

# LAKE JAMES PROTECTION ORDINANCE (2016)

## OF

### McDOWELL COUNTY, NORTH CAROLINA

#### ARTICLE I. TITLE

This ordinance shall be known as "The Lake James Protection Ordinance (2016) of McDowell County, North Carolina."

#### ARTICLE II. AUTHORITY AND GENERAL REGULATIONS

##### Section 201. Authority and Enactment.

In pursuance to the authority conferred by the North Carolina General Statutes, particularly Chapter 153A, Article 18, Part 3, the County Commissioners of McDowell County, North Carolina, hereby ordain and enact into law the following articles and sections.

##### Section 202. Intent.

It is the intent of this Ordinance to protect water quality, public safety, aesthetics, fish and wildlife habitat, and recreational use of Lake James by minimizing erosion, preventing siltation and turbidity, stabilizing soils, preventing excess nutrients and chemical pollution, maintaining natural water temperatures, maintaining healthy tree canopy and understory, preserving fish, bird and wildlife habitat, and respecting the overall natural condition of the shoreline. It is also the intent of this Ordinance to encourage responsible development of the shoreline of Lake James in compliance with this Ordinance.

##### Section 203. Jurisdiction.

The provisions of this ordinance shall apply to all lands in McDowell County within two hundred fifty (250) feet, (measured horizontally) of the Reference Line of Lake James. The Reference Line is the Duke Power Company Lake James Project Boundary of 1,200 feet above mean sea level.

##### Section 204. Penalties.

This ordinance may be enforced by any one, all, or a combination of the remedies authorized and prescribed by G.S. 153A-123 and 153A-324.

##### Section 205. Remedies.

(A) If the Planning Administrator finds that any of the provisions of this Ordinance are being violated, he shall notify in writing the person responsible for such violation, indicating the nature of the violation, and ordering the action necessary to correct it. He shall order discontinuance of the illegal use of buildings or structures; removal of illegal

buildings or structures, or of additions, alterations or structural changes thereto; discontinuance of any illegal work being done; replacement of vegetation or humus layers; or shall take any action authorized by this ordinance to ensure compliance with or to prevent violation of its provisions. If a ruling of the Planning Administrator is questioned, the aggrieved party or parties may appeal such ruling to the Board of Adjustment.

(B) Violation of any provision of this ordinance shall subject the offender to a civil penalty in an amount not less than five-hundred dollars (\$500.00) nor more than five thousand dollars (\$5,000) per occurrence of the violation, depending upon the nature and severity of the violation. The removal of each protected tree may be considered as a separate violation. Such penalty shall be recovered by the County in a civil action in the nature of a debt if the offender does not pay the penalty within a period of seventy-two (72) hours after being cited. Citations shall be in writing and signed by the Planning Administrator, and shall be delivered or mailed to the offender either at his residence or at his place of business or at the place where the violation occurred. Each day that the violation continues shall constitute a separate and distinct offense without multiple citations being issued.

(C) A notification of violation shall be issued and the activity causing the problem shall cease immediately upon receipt of the notification. Work to correct the problem shall begin within ten (10) days unless the person involved can show just cause, which will provide an extension of time long enough to repair the damage.

#### Section 206. Severability.

Should any section or provision of this Ordinance be declared invalid or unconstitutional by any court of competent jurisdiction, the declaration shall not affect the validity of this Ordinance as a whole or any part thereof that is not specifically declared to be invalid or unconstitutional.

#### Section 207. Conflict With Other Laws.

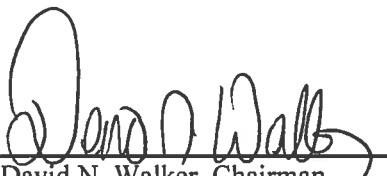
Where the provisions of any other law, ordinance or regulation impose higher standards than are required by the provisions of this Ordinance, the provisions of such law, ordinance or regulation shall govern.

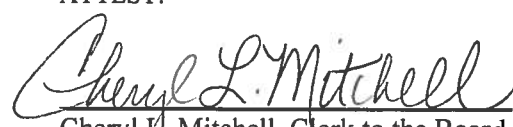
#### Section 208. Applicability

This Ordinance does not apply to any development that has an approved Master Plan or other Planning Board approval as of the Effective Date below.

#### Section 209. Effective Date.

This Ordinance shall take effect and be in force on the 14<sup>th</sup> day of November 2016.

  
David N. Walker, Chairman

ATTEST:  
  
Cheryl L. Mitchell, Clerk to the Board

### ARTICLE III. DEFINITIONS OF TERMS USED IN THIS ORDINANCE

#### Section 301 General Definitions.

**Accessory Building or Structure.** A building or structure on the same lot with and of a nature customarily incidental and subordinate to the principal use or structure. Examples of accessory uses are private garages, storage sheds, playhouses, swimming pools, satellite dish antenna and fuel pumps.

**Best Management Practices (BMP).** A structural or nonstructural management-based practice used singularly or in combination to reduce nonpoint source inputs to receiving waters in order to achieve water quality protection goals.

**Board of Adjustment.** The McDowell County Board of Adjustment. A quasi-judicial board composed of residents of McDowell County empowered to hear appeals from decisions of the Planning Administrator or his designee and grant variances from provisions of the Lake James Protection Ordinance.

**Board of Commissioners.** The McDowell County Board of Commissioners; the governing body.

**Building Inspector.** The building official named by the County Manager to administer and enforce the provisions of the building code, or his designated representative or agent.

**Building Permit.** A permit which is issued by the building inspector before a building or structure is started, improved, enlarged or altered as proof that such action is in compliance with county building code.

**Built-upon area.** Built-upon areas shall include that portion of a development project that is covered by impervious cover including buildings, pavement, gravel areas (e.g., roads, parking lots, paths), recreation facilities (e.g., tennis courts), etc. (Note: Wooden slatted decks and the water area of a swimming pool are considered pervious.)

**County.** McDowell County, North Carolina.

**Existing Lot (Lot of Record).** A lot which is part of a subdivision, a plat of which has been recorded in the Office of the Register of Deeds prior to the adoption of this ordinance, or a lot described by metes and bounds, the description of which has been so recorded prior to the adoption of this ordinance.

**Ground Cover.** The small plants in a natural area, except young trees, or a planting of low-growing plants that covers the ground in place of turf grasses.

**Hand Tools.** Hand held tools such as axes and mattocks, including power equipment such as chainsaws and weed trimmers.

**Humus Layer.** Decayed leaf litter and other organic material in or on the soil.

**Landowner.** Any owner of a legal or equitable interest in real property, including the heirs, devisees, successors, assigns, and personal representative of such owner.

**Leaf Litter.** Normal fallen leaves from trees.

**Lot.** A parcel of land occupied or capable of being occupied by a building or group of buildings devoted to a common use, together with the customary accessories and open spaces belonging to the same.

**Marina.** Any use of the project lands and waters of Lake James for facilities where water craft can be launched retrieved or moored and facilities for food services and convenience retailing, including petroleum dispensing, wet and dry storage of water craft and other activities customarily associated with marinas, campgrounds and yacht clubs are provided. This definition does not include private residential boat slips and ramps.

**Mechanical Clearing.** Any clearing of trees, shrubs, understories, stumps or humus layers by wheeled or tracked vehicles or equipment such as a bulldozer or backhoe. Mechanical clearing does not include clearing by hand held power equipment such as chainsaws.

**Planning Administrator.** The McDowell County official charged with the responsibility of enforcing this ordinance, or his/her designee.

**Planning Board.** The McDowell County Planning Board.

**Primary Structure.** A structure or building on a parcel which contains the primary use of a parcel of land. Typically the largest building, on a parcel.

**Prune.** To cut off or cut back parts of a plant above the ground in order to achieve a better shape or better growth. In order to reduce erosion potential, pruning shall not include the removal of any part of a plant below the surface of the soil.

**Reference Line.** The Duke Power Company Lake James Project Boundary of 1,200 feet elevation above mean sea level.

**Setback Line.** A line parallel to the shoreline and extending the full width or length of the lot for a specified distance at all points from the property line, and thus defining an area on which no building or structures, or portions thereof, may be constructed.

**Street (Road).** A right-of-way for vehicular traffic which affords the principal means of access to abutting properties.

**Structure.** Anything constructed or erected, including but not limited to buildings, which requires location on the land or attachment to something having permanent location on the land.

**Turf Grasses.** Normal yard grasses, including sod and fescue.

**Understories.** Small trees and shrubs (e.g. mountain laurel, dogwood.)

**Variance.** A reasonable deviation from those provisions regulating the size, area or location of a building, road or structure when the strict application of the provisions of this ordinance would result in an unnecessary or unreasonable hardship to the property owner, and such need for a variance would not be shared generally by other properties, and provided such variance is not contrary to the intended spirit and purpose of this ordinance.

**Variance, Minor.** A variance whose deviation from the numerical requirement is ten (10) percent or less and can be granted by the Planning Administrator.

**Water Dependent Structure.** Any structure for which the use requires access to or proximity to or citing within surface waters to fulfill its basic purpose, such as boat ramps, boat houses, docks and bulkheads. Ancillary facilities such as restaurants, outlets for boat supplies, parking lots and commercial boat storage areas are not water dependent structures.

#### **Section 302. Word Interpretation.**

For the purpose of this ordinance, certain words shall be interpreted as follows:

Words in the present tense include the future tense.

Words used in the singular number include the plural, and words used in the plural number include the singular, unless the natural construction of the wording indicates otherwise.

The word "person" includes a firm, association, corporation, trust, and company as well as an individual.

The word "structure" shall include the word "building."

The word "lot" shall include the words, "plot," "parcel," or "tract."

The word "shall" is always mandatory and not merely directory.

The word "will" is always mandatory and not merely directory.

### **ARTICLE IV. DEVELOPMENT REGULATIONS**

#### **Section 401 Natural Woodland Buffer.**

Where existing, a natural woodland buffer shall be maintained within one hundred (100) feet (measured horizontally) of the Reference Line.

##### **Section 401.01 General Provisions.**

Within the natural woodland buffer, the following provisions shall apply within fifty (50) feet (measured horizontally) of the Reference Line:

1. All trees, shrubs and ground cover are considered protected vegetation.
2. Clearing, thinning, pruning, and planting shall be accomplished with hand tools. Burning shall not be used as a method of clearing or thinning.
3. All existing forest floor humus layers, leaf litter and soil shall remain undisturbed and intact except for the construction of foot paths and clearing permitted by this section.
4. Accessory structures such as storage sheds and gazebos but excluding automobile garages may be permitted within 50 feet of the Reference Line provided that:
  - a. The footprint of the structure does not exceed 150 square feet.
  - b. The structure is usually customary and incidental to a legally authorized use.
5. Within fifty (50) feet of the Reference Line, existing trees with a diameter of six inches or greater, other than those considered hazardous to the home or cleared under other conditions of this article, may be removed when replaced by a quantity of trees totaling the diameter of the tree removed. Replacement trees are not to be less than one and a half ( 1 1/2 ) inch-diameter (i.e., four 1 1/2" trees may replace one 6" tree). Diameter shall be measured at a height of three feet from the base of the tree. The replacement trees shall be uniformly placed throughout and within fifty (50) feet of the Reference Line. The location and species of replacement trees shall be approved by the Planning Administrator.
6. Individual trees may be pruned to remove only lateral limbs from no more than the

lower fifty (50) percent of the trees total height.

**7. Replanting Timetable: When trees are removed as prescribed in this section legally, replacement trees and vegetation must be replaced within 12 months from the time of removal. A replanting timetable must be submitted and approved to the Planning Administrator and a date issued for replacement trees and vegetation to be complete. In instances where trees and vegetation are removed and considered a violation of this ordinance, the owner will have 30 days from receipt of violation notice to submit a replanting timetable and have temporary sediment and erosion control measures in place.**

#### 401.02 Activities Permitted Within Fifty Feet of the Reference Line.

The following, activities are permitted within fifty (50) feet of the Reference Line, with the approval of the Planning Administrator.

1. Dead, diseased, hazardous or unsafe trees, shrubs or ground cover may be removed.
2. Fallen trees may be removed.
3. Vines, shrubs, ground covers and small trees ( 2 inch diameter or less) may be selectively pruned in order to facilitate a better view or a more aesthetically pleasing landscape.
4. Understories of trees may be thinned, but no grubbing and grinding of stumps is allowed.
5. Ground cover other than grasses may be planted. Any replacement ground cover must prevent surface water runoff under normal precipitation conditions.
6. Shoreline stabilization is permitted, subject to approval of the plan for stabilization by the Planning Administrator. Stabilization materials shall not exceed a vertical height of four feet (4') above the Reference Line. Land disturbing activities in connection with shoreline stabilization shall not extend more than ten feet (10') measured horizontally from the Reference Line.
7. With approval of the Planning Administrator, permanent grasses other than turf grasses, may be permitted in special situations in conjunction with shoreline stabilization projects where the slopes will not support a natural mulch ground cover.
8. Clearing is allowed to create a single corridor, not to exceed ten (10) feet in width, for equipment access, and to allow slopes to be laid back to create a stable condition. Protected trees removed to accommodate the stabilization shall be replaced as provided in Section 401.01(5).
9. Structures that support water dependent uses (i.e., boat ramps, docks, and piers, but not parking areas) are permitted within fifty (50) feet of the Reference Line if they comply with all applicable Duke Power, local, state, and federal regulations.
10. Any land disturbing activity or tree removal (in excess of two (2) inch diameter) within fifty (50) feet of the Reference Line must be pre-approved by the Planning Administrator.

Section 401.03 Activities Not Permitted Within Fifty (50) Feet of the Reference Line.  
The following provisions are not permitted within fifty (50) feet (measured horizontally) of the Reference Line.

1. Topping of trees.
2. Grubbing or grinding of stumps of any size.
3. Chemicals shall not be used to kill stumps and other vegetation.
4. Mechanical clearing shall not be used unless it is used in conjunction with a shoreline stabilization project.

#### Section 401.04 Setback Provisions.

All permanent structures shall adhere to the following, setback provisions.

**1. Primary structures shall be set back at least seventy-five (75) feet (measured horizontally) from the Reference Line. Uncovered wooden slatted decks attached to a primary structure are allowed to extend fifteen (15) feet from the primary structure.**

2. Roads and/or driveways shall be set back at least seventy-five (75) feet (measured horizontally) from the Reference Line, and shall be designed to minimize disturbance to existing natural vegetation and topography, except for bridges and bridge approaches and access ways for emergency vehicles.

3. Primary structures shall be set back at least fifteen (15) feet (measured horizontally) from the side property lines.

#### Section 401.05 Natural Woodland Buffers.

Within the natural woodland buffer the following restrictions shall apply between fifty (50) and one hundred (100) feet (measured horizontally) of the Reference Line.

1. Existing natural woodland buffers must be maintained.

2. Dead, diseased, hazardous or unsafe trees, saplings, shrubs, or ground cover may be removed. Fallen trees may also be removed. Removal of lateral limbs of no more than fifty (50) percent of a tree's total height will be permitted.

3. Between fifty (50) and one-hundred (100) feet of the Reference Line, existing trees with a diameter of six inches or greater, other than those considered hazardous to the home or cleared under other conditions of this article, may be removed when replaced by a quantity of trees totaling the diameter of the tree removed. Replacement trees are not to be less than one and a half (1 1/2) inch-diameter (i.e., four 1 1/2" trees may replace one 6" tree). Diameter shall be measured at a height of three feet from the base of the tree. The replacement trees may be placed anywhere within one-hundred (100) feet of the Reference Line.

4. Removal of these trees with a diameter of six inches or greater is permitted to clear an opening for building construction, accessory structures, septic systems, roadways, pathways, and parking areas.

The establishment of turf grass in this area is permitted.

#### Section 401.06 Protected Shoreline Limit.

The following shall be adhered to within 250 feet of the Reference Line.

1. Planting efforts that are beneficial to wildlife are encouraged to be undertaken.

2. Trees that fall into the lake, and do not pose a navigational hazard or other safety concern shall be left in place to benefit fish habitat.



**3. Foot paths for individual lots shall be four feet or less in width and designed in a winding manner to prevent surface runoff and erosion. Foot paths serving common areas or multiple lots shall be six feet or less in width. Materials that are considered impervious(impenetrable materials) are not permitted for use on footpaths, these materials are as follows but not limited to: concrete, asphalt, gravel, stone, brick etc. Plant root systems adjacent to the foot path shall be protected by a layer of wood chips or other organic material.**

4. Buildings shall be fitted to the natural topography to avoid extensive grading that would alter the drainage patterns or create very steep slopes, minimize the potential for erosion and maintain existing vegetation.

5. Total parcel coverage by impervious surfaces including building footprint, impervious roads, or other impervious cover shall not exceed twenty-four (24) percent of the parcel.

6. Activities conducted by state regulated public utilities (i.e., utility, right of way, construction, and maintenance) are not subject to the provisions of this article. However, such activities, where practical, shall be conducted in a manner that is consistent with this article.

7. The provisions of this article shall not apply to activities which were permitted and/or approved by McDowell County prior to the adoption of these requirements.

#### Section 401.07 Dimensional Requirements for Lots

Lots created after the effective date of this Section and subject to the provisions of this Ordinance shall meet the following requirements:

**1. The minimum lot size shall be one and one –half (1.5) acres.**

**2. The minimum lot width at the Reference Line shall be one hundred fifty (150) feet.**

#### Section 402 Stormwater Management and Erosion Control.

The following provisions shall apply to land disturbing activities within two hundred fifty (250) feet of the Reference Line:

1. A storm water management and erosion control plan, sealed by a registered surveyor, engineer, architect, landscape architect or approved by a representative of the McDowell Soil and Water Conservation District, shall be submitted for any construction development and/or grading activities which disturb soil.

2. The following standards shall be applied in designing storm water management and erosion control measures:

- a. All measures in the storm water management and erosion control plan shall meet the Best Management Practices set forth in the North Carolina Erosion and Sediment Control Planning and Design Manual.
- b. Whenever practical, natural vegetation shall be retained, protected or

supplemented.

- c. Appropriate erosion and sediment control measures shall be installed prior to the removal of vegetation.
- d. Erosion and sediment control measures shall be placed immediately downstream of disturbed areas and shall not be placed within fifty (50) feet of the Reference Line, if feasible.
- e. The area of disturbance and the duration of exposure shall be kept to a minimum. Disturbed areas remaining idle for more than thirty (30) days shall be stabilized.
- f. Measures shall be taken to control sediment and retain it within the project area. Sediment in runoff water shall be trapped and retained within the project area using approved measures. Approved measures shall protect very poorly drained soils and surface waters within the project area as identified by the United States Department of Agriculture's Soil Survey of McDowell County.
- g. Off-site surface water runoff from undisturbed areas shall be carried non-erosively through the project area, or diverted away from disturbed areas where feasible.
- h. Priority shall be given to protecting natural drainage systems including perennial and intermittent streams, wetlands, swales, and drainage ditches for conveyance of runoff leaving the project area.
- i. All temporary erosion and sediment control measures shall be removed after final site stabilization. Trapped sediment and other disturbed soil areas resulting from the removal of temporary measures shall be permanently stabilized within thirty (30) days.
- j. Disturbance of one acre or more requires a permit from the Division of Land Quality under the North Carolina Sedimentation Control Act.
- k. No collected stormwater, such as water from gutter downspouts and driveway storm drains, shall be discharged within fifty feet (50') of the Reference Line.

#### Section 403 Marina and Mooring Provisions.

The purpose of this section is to regulate marinas and mooring areas on Lake James. North Carolina G.S. 143.215 does not allow the discharge of any pollutant or untreated wastes into the waters of North Carolina. A marina or mooring area is defined as any use of the project lands and waters of Lake James for facilities where water craft can be launched retrieved or moored and facilities for food services and convenience retailing, including petroleum dispensing, wet and dry storage of water craft and other activities customarily associated with marinas, campgrounds and yacht clubs are provided. This definition does not include private residential boat slips and ramps. All requirements of this ordinance must also be met.

- 1. All marinas and mooring areas permitting overnight use of water craft shall have pump-out stations, gray water disposal facilities, on shore trash disposal facilities and containment materials for oil and gas spills.
- 2. All water craft operating or moored on Lake James that have sleeping, kitchen and/or bathing facilities shall have a fixed or portable holding tank or other approved marine sanitation device for the collection of wastewater.

#### Section 404. Shoreline Protection Permit.

- 1. No building or built-upon area shall be erected, moved, enlarged or structurally altered, nor shall any clearing or grading commence, nor shall any building permit be issued until a Shoreline Protection Permit has been issued by the Planning Administrator or an agent

of the Planning Administrator. No Shoreline Protection Permit shall be issued except in conformity with the provisions of this ordinance.

2. Shoreline Protection Permit applications shall be filed with the Planning Administrator by the property owner or his/her designated agent. Property owners are responsible for evaluating their respective parcels, thereby placing the burden on the homeowner to comply with the Ordinance, including the need for shoreline stabilization, as part of the overall site planning process. Equipment access corridors should be planned and coordinated with other land disturbance on the property. The application shall include a completed application form and a site plan(s) which shall include the following:

Ownership and contact information

Name and address of person who prepared the plan

Date of the plan and an accurate record of any later revisions

North arrow

Property boundaries

Approximate contour lines at 10' intervals

Location and dimensions of existing and/or proposed structures

Location and dimensions of roads, driveways walks, paths and, any proposed access corridor

The Reference Line and 50' setback line

The location of any trees proposed for removal and the location of replacement trees and other proposed plantings

Sedimentation and erosion control plan

Location of proposed area of disturbance for any shoreline stabilization and description or plan of proposed stabilization measures

The property owner shall provide sufficient staking to readily identify on the property the fifty foot (50') setback from the Reference Line.

3. Prior to issuance of a Shoreline Protection Permit, the Planning Administrator may request additional supporting documentation deemed necessary and consult with qualified personnel for assistance to determine if the application meets the requirements of this ordinance. The property owner or his/her designated agent shall meet with the Planning Administrator on site to review the proposed plan.

4. A Shoreline Protection Permit shall expire if a Building Permit or Certificate of Occupancy for such use is not obtained by the applicant within twelve (12) months from the date of issuance, unless an extension is approved by the Planning Administrator.

5. The cost of a Shoreline Protection Permit shall be the amount specified in the County's Schedule of Fees and shall be payable to the County of McDowell at the time the application for a Shoreline Protection Permit is made.

#### Section 405. Building Permit Required.

No permit required under the North Carolina State Building Code shall be issued for any activity for which a Shoreline Protection Permit is required until that permit has been issued.

**Section 406. Certificate of Occupancy.**

1. The Planning Administrator or his duly authorized agent shall issue a Certificate of Occupancy certifying that all requirements of this ordinance have been met prior to the occupancy or use of a building hereafter erected, altered or moved.
2. A Certificate of Occupancy, either for the whole or part of a building, shall be applied for coincident with the application for a Shoreline Protection Permit and shall be issued or denied within ten (10) days after the erection or structural alterations of the building.
3. If the Certificate of Occupancy is denied, the Planning Administrator shall notify the applicant in writing stating the reasons for denial.
4. No building or structure which has been erected, moved, or structurally altered may be occupied until the Planning Administrator or his duly authorized agent has approved and issued a Certificate of Occupancy.

#### Section 407. Existing Development.

A lot which is part of a subdivision, a plat of which has been recorded in the Office of the Register of Deeds prior to the adoption date of this ordinance, or a lot described by a metes and bounds description, the description of which has been so recorded prior to the adoption of this ordinance is grandfathered from this ordinance.

### ARTICLE V: ADMINISTRATION, ENFORCEMENT AND APPEALS

#### Section 501. Planning Administrator and Duties Thereof.

The County shall appoint a Planning Administrator, who shall be duly sworn in. It shall be the duty of the Planning Administrator to administer and enforce the provisions of this ordinance as follows:

1. The Planning Administrator is granted the authority to administer and enforce the provisions of this Ordinance, exercising in the fulfillment of his responsibility the full police power of the County. The Planning Administrator, or his duly authorized representative, may enter any building, structure, or premises, as provided by law, to perform any duty imposed upon him by this Ordinance.
2. The Planning Administrator shall issue Shoreline Protection Permits and Certificates of Occupancy as prescribed herein. A record of all permits shall be kept on file and shall be available for public inspection during regular office hours of the Administrator.
3. The Planning Administrator shall serve as clerk to the Planning Board.
4. The Planning Administrator shall have the authority to grant minor variances of less than ten (10) percent of a numerical number.
5. The Planning Administrator or his/her designee shall respond to violations or complaints within three (3) business days of such notification.

#### Section 502. Appeal From the Planning Administrator.

Any order, requirement, decision or determination made by the Planning Administrator may be appealed to and decided by the Board of Adjustment. An appeal from a decision of the Planning Administrator must be submitted to the Board of Adjustment within thirty (30) days from the date the order, interpretation, decision or determination is made, all appeals must be made in writing

stating the reasons for appeal. Following submission of an appeal, the Planning Administrator shall transmit to the Board all papers constituting the record upon which the action appealed from was taken.

An appeal stays all proceedings in furtherance of the action appealed, unless the officer from whom the appeal is taken certifies to the Board after the notice of appeal has been filed with him, that by reason of facts stated in the certificate, a stay would in his opinion cause imminent peril to life or property. In such case, proceedings shall not be stayed otherwise than by a restraining order which may be granted by the Board or by a court of record on application of notice of the officer from whom the appeal is taken and upon due cause shown.

The Board shall fix a reasonable time for hearing the appeal and give notice thereof to the parties and shall decide the same within a reasonable time. At the hearing, any party may appear in person, by agent or by attorney.

#### Section 503. Establishment of the Board of Adjustment

1. There shall be and hereby is created the Board of Adjustment, consisting of eleven (11) members appointed by the McDowell County Board of Commissioners. Five (5) residents of McDowell County shall be appointed for three year terms. Three (3) residents of McDowell County shall be appointed for two (2) year terms. Three residents of McDowell County shall be appointed for one (1) year terms. Thereafter, all new terms shall be for three (3) years, and members may be reappointed.
2. Two (2) alternate members shall be appointed to serve on the Board of Adjustment in the absence of any regular member and shall be appointed for three (3) year terms. While attending in the capacity of a regular member, the alternate shall have and exercise all the powers and duties of the absent regular member.
3. The Board of Adjustment shall be cited and referred to as the McDowell County Planning Board.

#### Section 504. Rules of Conduct for Members.

Members of the Board may be removed by the McDowell Board of Commissioners for cause, including violation of the rules stated below:

1. Faithful attendance at meetings of the Board and conscientious performance of the duties required of members of the Board shall be considered a prerequisite to continuing membership on the Board.
2. No Board member shall take part in the hearing, consideration, or determination of any case in which he is personally or financially interested. A Board member shall have a "financial interest" in a case when a decision in the case will: 1) cause him or his spouse to experience a direct financial benefit or loss, or 2) will cause a business in which he or his spouse owns a 10 per cent or greater interest, or is involved in a decision-making role, to experience a direct financial benefit or loss. A Board member shall have a "personal interest" in a case when it involves a member of his immediate family (i.e., parent, spouse, or child).
3. No Board member shall discuss any case with any parties thereto prior to the public hearing on that case; provided, however, that members may receive and/or seek information pertaining to the case from the Planning Administrator or any other member of the Board, its secretary or clerk prior to the hearing.

4. Members of the Board shall not express individual opinions on the proper judgement of any case prior to its determination on that case.
5. Members of the Board shall give notice to the chairman at least forty-eight (48) hours prior to the hearing of any potential conflict of interest which he has in a particular case before the Board.
6. No Board member shall vote on any matter that decides an application or appeal unless he had attended the public hearing on that application or appeal.

#### Section 505. Powers and Duties-of the Board of Adjustment.

1. Administrative Review. The Board of Adjustment shall hear and decide appeals from any decision or determination made by the Planning Administrator in the enforcement of this ordinance.
2. Variances. The Board of Adjustment shall have the power to authorize, in specific cases, minor variances from the terms of this Ordinance as will not be contrary to the public interests where, owing to special conditions, a literal enforcement of this Ordinance will result in practical difficulties or unnecessary hardship, so that the spirit of this Ordinance shall be observed, public safety and welfare secured, and substantial justice done.

(A) Applications for a variance shall be made on the proper form obtainable from the Planning Administrator and shall include the following information:

- (1) A site plan, drawn to a scale of at least one (1) inch to forty (40) feet, indicating the property lines of the parcel upon which the use is proposed; any existing or proposed structures; parking areas and other built-upon areas; surface water drainage. The site plan shall be neatly drawn and indicate north point, name and address of person who prepared the plan, date of the original drawing, and an accurate record of any later revisions.
- (2) A complete and detailed description of the proposed variance, together with any other pertinent information which the applicant feels would be helpful to the Board of Adjustment in considering the application.

(B) Before the Board of Adjustment may grant a variance, it shall make the following three findings, which shall be recorded in the permanent record of the case, and shall include the factual reasons on which they are based:

- (1) There are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the Ordinance. In order to determine that there are practical difficulties or unnecessary hardships, the Board must find that the five following conditions exist:
  - (a) If he complies with the provisions of the Ordinance, the applicant can secure no reasonable return from, nor make reasonable use of, his property. Merely proving that the variance would permit a greater profit to be made from the property will not be considered adequate to justify the Board in granting an variance. Moreover, the Board shall consider whether the variance is the minimum possible deviation from the terms of the Ordinance that will make possible the reasonable use of his property.
  - (b) The hardship results from the application of the Ordinance to the

property rather than from other factors such as deed restrictions or other hardship.

(c) The hardship is due to the physical nature of the applicant's property, such as its size, shape, or topography, which is different from that of neighboring property.

(d) The hardship is not the result of the actions of an applicant who knowingly or unknowingly violates the Ordinance, or who purchases the property after the effective date of the Ordinance, and then comes to the Board for relief.

(e) The hardship is peculiar to the applicant's property, rather than the result of conditions that are widespread. If other properties are equally subject to the hardship created in the restriction, then granting a variance would be a special privilege denied to others, and would not promote equal justice.

(2) The variance is in harmony with the general purpose and intent of the Ordinance and preserves its spirit.

(3) In the granting of the variance, the public safety and welfare have been assured and substantial justice has been done. The Board shall not grant a variance if it finds that doing so would in any respect impair the public health, safety, or general welfare.

(4) In granting the variance, the Board may attach thereto such conditions regarding the location, character, and other features of the proposed building, structure, or use as it may deem advisable in furtherance of the purpose of this ordinance. If a variance for the construction, alteration or use of property is granted, such construction, alteration or use shall be in accordance with the approved site plan.

(5) The Board of Adjustment shall refuse to hear an appeal or an application for a variance previously denied if it finds that there have been no substantial changes in conditions or circumstances bearing on the appeal or application.

(6) A variance issued in accordance with this Section shall be considered a Shoreline Protection Permit and shall expire if a Building Permit or Shoreline Occupancy Permit for such use is not obtained by the applicant within six (6) months from the date of the decision.

#### Section 506, Appeals from the Board of Adjustment.

As provided in G.S. 153A-345(e), appeals from the Board of Adjustment must be filed with the Clerk of Superior Court within 30 days from the date of the decision. Review of appeals by the Superior Court will be in the manner of certiorari.