


Local Government Law Essentials for Judges  
**Land Use and Zoning Appeals**

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**Coverage --**

1. Ordinances used and basic structure of zoning
2. Form of appeal
3. Standing
4. Statutes of limitation
5. Standard of review
6. Disposition




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**Typical Ordinances**

Principally Used:

- Zoning – land uses, development standards
- Subdivision – lot layout, infrastructure
- Building code – state mandated, construction standards
- Housing code – habitability




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## Typical Ordinances

Others Commonly Used:

- Sedimentation
- Mobile home parks
- Signs
- Landscaping
- Adult businesses
- Telecommunication towers

- Often combined into "unified development ordinance"



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## Municipal Zoning

Population	% with Zoning
Under 1,000	69%
1,000 – 4,999	94%
5,000 – 9,999	98%
Over 10,000	100%

2005 SOG Survey

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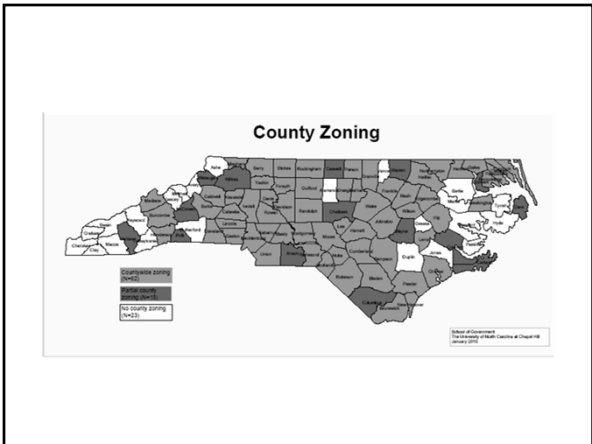
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## Zoning Ordinances

Zoning ordinances have 2 parts:

- Text to define standards and procedures
- Map to show location of zoning districts

Both parts are “ordinances” and must follow same process for amendment



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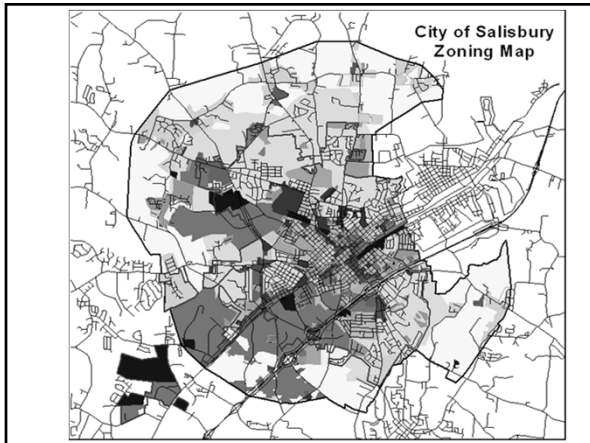
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## Each Zoning Ordinance is Unique

- Each city decides the content of its zoning
- Ordinances vary in:
  - Number and names of zoning districts
  - Use and development restrictions
  - Subject matter covered
- Each community tailors its ordinance to its needs



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## Typical Zoning Requirements



- Zoning districts and permitted uses:
  - Uses by right
  - Uses by special or conditional-use permit
- Other development standards:
  - Setbacks
  - Buffers
  - Parking
  - Landscaping
  - Signs
  - Lot access/circulation

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## Types of Decisions

- 1) Legislative
- 2) Quasi-judicial
- 3) Administrative
- 4) Advisory

Classification is question of law

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## Legislative and Quasi-Judicial Zoning Decisions

- Different purposes
- Very different process required
- As both can be done by governing board,
  - Council, applicants and citizens sometimes confuse the two

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## Legislative Decisions

- Purpose: Set policy  
Highly discretionary
- Process: Detailed statutory procedures
  - Public hearing
  - Notice of hearing (published, mailed, posted, actual)
  - Planning board referral
  - Statement on rationale




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## Quasi-judicial Decisions

- Purpose: Apply discretionary standards already in ordinance
- Process: Due process required
  - Formal evidentiary hearing
  - Adequate quality evidence in the record
  - Written findings of fact
  - Rules on impartiality, ex parte evidence, opinion testimony

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## Typical Allocation of Responsibilities

Type of Decision	Example	Typical Assignment
Legislative	Rezoning	Town Council or County Commissioners
Quasi-judicial	Variance, Appeals, Interpretation	Board of Adjustment
Advisory	Recommendation on rezoning	Planning Board
Administrative	Notice of zoning violation	Staff

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## Form of Action

- Declaratory judgment: Legislative decisions, constitutionality, validity and construction of ordinance
- Writ of certiorari (GS 160A-393): Quasi-judicial decisions
- Separate actions if both challenged



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## Standing -- Legislative

Specific personal interest that is directly and adversely affected

- 1) Facial challenge – specific application not required
- 2) As applied challenge – application required
- 3) Constitutional – injury in fact or immediate threat of such required



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## Standing – Quasi-judicial

GS 160A-393(d) codifies rule

- 1) Applicants and those with property interest in property subject to application
- 2) Local government whose board made decision
- 3) Others with “special damages” / “aggrieved persons”



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## Standing -- Other

General rule applies

- 1) Injury in fact – concrete, particularized
- 2) Causation – fairly traceable to challenged action
- 3) Redressable – individual relief possible



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## Statutes of Limitation

30 days	Quasi-judicial decision (from mailing/filing of written decision)
Two months	Zoning map amendment (from date of decision)
One year	Validity of ordinance (accrues when standing acquired, but three year limit to challenge adoption process)



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## Standard of Review – Legislative Decision

- Presumption of validity
- Tests -- Manifest abuse of discretion, arbitrary and capricious, irrational, no relation to legitimate objective
- Whole record review
- Burden on challenger
- Spot zoning exception – reasonableness required



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**Standard of Review –  
Quasi-judicial Decision**

De novo review:

- 1) Errors in law?
- 2) Within statutory authority and proper procedures followed?
- 3) Due process observed?

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**Standard of Review –  
Quasi-judicial Decision**

Whole record review

- 1) Substantial, competent, material evidence in record to support decision? If so, findings below are binding
- 2) Arbitrary and capricious?

If multiple types of error alleged, specify and apply applicable standard

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**Disposition --  
Legislative**

- Legislative: If invalidated, void ab initio

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Disposition --  
Quasi-judicial (GS 160A-393(l))

- Procedural error – remand to correct
- Failure to make findings – remand for findings on record unless basis of decision clear or facts undisputed
- Not supported by evidence or error of law – remand with instructions to correct error, including to issue or revoke permit

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SUPPLEMENTAL MATERIALS

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Planning Jurisdiction



- City jurisdiction includes areas
  - w/in city limits (including newly annexed areas) and
  - outside city limits in ETJ (extraterritorial planning jurisdiction)
- County planning jurisdiction includes areas outside of city jurisdiction

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### Powers Available to City in ETJ

- Zoning
- Subdivision regs
- Enforcement of State Building Code
- Community development projects
- Acquisition of open space
- Minimum housing code
- Soil erosion and sedimentation control ordinance
- Floodway regulation
- Historic preservation programs



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### Protest Petition

- 3/4 vote required if valid protest
- Owners of 20% of area being rezoned or 5% of a 100 foot perimeter buffer
- Filed two working days prior to date of hearing
- Signed by owners
- City may require form



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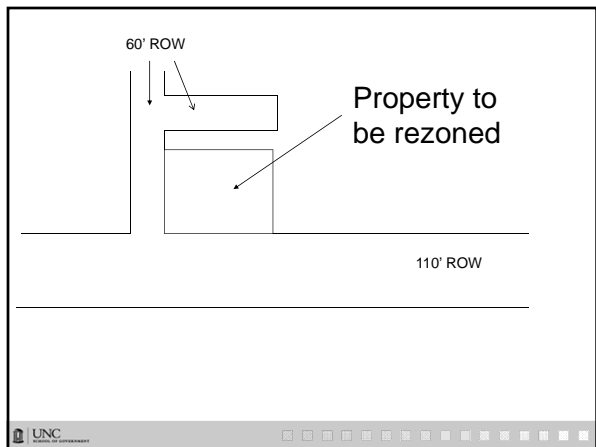
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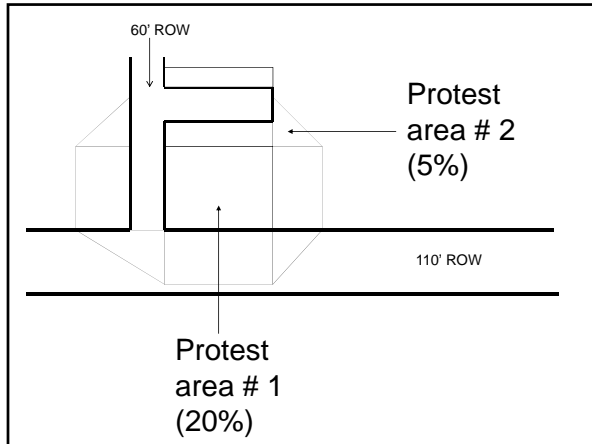
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### Legitimate Considerations in Rezoning

- Impacts on owner, neighbors, public (suitability of site for use, impacts on traffic, environment, neighborhood character, utilities, schools, etc.)
- Consistency with all applicable plans and policies
- Consistency with prior and future decisions

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### Illegitimate Considerations in Rezoning

- Ownership
- Particular attributes/conditions that are not part of requirements for the zone
- Ethnicity, income, "character" of residents

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### Quasi-judicial Decisions

- Rules apply when there is:
  - Fact finding
  - Standards with judgment/discretion
- Examples:
  - Variances
  - Special/conditional use permits
  - Appeals

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### Quasi-judicial Decisions

- Adequate record must be before the board at the time of decision
- **Substantial, competent, and material** evidence in the record is *required* for each key factual determination
- Record includes application, supporting documents and exhibits, testimony at hearing (minutes or transcript)

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### Evidentiary Hearings

- Witnesses
  - All persons offering evidence should be under oath
  - Cross-examination must be allowed – usually in form of questions by board, but also opportunity for other parties
  - Can (and should) limit irrelevant or repetitious testimony

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## Evidentiary Hearings

- Evidence
  - Hearsay limited (can accept, but not use as basis for key finding)
  - Opinions only from experts, especially on property value and traffic impacts/public safety (but distinguish factual and opinion testimony)
  - Documents (including photos, maps, studies, letters, etc.) submitted become part of record



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## Evidentiary Hearings

- Only evidence presented at hearing may be considered -- no ex parte communication with the board is allowed
- Site visits permissible, but avoid discussion with applicant, neighbors, or staff
- Written materials can be submitted and distributed prior to hearing (application, staff reports, documents)



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## Quasi-judicial Decisions

- Determining the weight of competing evidence a key responsibility of board
- Board must clearly indicate what it believes the facts to be
- Written findings of fact are required, not just conclusions



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### Quasi-judicial Decisions

- May continue advertised hearing if needed for additional evidence
- Rehearings after decision made -- only allowed if there are changed conditions or a different application
- Precedents -- prior decisions are not legally binding, but are persuasive and should be addressed by the board



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### Quasi-judicial Decisions

- Impartiality required. Prohibits:
- Fixed opinion prior to hearing
  - Undisclosed ex parte communication
  - Close family, business, or other relationship
  - Financial interest in outcome



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### Spot Zoning

- Legal only if reasonable
- Burden is on government to demonstrate reasonableness



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### What is "Reasonable"?

- Site characteristics – size of tract, topography, utilities, roads, rail, uses, etc.
- Relation to plan – comprehensive plan, small area plans, functional plans
- Degree of change allowed – upsetting expectations
- Balance of benefits and detriments – owner, neighbors, community



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### Spot Zoning

- Applicable to all CUD and conditional zoning (and small-scale conventional zoning)
- Can apply to rezoning or initial zoning



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### Conventional Zoning

- Standard rezoning to general use district
- Includes some permitted uses (uses by right)
- May include special/conditional use permits



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### Contract Zoning

- True bilateral contract with mutual promises made  
-- always illegal
- Quid pro quo renders rezoning invalid



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### Conventional Zoning

- Rezoning must be based on suitability of land for all potential uses in the district
- *But* knowledge of use not per se improper, provided it is clear all other uses were considered



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### Conventional Zoning

- Conditions may not be imposed on a rezoning unless applicable to all property in district
- Does not invalidate rezoning, but individual conditions are unenforceable



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### Conditional Use District Rezoning

- Developed in N.C. in 1980s to avoid illegal contract zoning
- Combines rezoning with conditional use permit



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### Conditional Use District Rezoning

- Must be requested by owner
- Involves **two** decisions
  - Rezoning to a district with only CUP/SUP, no permitted uses
  - Conditional/special use permit
- May conduct one hearing and make decisions concurrently



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### Conditional Zoning

- Some local governments averse to combining quasi-judicial process with rezonings, want exclusively legislative process
- Want flexibility for ex parte communication, maximum discretion
- Not possible with conditional/special use *permit*



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## Conditional Zoning

- Create new, unique zoning district, with individualized standards/site plan made a part of the ordinance standards
- Use approved by courts and allowed by statutes in 2005



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## Conditional Zoning

- Statute limits conditions to those:
  - Needed for ordinance/plan compliance
  - Impacts reasonably expected to be generated by project
- Require reasonableness analysis for all small-scale rezonings



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## Moratoria

- Development moratoria allowed on any development approval
- May require public hearing
  - Not required if imminent threat to public health and safety
  - Hearing with one published notice (7 days in advance) if moratorium is 60 days or less
  - Hearing with two published notices (first 10 days in advance) if moratorium is more than 60 days



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## Moratoria

- Require written statement prior to adoption on:
  - Reasons needed
  - Why alternatives are inadequate
  - Scope and duration (must be reasonable)
  - Action plan to address reasons for imposition

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