

**TOWN OF BLACK MOUNTAIN
ZONING BOARD OF ADJUSTMENT**

The Black Mountain Zoning Board of Adjustment held its regular meeting on Thursday, July 15, 2021, at 6:00 p.m. in Town Hall at 160 Midland Avenue, Black Mountain, North Carolina and virtually via Zoom.

I. CALL TO ORDER

The meeting was called to order with the following members present:

John DeWitt, Vice Chair
Jillian Ballard
Greg Feightner
Patrick Prosser
Janet McKimpson

Staff:

Jennifer Tipton, Senior Admin
Jake Hair, Zoning Administrator/Planner I
Ron Sneed, Town Attorney

The meeting was called to order at 6:00 p.m. and duly constituted and opened for business with a quorum of five (5) regular members.

II. ADOPTION OF AGENDA

Jillian Ballard made a motion to adopt the agenda as presented. The motion was seconded by Greg Feightner and approved by a vote of 5-0.

III. ADOPTION OF MINUTES

Greg Feightner made a motion to adopt the minutes of June 17, 2021 as written. The motion was seconded by Janet McKimpson and approved by a vote of 5-0.

IV. OLD BUSINESS

None.

V. NEW BUSINESS

1. Election of Officers

Patrick Prosser nominated John DeWitt for Chair. The motion was seconded by Janet McKimpson and approved by a vote of 5-0.

Janet McKimpson nominated Jillian Ballard for Vice Chair. The motion was seconded by Greg Feightner and approved by a vote of 5-0.

2. Discussion of Creating a Guiding Document for Applicants

John DeWitt began the discussion by talking about the Settings development and their more restrictive guidelines. Mr. DeWitt said he met with some members of the Design Review Board (DRB) and has received some information about their guidelines and processes and while the Town has the legal authority to approve or deny a variance from Town ordinances, the DRB has the homeowner's authority to approve or deny a variance from their guidelines. The thought of the DRB is that some property owners are coming to the Town first to gain approval and then

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using that as a marketing tool to sell the property even though there is not a guarantee that a variance would also be granted by the DRB. Town Attorney Ron Sneed also pointed out that the Settings is unique in that most developments don't have requirements that overlap with the zoning requirements but the Settings does and that requires homeowners to also seek a variance from the DRB.

Patrick Prosser spoke about the brochure that was created for the Town Council and that we could modify that brochure to fit the needs of this board and explain who the board is, what the board does, and the process for submitting information and hearings. It was suggested that the brochures be included with the notifications that are mailed out to property owners.

Another comment was that applicants sometimes also seem confused about the process and that maybe there is a way to make the application and process easier to understand. Greg Feightner said that it should be easy for applicants to understand the process particularly if they do not have the resources available to hire an attorney, do a traffic study, etc. and suggested taking the opening statement that is read at the meetings and breaking it down to make it easier to understand. Mr. Sneed suggested having a brochure for each topic (variances, special use permits, and appeals), because they each have a different process and then have a general brochure about the board and how the board functions. Mr. Sneed did say that the board cannot require applicants in the Settings to go to the DRB first but they can recommend it. It was also suggested that some of the information from the School of Government videos be used in the brochures. The board formally asked staff to create a draft brochure and then the board will review at their next meeting.

3. Training with Town Attorney Ron Sneed

Mr. Sneed began by talking about the links to the School of Government webinars and that those offer good information but might be a little outdated since the passage of Chapter 160D but said that Adam Lovelady from the School of Government will more than likely update them soon. Mr. Sneed said that the board of adjustment does not set policy and is not a sympathy board. The board must hear facts to prove a case and is based on the rule of evidence. Board members and parties have the opportunity to cross examine and board members are allowed to ask questions to pick out facts. The board must hear a case, make a decision and come up with an order and Mr. Sneed wants to make sure that the order will survive Superior Court if the case is appealed. Mr. Sneed provided several handouts including Chapter 160D-302 which is the establishing statute that allows the creation of a board of adjustment, Chapter 160D-705 which is about quasi-judicial zoning decisions, and Chapter 160D-109 which is the new conflicts of interest statute. The board of adjustment can hear appeals, variances and special use permits. The board is prohibited from doing homework, meaning that they cannot research the case. The decision must be based on the facts presented at the hearing. The board is allowed to do a drive-by site visit, can look at the packet, and can read the ordinances related to the case. Board members must disclose ex parte communications and this can include disclosing that they did a drive-by site visit or that they were approached at the grocery store by a citizen who asked about the case. Board members are not to discuss the case with anyone and if someone does approach a board member and asks about a case, they are to say that they cannot discuss it. It is also important to note that board members cannot discuss a closed case until thirty days after the hearing and if no one has appealed the case.

Hearings may be continued if board members feel that they do not have enough facts to make a decision. A continuation is different from a rehearing in that a continuation is the same meeting

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just ongoing and a rehearing can only take place if there has been a significant change from when the decision was made. Applicants may also be given the opportunity to withdraw their application and reapply when they have all of their information and the filing fee can be waived. The burden of proof is never on the board. The burden of proof is always on the applicant for variances and appeals, but for special use permits, the applicant just have to have a little bit of evidence that they meet the requirements and the burden of proof shifts to the opposition to prove why they do not meet the requirements.

There are four standards that are required to be met for a variance and variances require a super majority. The only time development restrictions or covenants will come into play with a variance is when they require a certain sized house to be built.

Due process is important for boards of adjustment as applicants are entitled to present to an impartial body who will listen to the evidence and make a decision based on facts and not opinion or feelings. Evidence presented must be competent, material and substantial.

The new conflict of interest statute states that member may not participate if they, a family member or a business partner will have a financial interest in the outcome of the decision. The board does act like a jury except that they cannot deliberate in private. All discussions must be done in open session and be loud enough for everyone to hear and to be recorded. The policy of the board of adjustment has been to have a recess before closing the public hearing so that they can determine if any more questions need to be asked because once the public hearing has been closed, no more questions may be asked of anyone, including staff.

The board does not have to allow people to talk and only people with standing will be allowed to provide witnesses and have the ability to cross examine witnesses. Those always having standing will be the Town and the applicant. For another person to have standing they must prove that they will be harmed in some way different than the public at large. Most of the time that will be having an appraiser speak about loss of value but can include traffic, stormwater, or safety. The person proving standing cannot prove standing based on their own opinion and must have evidence, facts, or professional opinions.

For appeals, the board has no discretion to hear an appeal if it has been filed untimely. Appeals to Superior Court are based on the record and the court will not rehear any evidence. The Court will look the record and determine if the evidence supports the facts in the order. The Court can uphold the decision, overturn the decision, or remand back to the board to fix the order or to rehear the entire case. The board will hear appeals from the Historic Preservation Commission for appeals of Certificates of Appropriateness and will do the same thing as Superior Court and will only review the record.

VI. COMMUNICATION FROM ZBA

None.

VII. COMMUNICATION FROM STAFF

None.

VIII. ADJOURNMENT

Janet McKimpson made a motion to adjourn at 7:31 p.m. The motion was approved by consensus.

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Prepared by:

John DeWitt, Chair

Jennifer Tipton, Senior Admin

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