Superior Court Judges' Summer Conference
June 20, 2007
Asheville, N.C.

Administrative Appeals: Zoning Cases

David W. Owens
School of Government
CB 3330, Knapp-Sanders Building
The University of North Carolina at Chapel Hill
Chapel Hill, N.C. 27599

Phone: 919-966-4208
Fax: 919-962-0654
Email: owens@sog.unc.edu

Types of Decisions

Local governments make many decisions in the process of adopting, amending, administering, and enforcing land development regulations. These governmental decisions can be grouped into four categories: legislative, quasi-judicial, advisory, and administrative. County of Lancaster v. Mecklenburg County, 334 N.C. 496, 507, 434 S.E.2d 604, 612 (1993). The categorization is vital for both the local government (as it determines the process that must be followed) and for judicial review (as it determines the form of action and standard of review).

1. Legislative

Legislative decisions are those that set general policies. Ordinance *adoption, amendment, and repeal* (including an amendment to the zoning map, commonly referred to as a "*rezoning*") are included in this category. Massey v. City of Charlotte, 145 N.C. App. 345, 550 S.E.2d 838, *review denied*, 354 N.C. 219, 554 S.E.2d 342 (2001) (holding conditional rezoning a legislative decision); Kerik v. Davidson County, 145 N.C. App. 222, 551 S.E.2d 186 (2001) (holding rezoning a legislative decision); Brown v. Town of Davidson, 113 N.C. App. 553, 439 S.E.2d 206 (1994) (rezoning a legislative decision and not subject to quasi-judicial procedures); Sherrill v. Town of Wrightsville Beach, 81 N.C. App. 369, 373, 344 S.E.2d 357, 360 (1986) (holding rezoning to be a legislative act).

2. Quasi-judicial

Quasi-judicial decisions involve the application of ordinance policies to individual situations rather than the adoption of new policies. Lee v. Board of Adjustment, 226 N.C. 107, 37 S.E.2d 128 (1946) (holding a use variance to be illegal, constituting an improper de facto amendment of the ordinance, which requires a legislative zoning decision). Examples include *variances*, permits for *special and conditional uses* (even if issued by the governing board or planning board), *appeals*, and *interpretations*. These decisions involve two key elements: the finding of facts regarding the specific proposal and the exercise of some judgment and discretion in applying predetermined policies to the situation. Quasi-judicial decisions may be assigned by the ordinance to the board of adjustment, planning board, or governing board, but they may not be assigned to a staff administrator.

3. Advisory

Advisory decisions are those rendered by bodies that may make recommendations on a matter but have no final decision-making authority over it. They are usually designed to provide advice on pending legislative decisions, such as the advice given by planning boards to governing boards on a rezoning petition. Statutes require advisory review of all zoning ordinance amendments. It is increasingly common for pending quasi-judicial decisions to also be referred to an advisory board for review and comment.

4. Administrative

Administrative/ministerial decisions are the day-to-day matters related to implementation of a land development regulation. Typically handled by staff, these include issuance of permits for permitted uses, initial interpretations of ordinances, and initiation of enforcement actions. While these often involve some fact-finding, they apply *objective*, nondiscretionary standards. If all of the technical standards of the ordinance are met, approval must be issued. No evidentiary hearing is required as part of the decision-making process and the staff has no authority to impose or consider factors beyond the technical standards of the ordinance. Nazziola v. Landcraft Properties, Inc., 143 N.C. App. 564, 545 S.E.2d 801 (2001) (holding subdivision plat approval an administrative decision). Sanco of Wilmington Service Corp. v. New Hanover County, 166 N.C. App. 471, 601 S.E.2d 889 (2004) (where plat approval standards are entirely objective, decision is ministerial and board has no authority to deny or condition approval when standards have been met). Even if the final decision is assigned to the governing board, if the decision is ministerial in nature, the board must approve the application as a matter of law if the applicant shows compliance with all of the objective decision-making standards.

5. Responsibility for classifying decisions

The categorization of a decision as legislative, quasi-judicial, or administrative is a question of law. The way a decision is labeled in an ordinance is not necessarily dispositive of the question of which legal category a decision falls into. For example, a rezoning applying an overlay zoning district (such as a historic district) is normally a legislative decision, but if an ordinance is structured in such a way that a person is entitled to the designation upon establishing specified conditions, the decision can be characterized as quasi-judicial. Northfield Development Co., Inc. v. City of Burlington, 136 N.C. App. 272, 523 S.E.2d 743, *aff'd per curiam*, 352 N.C. 671, 535 S.E.2d 32 (2000). Devaney v. City of Burlington, 143 N.C. App. 334, 337–38, 545 S.E.2d 763, 765, *review denied*, 353 N.C. 724, 550 S.E.2d 772 (2001). On borderline calls, however, some deference is afforded the ordinance's categorization of the decision. County of Lancaster v. Mecklenburg County, 334 N.C. 496, 510, 434 S.E.2d 604, 614 (1993).

The categorization of decisions depends on the nature of the decision, not the body making the decision. This is a frequent point of confusion. For example, a special use permit decision is a quasi-judicial decision no matter who is deciding it.

Some Key Differences Between Legislative and Quasi-judicial Decisions

	Legislative	Quasi-judicial
Decision-maker	Only governing board can decide (others may advise)	Can be board of adjustment, planning board, or governing board
Notice of hearing	Newspaper and mailed notice to owners and neighbors required; also posted notice for rezonings	Only notice to parties required unless ordinance mandates otherwise
Type of hearing	Legislative	Evidentiary
Speakers at hearings	Can reasonably limit number of speakers, time for speakers, overall time for hearing	Witnesses are presenting testimony, can limit to relevant evidence that is not repetitious
Evidence	None required; members free to discuss issue outside of hearing; speakers at hearing are not under oath or subject to cross-examination	Must have substantial, competent, material evidence in record; witnesses under oath, subject to cross-examination; no ex parte communication allowed
Findings	None required, but statement addressing plan consistency, reasonableness, and public interests served required	Written findings of fact required
Voting	Simple majority, but 3/4 required if protest petition filed on rezoning	4/5 to decide in favor of applicant, but if special/conditional use permit is issued by governing board or planning board, only a simple majority required
Standard for decision	Establishes standards	Can only apply standards previously set in ordinance
Conditions	Not allowed with conventional zoning	Allowed if based on standard in ordinance
Time to initiate judicial review	Two months to file challenge	30 days from mailing of written decision to file challenge and filing with clerk
Conflict of interest	Direct, substantial financial interest to disqualifies from voting(applies to governing board and advisory boards)	Any financial interest, personal bias, undisclosed ex parte communication, or close relationship with a party disqualifies from all participation in case (applies to any board making decision)
Creation of vested right	None	Yes, if substantial expenditures are made in reliance on it

Form of Action

1. Legislative decisions

Challenges to legislative land use regulatory decisions are brought under the state's *declaratory judgment* statute, G.S. 1-253 to -267. This statute may be used to address disputes regarding the constitutionality, the validity, or the construction of ordinances. 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); Village Creek Property Owners' Ass'n, Inc. v. Town of Edenton, 135 N.C. App. 482, 520 S.E.2d 793 (1999).

A legislative regulatory decision is not reviewable upon a writ of certiorari. 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).

2. Quasi-judicial decisions

Appeals of quasi-judicial land use regulatory decisions are reviewed by the superior court in proceedings in the nature of *certiorari*. G.S. 153A-345(e) and 160A-388(e) explicitly provide for this with quasi-judicial zoning decisions. G.S. 153A-340 and 160A-381 do so for quasi-judicial governing board decisions.

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 Development 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. Hemphill-Nolan v. Town of Weddington, 153 N.C. App. 144, 568 S.E.2d 887 (2002).

Senate Bill 212, approved by the Senate, will if enacted modestly modify and codify much of the procedure for judicial review of quasi-judicial decisions. Among the topics addressed are standing, pleadings, scope of judicial review, and the forms of judicial relief.

3. Administrative decisions

In most instances judicial appeals of administrative land use decisions will also be in the nature of certiorari. There is no North Carolina case law directly on point on this issue. As a practical matter, administrative decisions under zoning 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). The 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." Hemphill-Nolan v. Town of Weddington, 153 N.C. App. 144, 148, 568 S.E.2d 887, 889–90 (2002).

Petitions for certiorari for superior court review of quasi-judicial decisions are not the equivalent of a beginning of an action. Therefore they do not have to be verified and there is no need for a summons in these proceedings. 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). The common practice in North Carolina is not to file an answer to the petition for writ of certiorari. 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. An answer can be filed to contest standing, jurisdiction, or similar matters prior to submittal of the record.

4. Mixed and joint decisions

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, 326 N.C. 1, 11, 387 S.E.2d 655, 661–62, *cert. denied*, 496 U.S. 931 (1990), the court held that it was an error to join a complaint alleging constitutional causes of action (alleging 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. In Dobo v. Zoning Bd. of Adjustment, 149 N.C. App. 701, 706, 562 S.E.2d 108, 111–12 (2002), *reversed on other grounds*, 356 N.C. 656, 576 S.E.2d 324 (2003), 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.

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. In Simpson v. City of Charlotte, 8115 N.C. App. 51, 443 S.E.2d 772 (1994), 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. A few cases, however, 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 that the action was brought within the appropriate statute of limitations for legislative zoning decisions.

Standards of Review

1. Legislative Decisions

The courts nationally and in North Carolina give substantial deference to the judgment of elected officials making legislative land use regulatory decisions. A limited exception to the presumption of validity exists for spot zoning cases. In these instances the burden is on the government to establish a reasonable basis for the rezoning decision. Spot zoning is discussed in more detail below.

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.

> 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.

In re Parker, 214 N.C. 51, 55, 197 S.E. 706, 709, *appeal dismissed*, 305 U.S. 568 (1938).

If the action had a "reasonable tendency to promote the public good, it represent[ed] a valid exercise of the police power, and [was] entitled to implicit obedience." Marren v. Gamble, 237 N.C. 680, 75 S.E.2d 880 (1953). When reviewing rezonings, the 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." Zopfi v. City of Wilmington, 273 N.C. 430, 437, 160 S.E.2d 325, 332 (1968). 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. Ashby v. Town of Cary, 161 N.C. App. 499, 588 S.E.2d 572 (2003).

The burden is on a challenger to establish the invalidity of a legislative regulatory decision. Kinney v. Sutton, 230 N.C. 404, 53 S.E.2d 306 (1949); Nelson v. City of Burlington, 80 N.C. App. 285, 288, 341 S.E.2d 739, 741 (1986).

The court employs a whole record review to allegations that a legislative decision is arbitrary and capricious. 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. Western 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 reviewing court must base its decision on the record before the board rather than taking additional evidence to make a de novo ruling. Kerik v. Davidson County, 145 N.C. App. 222, 551 S.E.2d 186 (2001).

2. 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. Nazziola v. Landcraft Properties, 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 hearing such an appeal, the trial court judge is sitting in an appellate capacity:

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. Coastal Ready-Mix Concrete Co. v. Board of Comm'rs, 299 N.C. 620, 626–27, 265 S.E.2d 379, 383 (1980). The superior court review is limited to errors alleged to have occurred before the local board. Tate Terrace Realty Investors, Inc. v. Currituck County, 127 N.C. App. 212, 218, 488 S.E.2d 845, 848, *review denied*, 347 N.C. 409, 496 S.E.2d 394 (1997). In these reviews, the 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. In re Pine Hill Cemeteries, Inc., 219 N.C. 735, 738, 15 S.E.2d 1, 3 (1941); Humble Oil & Refining Co. v. Board 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. Board of Adjustment, 258 N.C. 476, 128 S.E.2d 879 (1963); Mize v. County of Mecklenburg, 80 N.C. App. 279, 284, 341 S.E.2d 767, 770 (1986).

The basic standard for judicial review of quasi-judicial decisions is set forth in Coastal Ready-Mix Concrete Co. v. Board of Commissioners. 299 N.C. 620, 626, 265 S.E.2d 379, 383 (1980). Courts reviewing quasi-judicial decisions examine the following five questions:

1. Were there errors in law?
2. Were proper procedures in both statute and ordinance followed?
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?

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. In these reviews the court is not bound by findings made by the board. The court considers the matter anew, as if not considered or decided by the board. Amanini v. N.C. Dep't of Human Resources, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994). This is true both for trial court review and for appellate court review. In re Willis and City of Southport Bd. of Adjustment, 129 N.C. App. 499, 501–02, 500 S.E.2d 723, 726 (1998).

A *whole record* review is conducted of allegations that the decision was not supported by the evidence or that the decision was arbitrary and capricious. Powell v.

North Carolina Dep't of Transportation, 347 N.C. 614, 623, 499 S.E.2d 180, 185 (1998); ACT-UP Triangle v. Comm'n for Health Services, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997); Associated Mechanical Contractors v. Payne, 342 N.C. 825, 832, 467 S.E.2d 398, 401 (1996); Zoning cases stating this standard include Stealth Properties, Inc. v. Town of Pinebluff Bd. of Adjustment, ___ N.C. App., ___ S.E.2d ___ (2007); In re Willis and 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).

In a whole record review, the board's findings of fact are binding on the reviewing court if they are supported by substantial competent evidence. 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 County, 127 N.C. App. 212, 218, 488 S.E.2d 845, 849, *review denied*, 347 N.C. 409, 496 S.E.2d 394 (1997). As the court noted in Thompson v. Board of Education,

> The "whole record" test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it de novo. On the other hand, the " whole record" rule requires the court, in determining the substantiality of evidence supporting the Board's decision, to take into account whatever in the record fairly detracts from the weight of the Board's evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the Board's result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.

292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977).

If the appeal alleges errors of multiple types, the trial court must apply the appropriate type of review to each separate issue (and apply more than one standard if the issues so require). Mann Media, Inc. v. Randolph County Planning Bd., 356 N.C. 1, 14, 565 S.E.2d 9, 18 (2002); Sun Suites Holdings, LLC, 139 N.C. App. 269, 273, 533 S.E.2d 525, 528, *review denied*, 353 N.C. 280, 546 S.E.2d 397 (2000); In re Willis and City of Southport Bd. of Adjustment, 129 N.C. App. 499, 502, 500 S.E.2d 723, 726 (1998).

As for alleged procedural errors in a quasi-judicial matter, while fundamental fairness is required, the strict rules of evidence and procedure can be relaxed and harmless errors do not necessitate a remand on appeal. Durham Video & News, Inc. v. Durham Bd. of Adjustment, 144 N.C. App. 236, 550 S.E.2d 212, *review denied*, 354 N.C. 361, 556 S.E.2d 299 (2001); Dockside Discotheque, Inc. v. Board of Adjustment, 115 N.C. App. 303, 444 S.E.2d 451, *review denied*, 338 N.C. 309, 451 S.E.2d 635 (1994).

It is also important to note that procedural requirements imposed by local ordinances, as well as those imposed by the general zoning enabling act, are binding. George v. Town of Edenton, 294 N.C. 679, 242 S.E.2d 877 (1978); Humble Oil & Refining Co. v. Board of Aldermen, 284 N.C. 458, 202 S.E.2d 129 (1974). For example, many local ordinances have supplemental hearing notice requirements and mandatory referral of matters to advisory boards.

Standing

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.

1. Legislative decisions

Challenges to legislative zoning decisions can 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." Taylor v. City of Raleigh, 290 N.C. 608, 620, 227 S.E.2d 576, 583 (1976). 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.

2. Quasi-judicial decisions

The basic rule for standing to challenge quasi-judicial decisions is similar, though it also has a statutory dimension. 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," and they allow for appeal of the board's decision to superior court but do not explicitly address who has standing to appeal from the board of adjustment to superior court.

In a series of cases applying this statute and the special damages test for standing to appeal quasi-judicial zoning decisions, holdings include:

- Appellants must present evidence that they are owners of affected property, Pigford v. Board 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)
- Even adjoining property owners must allege, and present some evidence of, a reduction in their property values, Heery v. Town of Highlands Zoning Bd. of Adjustment, 61 N.C. App. 612, 300 S.E.2d 869 (1983)
- Nearby property owners must allege special damages distinct from the rest of the community, Sarda v. City/County 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)
- Expert testimony about the in appropriateness of a proposed use is adequate to establish such special damages, Allen v. City of Burlington Bd. of Adjustment, 100 N.C. App. 615, 397 S.E.2d 657 (1990).

In many instances a person in the process of acquiring title has the same standing as the owner of the property. The court held in Humble Oil & Refining Co. v. Board of Aldermen 31284 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. Similarly, 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). The key here is the presence of a legal obligation to purchase. By contrast, a mere optionee does not have standing. Lee v. Board of Adjustment, 226 N.C. 107, 37 S.E.2d 128 (1946).

A plaintiff may, with good cause, be allowed to amend a defective petition for judicial review to add requisite allegations regarding standing. Darnell v. Town of Franklin, 131 N.C. App. 846, 508 S.E.2d 841 (1998).

Spot Zoning

Spot zoning occurs when a relatively small tract of land is zoned differently from the surrounding area. In North Carolina, spot zoning is not illegal in and of itself, as it is in some states. However, to be upheld, spot zoning must be supported by a reasonable basis.

The North Carolina courts have refused to characterize small-scale rezonings as quasi-judicial. 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). However, stricter judicial scrutiny is given to rezonings that affect a small geographic area or a small number of landowners rather than to broad public policy issues. Heightened judicial review of spot zoning is founded on state constitutional prohibitions against the granting of exclusive privileges, the creation of monopolies, and the violation of due process or equal protection of the law.

In its most comprehensive review of spot zoning limitations, the court in Chrismon v. Guilford County, 322 N.C. 611, 370 S.E.2d 579 (1988), concluded that a clear showing of a reasonable basis must support the validity of spot zoning. This shifts the presumption of validity accorded to legislative zoning decisions when a small-scale rezoning is involved. Good Neighbors of South Davidson v. Town of Denton, 355 N.C. 254, 258 n.2, 559 S.E.2d 768, 771 (2002).

This mandated analysis of reasonableness was incorporated into the zoning statutes in 2005 with the addition of a requirement that a statement analyzing the reasonableness of the proposed rezoning be prepared as part of the consideration of all petitions for a special or conditional use district, a conditional district, or any other small-scale rezoning. G.S. 160A-383(b) and 153A-343(b). With other rezonings, if the reasonableness of the amendment is debatable, it is upheld. With spot zoning amendments the local government must affirmatively show the reasonableness of its action. In addition to being held to a standard of reasonableness G.S. 153A-341 and 160A-383 require that zoning regulations are made in accordance with a comprehensive plan. A rezoning decision on a relatively small parcel that does not consider the effects of the rezoning within the larger community context violates this mandate. Allred v. City of Raleigh, 277 N.C. 530, 178 S.E.2d 432 (1971); Alderman v. Chatham County, 89 N.C. App. 610, 366 S.E.2d 885, *review denied*, 323 N.C. 171, 373 S.E.2d 103 (1988).

In *Chrismon* the court set out in detail four factors that are considered particularly important by the courts in determining whether there is a reasonable basis for spot zoning: At the outset, we note that a judicial determination as to the existence or nonexistence of a sufficient reasonable basis in the context of spot zoning is, and must be, the "product of a complex of factors." The possible "factors" are numerous and flexible, and they exist to provide guidelines for a judicial balancing of interests. Among the factors relevant to this judicial balancing are the size of the tract in question; the compatibility of the disputed zoning action with an existing comprehensive zoning plan; the benefits and detriments resulting from the zoning action for the owner of the newly zoned property, his neighbors, and the surrounding community; and the relationship between the uses envisioned under the new zoning and the uses currently present in

adjacent tracts. 322 N.C. at 628, 370 S.E.2d at 589. The criteria are flexible, and the specific analysis used depends on the facts and circumstances of a particular case. The court has subsequently emphasized that a mere cataloging of benefits is inadequate. The showing of reasonableness must address the totality of circumstances involved and "must demonstrate that the change was reasonable in light of its effect on all involved." Good Neighbors of South Davidson v. Town of Denton, 355 N.C. 254, 258, 559 S.E.2d 768, 771 (2002).

Conditional Zoning

At the outset, it is important to distinguish conventional zoning districts from conditional zoning districts.

1. Conventional zoning districts

Conventional zoning districts have been a part of zoning from its initiation in the 1920s. Their key characteristic is that they have some land uses automatically permitted (often termed "uses by right"). A district may also include other uses only permitted subject to individual permit reviews, usually termed "special use permits" or "conditional use permits." Each of these requires an evidentiary hearing and is determined according to pre-determined standards set forth in the ordinance.

Older zoning ordinances had only a few zoning districts, typically one each for residential, commercial, and industrial uses. A modern zoning ordinance will typically have twenty or more districts, usually splitting the basic use distinctions into subparts (e.g., highway commercial, shopping center commercial, neighborhood commercial, central business district commercial). Among the other approaches used with conventional zoning districts are:

- *Overlay districts* -- Overlay zones are special districts that create special requirements that are in addition to the basic zoning requirements, such as a highway corridor overlay district that imposes special landscaping requirements along a major entryway to town. A parcel covered by an overlay district is subject to the requirements of both the underlying and the overlay district. Unless the ordinance provides otherwise, the more restrictive provision applies in the event of a conflict.

- *Floating districts* -- Floating districts are those that are defined in the ordinance but not applied to property unless the owner requests it, such as manufactured home park district, mixed use district, or traditional neighborhood design district. These are usually the underlying or base district, but can be overlay districts.

- *Planned unit development (PUD's)* -- These are special districts that can be applied to a large parcel, usually with mixed land uses, being developed according to an overall plan. An example would be a large site with some office uses, a shopping area, some multi-family housing, and some single family housing, all being developed under a pre-approved overall development scheme. Originally used primarily for industrial and commercial projects, contemporary ordinances use a variety of this scheme for "traditional neighborhood design" mixed use projects.

A key limitation with conventional districts is that the standards for the most part can not be individualized to meet site specific needs. There are two reasons for this.

First, G.S. 160A-382 and 153A-342 provide that "all regulations shall be uniform for each class or kind of building throughout each [zoning] district." In Decker v. Coleman, 6 N.C. App. 102, 169 S.E.2d 487 (1969), the court held that this uniformity

requirement precludes imposition of conditions on conventional, general rezonings. The inclusion of an invalid condition does not serve to invalidate the rezoning. Barring other legal defects, the rezoning stands; its conditions do not. In *Decker*, the city council included a specific severability clause and the court applied it to sever the condition, invalidate it, and leave the remainder of the ordinance amendment in place.

Second, if the rezoning was based on an assumption that individualized conditions would be enforceable, the entire rezoning is invalid. Hall v. City of Durham, 323 N.C. 293, 372 S.E.2d 564 (1988). The fact that specific plans are presented to the governing board, however, does not in and of itself invalidate a rezoning, so long as the record is clear that all permissible uses are considered. Kerik v. Davidson County 21 145 N.C. App. 222, 551 S.E.2d 186 (2001).

2. Conditional zoning districts

There are two alternatives to conventional zoning that allow imposition of individualized, site-specific standards as part of a rezoning. Conditional use districts were developed in North Carolina in the 1970s to do this and the tool was adopted by many of the state's more populous jurisdictions. In the past decade a simpler alternative, conditional zoning, has been approved for use and is now often supplanting conditional use districts.

C*onditional use districts (CUD's)* are zoning districts with no permitted uses at all; all development is subject to acquiring a conditional use permit. These can only be established at the landowner's request. They are sometimes also call special use districts. They are complicated because they combine a legislative rezoning and a quasi-judicial conditional use permit, usually done concurrently and with a single hearing. G.S. 153A-342 and 160A-382 specifically allow use of special and conditional use districts but only upon the petition of the owners of all of the land to be included in the district. Use of this scheme was approved in Chrismon v. Guilford County, 322 N.C. 611, 370 S.E.2d 579 (1988),

Conditional districts are zoning districts that incorporate site specific development plans and conditions into the ordinance. Unlike CUD's, there is no accompanying conditional use permit, so these are entirely legislative. Each conditional district is unique and can have its own standards (or may be based on a standard district with supplemental standards). The court sanctioned this entirely legislative approach in 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), and 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).

In 2005 the General Assembly amended the zoning statutes to explicitly authorize city and county use of conditional zoning. G.S. 160A-382(a) and 153A-342(a) provide that zoning ordinances may include conditional districts. As with conditional use districts, the statute provides that land may be placed in a conditional district only upon petition of all of the owners of the land to be included.

The statute also addresses the origin and nature of conditions that may be imposed. G.S. 160A-382(c) and 153A-342(c) provide that specific conditions may be

suggested by the owner or the government, but only those conditions mutually acceptable to both the owner and the government may be incorporated into the ordinance or individual permit involved. These statutes also provide that any conditions or site specific standards imposed are limited to those that address the conformance of the development and use of the site to city or county ordinances and officially adopted plans and those that address the impacts reasonably expected to be generated from the development or use of the site. These provisions regarding conditions apply to both conditional zoning and to special and conditional use

Protest Petitions

While landowners and neighbors are significantly affected by zoning, the choice to change zoning restrictions is a discretionary policy choice of elected officials. Neither landowners nor neighbors can be given a veto over proposed zoning changes. The North Carolina court has specifically held that neighbors have no right to the continuation of a particular zoning restriction. McKinney v. City of High Point, 239 N.C. 232, 237, 79 S.E.2d 730, 734 (1954).

The provision in North Carolina zoning law for a protest petition, G.S. 160A-385(a), is mandatory for cities. The protest petition is available in all cities, whether or not an individual zoning ordinance includes provisions for it. A city may not reduce the required supermajority requirement by local ordinance. Eldridge v. Mangum, 216 N.C. 532, 5 S.E.2d 721 (1939). There is no specific statutory authorization for the protest petition in the county zoning enabling legislation; and therefore absent authorization through local legislation, counties likely do not have the authority to use the protest petition.

If a sufficient number of those most immediately affected by a zoning change object to a proposed zoning amendment, the amendment may be adopted only if approved by three-fourths of all the members of the governing board. This requirement applies to repeal as well as to amendment of a zoning ordinance. It does not apply to the initial zoning of an area being added to the territorial coverage of an ordinance, whether by annexation or by an extra territorial ordinance. Amendments to special or conditional use districts and conditional zoning districts are also exempt from the protest petition, provided that the type of use is not changed, the density of residential use allowed is not increased, the size of nonresidential development is not increased, and the amount of buffers or screening is not reduced. Amendments to individual conditional or special use permits are quasi-judicial rather than legislative zoning decisions and therefore are not affected by a protest petition.

The protest petition only applies to zoning map amendments. It most often arises when neighbors object to the rezoning of a parcel, but it also applies to creation and application of new overlay zoning districts. Prior to 2006 the statute also applied to text amendments. G.S. 160A-385(a)(1) was amended to explicitly provide that the protest is applicable only to a zoning map change.

When a valid protest petition has been filed, G.S. 160A-385(a) provides that adoption of the proposed amendment requires the favorable vote of three-fourths of "all the members of the city council." G.S. 160A-385(a)(1) provides that for purposes of the protest petition, vacant positions on the board and members who are excused from voting are not to be considered as "members of the board" in computing the requisite supermajority.

The qualifying areas for a protest petition include either the property being rezoned itself or some portion of the 100-foot-wide strip immediately adjacent to or across the street from it. A qualifying area is just that—an area, not 20 percent of the

frontage of the area being rezoned or 5 percent of the landowners in the qualifying area. G.S. 160A-385(a)(2) provides that the petition must be signed by the owners of either:

1. 20 percent or more of the area included in the proposed change, or

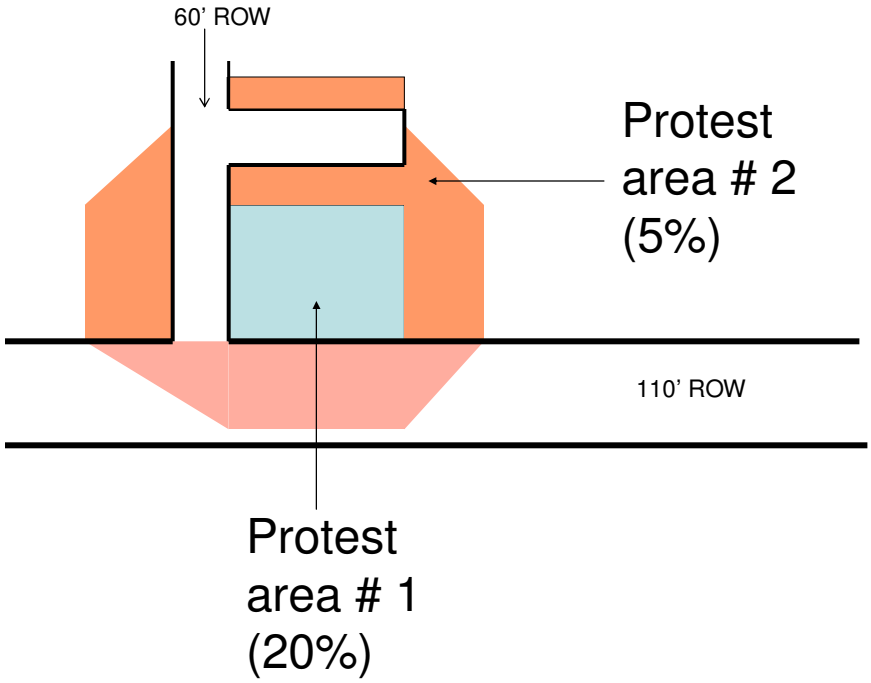
2. 5 percent of a 100-foot-wide buffer extending along the entire boundary of each discrete or separate area proposed to be rezoned.

A street right-of-way is not to be considered in computing the 100-foot buffer area as long as that street right-of-way is 100 feet wide or less. A diagram illustrating these two qualifying areas is on the following page.

G.S. 160A-386 provides that a person may withdraw his or her name from the petition at any time prior to the vote on the proposed zoning amendment. Only those rezonings that have a sufficient number of qualifying protests at the time of the vote trigger the three-fourths vote requirement.

G.S. 160A-386 establishes several procedural requirements for protest petitions. The petition must be written. The property owners must sign it; signatures by tenants, other non-landowner occupants of the property, or interested citizens are not considered. The North Carolina court has not ruled on whether one owner's signature is adequate if the property has joint owners, but there is some suggestion that all of the owners must sign. Coleman v. Town of Hillsborough, 173 N.C. App. 560, 619 S.E.2d 555 (2005). The petition must specifically state that it protests the proposed zoning change. The petition must be presented to the city clerk in time to allow the clerk two working days before the date of the hearing (excluding weekends and holidays) to determine its sufficiency and accuracy. This mandatory filing deadline cannot be waived by the city, even if the city could determine sufficiency in less time. *Id*. Cities may require that the petition be on a form provided by the city and that it contain "any reasonable information" necessary to allow the city to verify the petition. In the absence of evidence to the contrary, G.S. 160A-385(a)(3) provides that the city may rely on the county tax listing to determine the ownership of qualifying areas.

The protest petition statute establishes an affirmative duty on the part of the city to determine the sufficiency and timeliness of the protests. Failure to discharge this duty renders the ordinance change invalid on its face. Morris Communications Corp. v. City of Asheville, 356 N.C. 103, 111–12, 565 S.E.2d 70, 75–76 (2002); Unruh v. City of Asheville,12897 N.C. App. 287, 388 S.E.2d 235, *review deni*ed, 326 N.C. 487, 391 S.E.2d 813 (1990).



For further details, see David W. Owens, LAND USE LAW IN NORTH CAROLINA (2006).