Procedures for Judicial Review

CHAPTER 29

The overwhelming majority of land use decisions by local governments are not challenged in court. Several surveys conducted by the School of Government indicate that judicial review is sought for only a handful of variance, special or conditional use permit, or zoning amendment decisions. Table 29.1 summarizes these reported judicial appeal rates.[1] Still, given the volume of decisions made, the courts are called upon to review a sizable number of land use regulatory decisions each year, and it is typically the most controversial and complicated cases that come before the courts.

Form of Action

While the occasional case is appropriate for federal courts,[2] most litigation on land use regulatory ordinances takes place in state courts.

Challenges to legislative land use regulatory decisions are brought under Sections 1-253 to -267 of the North Carolina General Statutes (hereinafter G.S.), the state's declaratory judgment statute. These provisions may be used to address disputes regarding the constitutionality, validity, or construction of ordinances.[3] However, they do not allow for advisory opinions or judgments before a genuine controversy arises. A legislative regulatory decision is not reviewable upon a writ of certiorari.[4]

Appeals of quasi-judicial land use regulatory decisions are reviewed by the superior court in proceedings in the nature of certiorari.[5] In most instances judicial appeals of administrative land use decisions will also be in the nature of certiorari.[6]

G.S. 160A-393(c) sets the requirements for a petition for writ of certiorari. The petition must contain the basic facts that establish standing, the grounds of the alleged error, the facts that support any alleged conflict of interest,[7] and the relief the person seeks from the court. G.S. 160A-393(f) provides that upon filing the petition, the petitioner shall submit to the clerk of superior court a proposed writ. The proposed writ must include a direction to the responding

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1. David W. Owens, Zoning Amendments in North Carolina 18 (School of Government, Special Series No. 24, 2008).

2. See Chapter 23 regarding federal statutory claims. Chapters 24 through 28 also discuss federal constitutional claims that may serve as the foundation for litigation in federal courts.

3. Taylor v. City of Raleigh, 290 N.C. 608, 620, 227 S.E.2d 756, 583 (1976); Blades v. City of Raleigh, 280 N.C. 531, 544, 187 S.E.2d 35, 42 (1972); Vill. Creek Prop. Owners' Ass'n, Inc. v. Town of Edenton, 135 N.C. App. 482, 520 S.E.2d 793 (1999).

4. *In re* Markham, 259 N.C. 566, 569, 131 S.E.2d 329, 332, *cert. denied*, 375 U.S. 931 (1963); Massey v. City of Charlotte, 145 N.C. App. 345, 355, 550 S.E.2d 838, 845, *review denied*, 354 N.C. 219, 554 S.E.2d 342 (2001).

5. In 2009 the General Assembly codified most of the provisions for judicial review of quasi-judicial zoning decisions as G.S. 160A-393. G.S. 153A-349 makes this section applicable to appeals of county quasi-judicial zoning decisions. *Also see* G.S. 153A-345(e2) and 160A-388(e2). An appeal of a decision not to consider an application for a quasi-judicial permit due to an incomplete application must also be made in the nature of certiorari. Northfield Dev. Co., Inc. v. City of Burlington, 165 N.C. App. 885, 599 S.E.2d 921, *review denied*, 359 N.C. 191, 607 S.E.2d 278 (2004). Appeals of quasi-judicial decisions made under other development ordinances (such as subdivision regulations) are reviewed in the same manner. G.S. 160A-377 and 153A-336. In *Hemphill-Nolan v. Town of Weddington*, 153 N.C. App. 144, 568 S.E.2d 887 (2002), which involved denial of a variance for a cul-de-sac length limit in a subdivision ordinance, the court held that the superior court has discretion to grant a writ of certiorari "in proper cases" and that this was such a case.

6. Administrative decisions under zoning ordinances are appealed first to the board of adjustment, and the board's decision can subsequently be appealed to superior court in the nature of certiorari. G.S. 153A-345(e); 160A-388(e), -393(b)(3). Uncertainty arises with administrative land use regulatory decisions that are made under ordinances other than zoning where the ordinance involved does not provide for an appeal to the board of adjustment. It is likely that such an appeal would also be a "proper case," as the court held in *Hemphill-Nolan v. Town of Weddington*, 153 N.C. App. 144, 148, 568 S.E.2d 887, 889–90 (2002).

7. An allegation of improper conflict of interest must be made in a timely fashion. In *McMillan v. Town of Tryon*, 200 N.C. App. 228, 683 S.E.2d 747 (2009), the appellate court upheld the trial court's decision not to allow a complaint to be amended to add a conflict of interest allegation when the motion to amend was filed nearly a year after the initial complaint and a week after the defendants motion for summary judgment with supporting affidavits. The court noted that even if the defendants' motion added new information about the details of the case, the plaintiff's failure to undertake any discovery until that point should not burden the defendants. Thus the court held that the trial court did not abuse its discretion in denying the motion to amend the complaint.

Table 29.1 **Frequency of Judicial Review Sought**

Type of Approval (Year Surveyed)	Total Number Sought	Percent (%) Appealed to Court
Variance Petitions (2002)	1,806	2.5
Special and Conditional Use Permit Applications (2004)	2,207	1.6
Zoning Map Amendments (rezonings) (2006)	3,029	0.9

local government to prepare and certify to the court by a specified date the record of the board's proceedings on the matter. The petition is filed with the clerk of superior court in the county in which the matter arose. The clerk then issues the writ ordering the city or county to prepare and certify to the court the record. The petitioner must serve the writ upon all respondents, following the same rules for service of a complaint in a civil suit. No summons is to be issued.[8] The clerk is directed to issue the writ without notice to the respondent(s) if the petition is properly filed and is in proper form.

The respondent may, but is not required to, file an answer to the petition for writ of certiorari.[9] The common practice in North Carolina is not to file such an answer. Rather, the record of the quasi-judicial proceeding is submitted and the parties deal with the merits of the matter through motions to dismiss or at trial. However, an answer must be filed to contest standing, and that answer must be served on all petitioners at least thirty days prior to the hearing on the petition.[10]

In general it is inappropriate to challenge a legislative decision as part of judicial review of a quasi-judicial or administrative decision applying the ordinance.[11] In *Simpson v. City of Charlotte*,[12] a neighbor appealed to the board of adjustment the zoning administrator's decision to issue a permit for expansion of a quarry. The board upheld the decision to issue the permit, and that decision was then appealed to superior court. The trial court held the ordinance provision at issue to be invalid. The court of appeals overturned that determination, holding that the board of adjustment had the authority only to grant or deny the permit and that the trial court through its derivative appellate jurisdiction could therefore not go beyond that issue to address the validity of the ordinance.

The constitutionality of an ordinance provision cannot be challenged in a certiorari review of a board of adjustment decision. In *Batch v. Town of Chapel Hill*,[13] the court held that it was an error to join a complaint alleging constitutional causes of action (a taking and denial of equal protection) with a petition for writ of certiorari seeking review of denial of subdivision approval under the city's development ordinance. When an applicant has received a permit and benefited thereby, the applicant may not later attack the validity of the ordinance.[14] In *Dobo v. Zoning Board of Adjustment*,[15] the court held that a petitioner cannot raise a constitutional challenge in the course of appealing a zoning officer's interpretation of the ordinance. In these cases, the board of adjustment has no authority to rule on the constitutionality of the ordinance, and the superior court is limited to review of whether the board properly affirmed or overruled the officer's determination.

Because of these limitations, it is appropriate for a plaintiff to bring two separate actions when he or she is both challenging the validity of an ordinance and seeking review of an individual decision pursuant to that ordinance. For example, in *Cary Creek Ltd. Partnership v. Town of Cary*,[16] the town's development ordinance included a riparian buffer requirement. After the plaintiffs were denied a variance from the buffer requirements they brought a declaratory judgment action challenging the validity of the ordinance. The court held that the plaintiff's separate certiorari proceeding challenging

8. Petitions for certiorari for superior court review of quasi-judicial decisions are not the equivalent of a beginning of an action. Garrity v. Morrisville Zoning Bd. of Adjustment, 113 N.C. App. 273, 444 S.E.2d 653, *review denied*, 337 N.C. 692, 448 S.E.2d 523 (1994) (petition for writ of certiorari need not be verified); Little v. City of Locust, 83 N.C. App. 224, 349 S.E.2d 627 (1986), *review denied*, 319 N.C. 105, 353 S.E.2d 111 (1987).

9. G.S. 160A-393(g).

10. G.S. 160A-393(g). Answers may also be used to challenge jurisdiction prior to submittal of the record.

11. Some cases have allowed challenges to the validity of a zoning requirement when the ordinance is applied. See, for example, *White v. Union County*, 93 N.C. App. 148, 377 S.E.2d 93 (1989), a case challenging the denial of a special use permit to establish electrical power to a mobile home. The court concluded that the plaintiff could directly challenge the validity of the ordinance requirement in the suit, provided the action was brought within the appropriate statute of limitations for legislative zoning decisions.

12. 115 N.C. App. 51, 443 S.E.2d 772 (1994). The court has held that the General Assembly may, by local legislation, specifically authorize legislative zoning decisions in an individual jurisdiction to be reviewed in a petition for certiorari. Gossett v. City of Wilmington, 124 N.C. App. 777, 478 S.E.2d 648 (1996).

13. 326 N.C. 1, 11, 387 S.E.2d 655, 661–62, *cert. denied*, 496 U.S. 931 (1990). Grounds for review in the nature of certiorari include reviewing for errors in law and for arbitrary and capricious decisions, so some overlap in issues raised is possible. See also *Guilford County Department of Emergency Services v. Seaboard Chemical Corp.*, 114 N.C. App. 1, 10–11, 441 S.E.2d 177, 182, *review denied*, 336 N.C. 604, 447 S.E.2d 390 (1994), where the court held that the superior court would not have jurisdiction to adjudicate a takings claim in a certiorari review but would have jurisdiction in an original action. There is also the issue of exhaustion of administrative remedies through application for permits and pursuit of available administrative appeals prior to making a constitutional challenge of an ordinance.

14. River Birch Assocs. v. City of Raleigh, 326 N.C. 100, 388 S.E.2d 538 (1990); Convent of Sisters v. City of Winston-Salem, 243 N.C. 316, 90 S.E.2d 879 (1956); Wake Forest Golf & Country Club, Inc. v. Town of Wake Forest, ___ N.C. App. ___, 711 S.E.2d 816 (2011); Shell Island Homeowners Ass'n, Inc. v. Tomlinson, 134 N.C. App. 217, 226, 517 S.E.2d 406, 413 (1999); Franklin Rd. Props. v. City of Raleigh, 94 N.C. App. 731, 735, 381 S.E.2d 487, 490 (1989); Goforth Props., Inc. v. Town of Chapel Hill, 71 N.C. App. 771, 323 S.E.2d 427 (1984). If, however, a permit was not actually required, then the permittee can subsequently challenge the enforceability of conditions on that permit. Stegall v. Zoning Bd. of Adjustment, 87 N.C. App. 359, 361 S.E.2d 309 (1987), *review denied*, 321 N.C. 480, 364 S.E.2d 679 (1988). *See also* Buckland v. Town of Haw River, 141 N.C. App. 460, 541 S.E.2d 497 (2000) (authority to impose off-site conditions on subdivision plat approval).

15. 149 N.C. App. 701, 706, 562 S.E.2d 108, 111–12 (2002), *rev'd on other grounds*, 356 N.C. 656, 576 S.E.2d 324 (2003). *See also* 321 News & Video, Inc. v. Zoning Bd. of Adjustment, 174 N.C. App. 186, 619 S.E.2d 885 (2005).

16. ___ N.C. App. ___, 690 S.E.2d 549 (2010).

the variance denial did not deprive the court of subject matter jurisdiction to hear this declaratory judgment action as these two legal actions must be brought separately.

There are also substantial limits on the ability to challenge the validity of an ordinance in the judicial review of an enforcement action. The time to challenge a permit decision or its conditions arises at the time of permit decision, not when it is enforced.[17] If an appeal challenges whether or not there was a violation or whether the particular enforcement remedy is appropriate, an initial appeal must be made to the board of adjustment. The enforcement action may not be collaterally attacked in subsequent judicial actions.[18]

Briefs and Fees

Briefs on appeal must meet all standard requirements, including setting out a full and complete statement of the facts and each argument and stating each question separately with pertinent assignments of error and appropriate references to the record on appeal.[19]

Successful litigants may not recover attorney fees as costs or damages unless that is expressly authorized by statute.[20] Among the statutes allowing for recovery of attorney fees are G.S. 6-19.1, if the court finds that a state agency has acted without substantial justification; G.S.6-21.5, if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party; G.S. 6-21.6, if a city or county has acted outside the scope of its legal authority and the court finds that action was an abuse of discretion; G.S. 19-8, for nuisance abatement actions; G.S. 41A-7, for enforcement actions under the State Fair Housing Act; G.S. 106-804, for enforcement of the Swine Farm Siting Act; G.S. 132-9, for securing disclosure of unlawfully withheld public records or for making a bad faith or frivolous claim regarding public records;[21] and G.S. 143-318.16B, for enforcement of the open meetings law.[22] As there is no statutory authority for such, attorney fees are generally not available in land use litigation.

Rule of Civil Procedure 65(e) does allow an award of damages upon dissolving a temporary restraining order or preliminary injunction. The court in *Schwarz Properties, LLC v. Town of Franklinville*[23] noted that a showing of malice or want of probable cause for the preliminary injunctive relief is not a prerequisite to the award of costs in this context.

When a plaintiff brings a successful action under Section 1983 of U.S. Code Title 42 regarding a violation of constitutional rights, Section 1988 under the same Title allows the prevailing plaintiff to recover attorney fees.[24] If, however, the plaintiff in such an action

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17. *See, e.g.*, Town of Pinebluff v. Marts, 195 N.C. App. 659, 663, 673 S.E.2d 740, 743 (2009); Forsyth Cnty. v. York, 19 N.C. App. 361, 364–65, 198 S.E.2d 770, 772, *cert. denied*, 284 N.C. 253, 200 S.E.2d 653 (1973).

18. Cnty. of Durham v. Addison, 262 N.C. 280, 283–84, 136 S.E.2d 600, 603 (1964); State v. Roberson, 198 N.C. 70, 150 S.E. 674 (1929); Appalachian Outdoor Adver. Co. v. Town of Boone, 103 N.C. App. 504, 406 S.E.2d 297 (1991); New Hanover Cnty. v. Pleasant, 59 N.C. App. 644, 297 S.E.2d 760 (1982); City of Elizabeth City v. LFM Enters., Inc., 48 N.C. App. 408, 269 S.E.2d 260 (1980); City of Hickory v. Catawba Valley Machinery Co. II, 39 N.C. App. 236, 249 S.E.2d 851 (1978). See the discussion of the requirement to exhaust administrative remedies below. Also see the discussion of enforcement in Chapter 21.

19. Northwood Homeowners Ass'n v. Town of Chapel Hill, 112 N.C. App. 630, 436 S.E.2d 282 (1993). In *Walsh v. Town of Wrightsville Beach*, 361 N.C. 348, 644 S.E.2d 224 (2007) (per curiam), the town had issued building permits for two single-family beach cottages on an adjacent lot formerly owned by the plaintiff. The plaintiff appealed the staff determination (which had been upheld by the board of adjustment) that the property contained two rather than one buildable lot. The court of appeals, 179 N.C. App. 97, 632 S.E.2d 271 (2006), upheld the trial court's dismissal for failure to include clear references in the record or transcript for the assignment of error and a failure of the appellate brief to reference a clear assignment of error for each question presented. The supreme court reversed and remanded for reconsideration in light of new directions for rules for application of sanctions and discretion in application of rules of appellate procedure. On remand, in an unpublished opinion the court of appeals again upheld the trial court's dismissal, noting that even though the plaintiff owned adjoining property, there had been no allegation of the requisite special damages, and thus the plaintiff had not established standing. 2007 WL 3256669 (N.C. Ct. App. Nov. 6, 2007), *appeal dismissed*, 657 S.E.2d 891 (N.C. 2008).

20. Stillwell Enters., Inc. v. Interstate Equip. Co., 300 N.C. 286, 289, 266 S.E.2d 812, 814 (1980). *See also* Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 602 (2001); Cnty. of Hoke v. Byrd, 107 N.C. App. 658, 668, 421 S.E.2d 800, 806 (1992) (county not entitled to attorney fees in an action to enforce junkyard-screening ordinance).

21. In *Quality Built Homes, Inc. v. Village of Pinehurst*, No. 1:06CV1028, 2008 WL 3503149 (M.D.N.C. Aug. 11, 2008), the village was awarded attorney fees for defending a frivolous public records claim. The plaintiff requested certified copies of the zoning amendments and council minutes on the last working day prior to the Christmas holiday. The records were made available the first working day after the Christmas holiday (the plaintiff contended they were not available until the day after the New Year's holiday). The court held that there is no legal right to immediate production and the records were clearly provided in a reasonable time period.

22. For an example of a case awarding attorney fees under such a statutory authorization, see *Table Rock Chapter of Trout Unlimited v. Environmental Management Commission*, 191 N.C. App. 362, 663 S.E.2d 333 (2008) (allowing attorney fees pursuant to G.S. 6-19.1 when state agency decision not to reclassify waters was successfully challenged as being without substantial justification and there were no special circumstances that would make the award unjust). In *Williams v. North Carolina Department of Environment & Natural Resources*, 166 N.C. App. 86, 601 S.E.2d 231 (2004), the court held that it was improper to award attorney fees where a regulatory decision is ultimately overturned by the court but there was conflicting evidence and a difficult factual determination at issue (in this case, determining whether the property included coastal wetlands). The court noted that when a reasonable person could have agreed with the agency, their decision could not be characterized as "without substantial justification."

23. ___ N.C. App. ___, 693 S.E.2d 271 (2010). The plaintiff had sued to invalidate an age restriction in a mobile home regulation and had secured a temporary restraining order (TRO) precluding denial of permits for location of manufactured homes during the litigation. Following a hearing, the trial court dissolved the TRO, allowed the town to revoke permits issued while it was in effect, dismissed the plaintiff's claims, and awarded damages to the town for the costs of defending the matter. The court of appeals upheld the award of costs (equal to the town's liability insurance deductible).

24. *See, e.g.*, Amward Homes, Inc. v. Town of Cary, ___ N.C. App. ___, 698 S.E.2d 404 (2010), *review granted*, 709 S.E.2d 597 (2011). The plaintiff successfully contended that the collection of school impact fees that were

prevails on statutory grounds and the constitutional issues are not addressed, no attorney fees are available.[25]

Parties and Standing

Proper Parties

Care must be exercised in identifying the proper governmental party in a suit challenging a land development regulatory decision.[26]

For a legislative decision, the governmental unit itself, not the governing board or its individual members, is the proper party if the decision is being challenged.[27] If monetary damages are being sought, board members may be sued in their individual as well as their official capacities.[28]

For quasi-judicial decisions, G.S. 160A-393(e) provides that the respondent to the petition for writ of certiorari is the local government, not the individual board making the decision.[29] If the petition for review is brought by the unit of government itself, the respondent is to be the decision-making board. If the petitioner is not the applicant for the decision being contested, the applicant must also be named as a respondent. A petitioner may also name as a respondent any owner or lessee of the property subject to the application if that person participated in the hearing or was the applicant.[30]

When an error is made in identifying proper parties, a complaint may be amended to add the proper parties. However, in *City of Raleigh v. Hudson Belk Co.*,[31] the N.C. Court of Appeals held that the trial court has no responsibility to add a necessary party on its own motion and may properly dismiss a case where the petitioner did not name the proper board as a party and made no request of the judge to do so. Also, a motion to amend the complaint must be made in a timely fashion. In *Piland v. Hertford County Board of Commissioners*,[32] an action challenging a rezoning, the complaint improperly named the board of commissioners rather than the county itself as a defendant. The court held that while the trial court may grant a motion to amend the complaint to amend the name of the proper parties, such an amendment does not relate back to the original filing. Thus if a necessary party is not included prior to the running of the applicable statute of limitations, the suit will be time-barred and this cannot be corrected by the motion to amend.

not statutorily authorized violated substantive due process, thus entitling recovery of attorney fees and costs (some $368,000 in this case) in addition to a refund of the fees collected.

25. In *Giovanni Carandola, Ltd. v. City of Greensboro*, No. 1:05CV1166, 2007 WL 703333 (M.D.N.C. Mar. 1, 2007), *aff'd per curiam*, 258 F. App'x 512 (4th Cir. 2007), the plaintiffs challenged the city's adult entertainment regulations. The plaintiffs' challenge of the ordinance consisted of two constitutional claims and a third claim contending the city's interpretation of the ordinance was incorrect as a matter of law. The court granted summary judgment for the plaintiffs on the statutory interpretation claim (finding that they were "grandfathered" by the terms of the ordinance). The court held that since the plaintiffs had not prevailed on the two constitutional claims, however, attorney fee awards were not permissible.

26. For the general provisions on parties in civil actions, see G.S. 1-57 to -72.1.

27. In an action challenging a rezoning, the court noted "[u]ndoubtedly, the real party in interest in this case is Hertford County, not the Board of Commissioners." Piland v. Hertford County Bd. of Comm'rs, 141 N.C. App. 293, 296, 539 S.E.2d 669, 671 (2000). G.S. 153A-11 and 160A-11 provide that the county and city are corporate entities to sue and be sued in their own names and the courts have long held that the governmental entity itself is the proper party rather than its officers. Lenoir Cnty. v. Crabtree, 158 N.C. 357, 74 S.E. 105 (1912) (county must sue and be sued in its own name); Young v. Barden, 90 N.C. 424 (1886) (city must be sued in its corporate name). G.S. 1-260 also requires that the N.C. Attorney General be served with a copy of the proceedings in any action alleging the unconstitutionality of an ordinance. *See also* Macon Cnty. v. Town of Highlands, 187 N.C. App. 491, 654 S.E.2d 17 (2007) (holding that neither the county nor individual commissioners were proper parties entitled to challenge the town's methods of computing the number of extraterritorial members to be appointed to the town planning board and board of adjustment).

In federal actions, suit against individuals in their official capacity is equivalent to suit against the governmental entity. Kentucky v. Graham, 473 U.S. 159, 165–67 (1985). Therefore individuals named in their official capacity will be dismissed as parties.

28. See Chapter 21 for a discussion of liability of the governmental unit and individual board members or employees for monetary damages.

29. Prior to the 2009 addition to the statutes of this explicit provision regarding respondents, courts had held the board making a quasi-judicial decision (as opposed to the jurisdiction itself or the individual board members) is a necessary party in a judicial appeal of a quasi-judicial decision. In *Mize v. County of Mecklenburg*, 80 N.C. App. 279, 341 S.E.2d 767 (1986), which involved an action challenging a zoning officer's interpretation, the court held that the board of adjustment is an independent body, not an agent of the county commissioners, and is hence a necessary party. Likewise, in *City of Raleigh v. Hudson Belk Co.*, 114 N.C. App. 815, 443 S.E.2d 112 (1994), involving an appeal by the city of the board of adjustment's reversal of the zoning officer's interpretation of sign limitations, the city failed to join the board of adjustment as a necessary party and the action was therefore dismissed. *See also In re* Appeal of Harris, 273 N.C. 20, 159 S.E.2d 539 (1968) (statutes providing for judicial review of administrative decisions should be liberally construed to preserve the right of appeal).

30. In an enforcement action seeking injunctive relief regarding an alleged sedimentation and erosion control ordinance violation, the court held that the landowner was a necessary party. Durham Cnty. v. Graham, 191 N.C. App. 600, 663 S.E.2d 467 (2008). The defendant secured a land disturbance permit for a landfill. The county issued a notice of violation alleging more than an acre had been disturbed, the fill had extended into a floodplain, and the sediment had not be contained onsite. The county sought an injunction to compel restoration and compliance with the terms of the permit. Subsequent to the permit and notice of violation, the property changed hands, went into foreclosure, and title was transferred to the lender. The court held that the current owners of the property were necessary parties as their rights to use the property would be affected by an injunction. The court held that lien holders were not necessary parties, nor was the city (which would have to permit the remedial actions being sought).

31. 114 N.C. App. 815, 443 S.E.2d 112 (1994).

32. 141 N.C. App. 293, 539 S.E.2d 669 (2000). The basic rule on relation back is set forth in *Crossman v. Moore*, 341 N.C. 185, 459 S.E.2d 715 (1995).

Individual Standing

A suit challenging a land development regulatory decision must be brought by a party with standing, that is, one whose legal rights are affected by the decision.[33] If the plaintiff in a suit challenging a decision does not establish that he or she has standing, the superior court has no subject matter jurisdiction to hear the case. The burden of establishing standing is on the party bringing the action.[34]

The United States Supreme Court in *Lujan v. Defenders of Wildlife* held that the "irreducible constitutional minimum" of standing contains three elements:

1. "injury in fact"-an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;
2. the injury is fairly traceable to the challenged action of the defendant; and
3. it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[35]

North Carolina courts generally apply this same basic test.[36]

Legislative Decisions

The basic rule for standing to challenge legislative decisions in state court in North Carolina is set forth in *Taylor v. City of Raleigh.*[37] The court there ruled that challenges to legislative zoning decisions could be brought only "by a person who [had] a specific personal and legal interest in the subject matter affected by the zoning ordinance and who [was] directly and adversely affected thereby."[38] A citizen or a taxpayer may not file a lawsuit as a member of the general public to bring a conceptual challenge to a legislative decision.[39] In *Taylor,* the challenge was brought not by adjoining landowners but by neighbors separated from the rezoned area by a 45-acre buffer area that was not rezoned. The court held that the plaintiffs lacked standing given the "minimal" effect of the rezoning on them. In reaching this conclusion the court considered (1) the modest additional uses allowed in the new district (the change was from R-4 to R-6, which allowed for increased density but not a substantial change in the type of uses); (2) the distance of the rezoned property from the plaintiffs' property (none of the challengers owned adjacent property, the closest piece being one-half mile from the rezoned property); and (3) the manner in which the plaintiffs had participated in the city's consideration of the matter (they had not protested before the lawsuit).[40]

A similar result was reached in *Davis v. City of Archdale.*[41] In this challenge to a rezoning, the court ruled that the alleged diminution of property values due to increased traffic and increased demands on overburdened utilities did not result in "special damages" distinct from those incurred by the rest of the community and that, therefore, the plaintiff had no standing to challenge the rezoning.[42] The use of the special damages test in the *Davis* case was taken

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33. "The gist of the question of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentations of issues upon which the court so largely depends for illumination of difficult constitutional questions." Stanley v. Dep't of Conservation & Dev., 284 N.C. 1, 28, 199 S.E.2d 641, 650 (1973) (quoting Flast v. Cohen, 392 U.S. 83, 99 (1968) (internal quotations omitted)). For general reviews of the law of standing for land use cases, see John D. Ayer, *The Primitive Law of Standing in Land Use Disputes: Some Notes from a Dark Continent*, 55 Iowa L. Rev. 344 (1969); Robert A. Hendel, Note, *The "Aggrieved Person" Requirement in Zoning*, 8 Wm & Mary L. Rev. 294 (1967).

34. Neuse River Found. v. Smithfield Foods, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51, *review denied*, 356 N.C. 675, 577 S.E.2d 628 (2003).

35. 504 U.S. 555, 560–61 (1992). *See also* Massachusetts v. Envtl. Prot. Agency, 549 U.S. 497, 517 (2007).

36. Marriott v. Chatham Cnty., 187 N.C. App. 491, 494, 654 S.E.2d 13, 16 (2007).

37. 290 N.C. 608, 227 S.E.2d 576 (1976). This case involved a challenge to Raleigh's annexation and rezoning of a 39.89-acre tract. For additional statements of the standing test for legislative zoning decisions, see *Grace Baptist Church v. City of Oxford*, 320 N.C. 439, 444, 358 S.E.2d 372, 375 (1987) (holding that a plaintiff must "produce evidence that he has sustained an injury or is in immediate danger of sustaining an injury as a result of enforcement" of the ordinance in order to have standing to challenge the constitutionality of a zoning ordinance provision), *Godfrey v. Zoning Board of Adjustment,* 317 N.C. 51, 344 S.E.2d 272 (1986), *Blades v. City of Raleigh,* 280 N.C. 531, 544, 187 S.E.2d 35, 42 (1972) ("owners of property in the adjoining area affected by the ordinance" have standing), *Zopfi v. City of Wilmington,* 273 N.C. 430, 160 S.E.2d 325 (1968), *Templeton v. Town of Boone*, ___ N.C. App. ___, 701 S.E.2d 709 (2010), *Musi v. Town of Shallotte*, 200 N.C. App. 379, 684 S.E.2d 892 (2009), and *Village Creek Property Owners' Ass'n v. Town of Edenton*, 135 N.C. App. 482, 520 S.E.2d 793 (1999).

38. *Taylor*, 290 N.C. at 620, 227 S.E.2d at 583. *See also* City of Shelby v. Lackey, 236 N.C. 369, 72 S.E.2d 757 (1952) (holding that if complaint failed to show how "neighbor" would be affected by zoning decision (e.g., whether he or she was town citizen or property owner or what nature of injury was), he or she should not be accepted as party plaintiff); Budd v. Davie Cnty., 116 N.C. App. 168, 171, 447 S.E.2d 449, 451, *review denied*, 338 N.C. 667, 453 S.E.2d 174 (1994) (adjacent and nearby property owner who has easement interest in part of the land being rezoned has standing to challenge rezoning).

39. For example, a challenge to Durham County's initial zoning ordinance brought by a group of citizens before enforcement of that ordinance was dismissed by the state supreme court. Fox v. Bd. of Comm'rs, 244 N.C. 497, 94 S.E.2d 482 (1956). The court ruled that, rather than going forward with building and then challenging the denial, the applicant had to follow procedures for appealing a permit denial to the board of adjustment and then make subsequent judicial appeal. The court found that "[p]laintiffs cannot present an abstract question and obtain an adjudication in the nature of an advisory opinion." *Id.* at 500, 94 S.E.2d at 485. Enactment of the ordinance can be enough in and of itself to create a genuine controversy for standing purposes, as, for example, when an amortization provision is adopted requiring removal of an existing land use.

40. Other states also use multiple factors in assessing standing in this context. *See, e.g.*, Reynolds v. Dittmer, 312 N.W.2d 75 (Iowa Ct. App. 1981) (consider proximity, character of neighborhood, type of zoning change, and statutory rights of notice of hearing).

41. 81 N.C. App. 505, 344 S.E.2d 369 (1986).

42. The court of appeals has noted in dicta that status as an adjoining or nearby owner, even without an allegation of a reduction in property value, might be sufficient to confer standing in a challenge to a legislative zoning decision in a declaratory judgment action. Concerned Citizens of Downtown Asheville v. Bd. of Adjustment, 94 N.C. App. 364, 366, 380 S.E.2d 130, 132 (1989).

from the cases on standing to challenge quasi-judicial zoning decisions.

Thrash Ltd. Partnership v. County of Buncombe[43] involved a facial challenge to the validity of an ordinance regulating multifamily dwellings that established different standards depending on the elevation of the property involved. The court held the plaintiff, who had not filed an application to develop, had standing to challenge the procedures by which the ordinance was adopted. The court noted that the fact that the plaintiff owned land that was subject to the regulations was sufficient for a facial challenge. The court distinguished such a facial challenge to the process of ordinance adoption from a challenge based on a claim that the ordinance was arbitrary or violated equal protection or some other constitutional principle. In the latter situations, known as "as applied" challenges, a particular application of the ordinance would be needed to assert a claim.[44] The court applied this same standing analysis in a companion case to *Thrash*, discussed just above, which challenged the process by which the county initially amended its zoning ordinance to extend it from partial county zoning to countywide coverage.[45] In *Templeton v. Town of Boone*,[46] the court distinguished standing for constitutional challenges from standing for statutory challenges of legislative decisions. For a constitutional challenge, the court held that a plaintiff must show an injury in fact or an immediate danger of injury as a result of enforcement of the challenged ordinance. For a statutory challenge, establishment of ownership of land affected by the challenged ordinance was held to be sufficient for standing.

Quasi-Judicial Decisions

The basic rule for standing to challenge quasi-judicial decisions is similar to the one applicable to legislative decisions, discussed in the preceding subsection, though it has a statutory dimension. G.S. 160A-393(d)[47] defines who can file a petition for writ of certiorari to review a quasi-judicial land use regulatory decision. This section specifies three categories of entities with standing to bring these judicial appeals. The first category covers those who applied for approval or who have a property interest in the project or property subject to the application.[48] This includes all persons with a legally defined interest in the property, including not only an ownership interest but also a leasehold interest, an option to purchase the property, or an interest created by an easement, restriction, or covenant. The local government whose board made the decision being appealed constitutes the second category. The third category of entities able to file a petition for writ of certiorari for review of a quasi-judicial land use regulatory decision includes other persons who will suffer "special damages" as a result of the decision. Included here are both individuals (such as a neighbor who contends the decision will adversely affect his or her property) and qualifying associations.

In a challenge of a special exception granted by Guilford County for a mobile home park the N.C. Supreme Court, in *Jackson v. Guilford County Board of Adjustment,*[49] stated that the following test was to be used for assessing standing in state court for quasi-judicial zoning decisions:

> The mere fact that one's proposed lawful use of his own land will diminish the value of adjoining or nearby lands of another does not give to such other person a standing to

43. 195 N.C. App. 727, 673 S.E.2d 689 (2009). The rules at issue here limited density, the height of buildings, parking standards, road construction, and the area of land disturbance. The ordinance was adopted using the procedures for a general police power ordinance rather than those required for a zoning ordinance. Also see *Amward Homes, Inc. v. Town of Cary*, ___ N.C. App. ___, 698 S.E.2d 404 (2010), *review granted*, 709 S.E.2d 597 (2011), where the court held that builders required to pay a school impact fee upon issuance of a building permit had standing to challenge the authority of the defendant town to impose the fee requirement on the developer of the subdivision involved in the case.

44. Andrews v. Alamance Cnty., 132 N.C. App. 811, 513 S.E.2d 349 (1999) (holding that a landowner had no standing to challenge the constitutionality of a mobile home park ordinance where no site plan or subdivision plat had been filed, no steps had been taken to develop the property, and no permits of any kind had been applied for or denied).

45. Thrash Ltd. P'ship v. Cnty. of Buncombe, 195 N.C. App. 678, 673 S.E.2d 706 (2009).

46. __ N.C. App. ___, 701 S.E.2d 709 (2010). A concurring in part and dissenting in part opinion in this case would have held an allegation of actual or threatened enforcement is only required for an as applied constitutional challenge but not for a facial constitutional challenge.

47. G.S. 153A-345(b) and 160A-388(b) provide that "any person aggrieved" may make appeals to the board of adjustment. These statutes also allow appeals by "an officer, department, board, or bureau" of the city or county involved. G.S. 153A-345(e) and 160A-388(e) provide for service of the decision of the board on "aggrieved parties." Prior to the adoption of G.S. 160A-393, the court held that the provision granting the county authority to appeal to the board of adjustment also provided standing for judicial appeals. Cook v. Union Cnty. Zoning Bd. of Adjustment, 185 N.C. App. 582, 588–89, 649 S.E.2d 458, 464–65 (2007).

48. Prior to adoption of this section in 2009, the law was not entirely clear as to how far this category extended beyond the owner of the fee interest in the property. The state high court held in *Humble Oil & Refining Co. v. Board of Aldermen,* 284 N.C. 458, 202 S.E.2d 129 (1974), that an option holder who had exercised his option subject to the necessary permits being obtained to develop the property had standing to participate in a review of those zoning permits. In *Habitat for Humanity of Moore County, Inc. v. Board of Commissioners of the Town of Pinebluff*, 187 N.C. App. 764, 653 S.E.2d 886 (2007), the ordinance specifically allowed conditional use permit applications and subdivision plats to be submitted by landowners, their agents, or persons who have contracted to purchase the property. The plaintiff organization's director testified at the permit hearing that his group had an option to purchase, and the council found the application to be complete. The court held that this was sufficient to establish standing for the plaintiff to file the application and pursue the appeal. *See also* Cox v. Hancock, 160 N.C. App. 473, 586 S.E.2d 500 (2003) ("prospective vendee" is real party in interest in special use permit application and litigation). Similarly, the state court of appeals had held that a person bound by contract to purchase the land in question also has standing. Deffet Rentals, Inc. v. City of Burlington, 27 N.C. App. 361, 219 S.E.2d 223 (1975). By contrast, the N.C. Supreme Court had held that a mere optionee did not have standing. Lee v. Bd. of Adjustment, 226 N.C. 107, 37 S.E.2d 128 (1946). Also, in *Wil-Hol Corp. v. Marshall*, 71 N.C. App. 611, 322 S.E.2d 655 (1984), the appeals court ruled that the estranged wife of a month-to-month lessee whose lease had been terminated had no interest in property sufficient to confer standing to challenge the applicability of a zoning ordinance.

49. 275 N.C. 155, 166 S.E.2d 78 (1969).

> maintain an action, or other legal proceeding, to prevent such use. If, however, the proposed use is unlawful, as where it is prohibited by a valid zoning ordinance, the owner of adjoining or nearby lands, who will sustain special damage from the proposed use through a reduction in the value of his own property, does have a standing to maintain such proceeding. . . . If, however, that which purports to be an amendment is, itself, invalid, the prohibition upon the use remains in effect. In that event, the owner of other land, who will be specifically damaged by such proposed use, has standing to maintain a proceeding in court to prevent it.[50]

In a series of cases applying this "special damages" test for standing to appeal quasi-judicial zoning decisions, the courts have held that appellants must present evidence both that they are owners of affected property[51] and that they will suffer special damages distinct from the rest of the community.[52] Mere proximity of land ownership is insufficient.[53] In *Smith v. Forsyth County Board of Adjustment*,[54] an adjacent owner sought to challenge an ordinance interpretation allowing a new church and associated athletic fields. The court held that the plaintiff had failed to establish that she was a "person aggrieved" with standing to appeal to the board of adjustment, as an allegation of mere proximity, absent an allegation of special damages distinct from the community, is insufficient to establish standing. Without standing to appeal to the board of adjustment, the question of standing for judicial review was held to be moot.

It is not necessary to show a negative property value impact in order to establish special damages. In *Mangum v. Raleigh Board of Adjustment*,[55] two adjacent owners and an additional neighboring business owner challenged a special use permit issued for an adult entertainment establishment. The court held that a credible allegation of special damages is necessary to qualify as an "aggrieved person." The court found that allegations of parking, stormwater, and crime problems are sufficient to establish "special damages" and, contrary to suggestions in earlier cases, that a plaintiff is not required to also show that property values would be reduced as a result of the special use permit. Other cases have allowed alleged harms based on traffic and noise to be considered without explicit reference to property value impacts.[56]

The potential for special damages may be established by affidavits or testimony. In *Murdock v. Chatham County*,[57] the plaintiffs alleged in their complaint that they owned land adjoining the larger tract at issue in the case and presented evidence about the adverse impacts on their property from the lights, noise, and stormwater runoff from the site should the project proposed be built. The court held this was sufficient to establish the requisite special damages.[58] Expert testimony about the inappropriateness of a proposed use is also adequate to establish the requisite special damages.

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50. *Id.* at 161, 166 S.E.2d at 82–83 (citations omitted). The opinion implies use of the same standing standard for legislative matters. *See also* Lee v. Bd. of Adjustment, 226 N.C. 107, 37 S.E.2d 128 (1946).

51. Pigford v. Bd. of Adjustment, 49 N.C. App. 181, 270 S.E.2d 535 (1980), *review denied*, 301 N.C. 722, 274 S.E.2d 230 (1981).

52. Sanchez v. Town of Beaufort, ___ N.C. App. ___, 710 S.E.2d 350 (2011) (neighbor directly across the street from property seeking a certificate of appropriateness from historical commission had special damages based on alleged violation of historic guidelines, loss of waterfront views, and depreciated property value); Cook v. Union Cnty. Zoning Bd. of Adjustment, 185 N.C. App. 582, 649 S.E.2d 458 (2007) (evidence in record showed residents of subdivision adjacent to proposed Wal-Mart would suffer special damages to their property that are unique in character and quantity and distinct from those inflicted on the community at large).

53. Casper v. Chatham Cnty., 186 N.C. App. 456, 651 S.E.2d 299 (2007) (neighboring landowners sought to challenge a conditional use permit for a retail use). Other states split on the question of whether proximity in and of itself is sufficient for standing. *See, e.g.*, Anundson v. City of Chi., 44 Ill. 2d 491, 496, 256 N.E.2d 1, 3–4 (1970) (any adjoining owner has standing); Anderson v. Swanson, 534 A.2d 1286, 1288 (Me. 1987) (abutters with some other allegation of injury have standing); Bryniarski v. Montgomery Cnty. Bd. of Appeals, 247 Md. 137, 145, 230 A.2d 289, 294 (1967) (adjoining and nearby property owners have prima facie special damages); Marashlian v. Zoning Bd. of Appeals, 421 Mass. 719, 721, 660 N.E.2d 369, 372 (1996) (abutters required to receive notice of hearing have a rebuttable presumption that they are persons aggrieved); Kalakowski v. John A. Russell Corp., 137 Vt. 219, 222, 401 A.2d 906, 908 (1979) (statute provides standing for those "in the immediate neighborhood").

54. 186 N.C. App. 651, 652 S.E.2d 355 (2007). *See also* Heery v. Town of Highlands Zoning Bd. of Adjustment, 61 N.C. App. 612, 300 S.E.2d 869 (1983) (showing of special damages distinct from those incurred by the rest of the community required for neighbors' standing to appeal granting of special use permit for multifamily housing). Sarda v. City/Cnty. of Durham Bd. of Adjustment, 156 N.C. App. 213, 575 S.E.2d 829 (2003) (allegation that petitioner resides 400 yards away from paintball playing field that received special use permit is insufficient alone to establish standing absent allegation of special damages); Lloyd v. Town of Chapel Hill, 127 N.C. App. 347, 489 S.E.2d 898 (1997).

55. 362 N.C. 640, 669 S.E.2d 279 (2008). *See also* Bailey & Assocs., Inc. v. Wilmington Bd. of Adjustment, ___ N.C. App. ___, 689 S.E.2d 576 (2010) (allowing neighbors standing to intervene on similar grounds).

56. *See* Taylor Home v. City of Charlotte, 116 N.C. App. 188, 447 S.E.2d 438 (1994); Kentallen, Inc. v. Town of Hillsborough, 110 N.C. App. 767, 431 S.E.2d 231 (1993) (allegation that plaintiff is owner of adjoining property is insufficient to confer standing without allegation relating to whether and in what respect that land would be adversely affected). *But see* Piney Mountain Neighborhood Ass'n v. Town of Chapel Hill, 63 N.C. App. 244, 304 S.E.2d 251 (1983) (allegation that members live in affected area and will potentially suffer injury sufficient to confer standing).

57. 198 N.C. App. 309, 679 S.E.2d 850 (2009), *review denied*, 363 N.C. 806, 690 S.E.2d 705 (2010). The plaintiffs also submitted affidavits from an appraiser and a real estate agent stating that the project would make the neighboring properties less attractive to potential purchasers. *See also* McMillan v. Town of Tryon, 200 N.C. App. 282, 287–88, 683 S.E.2d 743, 746–47 (2009) (neighbor's testimony at hearing regarding children walking in the street, impacts of increased stormwater, noise, and traffic were sufficient to establish standing to challenge conditional use permit).

58. *See also* Allen v. City of Burlington Bd. of Adjustment, 100 N.C. App. 615, 397 S.E.2d 657 (1990). In this case a Burlington property owner who objected to a community kitchen and a homeless shelter in his neighborhood was held to have established sufficient special damages through his own testimony.

The court applies a de novo review on a motion to dismiss for lack of standing. In this context the court views the allegations as true and in the light most favorable to the non-moving party.[59]

It is not necessary for those seeking judicial review to have formally intervened in the quasi-judicial hearing.[60]

Courts have applied a more general standing test outside of the zoning arena. In *Marriott v. Chatham County*,[61] the county approved several large developments on tracts adjacent to parcels owned by the plaintiffs without requiring an environmental impact statement. The court held that in order to have standing to challenge the decision on requiring an impact statement, the plaintiffs had to show: (1) injury in fact; (2) that the injury is fairly traceable to the challenged action; and (3) that it is likely the injury will be redressed by a favorable decision.

Courts apply similar rules on standing in challenges to permits under the highly analogous Administrative Procedure Act. In *Neuse River Foundation, Inc. v. Smithfield Foods, Inc.*,[62] the state appeals court held that the plaintiff had to allege (1) injury in fact to a protected interest that cannot be considered merged in the general public right, (2) causation, and (3) a proper or individualized form of relief. The court found that injury to aesthetic or recreational interests alone cannot confer standing on an environmental plaintiff as this is within the general public right.

The three-part standing tests enumerated in *Marriott* and *Neuse River Foundation* are substantially similar to the one used by federal courts. The federal standard for standing is set forth in the U.S. Supreme Court opinion in *Lujan v. Defenders of Wildlife*.[63] The Court there held that under Article III of the Constitution a plaintiff must show: (1) an actual, concrete, particularized injury in fact; (2) a causal connection between that injury and the defendant's actions; and (3) a likelihood that the injury can be redressed by a favorable decision in the case. Federal courts also consider prudential standing, asking whether the claim is sufficiently individualized to ensure effective judicial review.[64] Also, in federal court standing must be established for each particular claim raised, as standing to raise one claim does not open the door to raise any claim.[65]

The North Carolina statutes do not explicitly address the impact of jurisdictional boundaries on standing. In *Good Neighbors of South Davidson v. Town of Denton*,[66] the state supreme court took special note of the fact that those complaining of improper spot zoning were located outside of the jurisdiction of the offending town and had no political recourse regarding the challenged legislative zoning decisions. In the quasi-judicial context, the fact that affected property is outside of the jurisdiction of the decision-making jurisdiction has no bearing on whether or not the property will suffer special damages.

A plaintiff may, with good cause, be allowed to amend a defective petition for judicial review to add requisite allegations regarding standing. In *Darnell v. Town of Franklin*,[67] the plaintiff had appeared before the town's board of adjustment and town council (which had final decision-making authority for variances under the town's zoning ordinance) to object to a setback variance for an adjoining property owner. Upon issuance of the variance, the plaintiff filed a petition for writ of certiorari seeking judicial review of the variance decision. The petition stated that the plaintiff was an adversely affected property owner but contained no allegations specifying how the plaintiff was aggrieved by the decision. The town moved to dismiss for lack of subject matter jurisdiction. While that motion was under advisement, the plaintiff sought to amend her pleadings to add specific allegations of harm. The court held that while the initial petition was deficient, the plaintiff had clearly established by her participation in the matter before the town boards that she was affected by the action in a manner distinct from the rest of the community. Therefore the trial court should have allowed her to amend the petition under G.S.1A-1, Rule 15(a).

Standing considerations are complicated where there is a challenge of both a rezoning to a conditional use district and a concurrently issued conditional use permit. In *Village Creek Property Owners' Ass'n, Inc. v. Town of Edenton*,[68] the N.C. Court of Appeals noted that

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59. Mangum v. Raleigh Bd. of Adjustment, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008); McMillan v. Town of Tryon, 200 N.C. App. 282, 287–88, 683 S.E.2d 743, 746–47 (2009).

60. Cook v. Union Cnty. Zoning Bd. of Adjustment, 185 N.C. App. 582, 591, 649 S.E.2d 458, 466 (2007).

61. 187 N.C. App. 491, 654 S.E.2d 13 (2007), *review denied*, 362 N.C. 472, 666 S.E.2d 122 (2008). The county's subdivision ordinance contained a provision that allowed the planning board to require an environmental impact statement if the development exceeded two acres and the board deemed the statement "necessary for responsible review" due to the nature of the land or peculiarities in the proposed layout of the development. The plaintiffs sought to enjoin development of the property until the county amended its ordinance to provide minimum criteria for when an impact statement would be required and sought a writ of mandamus to compel the county to make these amendments. The court noted that an ordinance allowing an impact statement but providing no minimum criteria for when a statement is required is invalid. Since the ordinance as written is invalid and the court has no authority to order the ordinance amended, there is no likelihood the plaintiff's injury could be redressed by a favorable decision. Therefore the court held that the trial court properly dismissed the action for lack of standing.

62. 155 N.C. App. 110, 574 S.E.2d 48 (2002), *review denied*, 356 N.C. 675, 577 S.E.2d 628 (2003). In *County of Wake v. North Carolina Department of Environment & Natural Resources*, 155 N.C. App. 225, 573 S.E.2d 572 (2002), *review denied*, 357 N.C. 62, 579 S.E.2d 386 (2003), the court held that the individual neighbors who initiated the appeal of the permit issuance were aggrieved persons with standing to challenge the permit (they had alleged noise, pollution, landscape changes, and other negative environmental consequences that would interfere with the use and enjoyment of their property), as was the town (due to the impacts on its tax base and planning jurisdiction).

63. 504 U.S. 555, 560–61 (1992).

64. Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 11 (2004).

65. *See, e.g.*, Covenant Media of S.C., LLC v. City of N. Charleston, 493 F.3d 421, 429 (4th Cir. 2007) (standing to challenge lack of time period for decision in sign ordinance does not confer standing to challenge other substantive provisions in sign ordinance).

66. 355 N.C. 254, 559 S.E.2d 768 (2002).

67. 131 N.C. App. 846, 508 S.E.2d 841 (1998).

68. 135 N.C. App. 482, 520 S.E.2d 793 (1999). The court held that the requirement for a specific interest does not include the requirement for

conditional use district rezonings involve two legally distinct decisions—the rezoning decision and the permit decision. While the permit decision is properly challenged in the nature of certiorari, the rezoning decision is properly challenged by a declaratory judgment action. The court ruled that to establish standing, neighbors filing a declaratory judgment action to challenge a rezoning must allege a specific personal and legal interest in the matter and aver that they are directly and adversely affected by the decision.

As for appellate judicial review, only actual parties to litigation may appeal a trial court's decision. In *Duke Power Co. v. Salisbury Board of Adjustment*,[69] the appeals court held that the fact that neighbors were affected by a zoning decision, appeared at the board of adjustment hearing on a variance, and attended the trial court hearing on the matter did not confer upon them a right to appeal the trial court's decision absent their formal intervention in the judicial proceeding.[70]

Associational Standing

It is relatively common for a group, such as a neighborhood association, to seek to initiate or intervene as a party in a judicial challenge to a land use regulatory decision. This scenario presents the question of when the group itself, as distinct from its individual members, can be a party in zoning litigation.[71]

In some situations it is clear that there is no standing for a particular group. An association seeking standing must as a threshold matter establish its legal existence. If the group has been formally incorporated, such as by securing legal status as a nonprofit corporation, it must state that in its complaint.[72] If the group is an unincorporated nonprofit association, it may assert a claim in its name on behalf of its members "if one or more of them have standing to assert a claim in their own right, the interests the nonprofit association seeks to protect are germane to its purposes, and neither the claim asserted nor the relief requested requires the participation of a member or a person referred to as a 'member' by the nonprofit association."[73] If the unincorporated group is not a nonprofit association, it must have recorded a certificate of its activities with the county register of deeds in the county where it operates.[74] Failure to establish the legal existence of the group will result in dismissal of the group as a party.[75]

Also, if none of the individual members of a group have standing, the group does not have standing, as some member of the group must show actual harm in order to be aggrieved.[76]

A variety of zoning cases in North Carolina—some involving legislative zoning decisions and others quasi-judicial decisions—have allowed a group standing if some of its individual members had standing. For example, in *River Birch Associates v. City of Raleigh*,[77] the state's highest court noted that to have standing, the "complaining association or *one* of its members must suffer some immediate or threatened injury."[78] The court stated the general rule for associational standing as follows:

> An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.[79]

However, in a case challenging a rezoning, *Northeast Concerned Citizens v. City of Hickory*,[80] the state court of appeals held that contrary to the general rules on associational standing, since in a zoning context a person must have a specific personal and legal interest

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"special damages" as is the case for aggrieved parties seeking review of a quasi-judicial zoning decision by writ of certiorari. *Id.* at 485–86, 520 S.E.2d at 795–96. *See also* McMillan v. Town of Tryon, 200 N.C. App. 228, 683 S.E.2d 747 (2009).

69. 20 N.C. App. 730, 202 S.E.2d 607, *review denied*, 285 N.C. 235 (1974).

70. See, however, *Procter v. City of Raleigh*, 133 N.C. App. 181, 514 S.E.2d 745 (1999), in the discussion of permissive intervention, below.

71. Professor Mandelker notes that while the case law on this point is mixed nationally, the trend is toward granting organizations standing in a representational capacity. Daniel R. Mandelker, Land Use Law § 8.06 (5th ed. 2003). *See, e.g.*, Tri-Cnty. Concerned Citizens, Inc. v. Bd. of Cnty. Comm'rs, 32 Kan. App. 2d 1168, 95 P.3d 1012 (2004); Douglaston Civic Ass'n v. Galvin, 36 N.Y. 2d 1, 364 N.Y.S.2d 830, 324 N.E.2d 317 (1974).

72. "Any party not a natural person shall make an affirmative averment showing its legal existence and capacity to sue." G.S. 1A-1, Rule 9(a).

73. G.S. 59B-8(b). *See also* G.S. 1-69.1

74. G.S. 66-68. G.S. 1-69.1(a)(3) requires that the specific location of the recordation of this certificate must be included in the complaint of such an unincorporated association.

75. N. Iredell Neighbors for Rural Life v. Iredell Cnty., 196 N.C. App. 68, 674 S.E.2d 436, *review denied*, 363 N.C. 582, 682 S.E.2d 385 (2009).

76. Concerned Citizens of Downtown Asheville v. Bd. of Adjustment, 94 N.C. App. 364, 380 S.E.2d 130 (1989). *See also* Friends of Lincoln Lake v. Town of Lincoln, 2010 ME 78, 2 A.3d 284 (group has no standing to appeal permit for wind power project where no showing of particularized injury to member of group has been made).

77. 326 N.C. 100, 130, 388 S.E.2d 538, 555 (1990) (emphasis added). *See also* C.C. & J. Enters., Inc. v. City of Asheville, 132 N.C. App. 550, 512 S.E.2d 766, *review dismissed as improvidently granted*, 351 N.C. 97, 521 S.E.2d 117 (1999) (proper to allow an adjoining neighborhood association to intervene, as they had alleged special damages (reduced property values) to qualify as an aggrieved party); Piney Mountain Neighborhood Ass'n v. Town of Chapel Hill, 63 N.C. App. 244, 304 S.E.2d 251 (1983). *See generally* Creek Pointe Homeowners' Ass'n v. Happ, 146 N.C. App. 159, 552 S.E.2d 220 (2001), *review denied*, 356 N.C. 161, 568 S.E.2d 191 (2002).

78. 326 N.C. 100, 130, 388 S.E.2d 538, 555 (emphasis added).

79. *Id.* The N.C. Supreme Court took this standard from *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), and cited with approval *Warth v. Seldin,* 422 U.S. 490 (1975) (while holding no standing for plaintiffs challenging alleged exclusionary zoning of suburb, court noted that standing of one member confers standing on associational group). *See also* Sierra Club v. Morton, 405 U.S. 727 (1972) (if a member of the group suffers harm, the group has associational standing). The standard for associational standing is also discussed, but not decided, in *Wake Cares, Inc. v. Wake County Board of Education*, 190 N.C. App. 1, 9–10, 660 S.E.2d 217, 222–23 (2008), where the court held that the plaintiff association did not attempt to meet any of the standards for associational standing.

80. 143 N.C. App. 272, 545 S.E.2d 768, *review denied*, 253 N.C. 526, 549 S.E.2d 220 (2001). *See also* Landfall Group v. Landfall Club, Inc., 117 N.C. App. 270, 450 S.E.2d 513 (1994).

in the subject matter to have standing, in zoning cases a corporation must either have such an interest itself or *all* of its members/shareholders must have such an interest. Since the record in the case indicated that at most only twelve of the plaintiff nonprofit corporation's 114 members had such an interest, the court held that the plaintiff had no standing. The majority distinguished *River Birch Associates* as setting a general rule on associational standing and applying it to the unfair or deceptive trade practices element of that suit, while contending that zoning cases have a more demanding standing standard.[81] However, the *River Birch Associates* decision involved application of development ordinance requirements (authority to require transfers of required open space to a homeowners' association, effect of preliminary plat approval on dedications and vested rights, dedication of open space as a regulatory taking) and the standing of the association was assumed and not discussed by the court.[82] In contrast, the decision concluded with a holding that the association did not have standing to prosecute the fraud and unfair trade practice claims.[83] The *Northeast Concerned Citizens* concurrence would not have required each member of the association to have individual standing. It suggested using the following factors to determine if an association should have standing:

> (1) the capacity of the organization to assume an adversary position; (2) the size and composition of the organization as reflecting a position fairly representative of the community or interests which it seeks to protect; (3) the adverse effect of the decision sought to be reviewed on the group represented by the organization as within the zone of interests sought to be protected; and (4) whether full participating membership in the representative organization is open to all residents and property owners in the relevant neighborhood.[84]

The N.C. Supreme Court has indicated sympathy with this latter view. In *State Employees Ass'n of North Carolina, Inc. v. North Carolina*,[85] the court of appeals denied associational standing where all members of the group did not have standing. The dissent, largely relying on *River Birch Associates*, would have allowed standing for the association where a member had standing. In a per curiam opinion, the supreme court approved the views set forth in the dissent.[86]

The question of associational standing in appeals of quasi-judicial decisions was clarified in 2009 by the enactment of G.S. 160A-393(d). It provides that neighborhood associations and associations organized to protect and foster the interests of the neighborhood or local area have standing, provided at least one of the members of the association would have individual standing and the association was not created in response to the particular development that is the subject of the appeal.

Intervention

The rules for intervention in a judicial challenge to a quasi-judicial decision are set by G.S. 160A-393(h). The statute provides that Rule 24 of the Rules of Civil Procedure is to be applied, provided the applicant and persons with a property interest in the subject property can intervene as a matter of right and others must demonstrate that they would have had standing to initiate the proceeding.

Rule 24 generally provides that to intervene by right a person must show a statutory right to do so or show: (1) an interest in the property or transaction involved; (2) that disposition of the matter will as a practical matter affect that interest; and (3) that the person's interest is not adequately represented by the existing parties.[87] Rule 24 also provides for permissive intervention. In

81. The *Northeast Concerned Citizens* court concluded in a footnote that the standing requirements laid out in *Taylor v. City of Raleigh* (290 N.C. 608, 227 S.E.2d 576 (1976), discussed in the text above at note 37)—a specific and personal interest in the matter with a direct, adverse effect on the person—set a standing requirement for zoning challenges that is different from and more stringent than more general standards for associational standing in other contexts. *Northeast Concerned Citizens,* 143 N.C. App. at 277 n.1, 545 S.E.2d at 772 n.1.

82. 326 N.C. 100, 128, 388 S.E.2d 538, 554.

83. *Id.* at 129–30, 388 S.E.2d at 555–56.

84. *Northeast Concerned Citizens,* 143 N.C. App. at 280, 545 S.E.2d at 774. The concurring opinion contended that the majority view is contrary to the law on associational standing in other jurisdictions and may have the practical effect of "drastically curtail[ing] North Carolina citizens' ability to challenge zoning changes." *Id*. The quoted proposed standard on associational standing is taken from *Douglaston Civic Ass'n v. Galvin*, 324 N.E.2d 317, 321 (N.Y. 1974).

85. 154 N.C. App. 207, 573 S.E.2d 525 (2002).

86. *State Emps. Ass'n*, 357 N.C. 239, 580 S.E.2d 693 (2003). *See also* N.C. Forestry Ass'n v. N.C. Dep't of Env't & Natural Res., 357 N.C. 640, 588 S.E.2d 880 (2003) (holding trade association had standing to appeal a determination that new or expanding wood chip mills were excluded from coverage under a general timber products industry permit).

87. Bailey & Assocs., Inc. v. Wilmington Bd. of Adjustment, ___ N.C. App. ___, 689 S.E.2d 576 (2010) (allowing intervention by neighbors who alleged impacts from increased traffic, light, and noise would adversely affect the use and enjoyment of their property and adjacent protected waterways). *See generally* Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Natural Res., 361 N.C. 531, 648 S.E.2d 830 (2007); High Rock Lake Partners, LLC v. N.C. Dep't of Transp., ___ N.C. App. ___, 693 S.E.2d 361 (2010) (owner of property must be allowed to intervene as real party in interest in challenge to conditions imposed on a driveway permit application made by previous owner who subsequently assigned all rights to the landowner).

In a case decided prior to the adoption of G.S. 160A-393 in 2009, the plaintiff filed suit challenging denial of a conditional use permit for a single-family development. Neighbors sought to intervene in support of the board's denial, alleging that significant traffic increases as a result of a conditional use permit issuance would adversely affect their property values. The neighbors also alleged that the applicant and board intended to settle the suit by issuing the permit and sought a stay to prevent such action pending the outcome of the appeal. The trial court denied the motion to intervene on the basis that the neighbors did not have standing under the "special damages" test, discussed in the text above beginning at note 49 (and on the same day entered a consent judgment reversing the permit denial and remanding the case for further board proceedings). The court held that appellate review was not mooted by the settlement between the plaintiff and the board and that Rule 24 (rather than the special damages or aggrieved person standard) governs intervention in all civil actions. Councill v. Town of Boone Bd. of

Procter v. City of Raleigh Board of Adjustment,[88] neighbors had participated in a board of adjustment case and the board upheld the staff interpretation of the ordinance favored by the neighbors. Given the city's defense of the board decision in the trial court, the neighbors did not seek to intervene. But when the city decided not to appeal an adverse trial court ruling, the neighbors sought to intervene to pursue appellate court review. The trial court rejected the motion to intervene as not timely. The court of appeals reversed, concluding that the extraordinary and unusual circumstances of the case made intervention timely under Rule 24(a)(2). The court found that the neighbors had an interest in the transaction, an alleged practical impairment of that interest, and inadequate representation by the existing parties (and that the city's appeals had been adequate representation prior to the city's decision not to appeal the trial court's adverse ruling).

Statutes of Limitation

In the absence of a statute setting a time limit for challenging the validity of a legislative land use regulatory decision, a provision not included in the original zoning enabling act, courts apply the common law doctrine of laches.[89] This doctrine holds that if a person negligently fails to bring a claim within a reasonable amount of time, the claim will not be allowed if the lapse of time and other circumstances would serve to prejudice the rights of the party against whom the claim is made.

Three decisions in the late 1970s applied this doctrine to judicial challenges of legislative zoning decisions made from two to six years earlier. Two of these cases resulted in the challenges being dismissed, but the third allowed the challenge of a six-year-old rezoning.[90]

To resolve the uncertainty generated by these cases, the General Assembly established statutory timelines for bringing these challenges and has made several modification to those periods. In 1981 the legislature first added an explicit nine-month statute of limitations for challenges of legislative zoning decisions to the zoning enabling statutes. This time period was shortened to two months in 1996.[91] In 2011 the time period to challenge legislative decisions was extended to one year in many instances and as much as three years in others.[92] The statutes of limitation for legislative zoning decisions are codified in the civil procedure portions of the statutes. G.S. 1-54(10) sets the general rule of a one-year statute of limitations to contest the validity of a zoning or unified development ordinance other than some rezonings. The action accrues when the party bringing the action first has standing to do so, provided any challenge to the adoption process must be brought within three years of the challenged adoption. G.S. 1-54.1 sets a two-month statute of limitations for legislative zoning decisions that involve adopting or amending a zoning map or approving a request for a rezoning to a special or conditional use district or a conditional district, with such action accruing upon adoption of the ordinance or amendment. The zoning statutes restate these statutes of limitation and provide that they do not prohibit a party in a zoning enforcement action and persons appealing a notice of violation from raising the invalidity of the ordinance as a defense, provided that any challenge to the adoption process must be brought within three years of the challenged adoption.[93]

In a series of cases the courts have applied this statute to dismiss challenges to the validity of legislative zoning decisions.[94] The municipal provision was first applied in *Sherrill v. Town of Wrightsville Beach*,[95] in which the court held that G.S. 160A-364.1 prohibited a challenge to the validity of a zoning amendment brought more than

Adjustment, 146 N.C. App. 103, 551 S.E.2d 907 (2001). In *Lloyd v. Town of Chapel Hill*, 127 N.C. App. 347, 489 S.E.2d 898 (1997), the court applied the special damages test rather than Rule 24 to determine whether a party could intervene.

88. 133 N.C. App. 181, 514 S.E.2d 745 (1999).

89. Also see the discussion of laches and estoppel in the context of enforcement actions in Chapter 21.

90. In *Taylor v. City of Raleigh*, 290 N.C. 608, 227 S.E.2d 576 (1976), the court ruled that the challenge was barred by laches because it was filed more than two years after the rezoning, during which time both the city and the landowner had made substantial expenditures in reliance on the rezoning. Similarly, in *Capps v. City of Raleigh*, 35 N.C. App. 290, 241 S.E.2d 527 (1978), a suit initiated in 1975 to challenge the 1969 rezoning of an area from single-family residential to a district that allowed multifamily housing was dismissed. The defendants had spent more than $600,000 and had otherwise materially changed their position in reliance on the rezoning. Therefore the court of appeals held that the suit was barred by laches. By contrast, in *Stutts v. Swaim*, 30 N.C. App. 611, 228 S.E.2d 750, *review denied*, 291 N.C. 178, 229 S.E.2d 692 (1976), a suit initiated in June 1974 to challenge, as illegal spot zoning, the November 1968 rezoning of a 4-acre tract in the town of Randleman's extraterritorial area from single-family residential to a mobile home district was allowed. The court of appeals held that the challenge was not barred by laches because delay in bringing the action was alone insufficient to establish laches. Rather, there had to be an affirmative showing that the delay worked to the disadvantage, the injury, or the prejudice of the defendant. For a discussion of laches in enforcement cases, see Chapter 21.

91. 1996 N.C. Sess. Laws ch. 746. In *Reunion Land Co. v. Village of Marvin*, 129 N.C. App. 249, 497 S.E.2d 446 (1998), the court held that when the statute of limitations changes, plaintiffs must file their action within a reasonable time, but in no event beyond the new statute of limitations (here, within two months of the effective date of this legislative change, October 1, 1996).

92. S.L. 2011-384.

93. G.S. 153A-348(c); 160A-364.1(c).

94. The burden is on the defendant to plead an affirmative defense, including a statute of limitations. G.S. 1A-1, Rule 8(c). If the statute of limitations is raised as a defense, the long-standing and relatively unique rule in North Carolina is that the burden is then on the plaintiff to show that the claim is not time-barred. Lea Co. v. N.C. Bd. of Transp., 308 N.C. 603, 629, 304 S.E.2d 164, 18 (1983); Hooper v. Carr Lumber Co., 215 N.C. 308, 311, 1 S.E.2d 818, 820 (1939); Moore v. Westbrook, 156 N.C. 482, 492, 72 S.E. 842, 847 (1911); Amward Homes, Inc. v. Town of Cary, ___ N.C. App. ___, 698 S.E.2d 404 (2010), *review granted*, 709 S.E.2d 597 (N.C. 2011); Ga.-Pac. Corp. v. Bondurant, 81 N.C. App. 362, 363–64, 344 S.E.2d 302, 304 (1986).

95. 81 N.C. App. 369, 344 S.E.2d 357, *review denied*, 318 N.C. 417, 349 S.E.2d 600 (1986).

nine months after the rezoning (in this instance, a text amendment deleting duplexes as a permitted use). Similarly, the court held in *In re CAMA Minor Development Permit*,[96] a challenge to a zoning amendment by the town of Bath preventing additional marinas in town waters, that allegations of procedural irregularities regarding public notice and hearings on rezonings had to be brought within nine months of the adoption of the amendment. In *Thompson v. Town of Warsaw*,[97] the court of appeals applied this statute of limitations to bar a challenge to a "variance" issued by the town council that the plaintiffs contended was a de facto rezoning. In *Laurel Valley Watch, Inc. v. Mountain Enterprises of Wolf Ridge, LLC*,[98] the appeals court again applied this statute of limitations to litigation raising the question of whether the zoning map accurately reflected the actual zoning amendment made by the county commissioners. In *Schwarz Properties, LLC v. Town of Franklinville*,[99] the court applied this statute of limitations once again to prevent a challenge to zoning restrictions limiting the age of manufactured housing proposed to be located in the town. In *Templeton v. Town of Boone*,[100] the court applied this statute to a challenge of the procedures followed in adopting steep slope and viewshed protection ordinances incorporated into the town's unified development ordinance.

The county limitations provision was applied in *Baucom's Nursery Co. v. Mecklenburg County*.[101] The court there ruled that an action brought in 1987 to challenge a zoning amendment adopted in 1982 was barred by the nine-month statute of limitations established in G.S. 153A-348.

The municipal statute was applied to extraterritorial zoning in *In re Raynor*,[102] which involved the original adoption of zoning by the town of Garner for part of its extraterritorial jurisdiction in 1982 and a subsequent refusal to rezone the property at issue to a lower-intensity residential district in 1987. The court ruled that the statute of limitations in G.S. 160A-364.1 precluded a challenge to the zoning five years after the action was taken.

For the most part, the two-month statute of limitations does not apply to land use ordinances that are not zoning ordinances. In *Coventry Woods Neighborhood Ass'n, Inc. v. City of Charlotte*,[103] the court refused to apply the two-month statute of limitations to a challenge of a subdivision ordinance. The court distinguished zoning from subdivision ordinances and applied the more general three-year statute of limitations in G.S. 1-52 to the subdivision ordinance.

An exemption apparently exists for challenges to the adoption of an extraterritorial boundary ordinance under G.S. 160A-360. Although such an ordinance is within Article 19 of Chapter 160A of the General Statutes, it is not a zoning ordinance per se, although a zoning map amendment to zone the extraterritorial area is often considered concurrently with the extraterritorial boundary map. In *Pinehurst Area Realty, Inc. v. Village of Pinehurst*,[104] the court held that a challenge brought two years after the fact based on alleged procedural irregularities in the adoption of an extraterritorial boundary extension and application of zoning to the area was barred by the then-applicable nine-month statute of limitations. In similar fashion, the court in *Potter v. City of Hamlet*[105] applied the two-month statute of limitations to dismiss a challenge brought four years after adoption of an extraterritorial boundary ordinance.

There are a variety of other statutes of limitation that apply to judicial review of other land use regulatory decisions.

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96. 82 N.C. App. 32, 345 S.E.2d 699 (1986).

97. 120 N.C. App. 471, 462 S.E.2d 691 (1995).

98. 192 N.C. App. 391, 665 S.E.2d 561 (2008). In August 2005 the county commissioners met and unanimously approved a rezoning to an industrial zoning district to accommodate a proposed private airport. However, the minutes of the meeting noted that the property had been rezoned to a "residential-resort" district. The plaintiff filed this action in March 2006. The court held that since the evidence clearly supported a conclusion that the property had actually been rezoned to the industrial district in August 2005 and that there was a scrivener's error in the minutes, the two-month statute of limitations to challenge the rezoning ran from August 2005. The court found no evidence that the plaintiff had made any detrimental reliance on the scrivener's error.

99. ___ N.C. App. ___, 693 S.E.2d 271 (2010). The town on January 8, 2008, adopted a zoning provision precluding issuance of permits for location of manufactured homes more than ten years old. In February 2009 the state supreme court issued its decision in *Five C's, Inc. v. County of Pasquotank*, 195 N.C. App. 410, 672 S.E.2d 737 (2009), which invalidated a similar ten-year limitation on manufactured housing. This suit was filed in April 2009. The court held that it was time-barred, however, as it should have been filed no later than March 8, 2008.

100. ___ N.C. App. ___, 701 S.E.2d 709 (2010).

101. 89 N.C. App. 542, 366 S.E.2d 558, *review denied*, 322 N.C. 834, 371 S.E.2d 274 (1988). The court also ruled that to bring an action for actual damages, a plaintiff had to show that the county's government immunity had been waived by the purchase of liability insurance (which was not shown here) and, further, that punitive damages were allowed only if authorized by statute, and no such statute existed in respect to counties in North Carolina. *See also* White v. Union Cnty., 93 N.C. App. 148, 377 S.E.2d 93 (1989) (challenge to mobile home provision in zoning ordinance must be brought within nine months of adoption of regulation).

102. 94 N.C. App. 91, 379 S.E.2d 880, *review denied*, 325 N.C. 707, 388 S.E.2d 448 (1989).

103. ___ N.C. App. ___, 688 S.E.2d 538, *review denied*, 364 N.C. 128, 695 S.E.2d 757 (2010). The court in *Amward Homes, Inc. v. Town of Cary*, ___ N.C. App. ___, 698 S.E.2d 404 (2010), *review granted,* 709 S.E.2d 597 (N.C. 2011), likewise refused to apply the two-month statute of limitations to a school impact fee ordinance, holding that it was adopted under the subdivision ordinance authority (and included in the town's unified development ordinance). The federal court in *FC Summers Walk, LLC v. Town of Davidson*, No. 3:09-CV-266-GCM, 2010 WL 4366287 (W.D.N.C. Oct. 28, 2010), also held that an adequate public facilities ordinance incorporated into a unified development ordinance may be a "development regulation ordinance" as distinct from a "zoning ordinance" subject to the two-month statute of limitations.

104. 100 N.C. App. 77, 394 S.E.2d 251 (1990), *review denied*, 328 N.C. 92, 402 S.E.2d 417 (1991).

105. 141 N.C. App. 714, 541 S.E.2d 233, *review denied*, 353 N.C. 379, 547 S.E.2d 814 (2001). The plaintiff purchased a nonconforming small grocery store in the city's extraterritorial area. After failing to get an ABC permit for off-premise beer sales (denied as an unlawful expansion of a nonconformity) and failing to secure a rezoning, the plaintiff challenged the adoption of extraterritorial jurisdiction some four years earlier on the grounds that the boundary map had not been filed with the county register of deeds. While noting that the city had substantially complied with the notice requirements, the court held that G.S. 160A-364.1 barred the action.

Table 29.2 **Summary of Statutes of Limitation for Land Use Actions**

Time Period	Statute	Coverage
Ten years	G.S. 1-56	Actions for relief not otherwise limited by statute
Six years	G.S. 1-50(a)(3)	Actions to enforce private restrictive covenants
Three years	G.S. 1-52	Liability created by statute; damages related to construction of improvements; personal injury suits
Two years	G.S. 40A-51	Inverse condemnation claims
One year	G.S. 1-54(10)	Validity of ordinance
Two months	G.S. 1-54.1; 153A-348;	Challenges to validity of rezoning
Thirty days	G.S 153A-340, -345(e); 160A-381, -388(e)	Challenges to quasi-judicial zoning decisions (variances, special and conditional use permits, interpretations)

The time period to initiate a judicial challenge of a quasi-judicial zoning decision is set by G.S. 153A- 345(e2) and 160A-388(e2).[106] These statutes provide that appeals to superior court must be made within thirty days of the later of (1) the receipt of a written copy of the decision[107] by aggrieved parties or (2) the filing of the decision in an office designated by the ordinance. If the quasi-judicial decision is mailed but a copy is not filed with the clerk to the board, the period does not begin to run.[108]

In some instances the enabling statutes do not specify a particular time for appeals. This includes the time for making an appeal of an administrative decision to the board of adjustment[109] and the time for filing for judicial review of decisions made under subdivision ordinances, historic district regulations, and other non-zoning land use ordinances. In these instances the appeal must be filed within a reasonable time.[110]

Also, the state inverse condemnation statute, G.S. 40A-51, has a two-year period within which to file a claim.[111] G.S. 1-52 further provides for a general three-year statute of limitations on claims based on liabilities created by statute (unless a particular statute sets a different period) and claims for damages related to the construction or repair of improvements to real property.[112] These different periods are summarized in Table 29.2.

If an owner alleges that the application of a zoning provision has violated his or her constitutional rights,[113] he or she generally may bring suit within three years on that issue alone. In several cases, however, the state court of appeals has concluded that the much shorter nine-month (now two-month) statute of limitations in G.S.160A-364.1 applies to those claims as well.[114] By contrast, the Fourth Circuit has applied the three-year statute of limitations of

106. These statutes apply to quasi-judicial decisions made by a board of adjustment. They would likely also apply to quasi-judicial decisions made by any other board that has been delegated a function of the board of adjustment. G.S. 160A-381(c) and 153A-340(c1) expressly provide that judicial review of special and conditional use permit decisions by a governing board or planning board are also governed by these statutes.

107. The statutes specifically state that it is the "decision of the board" that must be filed and served on the parties. Since the decision must include sufficient findings of fact and conclusions (see Chapter 15 for a further discussion of these requirements), a letter simply noting the outcome of the vote is inadequate. If the formal written decision is not adopted until the minutes of the board meeting are approved, it is likely that this time period does not begin to run until a copy of the minutes is mailed to the parties.

108. Ad/Mor v. Town of S. Pines, 88 N.C. App. 400, 363 S.E.2d 220 (1988).

109. See Chapter 15 for a discussion of the timeliness of appeals to the board of adjustment.

110. White Oak Props., Inc. v. Town of Carrboro, 313 N.C. 306, 327 S.E.2d 882 (1985); Allen v. City of Burlington Bd. of Adjustment, 100 N.C. App. 615, 397 S.E.2d 657 (1990); *In re* Greene, 29 N.C. App. 749, 225 S.E.2d 647, *review denied*, 290 N.C. 661, 228 S.E.2d 451 (1976).

The rule requiring appeals to be filed within a reasonable time was applied to an appeal of a subdivision variance denial in *Hemphill-Nolan v. Town of Weddington*, 153 N.C. App. 144, 568 S.E.2d 887, 889–90 (2002), and to historic district regulations in *Meares v. Town of Beaufort,* 193 N.C. App. 96, 104, 667 S.E.2d 239, 244 (2008).

111. See, for example, *Robertson v. City of High Point*, 129 N.C. App. 88, 497 S.E.2d 300 (1998), where the court ruled that an inverse condemnation suit alleging damages from an adjacent landfill was barred by this two-year statute of limitations when the damage commenced in October 1993 and the suit was not filed until December 1996 (the court also held that the general three-year statute of limitations also barred claims based on nuisance, negligence, and trespass).

112. In *Dawson v. North Carolina Department of Environment & Natural Resources*, ___ N.C. App. ___, 694 S.E.2d 427 (2010), the court refused to apply the three-year statute of limitations regarding negligent construction of improvements to a claim regarding a faulty inspection of land for suitability for septic tanks, as the inspection related to the land rather than any improvement that had actually been constructed.

113. There is no federal statute of limitations for actions alleging a violation of the United States Constitution. In these cases the federal courts apply the relevant state personal injury statute of limitations. Wilson v. Garcia, 471 U.S. 261 (1985); Bireline v. Segondollar, 567 F.2d 260 (4th Cir. 1977).

114. Naegele Outdoor Adver., Inc. v. City of Winston-Salem, 113 N.C. App. 758, 762, 440 S.E.2d 842, 844 (1994), *aff'd*, 340 N.C. 349, 457 S.E.2d 874 (1995); Pinehurst Area Realty, Inc. v. Vill. of Pinehurst 100 N.C. App. 77, 81, 394 S.E.2d 251, 253–54 (1990), *review denied*, 328 N.C. 92, 402 S.E.2d 417 (1991); Sherrill v. Town of Wrightsville Beach, 81 N.C. App. 369, 344 S.E.2d 357, *review denied*, 318 N.C. 417, 349 S.E.2d 600 (1986). Note, however, that in *Frizzelle v. Harnett County*, 106 N.C. App. 234, 416 S.E.2d 421, *review denied*, 332 N.C. 147, 419 S.E.2d 571 (1992), the court held that the county had waived the nine-month statute of limitations because it was not raised in its answer nor had the county given notice of it to the plaintiff when it was raised in response to a summary judgment motion.

G.S.1-52(5) for constitutional challenges[115] and has held that there is no statute of limitations for facial challenges.[116] In *Capital Outdoor Advertising, Inc. v. City of Raleigh*,[117] the state supreme court reviewed these conflicting results on applied challenges and observed that the state court of appeals decisions seemed to be "the better reasoned decisions" given the specificity of the statute of limitations explicitly related to legislative zoning decisions. However, since neither the nine-month nor the three-year provision had been met in that case, the court declined to resolve the matter.[118] Thus where the same governmental action may be characterized in several ways, it is unclear which of these statutes will control.

A critical issue with statutes of limitation is when they begin to run. This issue often arises in the context of whether the period begins to run when the contested ordinance is adopted or when it is enforced. In *National Advertising Co. v. City of Raleigh*,[119] a challenge to a five-and-a-half-year amortization provision in Raleigh's zoning ordinance, the Fourth Circuit held that the time limit for bringing the lawsuit (three years, under G.S. 1-52(2), discussed in the text above) commenced with the adoption of the ordinance requirement, rejecting the plaintiff company's contentions that the amortization requirement was a continuing constitutional violation or that the statute of limitations period started to run only at the expiration of the amortization period.[120] State courts have reached the same conclusion in sign amortization cases.[121] However, in *Coventry Woods Neighborhood Ass'n, Inc. v. City of Charlotte*,[122] a case challenging the validity of a subdivision ordinance, the court held that the limitations period began to run when the plaintiffs learned of the plat approval decision that gave rise to the challenge. In *Amward Homes, Inc. v. Town of Cary*,[123] the court examined the limitations issue in the context of a challenge to the town's authority to impose and collect school impact fees. The court held that the three-year statute of limitations for personal injuries (here, the payment of fees assessed without adequate statutory authority was labeled as such an injury) applied to claims brought under Section 1983 of U.S. Code Title 42 for alleged U.S. Constitutional violations.[124] However, the court held that this period did not begin to run until the fee was paid (rather than when the ordinance was adopted) and that each fee payment acceptance constituted a continuing wrong by the town, so the fee recovery could date back three-years from the filing of the Section 1983 claim.[125] The court also concluded that claims for violation of the state constitution had no adequate state remedy or shorter statutory period of limitation, so the ten-year statute of limitations of G.S. 1-56 was applicable.

Exhaustion of Administrative Remedies

A person must seek any available administrative appeal of a zoning decision as a prerequisite to judicial review.[126] Failure to seek quasi-judicial review of an administrative decision (such as a permit denial or determination regarding nonconformity) precludes judicial

115. Nat'l Adver. Co. v. City of Raleigh, 947 F.2d 1158, 1162 (4th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992). See also *Franks v. Ross*, 313 F.3d 184, 194 (4th Cir. 2002), applying the three-year statute of limitations in G.S. 1-52(16) to an environmental justice claim regarding siting of a Wake County landfill.

116. Nat'l Adver. Co. v. City of Raleigh, 947 F.2d 1158, 1162, 1168 (4th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992). *See also* Frye v. City of Kannapolis, 109 F. Supp. 2d 436 (M.D.N.C. 1999) (no statute of limitation for facial First Amendment challenge to adult establishment siting regulations).

117. 337 N.C. 150, 446 S.E.2d 289 (1994).

118. *Id.* at 162, 446 S.E.2d at 296–97.

119. 947 F.2d 1158, *cert. denied*, 504 U.S. 931 (1992). See Chapter 20 for a discussion of amortization.

120. G.S. 1-52(2) has also been held to bar a taking claim based on a septic tank ban to protect water quality. Ocean Acres Ltd. P'ship v. Dare Cnty. Bd. of Health, 707 F.2d 103 (4th Cir. 1983). However, this statute of limitations has been held not to bar an inverse-condemnation action based on continuing overflights of property near a municipal airport. Hoyle v. City of Charlotte, 276 N.C. 292, 172 S.E.2d 1 (1970).

121. *See, e.g.*, Capital Outdoor Adver. Co. v. City of Raleigh, 337 N.C. 150, 163–64, 446 S.E.2d 289, 297 (1994).

122. ___ N.C. App. ___, 688 S.E.2d 538, *review denied*, 364 N.C. 128, 695 S.E.2d 757 (2010). The challenged ordinance allowed preliminary plat approval to be made without a hearing and notice to the neighbors. The neighbors contended that adoption of an ordinance without these violated their due process rights. Although the plaintiffs prevailed on the statute of limitations issue, the court held they had no property rights that had been violated.

123. ___ N.C. App. ___, 698 S.E.2d 404 (2010), *review granted*, 709 S.E.2d 597 (2011).

124. In *South Shell Island Investment v. Town of Wrightsville Beach*, 703 F. Supp. 1192, 1195 (E.D.N.C. 1988), the court also applied the three-year statute of limitations to claims alleging improper impact and tap fees.

125. On the continuing wrong doctrine generally, see *Williams v. Blue Cross Blue Shield of North Carolina*, 357 N.C. 170, 178–81, 581 S.E.2d 415, 423–24 (2003), *Faulkenbury v. Teachers' & State Employees' Retirement System of North Carolina*, 345 N.C. 683, 694–95, 483 S.E.2d 422, 429–30 (1997).

126. Laurel Valley Watch, Inc. v. Mountain Enters. of Wolf Ridge, LLC, 192 N.C. App. 391, 665 S.E.2d 561 (2008) (court was without subject matter jurisdiction to hear complaint against developers for a zoning violation as plaintiff failed to seek zoning administrator's ruling on zoning compliance and then appeal that determination to designated board prior to initiating judicial review); Northfield Dev. Co., Inc. v. City of Burlington, 165 N.C. App. 885, 599 S.E.2d 921, *review denied*, 359 N.C. 191, 607 S.E.2d 278 (2004) (where plaintiff's application for a special use permit was rejected due to an incomplete application, superior court has no subject matter jurisdiction to consider action for damages or for mandamus to compel permit issuance); Town of Garner v. Weston, 263 N.C. 487, 139 S.E.2d 642 (1965); Potter v. City of Hamlet, 141 N.C. App. 714, 541 S.E.2d 233, *review denied*, 353 N.C. 379, 547 S.E.2d 814 (2001) (failure to seek judicial review of board of adjustment finding regarding expansion of nonconformity precludes subsequent collateral attack of that determination); Midgette v. Pate, 94 N.C. App. 498, 380 S.E.2d 572 (1989) (neighbor challenging lack of enforcement of zoning requirement must first secure ruling from administrator and appeal that to the board of adjustment before seeking judicial intervention). *See also* Sunkler v. Town of Nags Head, No. 2:01-CV-22-H(2), 202 WL 32395571 (E.D.N.C. May 17, 2002), *aff'd*, 50 F. App'x 116 (4th Cir. 2002) (failure to appeal zoning enforcement decision to board of adjustment precludes suit alleging negligence of town officials). *See generally*, Note, *Exhaustion of Remedies in Zoning Cases*, 1964 WASH. U. L.Q. 368; Donald C. Scriven, Comment, *Exhausting Administrative and Legislative Remedies in Zoning Cases*, 48 TUL. L. REV. 665 (1974).

review of that decision.[127] The local government must have made a final decision and all administrative appeals must have been exhausted prior to judicial review. Interlocutory appeals are not allowed.[128]

A person who fails to seek judicial review of a board of adjustment's decision cannot collaterally attack the ruling in a subsequent zoning enforcement action.[129]

There are several situations when an administrative appeal is not required. These are situations where there is no jurisdiction to grant the relief sought at the administrative level. If the constitutionality of a regulation is challenged, administrative remedies are inadequate, as the administrative board has no jurisdiction to grant the relief sought and therefore a futile administrative appeal is not required.[130] If the defendant can establish that the property involved is in fact outside of the geographic jurisdiction of the government purporting to regulate it, there is no jurisdiction for the board of adjustment, and thus no appeal to it is necessary.[131] If no provision for an administrative appeal is made by a particular ordinance, such an appeal is not available and application for it need not be made.[132] Finally, if the jurisdiction refuses to issue a decision that can be appealed to the board of adjustment, judicial review is appropriate.[133]

Granting the approval sought renders judicial review of claims arising under that action moot. Shell Island Homeowners Ass'n, Inc. v. Tomlinson, 134 N.C. App. 286, 291, 517 S.E.2d 401, 404 (1999).

127. State v. Roberson, 198 N.C. 70, 150 S.E. 674 (1929); Ward v. New Hanover Cnty., 175 N.C. App. 671, 625 S.E.2d 598 (2006) (interpretation of terms of permit must be appealed to board of adjustment as prerequisite to judicial review); Grandfather Vill. v. Worsley, 111 N.C. App. 686, 689, 433 S.E.2d 13, 15, *review denied*, 335 N.C. 237, 439 S.E.2d 146 (1993) (failure to appeal notice of violation and civil penalty assessment to board of adjustment waives any right to raise in superior court any defenses to the assessment); Appalachian Outdoor Adver. Co. v. Town of Boone, 103 N.C. App. 504, 406 S.E.2d 297 (1991); Wil-Hol Corp. v. Marshall, 71 N.C. App. 611, 322 S.E.2d 655 (1984); Quadrant Corp. v. City of Kinston, 22 N.C. App. 31, 205 S.E.2d 324 (1974). Also see the discussion of enforcement actions in Chapter 21.

A number of cases involving appeals under the Administrative Procedure Act (APA) have held that a failure to exhaust administrative appeals deprives the courts of subject matter jurisdiction and that judicial appeals are properly dismissed under Rule 12(b)(1). Citizens for Responsible Roadways v. N.C. Dep't of Transp., 145 N.C. App. 497, 550 S.E.2d 253 (2001), *review denied*, 355 N.C. 210, 559 S.E.2d 798 (2002) (failure to seek APA review of finding of no significant impact that obviates need for environmental impact statement bars judicial review); Presnell v. Pell, 298 N.C. 715, 721, 260 S.E.2d 611, 615 (1979); Bryant v. Hogarth, 127 N.C. App. 79, 83, 488 S.E.2d 269, 271, *review denied*, 347 N.C. 396, 494 S.E.2d 406 (1997); Flowers v. Blackbeard Sailing Club, Ltd., 115 N.C. App. 349, 445 S.E.2d 614 (1995); Leeuwenburg v. Waterway Inv. Ltd. P'ship, 115 N.C. App. 541, 545, 445 S.E.2d 614, 617 (1994); N. Buncombe Ass'n of Concerned Citizens, Inc. v. Rhodes, 100 N.C. App. 24, 394 S.E.2d 462 (1990); Porter v. N.C. Dep't of Ins., 40 N.C. App. 376, 253 S.E.2d 44, *review denied*, 297 N.C. 455, 256 S.E.2d 808 (1979). *See also* Barris v. Town of Long Beach, ___ N.C. App. ___, 704 S.E.2d 285 (2010) (trial court has no jurisdiction to hear dispute regarding town improvements within non-exclusive street right-of-way since Coastal Area Management Act permit application was made (and not yet decided or appealed) and administrative appeal under that Act is exclusive remedy).

128. When multiple claims are raised, however, if the trial court enters a final judgment as to a claim and certifies that there is no just reason for delay, that judgment is subject to judicial review. Martin Marietta Techs., Inc. v. Brunswick Cnty., 348 N.C. 698, 500 S.E.2d 665 (1998), *citing* DKH Corp. v. Rankin-Patterson Oil Co., Inc., 348 N.C. 583, 500 S.E.2d 666 (1998).

129. Town of Pinebluff v. Marts, 195 N.C. App. 659, 673 S.E.2d 740 (2009); New Hanover Cnty. v. Pleasant, 59 N.C. App. 644, 297 S.E.2d 760 (1982); City of Elizabeth City v. LFM Enters., Inc., 48 N.C. App. 408, 269 S.E.2d 260 (1980); City of Hickory v. Catawba Valley Mach. Co., 39 N.C. App. 236, 249 S.E.2d 851 (1978). To the extent multiple issues are presented in a subsequent action, collateral estoppel only acts to bar relitigation of those issues that were actually before the board or court previously and were both critical and necessary to the decision. *See, e.g.*, United States v. Town of Garner, 720 F. Supp. 2d 721 (E.D.N.C. 2010) (in case alleging failure to make reasonable accommodation for a group home, court found that collateral estoppel applies only to the parties in the prior matter and only to the issues actually addressed by the board of adjustment).

130. City of Wilmington v. Hill, 189 N.C. App. 173, 657 S.E.2d 670 (2008) (defendant not required to appeal civil penalty to board of adjustment prior to bringing action challenging the constitutionality of the ordinance provision allegedly violated); Meads v. N.C. Dep't of Agric., 349 N.C. 656, 670, 509 S.E.2d 165, 174 (1998); Shell Island Homeowners Ass'n, Inc. v. Tomlinson, 134 N.C. App. 217, 224, 517 S.E.2d 406, 412 (1999). One may not, however, voluntarily proceed under a statute or ordinance, accept its benefits, and then challenge its constitutionality to avoid its burdens. See the discussion in Chapter 21 regarding estoppel and enforcement.

131. Guilford Cnty. Planning & Dev. Dep't v. Simmons, 102 N.C. App. 325, 401 S.E.2d 659, *review denied*, 329 N.C. 496, 407 S.E.2d 533 (1991). The defendant was denied a permit to construct two chicken houses and subsequently denied a variance for the same, and the variance decision was not appealed. After the defendant began construction the county commenced an enforcement action. The court held that an allegation that the property was not in the county's jurisdiction could be raised as a defense to the enforcement action; however, if the property were found to be in the county, the defendant could not collaterally attack the unappealed board of adjustment decision. In a subsequent proceeding after remand, the court upheld the trial court's determination that the property was not in fact within the county, thus depriving the board of adjustment and the court of subject matter jurisdiction. *See* 115 N.C. App. 87, 443 S.E.2d 765 (1994).

132. Ornoff v. City of Durham, 221 N.C. 457, 20 S.E.2d 380 (1942); State v. Roberson, 198 N.C. 70, 150 S.E. 674 (1929). In *Town of Kenansville v. Summerlin*, 70 N.C. App. 601, 320 S.E.2d 428 (1984), a case involving a permit decision, the court ruled that it was inappropriate to dismiss the defendant's appeal for having failed to make the usually requisite administrative appeal, because the town had not appointed a board of adjustment or designated a body to serve as such. However, because the defendant had produced no evidence to support issuance of the permit and had not applied for a variance, the court held that it was proper to find the defendant in violation of the zoning ordinance. Occasionally there is simply a lack of clarity in the ordinance as to whether appeals are or are not allowed or required. See, for example, *FC Summers Walk, LLC v. Town of Davidson*, No. 3:09-CV-266-GCM, 2010 WL 4366287 (W.D.N.C. Oct. 28, 2010), where the town staff made several determinations about the application of an adequate public facility requirement to different aspects of the plaintiff's development, some of which were appealed to the town council and others were not.

133. Meares v. Town of Beaufort, 193 N.C. App. 49, 62, 667 S.E.2d 244, 253 (2008).

Stays

The zoning statutes specifically provide for stays of enforcement actions pending administrative appeals. G.S. 160A-388(b) and 153A-345(b) provide that an appeal *to* the board of adjustment stays all proceedings in furtherance of the action appealed from (with exceptions provided if the zoning officer certifies that a stay would cause imminent peril to life or property or that the violation charged is transitory in nature and a stay would seriously interfere with enforcement; in these instances, there is no stay unless the board or a court issues a restraining order).

The zoning statute, however, is silent regarding any stays during judicial review. Therefore, once judicial review is sought, there is no automatic stay. A party desiring to preserve the status quo during the pendency of litigation must seek a judicial order to stay action during this period.[134]

If appellate judicial review is sought, there is an automatic stay of the trial court's order, but only until the expiration of time for giving notice of appeal.[135] Voluntary compliance with the trial court's order is permissible even in this time period unless one of the parties secures an injunction to prohibit action. In *Estates Inc. v. Town of Chapel Hill*,[136] the denial of a special use permit was appealed and the trial court subsequently ordered the permit issued. Neighbors who had intervened appealed to the court of appeals, but the town did not join the appeal and issued the permit while the matter was pending before the court of appeals. The court ruled that while the town was not compelled to issue the permit during the period of the automatic stay, it could voluntarily do so absent the intervenors' securing an injunction to prohibit it from doing so. Once the permit was issued, the intervenors' appeal was moot.

Interlocutory Appeals

For appellate review to be in order, the trial court must certify the case for appeal[137] or have entered an order that would both deprive the appellant of a substantial right and result in that right being lost absent appellate judicial review before final disposition of the case.[138]

Several cases have applied this rule in a land development regulation context. In *Hyatt v. Town of Lake Lure*,[139] the plaintiff sued the state and town regarding the town's lake structure regulations. The trial court granted summary judgment in favor of the town but did not rule on the claims against the state. The court noted that at common law there was no appeal of right from a decision of a trial court, and thus an appellant must strictly comply with the statutory provisions setting forth an avenue of appeal. Here a grant of partial summary judgment did not completely dispose of the case, so the court held it to be an interlocutory order that is not subject to appeal. In *Bessemer City Express, Inc. v. City of Kings Mountain*,[140] the city adopted a zoning amendment restricting the location, design, and use of video gaming machines, requiring a conditional use permit for them and amortizing nonconforming operations after a six-month grace period. The plaintiff operators of video game arcades filed a declaratory judgment action contesting the validity of the ordinance and sought and were denied a preliminary injunction to enjoin enforcement. The court held that an appeal of the denial of a preliminary injunction did not affect a substantial right (at the time of appeal the ordinance requiring removal had not taken effect) and in any event their overall business could continue in operation pending resolution of the case on the merits. Similarly, in *City of Fayetteville v. E & J Enterprises*,[141] the court held that the appeal of the denial of a preliminary injunction to prevent city enforcement of a regulation that prohibited topless dancing at a rebuilt nightclub (the original nonconforming topless club had been destroyed in a fire) should be dismissed as interlocutory. The business could operate (and offer non-topless dancing) during the pendency of the case, so the court held that the owner's substantial rights were not affected in a way that would escape review before final judgment in the case. In *Jennewein v. City Council of Wilmington,*[142] the court held that it was premature to seek appellate review of a trial court's order remanding a special use permit decision for a de novo administrative hearing.

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134. On appellate review of a trial court's refusal to issue a stay, the standard of review is abuse of discretion. Meares v. Town of Beaufort, 193 N.C. App. 49, 63, 667 S.E.2d 244, 254 (2008) (affirming refusal to grant stay).

135. Rule 62 of the N.C. Rules of Civil Procedure.

136. 130 N.C. App. 664, 504 S.E.2d 296 (1998), *review denied*, 350 N.C. 93, 527 S.E.2d 664 (1999). See below for a further discussion of mootness.

137. N.C. Rule of Civil Procedure 54(b). In *Amward Homes, Inc. v. Town of Cary*, ___ N.C. App. ___, 698 S.E.2d 404 (2010), *review granted*, 709 S.E.2d 597 (N.C. 2011), the court held that the fact that one plaintiff's cause of action was still pending in the trial court did not preclude an appeal where summary judgment had been entered for other plaintiffs and there was "no just reason for delay" under Rule 54(b).

138. G.S. 1-277(a) and 7A-27(d)(1). Goldston v. Am. Motors Corp., 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990); State v. Fayetteville St. Christian Sch., 299 N.C. 351, 261 S.E.2d 908, *appeal dismissed*, 449 U.S. 807 (1980). In *High Rock Lake Partners, LLC v. North Carolina Department of Transportation*, ___ N.C. App. ___, 693 S.E.2d 361 (2010), review granted, 709 S.E.2d 597 (N.C. 2011). The court held that an interlocutory order denying a landowner's right to intervene in a suit contesting conditions imposed on a driveway permit could be immediately appealed where the original permit applicant had withdrawn from the project and assigned all its rights to the landowner.

139. 191 N.C. App. 386, 663 S.E.2d 320 (2008). There was no Rule 54(b) certification in the record.

140. 155 N.C. App. 637, 573 S.E.2d 712 (2002).

141. 90 N.C. App. 268, 368 S.E.2d 20 (1988). The case involved Rick's Lounge in downtown Fayetteville.

142. 46 N.C. App. 324, 264 S.E.2d 802 (1980).

Standard of Judicial Review

Legislative Decisions

Courts nationally and in North Carolina give substantial deference to the judgment of elected officials making legislative land use regulatory decisions.

In one of the earliest zoning cases in North Carolina, the court held in *In re Parker*[143] that a zoning ordinance is presumed to be valid and a court must defer to the city council's legislative judgment unless it is clearly unreasonable or abusive of discretion. A zoning ordinance is not invalid unless it clearly "has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense."[144] The court further held the following:

> When the most that can be said against such ordinances is that whether it was an unreasonable, arbitrary or unequal exercise of power is fairly debatable, the courts will not interfere. In such circumstances the settled rule seems to be that the court will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining whether its action is in the interest of the public health, safety, morals, or general welfare.[145]

In a more recent zoning case, the court similarly observed, "In reviewing an ordinance to determine whether the police power has be exercised within constitutional limitations, this Court does not analyze the wisdom of a legislative enactment."[146]

Only an action deemed by the court to be oppressive and manifestly abusive of discretion will be overturned. If the action had a "reasonable tendency to promote the public good, it [will be deemed to have] represent[ed] a valid exercise of [the state's police] power, and [it will be] entitled to implicit obedience."[147] When reviewing rezonings, courts "are not free to substitute their opinion for that of the legislative body so long as there is some plausible basis for the conclusion reached by that body."[148] A governing board's decision not to zone or to rezone a parcel has the same presumption of validity. Such a decision is a policy choice that is left by the courts to the sound discretion of locally elected officials.[149]

The fact that some other formulation of an ordinance could have been adopted and may have also been a reasonable approach to address the issue at hand does not render an ordinance arbitrary or capricious.[150]

The burden is on a challenger to establish the invalidity of a legislative regulatory decision.[151] The courts employ a whole record review to allegations that a legislative decision is arbitrary and capricious.[152] The reviewing court must base its decision on the record before the board rather than taking additional evidence to make a de novo ruling.[153] The board's decision is to be upheld if there is substantial evidence in the record to support it.

In a legislative decision, unlike with quasi-judicial decisions, there is not a formal "record" of evidence as there is a public hearing on the matter rather than an evidentiary hearing. Some of the confusion on this point is semantic, in that courts are applying the same whole-record test to allegations that the decision was arbitrary and capricious and there is some tendency to cite and quote cases involving quasi-judicial decisions in cases addressing legislative decisions. The record for a legislative decision will primarily be

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143. 214 N.C. 51, 197 S.E. 706, *appeal dismissed*, 305 U.S. 568 (1938). *See also* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

144. *In re Parker*, 214 N.C. at 55, 197 S.E. at 709 (citations omitted).

145. *Id.* at 55, 197 S.E. at 709. For an earlier case that reached the same result, see *Small v. Councilmen of Edenton*, 146 N.C. 527, 60 S.E. 413 (1908). *See generally* 1 Edward H. Ziegler Jr., Rathkopf's The Law of Zoning and Planning § 5.02 (4th ed. 1998).

146. Grace Baptist Church v. City of Oxford, 320 N.C. 439, 443, 358 S.E.2d 372, 374 (1987) (upholding regulation requiring off-street paved parking). *See also* Town of Atl. Beach v. Young, 307 N.C. 422, 298 S.E.2d 686, *cert. denied*, 462 U.S. 1101 (1983).

147. Marren v. Gamble, 237 N.C. 680, 686, 75 S.E.2d 880,884 (1953). In a decision upholding a Walnut Cove zoning ordinance that prohibited locating mobile homes in certain zoning districts, the court held, "If the enactment and enforcement of the zoning ordinance is rationally related to a legitimate governmental objective," the presumption of validity applies. Duggins v. Town of Walnut Cove, 63 N.C. App. 684, 688, 306 S.E.2d 186, 189, *review denied*, 309 N.C. 819, 310 S.E.2d 348 (1983), *cert. denied*, 466 U.S. 946 (1984). *See also* Currituck Cnty. v. Wiley, 46 N.C. App. 835, 266 S.E.2d 52, *review denied*, 301 N.C. 234, 283 S.E.2d 131 (1980).

148. Zopfi v. City of Wilmington, 273 N.C. 430, 437, 160 S.E.2d 325, 332 (1968).

149. *See, e.g.*, Ashby v. Town of Cary, 161 N.C. App. 499, 588 S.E.2d 572 (2003). The plaintiffs challenged a refusal by the town of Cary to rezone a parcel in an existing commercial area from low-density residential to a business conditional use district. The court affirmed that a conditional use district rezoning decision is a purely legislative decision and is to be overturned only if the record before the town council at the time of the decision demonstrates that the decision had no foundation in reason and bore no substantial relationship to the public health, safety, morals, or welfare. If there is any plausible basis for the decision that has a basis in reason and relation to public safety, the decision must be affirmed.

150. *See., e.g.*, State v. Maynard, 195 N.C. App. 757, 673 S.E.2d 877 (2009). The court upheld an ordinance adopted by Nashville limiting the number of dogs kept on premises within the city. The ordinance limit was two dogs over the age of five months for lots of 30,000 square feet or less, with an additional dog allowed for lots of at least 37,000 square feet. The fact that the town could have chosen to base the regulation on the size or breed of dog did not render the choice actually made irrational.

151. Town of Atl. Beach v. Young, 307 N.C. 422, 426, 298 S.E.2d 686, 690, *cert. denied*, 462 U.S. 1101 (1983); Kinney v. Sutton, 230 N.C. 404, 53 S.E.2d 306 (1949); State v. Maynard, 195 N.C. App. 757, 759, 673 S.E.2d 877, 879 (2009); Nelson v. City of Burlington, 80 N.C. App. 285, 288, 341 S.E.2d 739, 741 (1986).

152. Coucoulas/Knight Props. v. Town of Hillsborough, 199 N.C. App. 455, 457–58, 683 S.E.2d 228, 230 (2009), *aff'd per curiam*, 364 N.C. 127, 691 S.E.2d 411 (2010); Summers v. City of Charlotte, 149 N.C. App. 509, 562 S.E.2d 18, *review denied,* 355 N.C. 758, 566 S.E.2d 482 (2002); Teague v. W. Carolina Univ., 108 N.C. App. 689, 692, 424 S.E.2d 684, 684, *review denied*, 333 N.C. 466, 427 S.E.2d 627 (1993). The courts likewise apply a whole record review to allegations that a quasi-judicial decision was arbitrary and capricious.

153. Kerik v. Davidson Cnty., 145 N.C. App. 222, 551 S.E.2d 186 (2001).

the minutes of the hearing and board member discussions in the meeting in which the decision was made.[154]

A limited exception to the presumption of validity of legislative regulatory decisions exists for spot zoning cases.[155] In these cases the burden is on the government to establish a reasonable basis for the rezoning decision.[156]

Quasi-Judicial Decisions

The courts apply a different, though often also deferential, review to quasi-judicial land use regulatory decisions. This standard for review applies to administrative or ministerial regulatory decisions as well.[157]

In *Harden v. City of Raleigh*,[158] one of the state's first zoning cases, the city staff's denial of a permit for a gasoline filling station in a neighborhood business district was appealed to the board of adjustment and upheld. The court ruled that the board of adjustment decision of the appeal was quasi-judicial. As such, the decision is not to be overturned by the court unless it is shown to be arbitrary.[159]

The zoning enabling statute provides that appeals of quasi-judicial zoning decisions are subject to review by the superior court by proceedings in the nature of certiorari.[160] As the North Carolina Supreme court has noted, in hearing such an appeal, the trial court judge is sitting in an appellate capacity:

> In reviewing the sufficiency and competency of the evidence at the appellate level, the question is not whether the evidence before the superior court supported the court's order, but whether the evidence before the town board was supportive of its action. In proceedings of this nature, the superior court is not the trier of fact. Such is the function of the town board. The trial court, in reviewing the decision of a town board on a conditional use permit application, sits in the posture of an appellate court. The trial court does not review the sufficiency of evidence presented to it but reviews that evidence presented to the town board.[161]

The trial court is therefore bound by the facts found by the decision-making board, provided they are supported by competent, substantial evidence. The trial court may not make new findings of fact or conduct a de novo review of the evidence as it is the sole province of the decision-making board to weigh the evidence and make determinations of credibility.[162] The trial court may recite, summarize, or synthesize the evidence that was before the decision-making board.[163]

The trail court judge is authorized to review questions of law and legal inference arising on the record. The broad discretionary powers normally vested in a trial judge are absent.[164]

The basic standard for judicial review of quasi-judicial decisions is set forth in *Coastal Ready-Mix Concrete Co. v. Board of Commissioners*[165] and is codified at G.S. 160A-393(k)(1). Courts reviewing quasi-judicial decisions examine the following five questions:

1. Were there errors in law?
2. Were proper statutory and ordinance procedures followed and was decision within statutorily delegated authority?

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154. Required statements of rationale that must be adopted for all legislative zoning decisions are discussed in Chapter 11. These statements should provide a starting point in a review of whether a contested decision was arbitrary and capricious. *See. e.g.*, Clear Channel Outdoor, Inc. v. City of St. Paul, 618 F.3d 851 (8th Cir. 2010) (examining a similar required statement in determining a ban on billboard "extensions" or appendages was arbitrary and capricious).

155. See Chapter 12 for a complete discussion of spot zoning.

156. Federal courts apply heightened scrutiny to land use regulations that significantly impact private property rights. *See* Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); First English Evangelical Lutheran Church v. County of L.A., 482 U.S. 304 (1987). Substantial academic comment has been made on whether a shift in the presumption of validity has in fact taken place as well as on the circumstances under which a shift *should* take place. *See, e.g.*, Robert J. Hopperton, *The Presumption of Validity in American Land-Use Law: A Substitute for Analysis, A Source of Significant Confusion*, 23 B.C. Envtl. Aff. L. Rev. 301 (1996); Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 Urb. Law. 1 (1992).

157. *See, e.g.*, Nazziola v. Landcraft Props., Inc., 143 N.C. App. 564, 545 S.E.2d 801 (2001) (applying whole record review to ministerial subdivision plat decision alleged to be arbitrary and capricious). In most instances such decisions will reach the court only as quasi-judicial decisions, as an initial administrative appeal of the ministerial decision to the board of adjustment is necessary to exhaust administrative remedies (with subsequent judicial review of the board's decision).

158. 192 N.C. 395, 135 S.E. 151 (1926).

159. "Quasi-judicial functions, when exercised, not arbitrarily, but in subordination to a uniform rule prescribed by statute ordinarily are not subject to judicial control. It is only in extreme cases, those which are arbitrary, oppressive, or attended with manifest abuse, that the courts will interfere." *Id.* at 397, 135 S.E. at 152–53.

160. G.S. 160A-393. For quasi-judicial decisions by the board of adjustment or the planning board acting in the capacity of a board of adjustment, see G.S. 153A-345(e) and 160A-388(e) For governing boards making special and conditional use permit decisions, see G.S. 153A-340 and 160A-381.

161. Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs, 299 N.C. 620, 626–27, 265 S.E.2d 379, 383 (1980). *See also* Powell v. N.C. Dep't of Transp., 347 N.C. 614, 624, 499 S.E.2d 180, 185 (1998).

162. Mangum v. Raleigh Bd. of Adjustment, 196 N.C. App. 249, 260, 674 S.E.2d 742, 750–51 (2009); Ghidorzi Constr., Inc. v. Town of Chapel Hill, 80 N.C. App. 438, 440, 342 S.E.2d 545, 547 (1986). The superior court review is "limited to errors alleged to have occurred before the local board." Tate Terrace Realty Investors, Inc. v. Currituck Cnty., 127 N.C. App. 212, 218, 488 S.E.2d 845, 848, *review denied*, 347 N.C. 409, 496 S.E.2d 394 (1997).

163. Cary Creek Ltd. P'ship v. Town of Cary, ___ N.C. App. ___, 700 S.E.2d 80 (2010); Cannon v. Zoning Bd. of Adjustment, 65 N.C. App. 44, 47, 308 S.E.2d 735, 737 (1983).

164. *In re* Pine Hill Cemeteries, Inc., 219 N.C. 735, 738, 15 S.E.2d 1, 3 (1941). *See also* Humble Oil & Ref. Co. v. Bd. of Aldermen, 284 N.C. 458, 202 S.E.2d 129 (1974); Jamison v. Kyles, 271 N.C. 722, 157 S.E.2d 550 (1967); Jarrell v. Bd. of Adjustment, 258 N.C. 476, 128 S.E.2d 879 (1963); Mize v. Cnty. of Mecklenburg, 80 N.C. App. 279, 284, 341 S.E.2d 767, 770 (1986).

165. 299 N.C. 620, 265 S.E.2d 379 (1980).

3. Were due process rights secured (including rights to offer evidence, cross-examine witnesses, and inspect documents)?
4. Was competent, material, and substantial evidence in the record to support the decision?
5. Was the decision arbitrary and capricious?[166]

The court, depending upon which of these issues is being reviewed, applies one of two standards of review.

A *de novo review* is made of alleged errors of law.[167] In these reviews the court is not bound by findings made by the decision-making board. Instead, the court considers the matter anew, as if not considered or decided by the board.[168] This is true both for trial court review and for appellate court review.[169]

If a trial court fails to properly make a de novo review, the appellate court can apply a de novo review anew rather than remanding the case. However, this can only be done if the record on appeal is complete enough to provide the requisite information for the review (such as including all of the relevant ordinance provisions).[170] With appellate review of alleged errors of law, since the appellate court is making a de novo review as well, the standard of review used by the trial court is irrelevant.[171]

A *whole record review* is conducted of allegations that a decision was not supported by the evidence or that the decision was arbitrary and capricious.[172] In these reviews, the board's findings of fact are binding on the reviewing court if they are supported by substantial, competent evidence.[173] Similarly, federal courts "must accord a zoning board's fact finding the same preclusive effect to which it would have been entitled in the state courts when the agency acted in a judicial capacity and the parties had an adequate opportunity to litigate."[174]

If both types of allegations are made, the trial court must delineate which standard was applied to which issue (and apply more than one standard if the issues so require).[175]

While fundamental fairness is required, the strict rules of evidence and procedure can be relaxed, and harmless errors will generally not result in a remand on appeal. Several cases illustrate this rule. In *Durham Video & News, Inc. v. Durham Board of Adjustment,*[176] the court of appeals held that a failure to comply with city rules to provide the petitioner with a copy of the written staff report being provided to the board of adjustment ten days prior to the hearing did not prejudice the plaintiff, as the staff report included only information previously available to the plaintiff or that was already a matter of public record. In *Dockside Discotheque, Inc. v. Board of Adjustment,*[177] the court held that a board's action of conducting an improper closed session to deliberate after all of the evidence had been received was not reversible error.

Deference in De Novo Reviews

A court is not bound by a board's interpretation of the terms of an ordinance, as these are questions of law subject to a de novo review.[178] G.S. 160A-393(k)(2), enacted in 2009, provides that the court making a de novo review of a board interpretation "shall consider the interpretation of the decision-making board, but is not bound by that interpretation, and may freely substitute its judgment as appropriate."

Case law provides some guidance as to the degree of consideration given and the circumstances in which it is appropriate for the

166. *Id.* at 626, 265 S.E.2d at 383.

167. G.S. 160A-393(k)(2).

168. Amanini v. N.C. Dep't of Human Res., 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994). However, a degree of deference is applied in some circumstances. See the discussion of deference in de novo reviews, below.

169. *In re* Willis & City of Southport Bd. of Adjustment, 129 N.C. App. 499, 501–02, 500 S.E.2d 723, 726 (1998).

170. Welter v. Rowan Cnty. Bd. of Comm'rs, 160 N.C. App. 358, 585 S.E.2d 472 (2003).

171. Capital Outdoor, Inc. v. Guilford Cnty. Bd. of Adjustment, 355 N.C. 269, 559 S.E.2d 547 (2002) (per curiam, rev'g 146 N.C. App. 388, 552 S.E.2d 265 (2001)).

172. Powell v. N.C. Dep't of Transp., 347 N.C. 614, 623, 499 S.E.2d 180, 185 (1998); ACT-UP Triangle v. Comm'n for Health Servs., 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997); Associated Mech. Contractors v. Payne, 342 N.C. 825, 832, 467 S.E.2d 398, 401 (1996); Thompson v. Bd. of Educ., 292 N.C. 406, 410, 233 .E.2d 538, 541 (1977); *In re* Willis & City of Southport Bd. of Adjustment, 129 N.C. App. 499, 500 S.E.2d 723 (1998); Ballas v. Town of Weaverville, 121 N.C. App. 346, 465 S.E.2d 324 (1996). *But see* Clark v. City of Asheboro, 136 N.C. App. 114, 119, 524 S.E.2d 46, 50 (1999) (stating that the issue of whether there is competent, material, and substantial evidence present in the record is a conclusion of law and subject to de novo review).

173. Capricorn Equity Corp. v. Town of Chapel Hill Bd. of Adjustment, 334 N.C. 132, 431 S.E.2d 183 (1993); *In re* Hastings, 252 N.C. 327, 113 S.E.2d 433 (1960); *In re* Pine Hill Cemeteries, Inc., 219 N.C. 735, 15 S.E.2d 1 (1941); Tate Terrace Realty Investors, Inc. v. Currituck Cnty., 127 N.C. App. 212, 218, 488 S.E.2d 845, 849, *review denied*, 347 N.C. 409, 496 S.E.2d 394 (1997). *See also* Mead v. N.C. Dep't of Agric., 349 N.C. 656, 663, 509 S.E.2d 165, 170 (1998).

174. AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Bd. of Adjustment, 172 F.3d 307, 314 (4th Cir. 1999).

175. Mann Media, Inc. v. Randolph Cnty. Planning Bd., 356 N.C. 1, 14, 565 S.E.2d 9, 18 (2002); McMillan v. Town of Tryon, 200 N.C. App. 228, 683 S.E.2d 747 (2009); Friends of Mt. Vernon Springs, Inc. v. Town of Siler City, 190 N.C. App. 633, 660 S.E.2d 657 (2008); Sun Suites Holdings, LLC v. Bd. of Aldermen of Town of Garner, 139 N.C. App. 269, 273, 533 S.E.2d 525, 528, *review denied*, 353 N.C. 280, 546 S.E.2d 397 (2000); Vill. Creek Prop. Owners' Ass'n v. Town of Edenton, 135 N.C. App. 482, 520 S.E.2d 793 (1999); In re Willis & City of Southport Bd. of Adjustment, 129 N.C. App. 499, 502, 500 S.E.2d 723, 726 (1998).

176. 144 N.C. App. 236, 550 S.E.2d 212, *review denied*, 354 N.C. 361, 556 S.E.2d 299 (2001).

177. 115 N.C. App. 303, 444 S.E.2d 451, *review denied*, 338 N.C. 309, 451 S.E.2d 635 (1994). *See also* Charlotte Yacht Club, Inc. v. Cnty. of Mecklenburg, 64 N.C. App. 477, 307 S.E.2d 595 (1983).

178. "Under de novo review a reviewing court considers the case anew and may freely substitute it own interpretation of an ordinance for a board of adjustment's conclusions of law." Morris Commc'ns Corp. v. City of Bessemer City Bd. of Adjustment, 365 N.C. 152, ___, 712 S.E.2d 868, ___ (2011) (reversing interpretation of "work" required to be commenced to avoid expiration of sign permit). Ayers v. Bd. of Adjustment, 113 N.C. App. 528, 439 S.E.2d 199 (1994).

court to substitute its judgment. As stated in *MacPherson v. City of Ashville*, "Where an issue of statutory construction arises, the construction adopted by those who execute and administer the law in question is relevant and may be considered. Such a construction is entitled to great consideration."[179] The degree of deference accorded is related to the thoroughness with which the issue was considered by the board, the validity of its reasoning, and the consistency with which it has been applied.[180]

A number of cases have applied some judicial deference to staff and board interpretations of land development regulations.[181] In *P.A.W. v. Boone Board of Adjustment*,[182] the court noted that because the board is "vested with reasonable discretion in determining the intended meaning of an ordinance, a court may not substitute its judgment for the board's in the absence of error of law or arbitrary, oppressive, or manifest abuse of authority."[183] Similar rulings include cases involving board interpretation of the terms "abandon" and "discontinue" as related to nonconformities,[184] interpretation of when renovation constitutes "expansion" of a nonconforming use,[185] interpretation of what constitutes a "group home,"[186] interpretation of what uses were included within the term "government offices and buildings,"[187] interpretation of the term "value" as applied to a damaged nonconforming sign,[188] and interpretation of what constituted a "private" or "commercial" kennel under the terms of the zoning ordinance.[189]

There are limits to what a court will accept. In *Harry v. Mecklenburg County*,[190] the court noted while a zoning administrator's interpretation is entitled to some deference, this should not occur if the interpretation is contrary to the express purpose of the ordinance. Similarly, where the terms of an ordinance are clear and there is no ambiguity, it is improper for either the board or the staff to go beyond those terms in interpreting the ordinance.[191] There are also cases where courts simply accorded no deference at all to board interpretation.[192]

Record on Appeal

If there is an allegation that the evidence did not support a board's decision or that the decision was arbitrary and capricious, the court

179. 283 N.C. 299, 307, 196 S.E.2d 200, 206 (1973) (upholding city's determination that applicant for site plan approval was an "owner" within the intent of the ordinance). *See also* Hensley v. N.C. Dep't of Env't & Natural Res., 364 N.C. 285, 698 S.E.2d 41 (2010) (deference to Division of Land Resources, the agency responsible for administering statute, in interpretation of Sedimentation and Erosion Control Act); Darbo v. Old Keller Farm Prop. Owners' Ass'n, 174 N.C. App. 591, 621 S.E.2d 281 (2005) (planning board's long-standing interpretation of ordinance entitled to considerable deference); M.W. Clearing & Grading, Inc. v. N.C. Dep't of Env't & Natural Res., 171 N.C. App. 170, 614 S.E.2d 568, *rev'd in part*, 360 N.C. 392, 628 S.E.2d 379 (2006) (deference accorded Environmental Management Commission's interpretation of controlling statutes); Britt v. N.C. Sheriffs' Educ. & Training Standards Comm'n, 348 N.C. 573, 576, 501 S.E.2d 75, 77 (1998).

180. Brooks v. McWhirter Grading Co., 303 N.C. 573, 581, 281 S.E.2d 24, 29 (1981).

181. For a review of case law interpreting various provisions of North Carolina zoning ordinances, see Chapter 18. The courts also apply this rule in de novo reviews of statutory and administrative rule interpretation under the Administrative Procedure Act. *In re* Broad & Gales Creek Cmty. Ass'n, 300 N.C. 267, 275, 266 S.E.2d 645, 651 (1980) (deference accorded expertise of agency administering a law). In *County of Durham v. North Carolina Department of Environment & Natural Resources*, 131 N.C. App. 395, 507 S.E.2d 310 (1998), *review denied*, 350 N.C. 92, 528 S.E.2d 361 (1999), the court upheld the agency's interpretation of the statutes to distinguish inert debris landfills from sanitary landfills. The court noted the long-standing judicial tradition of deferring to a specialized agency's interpretation of a statute it administers so long as the interpretation is reasonable and is based on a permissible construction of the law. A similar federal rule is set forth in *Chevron U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837 (1984).

182. 95 N.C. App. 110, 382 S.E.2d 443 (1989).

183. *Id.* at 113, 382 S.E.2d 443 at 444–45.

184. CG & T Corp. v. Bd. of Adjustment, 105 N.C. App. 32, 39, 411 S.E.2d 655, 659 (1992) (upholding interpretation that element of intent not required for "discontinuance" of nonconformity).

185. APAC-Atl., Inc. v. City of Salisbury, ____ N.C. App. ____, 709 S.E.2d 390 (2011).

186. Taylor Home of Charlotte v. City of Charlotte, 116 N.C. App. 188, 193, 447 S.E.2d 438, 442, *review denied*, 338 N.C. 524, 453 S.E.2d 170 (1994) (upholding interpretation that some element of rehabilitation was required for qualification as a "group home").

187. Rauseo v. New Hanover Cnty., 118 N.C. App. 286, 454 S.E.2d 698 (1995) (upholding interpretation that a volunteer fire station was a "government building").

188. Whiteco Outdoor Adver. v. Johnston Cnty. Bd. of Adjustment, 132 N.C. App. 465, 513 S.E.2d 70 (1999) (upholding interpretation that "value" of signs meant their initial value).

189. Tucker v. Mecklenburg Cnty. Zoning Bd. of Adjustment, 148 N.C. App. 52, 557 S.E.2d 631 (2001) (upholding interpretation that absent breeding, selling, training, or boarding, a kennel for rescued dogs was not a "commercial kennel").

190. 136 N.C. App. 200, 523 S.E.2d 135 (1999). The court found that the administrator's determination that a pier could be a "principal" use rather than an "accessory" use if it were the only structure on the lot was contrary to the "only logical construction of the Ordinance." *Id.* at 203, 523 S.E.2d at 138. *See also* Koontz v. Davidson Cnty. Bd. of Adjustment, 130 N.C. App. 479, 503 S.E.2d 108, *review denied*, 349 N.C. 529, 526 S.E.2d 177 (1998) (overturning board of adjustment determination that vested rights existed); Ball v. Randolph Cnty. Bd. of Adjustment, 129 N.C. App. 300, 498 S.E.2d 833 (1998) (overturning board determination that remediation of petroleum contaminated soil was an agricultural use).

191. Procter v. City of Raleigh Bd. of Adjustment, 140 N.C. App. 784, 538 S.E.2d 621 (2000) (if there is no ambiguity in ordinance, it is error for board of adjustment to look beyond the language of the ordinance in making its interpretation); Ayers v. Bd. of Adjustment, 113 N.C. App. 528, 439 S.E.2d 199 (1994), *review denied*, 336 N.C. 71, 445 S.E.2d 28 (1994) (apply plain and ordinary meaning of words in interpreting ordinance); Cardwell v. Town of Madison Bd. of Adjustment, 102 N.C. App. 546, 402 S.E.2d 866 (1991) (improper for administrator and board of adjustment to use technical definition of "building" from the building code rather than relying on the zoning code); Riggs v. Zoning Bd. of Adjustment, 101 N.C. App. 422, 399 S.E.2d 149 (1991) (holding zoning administrator and board of adjustment erred in not considering a stormwater system a "structure," ruling that the definition that should be applied (in the absence of a more precise definition in the ordinance) was the natural and recognized meaning of the term).

192. Hayes v. Fowler, 123 N.C. App. 400, 473 S.E.2d 442 (1996) (interpretation of the ordinance is a question of law subject to de novo review by the trial court wherein the court may freely substitute its judgment for that of the board of adjustment).

is limited to reviewing the whole record before the decision-making board to determine if the record supports the board's conclusions. For alleged errors of law, the court undertakes a de novo review.[193]

In either event the superior court is acting in an appellate review capacity and does not take additional evidence.[194] The writ of certiorari does not lie to review questions of fact to be determined outside the record.[195]

The statutory timetables for serving and filing the record on appeal are mandatory and have to be met unless extensions of time are granted.[196] Absent service of the case on appeal, the review on appeal is on the record proper alone.[197]

G.S. 160A-393(i) specifies the content of the record on appeal of quasi-judicial decisions. It provides that the record includes all documents and exhibits submitted to the decision-making board and the minutes of the meetings at which the matter was heard. Any party may request that the record include an audiotape or videotape of the meeting if that is available. Any party may also include a verbatim transcript of the meeting, with the cost of preparation of the transcript being the responsibility of the party choosing to include it. The record must be bound, paginated, and served on all petitioners by the local government within three days of filing it with the court. The court may allow the record to be supplemented with affidavits or testimony regarding standing, alleged impermissible conflicts of interest, and the legal issues of constitutionality or statutory authority for the decision (as these legal issues are beyond the scope of issues that could have been addressed by the original decision-making board).

G.S. 160A-393(j) does allow the trial court to take new evidence in very limited circumstances. These include where the record is not adequate to allow an appropriate determination of standing, alleged conflicts of interest, constitutional violations, or lack of statutory authority.[198]

Mootness

If an ordinance is amended while litigation is pending, the case becomes moot and the appeal is dismissed if the amendment provides the plaintiff the relief sought in the litigation.[199] However, if the amendment does not provide the relief sought by litigation, the claim remains valid and the case is not moot. For example, in *Lambeth v. Town of Kure Beach*,[200] the town denied a permit to widen a driveway based on a long-standing, but unwritten, interpretation of its ordinance. While litigation on the denial was pending, the town amended the ordinance to clearly prohibit the proposed activity. The court held that this did not moot the appeal, as the applicant was challenging the propriety of the denial, and the language of the ordinance at the time of the denial was the legal issue before the court (rather than the amended language). Likewise, the court in *Amward Homes, Inc. v. Town of Cary*[201] held that repeal of an ordinance requiring payment of school impact fees did not moot an action challenging the town's authority to adopt the ordinance and seeking a refund of fees paid. In *Wilson v. City of Mebane Board of Adjustment*,[202] the court held that subsequent amendment of the development ordinance in a way that may have made a project permittable does not moot a challenge to a permit based on the prior ordinance when the only permits that were issued were based on the prior ordinance.

The fact that a successful petitioner or applicant abandons a project after securing a rezoning or zoning permit does not moot an action brought by a neighboring third party to challenge the rezoning or permit issuance.[203] On the other hand, if a permit denial is

193. *In re* Willis & City of Southport Bd. of Adjustment, 129 N.C. App. 499, 500 S.E.2d 723 (1998).

194. Capricorn Equity Corp. v. Town of Chapel Hill, 334 N.C. 132, 431 S.E.2d 183 (1993) (superior court must base review on record presented and may not make additional findings of fact when reviewing board of adjustment decision); Jamison v. Kyles, 271 N.C. 722, 157 S.E.2d 550 (1967) (where there were sufficient facts on the record to support the board of adjustment's findings, the trial court erred in overruling those findings); *In re* Hastings, 252 N.C. 327, 113 S.E.2d 433 (1960) (board of adjustment's findings of fact may not be overturned on judicial review if supported by adequate evidence in the record); Lamar OCI S.C. v. Stanly Cnty., 186 N.C. App. 44, 650 S.E.2d 37 (2007), *aff'd per curiam*, 362 N.C. 670, 669 S.E.2d 322 (2008) (trial court properly denied county's motion to supplement the record with affidavits since in quasi-judicial matters the court may not consider evidence not before the board of adjustment).

195. *In re* Pine Hill Cemeteries, Inc., 219 N.C. 735, 15 S.E.2d 1 (1941).

196. City of Hickory v. Catawba Valley Mach. Co., 38 N.C. App. 387, 248 S.E.2d 71 (1978).

197. Thurston v. Salisbury Zoning Bd. of Adjustment, 24 N.C. App. 288, 210 S.E.2d 275 (1974).

198. G.S. 1A-1, Rule 59(4), allows motions for a new hearing if newly discovered material evidence is found which the party making the motion could not have discovered with due diligence and produced at the hearing. Rule 60(b)(2) allows a judgment to be set aside on the same grounds. However, in *Bailey & Associates, Inc. v. Wilmington Board of Adjustment*, ___ N.C. App. ___, ___, 689 S.E.2d 576, 588 (2010), the court indicated that this motion needs to be initially made and decided by the board making the decision, as otherwise the trial court would have no record on the issue on appeal.

199. Davis v. Zoning Bd. of Adjustment, 41 N.C. App. 579, 255 S.E.2d 444 (1979). *See generally* State v. McCluney, 280 N.C. 404, 407, 185 S.E.2d 870, 872 (1972); Prop. Rights Advocacy Group v. Town of Long Beach, 173 N.C. App. 180, 182–83, 617 S.E.2d 715, 717–18 (2005).

200. 157 N.C. App. 349, 578 S.E.2d 688 (2003). In *Meares v. Town of Beaufort*, 193 N.C. App. 96, 100, 667 S.E.2d 239, 241–42 (2008), the court held that repeal of a contested provision in the town's Historic District Guidelines while judicial review was pending did not moot the case, as the board of adjustment had ordered a new hearing on the initial application for a certificate of appropriateness and the applicant was entitled to a decision on the application based on the rules in effect at the time of that initial application. In *Bailey & Assocs., Inc. v. Wilmington Bd. of Adjustment*, ___ N.C. App. ___, 689 S.E.2d 576 (2010), the court noted that the express terms of an ordinance amendment adoption can also provide that the amendment applies prospectively only.

201. ___ N.C. App. ___, 698 S.E.2d 404 (2010).

202. ___ N.C. App. ___, 710 S.E.2d 403 (2011).

203. Friends of Mt. Vernon Springs, Inc. v. Town of Siler City, 190 N.C. App. 633, 660 S.E.2d 657 (2008). The court noted that abandonment of the project by the applicant does not provide the relief sought—here invalidation of the rezoning and revocation of the permit. In *Adams v. Village of Wesley Chapel*, 259 F. App'x 545 (4th Cir. 2007), the court held that the plaintiff's sale of the land that was the basis of a constitutional challenge to land use restrictions on the property did not moot the case.

being appealed and the permit is issued while the matter is still on appeal, that action moots the appeal.[204]

Disposition

If a court invalidates a legislative land use regulatory decision, the challenged action is void ab initio.[205] However, even if the legislative action is invalidated, imposition of additional remedies on the landowner may not be imposed unless the landowner (as well as the unit of government involved) was a party to the suit.[206]

G.S. 160A-393(l) addresses the remedies available for consideration by courts in these situations. It provides that a court may affirm or reverse the original decision made by the local government board or may remand it with either instructions or a direction for further proceedings.[207] A remand can be made to correct a procedural record or to make findings of fact based on the existing record. If the court finds the board's decision is not supported by substantial competent evidence in the record or has an error of law, the remand may include an order to issue the approval (subject to reasonable and appropriate conditions) or to revoke the approval. The relief can also include appropriate injunctive orders.

If there is competent, material, and substantial evidence in the record to support findings that all relevant standards have been met and no competent evidence to the contrary, the trial court may order the permit issued without further hearing on remand (conversely, it can order the permit revoked if it is determined it was wrongfully issued).[208] If a permit contains conditions deemed to be improper, the court may order the offending conditions struck and order reissuance of a corrected permit where it is clear that this is the only possible result on remand.[209] Once remanded, appellate judicial review is premature pending resolution of the case on remand.[210]

Since interpretation of the ordinance or statute is a question of law subject to de novo review, in most instances the appropriate judicial disposition of such a matter is an order mandating issuance or denial of the challenged permit. The same is true for an appeal of a ministerial decision that does not involve contested facts.[211]

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204. Carolina Marina & Yacht Club v. New Hanover Cnty. Bd. of Comm'rs, ___ N.C. App. ___, 699 S.E.2d 646 (2010). The plaintiff applied for a special use permit to modify an existing commercial marina. The county denied the special use permit, but on appeal the superior court overturned that decision and ordered the permit issued. A neighbor who opposed the project and had intervened in the judicial review appealed that decision to the court of appeals. The county did not join in the appeal. The neighbor unsuccessfully sought a stay of the trial court's order and an injunction to prohibit permit issuance while she pursued the appeal. The county subsequently issued the special use permit. The court held that since the only issue on appeal was the validity of the county's permit denial, subsequent issuance of the permit resolved that matter and made the appeal moot. The same result obtained in *Estates Inc. v. Town of Chapel Hill*, 130 N.C. App. 664, 504 S.E.2d 296 (1998), *review denied*, 350 N.C. 93, 527 S.E.2d 664 (1999). The denial of a special use permit was appealed and the trial court subsequently ordered the permit issued. Neighbors who had intervened appealed to the court of appeals, but the town did not join the appeal and issued the permit while the matter was pending before the court of appeals. The court ruled that while the town was not compelled to issue the permit during the period of the automatic stay, it could voluntarily do so absent the intervenors securing an injunction to prohibit it from doing so. Once issued, the intervenors' appeal was moot. For a situation where the court held that judicial review was not made moot by a subsequent permit issuance, see *Councill v. Town of Boone Board of Adjustment*, 146 N.C. App. 103, 551 S.E.2d 907, *review denied*, 354 N.C. 360, 560 S.E.2d 130 (2001). The intervenors had alleged that a settlement of the case was illegal and that the permit was issued pursuant to that consent judgment, so that the issue originally raised was still at issue.

205. Keiger v. Winston-Salem Bd. of Adjustment, 281 N.C. 715, 721, 190 S.E.2d 175, 179 (1972).

206. McDowell v. Randolph Cnty., 186 N.C. App. 17, 649 S.E.2d 920 (2007).

207. Under prior case law, the usual course of action if the court determined the record was insufficient to support the findings was a remand of the case for further hearing by the board. *See*, *e.g.*, Deffet Rentals, Inc. v. City of Burlington, 27 N.C. App. 361, 219 S.E.2d 223 (1975); Long v. Winston-Salem Bd. of Adjustment, 22 N.C. App. 191, 205 S.E.2d 807 (1974) (remanding case for de novo board proceeding to secure competent evidence). The trial court must rely solely on the grounds for action set forth by the board making the quasi-judicial decision; it is error for the court to substitute or supplement the findings or conclusions made in the administrative proceeding. Godfrey v. Zoning Bd. of Adjustment, 317 N.C. 51, 63–64, 344 S.E.2d 272, 279–80 (1986) (quoting Secs. & Exch. Comm'n v. Chenery Corp., 332 U.S. 194, 196 (1947)); Ballenger Paving Co. v. N.C. State Highway Comm'n, 258 N.C. 691, 695, 129 S.E.2d 245, 248 (1963); Guilford Fin. Servs., LLC v. City of Brevard, 356 N.C. 655, 576 S.E.2d 325 (2003), *per curiam, adopting dissent in* 150 N.C. App. 1, 563 S.E.2d 27 (2002).

208. G.S. 160A-393(l)(3). *See also* Stealth Props., LLC v. Town of Pinebluff Bd. of Adjustment, 183 N.C. App. 461, 645 S.E.2d 144, *review denied*, 361 N.C. 703, 653 S.E.2d 153 (2007) (where there is insufficient evidence in the record to support a variance denial and there is evidence to support its issuance, proper course is to remand with instructions to issue the variance); Cumulus Broad., LLC v. Hoke Cnty., 180 N.C. App. 424, 638 S.E.2d 12 (2006); Humane Soc'y of Moore Cnty., Inc. v. Town of S. Pines, 161 N.C. App. 625, 589 S.E.2d 162 (2003); Sun Suites Holdings, LLC v. Town of Garner, 139 N.C. App. 269, 533 S.E.2d 525, *review denied*, 353 N.C. 280, 546 S.E.2d 397 (2000); Clark v. City of Asheboro, 136 N.C. App. 114, 524 S.E.2d 46 (1999); Estates, Inc. v. Town of Chapel Hill, 130 N.C. App. 664, 504 S.E.2d 296 (1998), *review denied*, 350 N.C. 93, 527 S.E.2d 664 (1999).

209. Overton v. Camden Cnty. I, 155 N.C. App. 100, 109, 574 S.E.2d 150, 156 (2002). The court cited cases from several other jurisdictions with similar holdings. These include *Belvoir Farms Homeowners Ass'n, Inc. v. North*, 355 Md. 259, 268, 734 A.2d 227, 232–33 (Ct. App. 1999), and *Parish of St. Andrew's Protestant Episcopal Church v. Zoning Board of Appeals*, 155 Conn. 350, 354, 232 A.2d 916, 919 (1967).

210. Jennewein v. City Council of Wilmington, 46 N.C. App. 324, 264 S.E.2d 802 (1980).

211. Clinard v. City of Winston-Salem, 173 N.C. 356, 358, 91 S.E. 1039, 1040 (1917). In this case, after the inspector issued a building permit for an addition to a structure, a question arose as to whether the addition encroached into an alley subject to public use. The inspector revoked the permit until that issue could be resolved. It was eventually determined that there were no public rights to this portion of the alley. The court held that the appropriate remedy was mandamus for issuance of the permit but that there was no liability for monetary damages for the city or the inspector.