing party may cross-examine them.
- (h) The Chairperson (or his/her designee) shall summarize the evidence which has been presented, giving all parties the opportunity to make objections or corrections.
- (g) After the evidence has been summarized, the Chairperson shall close the period of public discussion. Persons may provide additional testimony (with additional cross-examination and rebuttals permitted with regard to that testimony) only if specifically asked to do so by a Board member prior to a vote being taken.

The Chairperson may continue the case to another time and date if a decision is not rendered at the meeting at which the case was initially heard. Such time, date, and location shall be made known to those persons in attendance at the time said decision is made.

G. Decisions

1. Time

A final decision by the Board shall be made within thirty-one (31) days from the date the public hearing was officially opened, unless extenuating circumstances dictate otherwise.

2. Form

The final decision of the Board shall be shown in the record of the case as entered in the minutes of the Board. Written notice of the final decision of the Board for which a public hearing was held shall be sent by first class mail to the applicant and to every aggrieved party who has filed a written request for such notice with the Secretary or the Chairperson within five (5) working days after the case is decided. Such record shall show the reasons for the determination, with a summary of the evidence introduced and the findings of fact made by the Board.

When a variance is granted, the record shall state in detail any exceptional difficulty or unnecessary hardship upon which the variance was based and which the Board finds to exist. The decision rendered with regard to an appeal may reverse or affirm, wholly or partly, or modify the order, requirement, decision, or determination which was appealed. The record shall state in detail any facts or supporting findings required to be made with any decision (of a quasi-judicial nature) made by the Board. The record shall state in detail what, if any, conditions and safeguards are imposed by the Board in connection with the granting of a variance, change in nonconformity, or permission to allow a temporary structure or use.

3. Voting at Public Hearings

~~The concurring vote of four-fifths of the members of the Board (i.e., at least four (4) voting members) shall be necessary to reverse any order, requirement, decision, or determination of the Planning and Zoning Administrator; to interpret the terms of Zoning Ordinance; or to decide in favor of the applicant any matter upon which the Board is required by Ordinance to pass.~~ 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 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 Voting on any issue shall be done by a show of hands or by voice. Only those members who attended the public hearing (or meeting) at which the item at hand was discussed shall be allowed to vote on that matter. For items requiring a quasi-judicial public hearing, this shall mean, as a minimum, that the member was in attendance at the time the evidence of the hearing was summarized and when ensuing discussion among the Board members regarding said item took place. Voting by proxy on any issue is forbidden. Any member present (and not having a conflict of interest) who abstains from voting shall be considered to have voted "yes" on such matter. All actions shall have been put before the voting members in the form of a motion which is duly seconded. The Chairperson shall not have the authority to introduce or second any motion.

4. Public Record of Decision

The decisions of the Board, as filed in its minutes, shall be a public record, available for inspection at the Planning and Zoning Administrator's office during normal business hours.

H. Appeals of Board Decisions

Any person or persons, jointly or severally, aggrieved by any decision of the Board, within thirty (30) days after the Board's decision has been filed or after a written copy thereof is delivered to every aggrieved party who has filed a written request for such copy with the Secretary or Chairperson at the time of its hearing of the case, whichever is later, may present to a court of competent jurisdiction a petition duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of illegality, whereupon such decision of said Board shall be subject to review by the Superior Court by proceedings in the nature of certiorari as provided by law.

Y. Rehearings

An application for a rehearing may be made in the same manner as provided for in the original hearing. All applications for rehearings shall be made within fifteen (15) days after the decision of the Board has been filed in its office. Evidence in support of the application shall initially be limited to that which is necessary to enable the Board to determine whether there has been a substantial change in the facts, evidence, or conditions in the case. The application for rehearing shall be denied by the Board if, from the record, it finds that there has been no substantial change in facts, evidence, or conditions. If the Board finds that there has been a change, it shall thereupon treat the request in the same manner as any other application. The Board of Adjustment shall not be required to hold a public hearing to determine whether or not a rehearing of the case shall be conducted. Said determination, however, shall require a ~~four-fifths~~ three-fifths vote of the Board of Adjustment.

VI. AMENDMENTS

These rules may, within the limits allowed by law, be amended at any time by an affirmative vote of a majority of the entire membership of the Board, provided that the text of such proposed amendment is submitted to each Board member at least seven (7) days prior to the meeting at which the proposed amendment is to be discussed.

ADOPTED: FEBRUARY 17, 1998

REVISED MARCH 16, 2021

Revisions to Rules of Procedure for BOA 03.16.2021