ADMINISTRATIVE MODIFICATIONS

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Overview

North Carolina local governments may establish procedures to allow for administrative review of proposed minor amendments for conditional zoning, special use permits, and other development approvals. This administrative flexibility reduces the need for a full approval process to accommodate a limited change to the plans for a project. Any significant amendments must still go through the full review process (legislative for conditional zoning, quasi-judicial for special use permits, and full administrative review process for administrative approvals).

An important limitation: The new statutory language authorizing administrative modifications is specifically for minor adjustments to projects that are already approved. This is not an alternative to the variance standards and procedures. Examples of administrative minor modifications include reconfiguring parking design, changing landscaping arrangements, or slightly altering road and lot configurations for a development that has already gone through the full approval process. Arguably there is authority within the general zoning powers and applicable caselaw to allow for minor modifications to dimensional ordinance standards, but that is not explicitly authorized by Chapter 160D.

Administrative modification is an option for local governments. A community may choose to include administrative modification in the ordinance or not.

The following sections outline policy considerations and legal criteria for administrative modification of development approvals, but as with any policy decisions and ordinance language, each jurisdiction should carefully consider the preferred approach for that community. Sample ordinance language must be tailored to the particular ordinance and local context.

This Chapter 160D Guidance is one in a series of guidance documents intended to provide supplemental information on specific topics. Additional guidance documents, training videos, an explanatory book, and other Chapter 160D resources are available at nc160D.sog.unc.edu.

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Key Considerations

What types of changes warrant going back through the full review process? And what types of changes are best handled by administrative staff? Those are the overarching questions for administrative minor modification. While boards commonly want to review the significant aspects of a project, they may not want to spend excessive time reviewing minor changes. Without administrative modification, a change to an approved development must go through the full procedural requirements of notice, hearing(s), and other procedural safeguards. There is less need for such process when changes are simply tweaks to an already approved project, so minor modification may be an alternative.

Here are important considerations for administrative review of proposed minor modifications:

- ***Distinguish Site Design Modification from Dimensional Standard Modification.*** There are two distinct types of minor modification, one clearly authorized by Chapter 160D and the other arguably authorized under the general zoning powers and applicable caselaw.

  First, there are site design modifications—changes to the design of previously approved development approvals. This would include a tweak to the design of a preliminary subdivision plat or a slight alteration of the site plan required as a condition in a special use permit. For these changes, the development still meets the underlying zoning requirements, but there is a need for flexibility in the design of the site plan or preliminary subdivision plat. Chapter 160D clearly authorizes such site design modifications provided they are defined in the ordinance and subject to prescribed limits. Even so, caselaw demands that such changes must follow clear, objective standards and a fair process.

  Second, there are dimensional standard modifications—changes to the underlying zoning standards. These might include reductions in parking standards or setbacks that are set by ordinance. Local governments must take great care in allowing such modifications. Dimensional standard modifications are not explicitly authorized by Chapter 160D, but those modifications arguably may be authorized under the general zoning authority and applicable caselaw. An alteration to a basic ordinance standard is substantially similar to a variance which requires a quasi-judicial evidentiary hearing by the board of adjustment. Clear, objective standards, a fair process, and a straight-forward appeal process will be necessary for such modification provisions.

- ***Define Minor Modification.*** The ordinance must define the types of changes that qualify for administrative review and the limits on such changes. Ordinances may include topics

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such as lot configuration, parking design, building location, and similar requirements as topics for which minor modification may be granted. As discussed more below, the limitations are commonly phrased as numerical or percentage caps for the change (no more than five feet or ten percent, for example). Communities may permit administrative modification of a site plan that has been attached as a condition of approval to a conditional zoning district or special use permit. The ordinance may also define changes that do not qualify for minor modification—changes that require a major amendment—such as changes that would increase the traffic from the project beyond the levels projected in a Transportation Impact Analysis (TIA) or increase the stormwater impacts beyond what was identified in the stormwater analysis conducted as part of the original approval.

- ***No change in use or density.*** The statutes (excerpted below) prohibit administrative minor modifications that "involve a change in uses permitted or the density of overall development permitted." An administrative modification could not be used to convert a use from residential to commercial, for example. That said, there is the potential for some ambiguity. Could an administrative official approve a shift in equivalent amounts of activity between different uses within a similar category, such as trading an equivalent number of dwelling units from one housing type to another, or trading equivalent square footage between non-residential uses? Such modification may be possible if it could be demonstrated that the original approval foresaw such flexibility and the proposed shift did not increase the "overall density of development."

- ***Qualifying criteria for modification.*** When is a minor modification authorized? An administrator cannot have wide-open discretion for granting modifications. There must be specific, neutral, and objective criteria in place for when a minor modification is authorized. So, for example, a minor modification may be allowed to provide relief from a unique physical attribute of the property not known at the time of initial approval. With such a limit, the applicant will need to provide evidence of why relief is needed. While the administrator may need to engage in some fact finding, it may be administrative rather than quasi-judicial as long as it is defined by the ordinance and limits are placed on the discretion exercised by the local government staff person or appointed board (discussed below).

- ***Limits on amount of modification.*** In addition to clear criteria for when modifications are authorized, the ordinance should set specific, neutral, and objective limits for the permissible amount of modification. For example, a setback may be reduced *up to ten percent or 24 inches*, or a parking requirement may be reduced *no more than 25 percent*.

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- ***Decision-maker.*** The ordinance should identify which official or board is charged with reviewing a request for administrative modification. Administrative review functions can be delegated either to local government staff or appointed boards, as desired by the unit of local government.

- ***Parcel-specific modification.*** In the case of modifications to conditional zoning districts, the statute authority permits the owners of individual parcels to "apply for modification of the conditions so long as the modification would not result in other properties failing to meet the terms of the condition." Such a change applies only to the properties whose owners require the change.

- ***Major amendments remain.*** If a requested change does not qualify as a minor amendment, the applicant may still seek a major amendment to the approval. Such proposed revisions must go through the full approval process. An ordinance may specify that multiple, sequential minor modifications will trigger the need for a major amendment (projects are limited to one minor modification or one minor modification per year, for example).

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Caselaw Limitations

Long before Chapter 160D, North Carolina courts explained, emphasized, and enforced the difference between quasi-judicial decisions and administrative decisions. The distinctions are especially important because of the differing procedural requirements to protect the rights of affected parties. If a decision requires judgment and leaves substantial discretion to the decision-maker, it is quasi-judicial and must follow elements of a fair trial including an evidentiary hearing. If a decision is routine and nondiscretionary, then the decision is administrative or ministerial and there is no need for a quasi-judicial hearing.

In *County of Lancaster v. Mecklenburg County*, 334 N.C. 496, 434 S.E.2d 604 (1993), the North Carolina Supreme Court provided the following distinctions:

> In making quasi-judicial decisions, the decisionmakers must investigate facts, or ascertain the existence of facts, hold hearings, weigh evidence, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature.
>
> . . .
>
> Administrative decisions are routine, nondiscretionary zoning ordinance implementation matters carried out by the staff, including issuance of permits for permitted uses. In general, the zoning administrator is a purely administrative or ministerial agent following the literal provisions of the ordinance. The zoning administrator may well engage in some fact finding, . . . [b]ut, in such instances, this involves determining objective facts that do not involve an element of discretion.

In *County of Lancaster v. Mecklenburg County*, the county standards for landfill permits called for the zoning administrator to make certain determinations. Most were plainly objective (yard requirements, screening, hours of operation, access, and notification of adjoining property owners). Two determinations, though, required some judgement: whether the proposed use would be *consistent* with the county's land use plan and whether the cost estimates for reclamation were *reasonable*.

Neighbors argued that the permit standards were quasi-judicial in nature, and thus, the delegation to the administrator violated due process. The Supreme Court acknowledged that decisions requiring discretion are quasi-judicial and must meet the elements of a fair trial, but the court also affirmed that some fact-finding and determination may be involved in administrative decisions. Such administrative decisions must still be based on objective facts, not administrator discretion. In this case, the court deferred to the county's determination, as

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evidenced in the adopted ordinance provisions, that these were objective standards that could be applied by administrative staff.

In *Butterworth v. City of Asheville*, 247 N.C. App. 508, 786 S.E.2d 101 (2016), the North Carolina Court of Appeals emphasized that there are limits to administrative decision-making: A decision requiring the exercise of judgment and discretion in applying general standards to a particular case is quasi-judicial and due process requires that the board must follow the elements of a fair trial. In that case, the local ordinance allowed a modification to standards with a finding of "unusual and unnecessary hardship." The city treated that determination as administrative, but the court ruled that such a standard is essentially a variance. It requires the exercise of judgment and discretion, so it is quasi-judicial.

The court did clarify that some modifications may be allowed as administrative decisions, but such modifications must be based on "specific, neutral, and objective criteria." The court identified acceptable administrative modifications in the Asheville code "such as the limitation of a deviation not in excess of 'up to ten percent or 24 inches . . . from the approved setback,' or a reduction of no more than '25 percent in the number of parking spaces required[.]'"

Statutory Authorization

Conditional Zoning (Legislative)

N.C.G.A. § 160D-7-3(b) states:

> Conditional Districts. – Property may be placed in a conditional district only in response to a petition by all owners of the property to be included. Specific conditions may be proposed by the petitioner or the local government or its agencies, but only those conditions mutually approved by the local government and the petitioner may be incorporated into the zoning regulations. Conditions and site-specific standards imposed in a conditional district shall be limited to those that address the conformance of the development and use of the site to local government ordinances, plans adopted pursuant to G.S. 160D-5-1, or the impacts reasonably expected to be generated by the development or use of the site. []
>
> *The zoning regulation may provide that defined minor modifications in conditional district standards that do not involve a change in uses permitted or the density of overall development permitted may be reviewed and approved administratively.* Any other modification of the conditions and standards in a conditional district shall follow the same process for approval as are applicable to zoning map amendments. If multiple parcels of land are subject to a conditional zoning, the owners of individual parcels may apply for modification

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> of the conditions so long as the modification would not result in other properties failing to meet the terms of the conditions. Any modifications approved shall only be applicable to those properties whose owners petition for the modification.

Special Use Permits (Quasi-Judicial)

N.C.G.A. § 160D-705(c) states:

> Special Use Permits. – The regulations may provide that the board of adjustment, planning board, or governing board hear and decide special use permits in accordance with principles, conditions, safeguards, and procedures specified in the regulations. Reasonable and appropriate conditions and safeguards may be imposed upon these permits. Where appropriate, such conditions may include requirements that street and utility rights-of-way be dedicated to the public and that provision be made for recreational space and facilities. Conditions and safeguards imposed under this subsection shall not include requirements for which the local government does not have authority under statute to regulate nor requirements for which the courts have held to be unenforceable if imposed directly by the local government.
>
> *The regulation may provide that defined minor modifications to special use permits that do not involve a change in uses permitted or the density of overall development permitted may be reviewed and approved administratively.* Any other modification or revocation of a special use permit shall follow the same process for approval as is applicable to the approval of a special use permit. If multiple parcels of land are subject to a special use permit, the owners of individual parcels may apply for permit modification so long as the modification would not result in other properties failing to meet the terms of the special use permit or regulations. Any modifications approved shall only be applicable to those properties whose owners apply for the modification. The regulation may require that special use permits be recorded with the register of deeds.

Development Approvals (Administrative)

N.C.G.A. § 160D-403(d) states:

> Changes. – After a development approval has been issued, no deviations from the terms of the application or the development approval shall be made until written approval of proposed changes or deviations has been obtained. *A local government may define by ordinance minor modifications to development approvals that can be exempted or administratively approved.* The local government shall follow the same development review and approval process

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required for issuance of the development approval in the review and approval of any major modification of that approval.

Sample Ordinance Language

Changes to Prior-Approved Developments

A. **Major Amendments.** Except as allowed under Minor Modifications below, all changes to approved ____________ [INSERT ALL THAT APPLY: CONDITIONAL ZONING, SPECIAL USE PERMIT, AND/OR OTHER DEVELOPMENT APPROVALS] are major amendments and shall follow the same process applicable for the original approval.

B. **Changes to Individual Parcels within a Conditional Zoning District.** For a conditional zoning district applicable to multiple parcels, the owners of individual parcels may apply for minor modification or major amendment so long as the change would not result in other properties failing to meet the terms of the conditions. Any approved changes shall only be applicable to those properties whose owners petitioned for the change.

C. **Minor Modifications.** The _________ [insert appropriate title/position] is authorized to review and approve administratively a minor modification to an approved ___________ [INSERT ALL THAT APPLY: CONDITIONAL ZONING, SPECIAL USE PERMIT, AND/OR OTHER DEVELOPMENT APPROVALS], subject to the following limitations.

    1. *General Limitations.* The minor modification:
        i. Does not involve a change in uses permitted or the density of overall development permitted;
        ii. Does not increase the impacts generated by the development on traffic, stormwater runoff, or similar impacts beyond what was projected for the original development approval; and
        iii. Meets all other ordinance requirements.

    2. *Site Design.* Site design minor modifications are limited adjustments to the terms or design of an approved development plan or plat, including a site plan attached as a condition to a conditional zoning or special use permit. In addition to the general limitations for minor modifications, a site design minor modification must:
        i. Comply with underlying zoning standards and other applicable conditions of the approval;
        ii. Be limited to a minor change such as, without limitation, a minor adjustment to road configuration or internal circulation, a minor adjustment to building location, or a minor adjustment to utility alignment.

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3. *Dimensional Standards*. Dimensional standard minor modifications are adjustments to the dimensional standards of the zoning ordinance. Dimensional standards may only be modified upon a finding by the administrator, based on evidence from the permit holder, that the modification is needed to address a site characteristic or technical design consideration not known at the time of initial approval.

   In addition to the general limitations for minor modifications, dimensional standard minor modifications are limited to:

   i. An adjustment to parking requirements up to the greater of __ spaces or ___ percent.
   ii. An adjustment to setback requirements up to greater of __feet or __ percent of the standard setback.
   iii. An adjustment to landscape standards up to __ percent of required landscaping.

D. **Appeals and Variances.** A decision on minor modification may be appealed to the Board of Adjustment as an administrative determination. An application for a minor modification does not preclude an applicant from seeking a variance from the Board of Adjustment.

Example Ordinance Provisions

The following example ordinance provisions are drawn from North Carolina communities. These provisions were in place prior to the adoption of Chapter 160D. They are excerpted with minor noted edits to align with the guidance of Chapter 160D such as the prohibition on minor modifications for density.

City of Asheville – Minor Modifications for Conditional Use District

Section 7-9-9. [Special Use Permits]

(b) General requirements. . . .

(6) Minor modifications of the approved [special] use permit may be approved by the planning and development director. The minor modifications authorized herein are intended to provide relief where conditions, established by the [special] use permit granted, create a hardship based upon a unique physical attribute of the property itself or some other factor unique to the property which was not known at the time of permit approval and which subsequently rendered the land difficult or impossible to use due to the condition(s) imposed. The permit holder shall bear the burden of proof to secure the modification(s). Such modifications shall be limited to the following:

a. A deviation of up to ten percent or 24 inches, whichever is greater, from the approved setback, provided that the conditions for approving a deviation from the required setback established by subsection 7-11-8(c)(1) of this chapter are met.

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b. A reduction of up to 25 percent in the number of parking spaces required for the use provided that the conditions established by subsection 7-11-8(c)(2) of this chapter are met.

Currituck County – Minor Deviations to Conditional Rezonings

Section 2.4.4 – Conditional Rezoning

(I) Minor Deviations from Approved Conceptual Development Plan

Subsequent plans and permits for development within a conditional zoning district may include minor deviations from the approved conceptual development plan, provided such deviations are limited to changes addressing technical considerations that could not reasonably be anticipated during the conditional zoning classification process, or any other change that has no material effect on the character of the approved development. Changes in the following shall constitute minor deviations that may be approved by the Planning Director:

(a) Driveway locations;

(b) Structure floor plan revisions;

(c) Minor shifts in building size or location; and

. . .

(2) Material Changes are Amendments

Changes that materially affect the basic configuration of the approved conceptual development plan are not considered minor deviations, and shall only be changed as amendments to the conditional rezoning in accordance with Section 2.3.14, Amendment of Development Approval.

Town of Morrisville – Minor Modification Procedure for Special Use Permits

Section 2.5.5 Special Use Permit

(C)(7)(d) Minor Modifications Allowed

(1) Subsequent development applications may incorporate minor changes from the development defined by the Special Use Permit approval, without the need to amend the Special Use Permit in accordance with Section 2.4.8.D, Modification or Amendment of Approval, where the Planning Director determines that the changes:

(A) Continue to comply with this Ordinance;

(B) Are necessary to comply with conditions of approval; or

(C) Are consistent with the Special Use Permit approval or any Town Council approval on which the Special Use Permit approval was based (e.g., PD Plan/Agreement approval, Conceptual Master Plan Approval). Consistency means the changes would not significantly alter the development's general function, form, intensity, character, demand on public facilities, impact on adjacent properties, or other characteristic from that indicated by the Special Use Permit approval or any prior Town Council approval on which it was based.

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(2) In any case, the following changes from the Special Use Permit approval or Town Council approval on which it was based shall constitute a major change requiring amendment of the Special Use Permit in accordance with Section 2.4.8.D, Modification or Amendment of Approval:

(A) A change in a condition of approval;

[(B) A change in uses permitted or the density of overall development.]

[(C) A change greater than ten percent in the ratio of gross floor area devoted to residential uses to that devoted to nonresidential floor area; and

. . .

(D) An increase greater than ten percent in the amount of land devoted to nonresidential uses[.]

. . .

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