

TOWN OF KILL DEVIL HILLS

The Zoning Board of Adjustment meets on an as-needed basis, scheduled as much as possible without creating a burden on the applicant, for the last Tuesday of the month, at 6:00 p.m.

ZONING BOARD OF ADJUSTMENT – Five Regular Members, Three Alternate Members

Cox, Kevin P., <u>Regular Member</u> 523 First Flight Lane PO Box 2435 Kill Devil Hills, NC 27948	Home: 441-6389 Term Expires: October 2017
Culpepper, Blake, <u>Alternate Member</u> 510 First Street Kill Devil Hills, NC 27948	Home: 441-7241 Term Expires: May 2018
Donahue, William E., <u>Regular Member/Vice-Chairman</u> 518 Parkwood Drive Kill Devil Hills, NC 27948	Home: 261-7292 Regular Term Expires: May 2018 Vice-Chair Expires: June 2016
Dorn, Myra “Toni,” <u>Regular Member</u> 601 Indian Drive Kill Devil Hills, NC 27948	Cell: 757-510-0965 Term Expires: June 2018
Lowack, Michael, <u>Regular Member</u> 106 Porthole Court Kill Devil Hills, NC 27948	Home: 480-1568 Term Expires: May 2017
Rollason, III, Robert E., <u>Regular Member</u> 706 Seventh Avenue Kill Devil Hills, NC 27948	Home: 475-0002 Term Expires: October 2019
Seidman, II, Ronald J. “Ron” <u>Alternate Member</u> 504 West Landing Drive Kill Devil Hills, NC 27948	Home: 202-8936 Term Expires: July 2017
Self, Jason, <u>Alternate Member</u> 319 Truxton Street Kill Devil Hills, NC 27948	Cell: 252-423-2337 Term Expires: October 2019

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Chapter 31: Boards and Commissions. Board of Adjustment.

§ 31.49 through 31.59. Reserved.

§ 31.60. Board of Adjustment Established.

Pursuant to G.S. § 160A-388, the Board of Commissioners establishes a Board of Adjustment for the purpose of hearing matters as provided for in the enabling act of the General Assembly.

Statutory reference:

Board of Adjustment, see G.S § 160A-388

§ 31.61. Composition; Attendance; Meetings.

(A) The Board of Adjustment shall consist of five members who shall be residents of the town and shall be appointed by the Board of Commissioners. In addition, three alternate members shall be appointed by the Board of Commissioners. Alternate members shall serve on the board in the absence or temporary disqualification of any regular member or fill a vacancy pending appointment of a member. Each alternate serving on behalf of any regular member has all the powers and duties of a regular member.

(B) Each regular member of the Board of Adjustment shall notify the secretary at least five days in advance of every regular meeting in the event he cannot attend such meeting. The Secretary shall then immediately notify an alternate member to attend this meeting.

(C) All meetings of the board shall be held at a regular place and shall be open to the public. A quorum of four members shall be present at the designated meeting place before a vote is taken or final disposal of any appeal is made upon which the board is required to pass.

(D) The board shall keep minutes of its proceedings showing the vote of each member upon each question, or if absent or failing to vote, an indication of such fact; and the final disposition of appeals and variances shall be recorded resolution indicating the reasons of the board therefor all of which shall be a public record.

§ 31.62. Term.

The term of office of the members of the Board of Adjustment shall be three years and appointment shall be made for terms of one year, two years and three years initially to the end that the Board of Adjustment shall have continuity, and upon the expiration of the initial one- and two-year terms each person thereafter appointed shall serve for three years. This shall be effective upon the expiration of any existing term of office.

§ 31.63. Compensation.

The Board of Commissioners shall provide, from time to time, compensation to the members of the Board of Adjustment based on attendance at meetings. Alternate members serving at regular or special meetings shall be compensated in the same manner as if they were regular members.

§ 31.64. Vacancies.

Vacancies on the Board of Adjustment, from time to time, shall be filled for the unexpired term of the member being replaced to the end that there shall be continuity upon the Board.

§ 31.65. Removal.

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Any member or alternate may be removed in accordance with the personnel policy of the town.

§ 31.66. Offices.

The Board of Adjustment shall make the appointment for the Chairperson and the Vice-Chairperson from within its own membership, annually.

§ 153.320 INTENT.

It is the intention of this ordinance that all questions arising in connection with the enforcement of this chapter shall be presented first to the town planner for consideration and that such questions shall be presented to the Board of Adjustment only on appeal from a decision of an administrative official charged with the enforcement of this chapter, and that from the decision of the Board of Adjustment, recourse shall be had to the courts, as provided by law. It is further the intention of this division that appeals from a decision of the Zoning Administrator or other administrative official, related to this chapter but not pertaining to the state building code or state building laws, shall be taken to the Board of Adjustment, and that from the decision of the Board of Adjustment, recourse shall be had to the courts, as provided by law; except that it shall be the duty of the board of commissioners to consider any amendments to this chapter, applications for conditional use or special use permits or site plans as provided by this chapter and any other duty not specifically delegated to the Board of Adjustment herein.

§153.321 DUTIES AND RESPONSIBILITIES OF THE BOARD OF ADJUSTMENT.

(A) *Interpretations.* The board shall interpret zoning maps and pass upon disputed questions of lot lines or district boundary lines and similar questions that may arise in the administration of this chapter. The board shall hear and decide all matters referred to it or upon which it is required to pass under this chapter.

(B) *Administrative Review; Appeals.* Pursuant to its powers and duties, the Board of Adjustment shall hear and decide appeals to decisions of administrative officials charged with the enforcement of this chapter, where it is alleged there is an error in any order, decision, determination or interpretation made by the Zoning Administrator or such other designated administrative officer in the enforcement of Chapter 153, Zoning of the Kill Devil Hills Town Code. As used in this section, the term "decision" includes any final and binding order, requirement, or determination.

(C) *Variances.* To authorize upon appeal in specific cases, variances from the terms of the Zoning Ordinance according to the standards and procedures herein so that the spirit of the ordinance is observed, public safety and welfare secured, and substantial justice done.

(1) The Board of Adjustment may impose appropriate conditions on any variance, provided the conditions are reasonably related to the variance.

(a) A violation of such conditions and safeguards, when made a part of the terms under which the variance is granted, shall be a violation of this chapter.

(2) The variance is the minimum variance that will make possible the reasonable use of the land, building, or structure.

(D) *Chapter 151, Flood Damage Prevention Ordinance.* Pursuant to the terms, conditions and procedures contained in Chapter 151, Flood Damage Prevention Ordinance, the Board of Adjustment shall act as the appeal board and shall hear and decide requests for variances of the provisions of that chapter; and, shall hear appeals and modify or affirm the corrective order issued by the Floodplain Administrator.

§ 153.322 APPEALS.

(A) *Appeals procedures.*

(1) An appeal may be initiated by any aggrieved party or by any officer or the Board of Commissioners of the Town of Kill Devil Hills.

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(2) The Board of Adjustment shall hear and decide appeals decisions of administrative officials charged with enforcement of the zoning or flood damage prevention ordinance, pursuant to all of the following:

(a) Any person who has standing under G.S. 160A-393(d) or the Town of Kill Devil Hills may appeal a decision to the Board of Adjustment. A written notice of appeal stating the grounds for the appeal must be filed with the town clerk.

(b) The official who made the decision must 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 must be delivered by personal delivery, electronic mail, or by first-class mail.

(c) The owner or other party shall have thirty (30) days from receipt of the written notice within which to file an appeal. Any other person with standing to appeal shall have thirty (30) days from receipt from any source of actual or constructive notice of the decision within which to file an appeal.

(d) The official who made the decision must transmit to the board all the documents and exhibits constituting the record upon which the action appealed was taken. The official must 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.

(e) 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 this chapter. 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 must meet to hear the appeal within fifteen (15) days after such request is filed. Notwithstanding the foregoing, appeals of decisions granting a permit or otherwise affirming that a proposed use of property is consistent with this chapter 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.

(f) The Board of Adjustment must hear and decide the appeal within a reasonable time.

(g) Notice of the public hearing must be mailed to, the person or entity whose application is the subject of the hearing; to the owner of the property that is subject of the hearing if the owner did not initiate the hearing; to the owners of all parcels of land adjoining the property that is the subject of the hearing; and to any other persons entitled to receive notice at least ten (10) days, but not more than twenty-five (25) days, prior to the hearing for any appeal. For the purpose of applying this standard, an adjoining property is deemed to be any parcel that abuts the subject property or is located directly across a public right-of-way from the subject property. In the absence of evidence to the contrary, the town may rely on Dare County tax listings to determine owners of the property entitled to be mailed notice.

(1) 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 a Kill Devil Hills 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 the sign shall be the responsibility of the landowner or applicant. Verification of the posting shall be provided to the Kill Devil Hills official who made the decision.

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(h) The official who made the decision must be present at the hearing as a witness.

(i) 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.

(j) When hearing an appeal pursuant to NCGS 160A-400.9(c) or any other appeal in the nature of certiorari, the hearing shall be based on the record and the scope of review shall be as provided in NCGS 160A-393(k).

(3) Standards for granting an appeal.

(a) The Board of Adjustment shall reverse or modify the order, decision, determination, or interpretation under appeal only upon finding an error in the application of these regulations on the part of the officer rendering the order, decision, determination, or interpretation.

(b) In modifying the order, decision, determination, or interpretation, the Board of Adjustment shall have all the powers of the officer from whom the appeal is taken.

§153.322 VARIANCES.

(A) Procedures.

(1) A petition for variance may be initiated only by the owner of the affected property, an agent authorized in writing to act on the owner's behalf, or a person having a written contractual interest in the affected property.

(2) When unnecessary hardships would result from carrying out the strict letter of this chapter, the Board of Adjustment shall vary any of the provisions upon a showing of all of the following:

(a) 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.

(b) 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.

(c) 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 granting of a variance shall not be regarded as a self-created hardship.

(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.

1. The Board of Adjustment may impose appropriate conditions on any variance, provided the conditions are reasonably related to the variance, which include, as appropriate, requirements that street and utility rights-of-way be dedicated to the public and that provision be made for recreational space and facilities.

2. A violation of such conditions and safeguards, when made a part of the terms under which the variance is granted, shall be a violation of this chapter.

3. The variance is the minimum variance that will make possible the reasonable use of the land, building, or structure.

(3) Restrictions.

(a) Under no circumstances shall the Board of Adjustment grant a variance to allow a use not permissible under the terms of this chapter in the district involved, or any use expressly or by implication prohibited by the terms of this chapter in the district.

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(b) The existence of a non-conforming use of neighboring land, buildings, or structures in the same district, or of permitted or non-conforming uses in other districts, shall not constitute sufficient reason for granting the requested variance.

(c) The fact that property may be utilized more profitably will not be considered adequate to justify the Board of Adjustment in granting a variance.

(4) Notice and public hearing.

(a) Notice of the public hearing shall be posted on the subject property at least ten (10) days, but not more than twenty-five (25) days, in advance of the public hearing at which the board is to consider the variance. Notice of the public hearing must be mailed to the person or entity whose application is the subject of the hearing; to the owner of the property that is subject of the hearing if the owner did not initiate the hearing; to the owners of all parcels of land adjoining the property that is subject of the hearing; and to any other persons entitled to receive notice at least ten (10) days, but not more than twenty-five (25) days, prior to the hearing for any variance. For the purpose of applying this standard, an adjoining property is deemed to be any parcel that abuts the subject property or is located directly across a public right-of-way from the subject property. In the absence of evidence to the contrary, the Town may rely on Dare County tax listings to determine owners of the property entitled to be mailed notice.

§153.323 ACTION BY THE BOARD OF ADJUSTMENT.

(A) A concurring vote of four-fifths (4/5's) of the board members shall be required to grant a variance. The board may grant the variance as requested, deny the variance, or grant the variance with conditions. 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. The Board of Adjustment shall grant or deny the variance or shall reverse, affirm, or modify the order, decision, determination, or interpretation under appeal by recording in the minutes of the meeting the reasons that the Board of Adjustment used and the findings of fact and conclusions of law made by the Board of Adjustment to reach its decision. For 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 supermajority majority if there are no qualified alternates available to take the place of such members.

(B) A member of the board 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 conflicts 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. 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.

(C) *Quasi-judicial decisions.* 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, or such other office or official as the ordinance specifies. 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.

(D) *Oaths.* The chair of the board or any member acting as chair and the clerk to the

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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) *Subpoenas*. 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.

§153.324 EFFECT OF GRANTING OF VARIANCE OR REVERSAL OR MODIFICATION OF ADMINISTRATIVE DECISION.

(A) After the Board of Adjustment approves a variance, or reverses or modifies an order, decision, determination, or interpretation of an administrative officer, the appellant or petitioner shall be responsible for a building permit and/or certificate of occupancy, as applicable, in order to proceed with the development of the subject property. All orders, decisions, determinations, and interpretations made by administrative officers under those procedures shall be consistent with the variance, reversal, or modification granted to the appellant or petitioner by the Board of Adjustment.

(B) *Rehearing!*. The Board of Adjustment shall refuse to hear an appeal or variance petition which has been previously denied unless it finds that there have been substantial changes in the conditions or circumstances relating to the matter.

(C) *Appeal from Board of Adjustment*. 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 thirty (30) days after the decision is effective or after a written copy thereof is given in accordance with subsection _____. When first class mail is used to deliver notice, three (3) days shall be added to the time to file the petition.

§ 153.325 FEES.

A fee established by the Board of Commissioners shall be paid by the applicant, property owner, or appellant to the town at the time of filing of any proceeding for hearing before the Board of Adjustment.