

- (3) Vested Right Revocation. The *ZBA* may conclude forfeiture of a Vested Right previously recorded where there is failure to abide by the terms and conditions placed upon the original approval.

§200A-333. Common Law Vested Rights

- A. Purpose. A Common Law Vested Right is a right established by common law to undertake and complete the development and *use* of property based on substantial expenditures in good faith reliance on a valid governmental approval. Any request for a Common Law Vested Right will be reviewed and acted upon by the *Planning Director* in accordance with the requirements and procedures set forth in this subsection.
- B. Application. The *applicant* must provide proof of each of the following provisions:
 - (1) A valid governmental permit has been obtained for the specific project;
 - (2) The developer made a substantial expenditure in reliance upon the permit;
 - (3) The developer was acting in good faith; and
 - (4) The developer suffers harm if required to comply with the new rules.
- C. Staff Review. The *Planning Director* shall review the evidence submitted as proof demonstrating the existence of each of the four (4) provisions above. All of these provisions shall be met in order to approve a Common Law Vested Right.
- D. Appeals. An *appeal* of the *Planning Director's* determination of the existence of a Common Law Vested Right shall be heard in a quasi-judicial hearing conducted by the Zoning Board of Adjustment (*ZBA*).

Subpart G. Variances

§200A-334. General

All applications for a *Variance* shall include, at minimum: (1) the name(s) and address(es) of the owner(s) of the property in question; (2) the location of the property; (3) the *PIN* as shown on the County tax listing; (4) a description and/or statement of the present zoning district; (5) the appropriate level of *site plan*; and, where an *applicant* chooses to appoint an agent to speak on their behalf, (6) an agent form. All applications for a *variance* shall adhere to the applicable review and approval process as outlined in this Subpart.

§200A-335. Variances

- A. Purpose. *Variances* are intended to provide limited relief from the requirements of this Chapter in those cases where the strict application of the provisions of this Chapter would result in unnecessary hardship. Any *use* which requires a *Variance* shall not be permitted without the approval of the Zoning Board of Adjustment (*ZBA*) in accordance with the requirements and procedures set forth in this section.
- B. Application.
 - (1) Pre-application Conference. Each *applicant* for a *Variance* shall meet with the appropriate Administrator (within this section "Administrator" shall refer to any of the following: *Communication Facilities, Manufactured Home Park, Soil*

Erosion and Sedimentation Control, Subdivision, or Zoning Administrator) in a pre-application conference no later than one (1) calendar week prior to the date the application is due. The purposes of this conference are to provide additional information regarding the review process and assistance in the preparation of the application.

- (2) Application. Each application for a *Variance* shall be submitted along with the appropriate fee and *site plan*, to the Administrator on or before the first business day of the month. Applications may be modified by the Administrator as necessary, who may require the *applicant* to supply additional information pertaining to the *Variance*. Incomplete applications must be resubmitted on or before the first business day of the month or will not be processed until the proceeding month.
 - (3) Review Schedule. Applications for a *Variance* have a 45 day processing period for notification requirements and review by the Administrator (and, if necessary the Technical Review Committee (*TRC*)) prior to the public hearing.
 - (4) Fees. Any review fee established by the Board of Commissioners shall be submitted with the application.
- C. Staff Review. The Administrator shall process and review all applications for *Variances*. The Administrator may present the application to the *TRC* for its comments and recommendations and may forward the application on to the appropriate departments and agencies for their review. The Administrator shall also prepare a staff recommendation for the *ZBA* on the application for a *Variance*.
- D. Formal Review. Prior to taking any action on a *Variance*, the *ZBA* shall consider the Administrator's recommendation on the *Variance*.
- E. Public Hearing. Prior to considering a *variance* application the *ZBA* shall hold a public hearing on the application in accordance with §200A-338 (Quasi-Judicial Process Standards).
- F. Public Notification. Public notification of such hearing shall comply with the provisions of §200A-338 (Quasi-Judicial Process Standards). The Administrator shall be responsible for all necessary public notifications.
- G. Quasi-Judicial Proceeding. The concurring vote of four-fifths (4/5) of the *ZBA* shall be necessary to grant a *Variance*. Any approval or denial of the request must be in writing and permanently filed with the office of the *ZBA* and with the Administrator as public record.
- (1) Standards of Review. The *ZBA* shall not grant a *Variance* the effect of which would be to: (1) allow the establishment of a *use* not otherwise permitted in a general *use district*, (2) extend physically a *nonconforming use* of land or (3) change the district boundaries shown on the Official Zoning Map. No *Variance* shall be granted or considered where the fact that the property could be used more profitably is the reason for the request for the *Variance*. The following written findings must be made in order for the *ZBA* to grant a *Variance*:

- a. There are practical difficulties or unnecessary hardships in carrying out the strict letter of this Chapter, as demonstrated by:
 1. The fact that, if the *applicant* complies with the literal terms of this Chapter, he/she cannot secure a reasonable return from, or make a reasonable *use* of, the property.
 2. The hardship of which the *applicant* complains results from unique circumstances related to the *applicant's* land.
 3. The hardship is not the result of the *applicant's* own action.
- b. The *Variance* is in harmony with the general purpose and intent of this Chapter and will preserve its spirit.
- c. The *Variance* will secure the *public safety* and welfare and will do substantial justice.
- d. The *Variance* shall not be based on the existence of a *nonconforming use* of neighboring land or *structures* in the same district, or permitted *nonconforming uses* in other districts, and shall in no way constitute a reason for the requested *Variance*.

(2) Conditions. The *ZBA* may, in granting a *Variance*, prescribe: (1) additional conditions; (2) additional safeguards; (3) a time limit within which the action for which a *Variance* is sought shall be begun; (4) a time limit within which the action for a *Variance* is sought shall be completed; and (5) a time duration within which construction, operation or installation shall commence on the project for which the *Variance* was obtained.

H. Variance Validity. Upon issuance of a *Variance*, the *applicant* shall have 12 months within which (unless otherwise specified by the *ZBA*) to commence construction, operation or installation. If construction, operation or installation is commenced within the specified time period the *Variance* shall continue in force as long as the *structure*, operations or installation remains.

(1) Variance Revocation. If construction or operation is not commenced within 12 months (or other specified time period), the *Variance* shall no longer be valid.

§200A-336. Variances (Flood Damage Prevention)

A. Purposes. Flood Damage Prevention Variances are intended to provide limited relief from the requirements of Article VIII (Natural Resources) Subpart A (Flood Damage Prevention).

B. Application.

(1) Application. Each application for a Flood Damage Prevention Variance shall be submitted along with a written report addressing each of the factors identified by §200A-336 (Variances (Flood Damage Prevention)) E(1) (Granting Variances).

(2) Fees. The Board of Commissioners shall establish a Schedule of Fees, charges and expenses, and a collection procedure, for Flood Damage Prevention Variances and other matters pertaining to Article VIII (Natural Resources)

Subpart A (Flood Damage Prevention). No application for a Flood Damage Prevention Variance, shall be processed unless or until such fees, as established, and all estimated expenses have been paid in full.

C. Eligibility for Flood Damage Prevention Variance. Flood Damage Prevention Variances may be issued for:

- (1) The repair or rehabilitation of historic *structures* upon the determination that the proposed repair or rehabilitation will not preclude the *structure's* continued designation as an historic *structure* and the Flood Damage Prevention Variance is the minimum necessary to preserve the historic character and design of the *structure*;
- (2) Functionally dependent facilities if determined to meet the definition as stated in Article XIV, provided provisions of §200A-336 (Variances (Flood Damage Prevention)) have been satisfied, and such facilities are protected by methods that minimize flood damages during the *base flood* and create no additional threats to *public safety*; or
- (3) Any other type of development, provided it meets the requirements of §200A-336 (Variances (Flood Damage Prevention)) and Article VIII (Natural Resources) Subpart A (Flood Damage Prevention); or
- (4) *Solid waste disposal facilities, hazardous waste management facilities, salvage yards, and chemical storage facilities* that are located in *Special Flood Hazard Areas* provided that all of the following conditions are met:
 - a. The *use* serves a critical need in the community;
 - b. No feasible location exists for the *use* outside the *Special Flood Hazard Area*;
 - c. The *reference level* of any *structure* is elevated or floodproofed to at least the *regulatory flood protection elevation*;
 - d. The *use* complies with all other applicable Federal, State and local laws;
 - e. Henderson County has notified the Secretary of the North Carolina department of Crime Control and Public Safety of its intention to grant a *variance* at least 30 calendar days prior to granting the *variance*.
- (5) But not for *special fill permits*, pursuant to §200A-323 (Special Fill Permit Procedures) herein.

D. Public Hearing. Prior to considering the Flood Damage Prevention Variance application, the Flood Damage Prevention Board shall hold a public hearing on the application in accordance with §200A-339 (Quasi-Judicial Process Standards).

E. Granting Flood Damage Prevention Variances.

- (1) In determining whether to grant or deny Flood Damage Prevention Variances, the Flood Damage Prevention Board shall consider all technical evaluations, all relevant factors, all standards specified in Article VIII (Natural Resources) Subpart A (Flood Damage Prevention), and:

- a. The danger that materials may be swept onto other lands to the injury of others;
 - b. The danger to life and property due to flooding or *erosion* damage;
 - c. The susceptibility of the proposed facility and its contents to flood damage and the effect of such damage on the individual owner;
 - d. The importance of the services provided by the proposed facility to the community, including the retention of land for *agriculture*;
 - e. The necessity to the facility of a waterfront location as defined under Article XIV (Definitions) as a *functionally dependent facility*, where applicable;
 - f. The availability of alternative locations, not subject to flooding or *erosion* damage, for the proposed *use*;
 - g. The compatibility of the proposed *use* with existing and anticipated development;
 - h. The relationship of the proposed *use* to the *Comprehensive Plan* and *floodplain management* program for that area;
 - i. The safety of access to the property in times of flood for ordinary and emergency *vehicles*;
 - j. The expected heights, velocity, duration, rate of rise, and *sediment* transport of the floodwaters and the effects of wave action, if applicable, expected at the site; and
 - k. The costs of providing governmental services during and after flood conditions including maintenance and repair of public utilities and facilities such as sewer, gas, electrical and water systems, and *roads* and bridges.
- (2) Upon consideration of the factors listed above and the purposes of Article VIII (Natural Resources) Subpart A (Flood Damage Prevention), the Flood Damage Prevention Board may attach such conditions to the granting of Flood Damage Prevention Variances as it deems necessary to further the purposes and objectives of Article VIII (Natural Resources) Subpart A (Flood Damage Prevention).
- (3) There are additional considerations of the Flood Damage Prevention Board in determining whether to grant or deny a Flood Damage Prevention Variance. Flood Damage Prevention Variances shall:
- a. Not be issued when the Flood Damage Prevention Variance will make the *structure* in *violation* of other Federal, State, or local laws, regulations, or ordinances.
 - b. Not be issued within any designated *floodway* or *non-encroachment area* if any increase in flood levels during the *base flood* discharge would result.

- c. Only be issued upon a determination that the Flood Damage Prevention Variance is the minimum necessary, considering the flood hazard, to afford relief.
- d. Only be issued prior to Floodplain Development Permit (see §200A-318 (Floodplain Development Permit)) approval.
- e. Only be issued upon:
 1. A showing of good and sufficient cause;
 2. A determination that failure to grant the Flood Damage Prevention Variance would result in exceptional hardship; and
 3. A determination that the granting of a Flood Damage Prevention Variance will not result in increased flood heights, additional threats to *public safety*, or extraordinary public expense, create nuisance, cause fraud on or victimization of the public, or conflict with existing local laws or ordinances.

F. Written Notice. Any *applicant* to whom a *variance* is granted shall be given written notice specifying the difference between the *Base Flood Elevation (BFE)* and the elevation to which the *structure* is to be built and a written statement that the cost of *flood insurance* will be commensurate with the increased risk resulting from the reduced *reference level* elevation. Such notification shall be maintained with a record of all *variance* actions.

§200A-337. Variances (Watershed)

A. Purpose. *Watershed Variances* are intended to provide limited relief from the requirements of Article VIII Subpart B. *Water Supply Watershed* Protection in those cases where the strict application of the provisions of this Chapter would result in unnecessary hardship. Any *use* which requires a *Watershed Variance* shall not be permitted without the approval of the Watershed Review Board in accordance with the requirements and procedures set forth in this section.

B. Application.

- (1) Pre-application Conference. Each *applicant* for a *Watershed Variance* shall meet with the *Watershed Administrator* in a pre-application conference no later than one (1) calendar week prior to the date the application is due. The purposes of this conference are to provide additional information regarding the review process and assistance in the preparation of the application.
- (2) Application. Each application for a *Watershed Variance* shall be submitted along with the appropriate fee and *site plan*, to the *Watershed Administrator* on or before the first business day of the month. Applications may be modified by the *Watershed Administrator* as necessary, who may require the *applicant* to supply additional information pertaining to the *Watershed Variance*. Incomplete applications must be resubmitted on or before the first business day of the month or will not be processed until the proceeding month.

- (3) Review Schedule. No formal review schedule is established for a *Watershed Variance* from Article VIII Subpart B. *Water Supply Watershed* Protection.
 - (4) Fees. Any review fee established by the Commissioners shall be submitted with the application.
- C. Staff Review. The *Watershed Administrator* shall process and review all applications for *Watershed Variances*. The *Watershed Administrator* shall notify in writing each *local government* having jurisdiction in the *watershed* of the *Watershed Variance* request, the notice for which shall include a description of the *Watershed Variance* being requested. *Local governments* receiving notice of the *Watershed Variance* request may submit comments to the *Watershed Administrator* prior to a decision by the Watershed Review Board. The *Watershed Administrator* shall prepare a staff recommendation for the Watershed Review Board on the application for a *Watershed Variance*.
- D. Formal Review. Prior to taking any action on a *Watershed Variance*, the Watershed Review Board shall consider the *Watershed Administrator's* recommendation on the *Watershed Variance*. Comments received from *local governments* (if applicable) shall become a part of the record of proceedings of the Watershed Review Board. The Watershed Review Board shall refuse to hear an application for a *Watershed Variance* previously denied if it finds that there have been no substantial changes in conditions or circumstances bearing on the *appeal* or application. The Watershed Review Board shall not grant a *Watershed Variance* without making the following three (3) findings, which shall be recorded in the permanent record of the case, and shall include the factual reasons on which they are based:
- (1) Finding One (1). There are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of this Chapter, specifically Article VIII (Natural Resources) Subpart B. (Water Supply Watershed Protection). In order to determine that there are practical difficulties or unnecessary hardships, the Watershed Review Board must find that the following conditions exist:
 - a. If the *applicant* complies with the provisions of this Chapter, the *applicant* can secure no reasonable return from, nor make reasonable *use* of, his/her property. Merely proving that the *Watershed Variance* would permit a greater profit to be made from the property will not be considered adequate to justify the Watershed Review Board in granting a *Watershed Variance*. Moreover, the Watershed Review Board shall consider whether the *Watershed Variance* is the minimum possible deviation from the terms of this Chapter that will make possible the reasonable *use* of the property;
 - b. The hardship results from the application of this Chapter to the property rather than from other factors, such as deed restrictions or other hardship;
 - c. The hardship is due to the physical nature of the *applicant's* property, such as its size, shape or topography, which is different from that of neighboring property;
 - d. The hardship is not the result of the actions of an *applicant* who knowingly or unknowingly violates this Chapter or who purchases the

property after the effective date of this Chapter then comes to the Watershed Review Board for relief; and/or

- e. The hardship is peculiar to the *applicant's* property, rather than the result of conditions that are widespread. If other properties are equally subject to the hardship created in the restriction, then granting a *Watershed Variance* would be a special privilege denied to others and would not promote equal justice.
- (2) Finding Two (2). The *Watershed Variance* is in harmony with the general purpose and intent of this Chapter, specifically Article VIII (Natural Resources) Subpart B (Water Supply Watershed Protection), and preserves its spirit.
 - (3) Finding Three (3). In the granting of the *Watershed Variance*, the *public safety* and welfare have been assured and substantial justice has been done. The Watershed Review Board shall not grant a *Watershed Variance* if it finds that doing so would in any respect impair the public health, safety or general welfare.
- E. Environmental Management Commission Review. Where the application calls for the granting of a Major *Variance*, and if the Watershed Review Board decides in favor of granting the *Watershed Variance*, the Watershed Review Board shall prepare a preliminary record of the hearing with all deliberate speed. The preliminary record of the hearing shall include the: (1) *Watershed Variance* application; (2) hearing notices; (3) evidence presented; (4) motions, offers of proof, objections to evidence and rulings on them; (5) proposed findings and exceptions; and (6) proposed decision, including all conditions proposed to be added to the *Watershed Variance*. The preliminary record shall be sent to the Environmental Management Commission for its review as follows:
- (1) Situation One (1). If the Environmental Management Commission concludes from the preliminary record that the *Watershed Variance* qualifies as a Major *Variance* and that the property owner can secure no reasonable return from, nor make any practical *use* of, the property unless the proposed *Watershed Variance* is granted and that the *Watershed Variance*, if granted, will not result in a serious threat to the water supply, then the Environmental Management Commission may approve the *Watershed Variance* as proposed or approve the proposed *variance* with conditions and stipulations. The Environmental Management Commission will prepare a Commission decision and send it to the Watershed Review Board. If the Environmental Management Commission approves the *Watershed Variance* as proposed, the Watershed Review Board shall prepare a final decision granting the proposed *Watershed Variance*. If the Commission approves the *variance* with conditions and stipulations, the Watershed Review Board shall prepare a final decision, including such conditions and stipulations, granting the proposed *Watershed Variance*.
 - (2) Section Two (2). If the Commission concludes from the preliminary record that the *Watershed Variance* qualifies as a Major *Variance* and that the property owner can secure a reasonable return from or make a practical *use* of the property without the *Watershed Variance* or that the *Watershed Variance*, if granted, will result in a serious threat to the water supply, then the Commission may deny approval of the *Watershed Variance* as proposed. The Commission shall prepare a

Commission decision and send it to the Watershed Review Board. The Watershed Review Board will prepare a final decision denying the *Watershed Variance* as proposed.

- F. Conditions. The Watershed Review Board may, in granting a *Watershed Variance*, prescribe: (1) additional conditions regarding the location, character and other features of the proposed *building, structure* or *use*; (2) additional safeguards; (3) a time limit within which the action for which a *Watershed Variance* is sought shall be begun; (4) a time limit within which the action for a *Watershed Variance* is sought shall be completed; and (5) a time duration within which construction, operation or installation shall commence on the project for which the *variance* was obtained. If a *Watershed Variance* for the construction, alteration or *use* of property is granted, such construction, alteration or *use* shall be in accordance with the approved *site plan*.
- G. Variance Validity. Upon issuance of a *Watershed Variance*, it shall then be considered as a *Water Supply Watershed Use Permit* (see §200A-327 (WSW Use Permits)), and shall adhere to the permit validity outlined therefore.

Subpart H. Legislative and Quasi-Judicial Process Standards

§200A-338. Legislative Process Standards

A. Text Amendments and Comprehensive Plan Amendments

- (1) Public Hearing. Before adopting or amending any ordinance the Board of Commissioners shall hold a public hearing on the ordinance or amendment.
- (2) Newspaper Notice. In accordance with *NCGS* 153A-323, the Commissioners shall cause notice of such hearing to be published in a newspaper of general circulation in the County once a week for two (2) successive calendar weeks. The notice shall be published the first time not less than ten (10) days nor more than 25 days prior to the date fixed for the hearing. The notice shall include the time, place and date of the hearing and include a description of the property or the nature of the change or amendment to map. In computing such period, the day of publication is not to be included but the day of the hearing shall be included.

B. Map Amendments.

- (1) Public Hearing. Before adopting or amending any ordinance the Board of Commissioners shall hold a public hearing on the ordinance or amendment.
- (2) Newspaper Notice. In accordance with *NCGS* 153A-323, the Commissioners shall cause notice of such hearing to be published in a newspaper of general circulation in the County once a week for two (2) successive calendar weeks. The notice shall be published the first time not less than ten (10) days nor more than 25 days prior to the date fixed for the hearing. The notice shall include the time, place and date of the hearing and include a description of the property or the nature of the change or amendment to map. In computing such period, the day of publication is not to be included but the day of the hearing shall be included.