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Coates' Canons Blog: Choosing the Right Development Review Process: Factors to Consider

By David Owens

Article: http://canons.sog.unc.edu/?p=7376

This entry was posted on October 24, 2013 and is filed under Land Use & Code Enforcement

The city will soon be making a major land use regulatory decision. There is a 15-acre site in town that is mostly vacant, but has a few modest, outdated commercial buildings. The site fronts a major street, so more intensive use is feasible. The owner has expressed interest in a new mixed use development that will include commercial and office space along with a substantial multi-family housing component. Much of the surrounding land behind the site has already been developed for single-family residential use and the neighbors will no doubt be strongly concerned about the traffic, noise, congestion, stormwater runoff, and other impacts of any intensive development. A variety of detailed land use issues are likely to arise — questions about site design, street and sidewalk improvements, fiscal impacts for the town, building design, buffers and landscaping to mention a few.

What type of development review process should be used for this type of proposal? Would it be best to require a rezoning? Or perhaps a special use permit review? How about an administrative review by staff experts to apply detailed development standards?

The short answer is that it depends. A zoning ordinance can be structured to use any of these three types of review. The challenge is to think about what type of review is best suited for different situations and needs and then to structure the ordinance so that anticipated developments are placed into the appropriate category.

Choices Available

A city or county has three basic options when it comes to choosing which type of regulatory review process to use. It can choose to use a legislative, quasi-judicial, or administrative review process. This choice is not made on an ad hoc basis as individual development applications are received. The ordinance itself is structured to require one of these three types of review in differing situations. As applications are received they must be processed based on the policy choices that are reflected in the ordinance.

Each of these options serves a distinct purpose and each requires a very different review process. In brief:

> *Legislative decisions* set policy and provides the decision-making board with the maximum amount of discretion. The process that must be followed also allows maximum public engagement. There is a required public hearing with broad public notice and a mandatory planning board review.
>
> *Quasi-judicial decisions* require the board to apply standards that are already set in the ordinance using a legalistic process to gather quality evidence to resolve contested facts, and to apply those facts to standards that involve judgment (such as being “compatible “ or “harmonious” with the surrounding neighborhood). Public engagement is limited to those who have relevant evidence on whether the proposal meets the standards.
>
> *Administrative decisions* require staff to apply objective standards set in the ordinance to facts that are supplied in applications. If the application meets the standards it is approved; if not, it is denied. The process is bureaucratic in nature, with minimal discretion or public engagement.

In previous posts we have explored the legal requirements for these processes. A board member cannot gather evidence outside the hearing in a quasi-judicial matter but can in a legislative matter (**here**). A board member with a bias cannot participate in a quasi-judicial decision but can in a legislative decision (**here**). Persons appearing as witnesses in a quasi-judicial matter offer sworn testimony, while citizens speaking at a legislative hearing are free to offer unsubstantiated

opinions (**here** and **here**). It is permissible to have reasonable time limits for speakers at a legislative hearing, but witnesses must be given adequate time to present relevant, non-repetitive testimony in an evidentiary hearing on a quasi-judicial decision (**here**). Detailed, site-specific conditions can be added to quasi-judicial decisions, but usually not to legislative ones (**here**, **here**, **here**, and **here**). There is the possibility of combining use of these tools, such as with conditional use district zoning, but the basic rules for each process still apply.

Given the vastly different procedures that the law imposes on these different types of review, a vitally important consideration in crafting a development regulation is making sure the right process is used in the right circumstance. In the example provided at the outset, the ordinance could be structured to require any of these three options. The site could be placed in a low density single-family zoning district so as to require a rezoning in order to allow a mixed use development. The site could be placed in a district that allows mixed use development but only if a special use permit is obtained. Or it could be placed in a district that allows mixed use development automatically if prescribed objective standards are met.

Factors in choice of option

In crafting the ordinance, how should boards decide which process is best in a particular set of circumstances or setting? Traditionally, the principal factors guiding the decision have been the type of land use involved, the intensity or scale of the development, and the locations involved. But there are dimensions to this question that are often overlooked.

Here are seven questions that should be considered in making the choice of which development review process is appropriate.

1. Are there unresolved policy questions to be addressed? If decisions about what land uses and density levels would be appropriate, what design standards are needed, how to provide necessary infrastructure, or how to deal with environmental impacts have not yet been made, a legislative decision is the process to use. Where clear policy choices have been made and standards set, administrative decisions are appropriate. A closely related question is how much involvement by elected officials is desired? Elected officials make legislative decisions, but have little if any involvement in administrative ones.
2. Is speed, predictability, and certainty a key factor? An administrative decision is the quickest and most predictable for land owners and neighbors, while a quasi-judicial decision takes longer and requires more rigorous analysis. The legislative decision is by its very nature the least predictable and often slowest process. If a city wants to encourage development or redevelopment of a particular type at a specific site and already knows the standards that should be met, an administrative review rather than a rezoning would be the choice to make.
3. How much citizen engagement is desired? Legislative decisions allow for the most citizen engagement, quasi-judicial decisions allow those directly affected to present evidence, while administrative decisions are largely determined by staff without consulting the public. Politically sensitive policy issues are best broadly discussed in a legislative context, not resolved by staff members applying technical review standards. A rezoning allows broad public discussion, while most citizens will not learn of an administrative decision until after it has been made.
4. How much does the decision turn on detailed technical analysis and how likely is it that the facts will be contested? An administrative review is well suited to gather substantial information and conduct technical analysis. The quasi-judicial process is well suited to resolve contested facts, especially where both sides to a land use dispute are well represented. It is useful in this context to consider both the type of issues to be resolved and the type of decision maker needed. Professional staff make administrative decisions, quasi-judicial decisions are usually make by appointed boards, while legislative decisions are entrusted to elected officials. Legislative bodies sometimes struggle when limited to an adjudicative quasi-judicial process.
5. How much flexibility and discretion is desired? Legislative decisions allow the greatest discretion, administrative decisions the least.
6. Is there a need to tailor site-specific conditions? The legislative decision can be used for this in North Carolina (though not in some states). But the legislative process is better suited for setting broader community policies. The quasi-judicial process is useful when it is known that some conditions or exactions may well be needed, but a detailed individualized review is needed to determine their precise design or scale.
7. Is ease of administration and enforcement a concern? Administration of standardized, uniformly applied rules is far simpler than developing and keeping track over time of rules that change from parcel to parcel.

The choice to be made involves some inherent trade offs. A legislative decision allows a greater range of discretion and

broad public engagement, but is not particularly quick or predictable. A quasi-judicial decision allows for a careful, searching inquiry into the facts, but is formal and legalistic, limiting possibilities for informal discussion among applicants, citizens and decision-makers. An administrative decision is quick and efficient, but requires more advance work on the ordinance (such as specifying necessary infrastructure improvements, design standards for a form-based regulation, or technical standards to be met) to be sure all of the right standards are in place before an application is made and it provides little opportunity for governing board or citizen involvement. Efficiency and engagement are not mutually exclusive considerations, but sometimes one or the other will take precedence.

The time to determine which process should be used for a particular site or type of development proposal is before an application is submitted. This must be resolved in crafting or updating the development ordinance. It is too late in the midst of a hearing on a special use permit to decide more informal discussions between council members, the applicant, and staff would help refine the application.

With the example provided at the outset, the city should carefully consider its options and structure the development regulations accordingly prior to an application being made. If the city wants to have a broad public discussion about the types and intensity of uses that would be appropriate for the site, a legislative rezoning option would allow that to take place. If planning and policy discussions have already resolved those questions, but detailed review of the site plan, project design, and infrastructure improvements, as well as ample opportunity for neighbor comment and review is desired, a quasi-judicial special use permit would be appropriate. And if the city knows what is desired and permissible and wants to encourage development of the site in accordance with those standards, an administrative review with staff approval would be appropriate.

Which option is the right choice depends entirely on the context and what the city hopes to accomplish with the development approval process.

Coates' Canons Blog: Mandated Notices in Land Development Regulations

By David Owens

Article: http://canons.sog.unc.edu/?p=7491

This entry was posted on January 28, 2014 and is filed under Administration & Enforcement, Land Use & Code Enforcement, Legislative Decisions, Public Hearings, Quasi-Judicial Decisions, Zoning

Local governments make hundreds of decisions every day under local development regulations. Permits are issued or denied. Enforcement actions are initiated. Ordinance provisions are interpreted. Property is rezoned. Ordinances are amended.

When a local government is considering these, does it have to provide notice that a decision is pending and solicit comments? Once the decision is made, who has to be told about it?

Because many of these decisions have a significant impact on landowners, neighbors, and the community, state law requires the local government to provide notice and an opportunity to comment prior to some land use regulatory decisions. Since the time for appeals is limited for some types of decisions, state law also requires that written notice of those decisions be provided. These notices should provide sufficient information to alert a reasonable person as to the nature of the action involved, where and how they can get more information, and how they can offer comments or take needed action.

This post summarizes when state law requires that notices be provided and the minimum amount and form of the notice required. A summary table of the requirements is included. Individual local ordinances can add or expand upon these minimum requirements, but every city and county is required to at meet these state notice requirements.

Staff Determinations

For the most part there is no state mandate for prior notice of *pending* administrative decisions made by a local government staff. Since these decisions involve application of existing, objective standards rather than making policy choices, the need for and use of public input is very limited. Thus there is no public hearing required when an administrative staff member makes a decision on a building permit, a certificate of zoning compliance, a notice of violation, a preliminary or final plat, or similar ministerial decision by the staff. A few local ordinances may require notice to neighbors for these, but that is rare. For the most part these routine decisions are handled through direct communication between the applicant and the staff only. See this **post** by my colleague Rich Ducker for a discussion of additional aspects of the law on notice of administrative decisions.

When a staff member makes a *final, binding determination* under a zoning ordinance, the right of the person receiving the decision to make an appeal to the board of adjustment is triggered. State law requires the local government to provide written notice of the determination to the party who sought the determination, and to the owner of the property involved. **G.S. 160A-388(b1)(2)**. The notice may be delivered by personal delivery, electronic mail, or first-class mail. Those persons then have 30 days from receipt of the written notice to file an appeal to the board of adjustment. Other persons who are directly affected by that determination have 30 days from the time they receive actual or constructive notice of the decision to file an appeal. There is no state requirement to send the notice to neighbors. State law gives the property owner the option of posting the site with a sign notifying neighbors that a determination has been made, which triggers the start of the neighbors' time to make an appeal. **G.S. 160A-388(b1)(4)**.

Another important variation arises with enforcement orders that require repairing, vacating, or demolishing residences that are unsafe for habitation under housing codes (**G.S. 160A-443**, **-445**). Notices to the owner by personal service or registered/certified mail and posting the property are required. There are similar statutory notice and hearing requirements for determinations regarding unsafe buildings (G.S. 153A-366 to –369; 160A-425 to 429).

Hearings on Pending Quasi-Judicial Zoning Decisions

When a local government board makes a quasi-judicial decision – deciding a special or conditional use permit application, a variance request, or an appeal of a staff determination – it must hold an evidentiary hearing. Prior to 2013, state law left it to local ordinances to determine what "reasonable notice" of the hearing was to be provided. State law now sets a uniform standard for mandated notice of these hearings.

The local government holding the evidentiary hearing must provide both mailed and posted notice of the hearing. **G.S. 160A-388(a2)**. A notice of the hearing must be mailed to the person who initiated the hearing, the owner of the affected property, and the owners of abutting properties. Some local ordinances expand the mailing requirement to the owners of all properties within a set distance of the affected property (typically those within 100 feet). The notice must be deposited in the mail at least 10 but not more than 25 days prior to the hearing. The local government must also post a notice of the hearing on the site involved. That sign has to be put up at least 10 but not more than 25 days prior to the hearing. There is no state mandate for publishing the notice of an evidentiary hearing in the newspaper, since the purpose of these hearings is to gather facts about a particular case, not to solicit public opinion about a pending policy choice. The notion here is that the interests of those most directly affected and who are most likely to have relevant evidence to offer are best served by mailed and posted notice, while newspaper publication is oriented more to the general public. Some local ordinances, however, do require published notice of these hearings.

The Open Meetings Law also applies to these hearings, so in addition to the specific requirements noted above, the notices required by that law must also be provided. **G.S. 143-318.10**. A copy of the regular meeting schedule must be filed in a central location and posted on the local government's web site (if it has one). A special meeting held outside the regular meeting schedule requires posting written notice of the meeting on the local government's principal bulletin board, posting notice on the local government's web site, and mailing a copy of the notice 48 hours in advance of the meeting to each person who has made a request for notification. Notice of an emergency meeting must be provided to the local news media.

Quasi-Judicial Zoning Decisions

Once a local government board makes a decision on a quasi-judicial matter, that decision must be reduced to writing. The written decision has to include the resolution of any contested facts and must apply the applicable standards to the facts of the case. Once signed by the board chair, the written decision must be filed with the clerk to the board. The decision must then be delivered to the applicant, the owner of the affected property, and to any person who has made a written request for a copy of the decision prior to the time the decision is filed with the clerk. The decision can be delivered by personal delivery, electronic mail, or by first-class mail. The person who delivers the decision is to certify that proper notice of the decision has been made. **G.S. 160A-388(e2)(1)**. Persons affected by a quasi-judicial decision only have 30 days from the time this notice is provided to initiate judicial review (three days is added to the time notice is sent if that is done by first-class mail).

These statutes are directly applicable only to zoning decisions. A local government can make plat approval (or other development approval) quasi-judicial by including standards for approval that require judgment and discretion. If that is done, the notice required for zoning decisions provides a useful guide to the notice that should also be provided for those decisions.

Hearings on Pending Legislative Decisions

Whenever a local government adopts, amends, or repeals a development regulation, it must first hold a public hearing to solicit public comments. This applies to zoning, subdivision ordinances, housing codes, and any other development regulation. The requirement for a hearing on pending legislative decisions has been a feature of North Carolina statutes

since the initial authorization to adopt zoning was granted to the state's cities in 1923. The requirements for how notice of that hearing is to be provided have evolved over the decades.

Current law requires that notice of the hearing be published in a newspaper**.** **G.S. 153A-323**, **160A-364**. This requirement applies to all development ordinances, not just zoning. It applies to subdivision ordinances, unified development ordinances, housing codes, and so forth. The notice must be published twice, with the first notice appearing at least 10 but not more than 25 days prior to the hearing (the date of publication is not included in this calculation, but the day of the hearing is). A few local governments have been given legislative authorization to substitute electronic notice for these published notices, but recent efforts to extend that option to all cities and counties have faced stiff opposition from newspapers. Notice of the hearing must also be sent by certified mail to the base commander if the proposed amendment affects permitted uses, major subdivisions, or tall structures within five miles of a military base.

If the ordinance amendment is a rezoning – an amendment of the zoning map – there are three additional notice requirements mandated. **G.S. 153A-343**, **160A-384**. First, notice of the hearing must be mailed to the owner of each affected property and the owners of all abutting properties (it is fairly common for local governments to extend mailed notice to all those owning property within a set distance, such as within 100 feet, not just abutting owners). The notice must be deposited in the mail at least 10 but not more than 25 days prior to the hearing. Second, a sign notifying the public of the hearing must be posted on the site affected or the adjacent street right of way. State law does not specify the time of the posting, but many local governments use the same 10 to 25 day window required for the mailed notice. Third, if the rezoning was not requested by the owner of the affected property or by the local government involved, actual notice of the hearing must be provided to the property owner. This must be done in the same manner personal service is required in civil suits — personal delivery, registered or certified mail, or delivery with signature confirmation. The person who requested the rezoning is responsible for making this actual notice to the owner. Also, notice of the hearing must be sent by certified mail to the base commander for any rezoning of land located within five miles of a military base.

The requirements for notice of these various actions are summarized by the table below:

Type of Action	***Type of Notice***	***Recipient***	***Timing***
Final Staff Determination	Personal service, email, or mail; Posting by owner (optional)	Person requesting; Property owner	When made
Hearing on Quasi-judicial Decision	Mail; Post site	Applicant; Property owner; Abutting property owners	10 to 25 days prior to hearing
Quasi-judicial Decision	File with clerk; Personal service, email, or mail	Applicant; Property owner; Others making written request prior to effective date	When made
Hearing on Ordinance Text Amendment	Newspaper; Certified mail if near military base	Public; Base commander	10 to 25 days prior to hearing
Hearing on Rezoning	Newspaper; Mail; Post site; Personal service if not initiated by owner or government; Certified mail if near military base	Property owner; Adjacent property owner; Base commander	10 to 25 days prior to hearing

Consequences of Failure to Provide Notice

All of the state statutory requirements noted above must be strictly followed. Any additional requirements included in local ordinances must also be strictly followed. The courts have held that these notice requirements are a vital part of land development regulations, providing essential notice to property owners, neighbors, and citizens as to proposed decisions. An ordinance amendment made without observing the notice requirements will be invalidated if challenged in court. The notices required for final decisions that have been made are critical for initiating appeal times, as well as for providing essential information to those affected by the actions taken. Failure to provide notice could be a basis for allowing a

challenge beyond the time provided in the statutes. It is therefore essential that all of those administering development regulations know and follow these mandates.

Links

- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160A-388
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160A-443
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=153A-323
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160A-364
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=153A-343
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160A-384

Coates' Canons Blog: Is the Mayor Doing Her Job or Improperly Receiving Evidence?

By David Owens

Article: http://canons.sog.unc.edu/?p=5202

This entry was posted on August 10, 2011 and is filed under Land Use & Code Enforcement

Mayor Juanita Beasley was stuck in the checkout lane at the supermarket. She was wondering why she always managed to pick the slowest line when she felt a tap on her shoulder.

She turned to find her old high school friend Clara Edwards smiling and leaning in. After a quick exchange of pleasantries, Clara says, "Juanita, you know that store they're talking about putting in across the street from me on Raleigh St.? The one that's up before the town council next week. A couple of folks from the neighborhood are getting together at my house Sunday afternoon to talk about it and it would be so nice if you could stop by and join us. We'd sure like to share our thoughts and see what you can do to help us."

"Well, Clara, I'd be delighted to stop by. You know I always have time for you. And what good's a mayor who doesn't take time to find out what on her constituents' minds? What time should I come by?"

Juanita knew exactly what project Clara was talking about. After a couple of quiet years, development was beginning to stir in Maycomb. The town had received a special use permit application for a new 24-hour drug store on Raleigh St. The hearing on the permit was coming before the town council next week. Juanita was more than a little familiar with the site proposed for the store. Although she now lived on the other side of town, she had grown up just a couple of blocks away from the proposed site and had seen firsthand how that neighborhood had changed over the years.

A couple of folks had already called Juanita to raise concerns about the traffic and noise the new store would bring to the old neighborhood. While Juanita was generally inclined to vote for a project that would bring jobs to town, she was concerned that this site might have some real problems. She had driven by the site just yesterday to take a look at how traffic moved during the evening rush and had made a mental note to drop by the planning office to chat with the staff about what conditions could be added to prevent this store from making things worse.

In all of this is Juanita being a good public servant, dutifully checking into the matter and meeting with folks to help get a good resolution of a community controversy? Or do we have a problem brewing?

While Mayor Beasley has been diligent and responsible so far, she may be about to cross the line between being a responsive and responsible official and violating the legal rights of a permit applicant.

Many critical land use regulatory decisions are made by citizen boards—city councils, county boards of commissioners, planning boards, and boards of adjustment. There are different legal rules for the process that must be followed that depend on the type of decision being made. For some decisions, such as the policy choice of whether or not to approve a requested rezoning, the process is designed to assure broad and open public discussion with the decision-making board. But for other types of decisions, those termed "quasi-judicial," the law's emphasis is on assuring a fair decision-making process for those most directly affected. Quasi-judicial decisions involve two critical elements—determining contested facts and applying standards that require application of some judgment. With quasi-judicial decisions—special and conditional use permits, variances, and appeals—there is not a policy choice being made. Rather these decisions must apply the policies already in the ordinance. The purpose of a public hearing for a quasi-judicial decision is not to gather public opinion about whether the proposal would be good for the community. The purpose of the hearing in a quasi-judicial matter is to gather quality evidence in a fair manner to determine the facts of the case. So what is lawful and perfectly appropriate in a rezoning hearing may be unlawful and inappropriate in a special use permit hearing.

And therein lies our potential problem. While some degree of informality is permissible even in a quasi-judicial matter,

applicants and those neighbors who may be substantially affected have a constitutionally protected right to a fair hearing. In a case involving a decision by the town council on a special use permit for a gas station in downtown Chapel Hill, Justice Susie Sharp set forth specific due process requirements for a quasi-judicial land use regulatory decisions. She noted, “Notwithstanding the latitude allowed municipal boards, . . . a zoning board of adjustment, or a board of aldermen conducting a quasi-judicial hearing, can dispense with no essential element of a fair trial.” Humble Oil & Refining Co. v. Board of Aldermen, 284 N.C. 458, 470, 202 S.E.2d 129, 137 (1974).

The court held that one of the “essential elements” of a fair trial is that each party have an opportunity to review all of the evidence being considered and have the chance to rebut that evidence. All of the decision-makers must see the same evidence and have a chance to assess the credibility of the witnesses, as well as the opportunity to ask questions of the witnesses. Thus the courts have long concluded that board members must not gather evidence outside of the hearing, a limitation on what the courts refer to as “ex parte” contact. Undisclosed ex parte communications can evidence impermissible bias or rise to a level of unfairness that will lead to judicial invalidation of the decision. Crump v. Board of Education, 326 N.C. 603, 392 S.E.2d 579 (1990). In addition to constitutional due process considerations, the zoning statutes also provide that members of boards exercising quasi-judicial functions must not participate in or vote on any quasi-judicial matter if they have a fixed opinion prior to hearing the matter that is not susceptible to change or have undisclosed ex parte communications. G.S. 160A-388(e1) and 153A-345(e1). Many local land use ordinances also specifically prohibit ex parte communications with decision-makers on quasi-judicial matters.

Our situation poses at least four potential dimensions of ex parte evidence. Mayor Beasley may be establishing facts outside of the hearing through: (1) her prior personal knowledge of the site; (2) her site visit to inspect traffic conditions; (3) phone calls and a potential meeting with neighbors to discuss the case; and (4) a potential visit with staff prior to the hearing to discuss potential permit conditions. Which of these pose a problem with the limits on ex parte evidence? Let’s take a quick look at each.

Prior personal knowledge

Board members hearing quasi-judicial matters are members of the community in which these land use cases arise. They may well have personal knowledge about the site or a personal acquaintance with the parties. The courts have applied a rule of reason to ex parte communication in quasi-judicial proceedings. If a board member has prior or specialized knowledge about a case, it is entirely proper to consider that knowledge. But it is essential that knowledge be disclosed to the rest of the board and the parties during the hearing. Humble Oil & Refining Co. v. Board of Aldermen, 284 N.C. 458, 468, 202 S.E.2d 129, 136 (1974).

So in our case it is entirely appropriate for Mayor Beasley to consider what she already knows about the history of the site and the neighborhood. But she should be careful to lay that out at the hearing for the benefit of other council members, the applicant, and the neighbors. That way if anyone disagrees with her views of the facts or wants to offer rebuttals, they can do so.

Site visit

As with personal knowledge of the facts, the courts have long held that site visits by board members are permissible. Photographs, surveys, and even video tapes of the site may be submitted as exhibits, but often there is often no substitute for getting a look at the site and the conditions that exist there.

If board members do make a site visit, they should during the course of the hearing note that they have done so and summarize any pertinent facts they discern from the visit. Again, this allows all parties to know the evidence being considered and gives them an opportunity to present rebuttal information. Members should refrain from discussing the facts of the case with the applicant, neighbors, or staff during a site visit. Those comments are best made at the hearing for the benefit of all involved.

Meetings with neighbors (or applicant)

It is not uncommon for a board member to have had casual conversations about the case prior to the hearing with staff, the applicant, or the neighbors. As long as those are relatively brief and are fully disclosed at the hearing, there is no legal problem.

That said, board members must avoid any extensive discussion about the facts of a case outside the hearing. The applicant has a legal right to know what the neighbors are saying about the case and have a chance to rebut factual assertions. Even if the conversations are innocent and well intentioned, the applicant has no way of knowing what is being said. Public confidence in the integrity of the decision depends on all of the evidence being presented openly and transparent to everyone affected. Evidence needs to be gathered at the hearing, not through the **grapevine**. So discussions with the neighbors (and with the applicant) outside the hearing must be minimized. Even disclosure may not cure extensive contact with a party about the case prior to the hearing.

So Mayor Beasley should politely tell folks who call her about the case that she appreciates their concerns, encourage them to come to the hearing and speak on the case, but let them know that she is not at liberty to hear about the case outside of the hearing. She could do the same at a brief drop-in with neighbors, but it would probably best to avoid attending meetings about the case with the neighbors or the applicant prior to the hearing.

Meetings with staff

The same rule applies, and for the same reasons, to a board member's discussions outside the hearing with the board's staff. Both the applicants and the neighbors have a right to see and hear all of the evidence being presented. It is acceptable to speak with staff about the ordinance and its requirements prior to a hearing, but those discussions should not include the facts of a pending case.

It would certainly be appropriate for Mayor Beasley to ask staff these questions at the hearing. It is acceptable for her to send staff a memo prior to the hearing alerting them to information she would like to see presented at the hearing. It is also appropriate for staff to prepare reports and recommendations to be presented to the board, provided that information is presented to all board members and to all parties (and the staff member should be available at the hearing to present the report and respond to queries). But a board member must be careful not to express an opinion about the ultimate outcome of the case or even the need for a particular condition prior to hearing the evidence at the hearing.

All of these rules may seem unduly formal and constraining. But the permit decision will have a significant impact on the applicant and the neighbors. Both have rights to a fair hearing. Board members making quasi-judicial decisions have a responsibility to observe and protect those rights. A fair hearing requires that all board members and the parties see the same evidence and have a fair chance to rebut and challenge that evidence. Avoiding undue receipt of information outside the hearing is therefore an essential duty for boards making quasi-judicial decisions.

Links

- www.youtube.com/watch?v=Y7dGdrP3pms

Coates' Canons Blog: When Can a Biased Elected Official Participate in a Zoning Decision?

By David Owens

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A rezoning petition is pending before the city council. The parcel involved is zoned for single-family residential use. The landowner wants to build a retail store on the site, so she is seeking a change in the zoning to a commercial zoning district. The planning board has recommended approval, noting the adjacent street can handle the additional traffic and that the land use plan calls for more commercial activity in this general area. Most of the neighbors strongly oppose the rezoning, objecting to the extra traffic, noise, and "commercialization" of their quiet residential neighborhood.

The day before the public hearing on the rezoning the local newspaper has a front page story about the controversy. The article quotes the landowner on her plans and the leader of the neighborhood opposition about his concerns. The article then includes the following –

> Things could get interesting when the council holds its public hearing tomorrow night. Council member Hamilton Berger said he strongly supports the proposed rezoning. Burger said the jobs that will be provided will greatly benefit the community and the tax revenues from this business will help reduce the tax burden on town residents. "I'm pumped. I can't wait to help cut the ribbon at the store opening," Burger said. But Council member Della Street also expressed strong opinions about the rezoning. "I got elected to prevent exactly this type travesty," she said. "Hamilton and his fast talking buddies may throw a lot of figures around, but I know in my heart just how bad this would be for the neighborhood. I don't care what they say tomorrow at the hearing, I can tell you right now I'm going to do everything I can to stop this terrible project.

We have two council members with strongly held opinions about a pending land use decision. Both have proudly and unequivocally announced prior to the public hearing just how they intend to vote. Does this pose a legal problem? If they have indeed already made up their minds prior to the hearing, can they still vote on the rezoning?

Yes they can.

It is not unusual for members of city councils and county boards of commissioners to have a personal interest in the outcome of a zoning decision. It is common for developers, real estate agents, neighborhood activists, and others strongly interested in development to be represented on local government boards. Given the strong impact development regulations have on their interests, it is hardly surprising that those most directly affected by the decisions actively seek out board membership. These members bring expertise and well-informed perspectives to the crafting and implementation of development regulations. But the participation in decision-making by persons who may be personally affected by the decisions presents the need for safeguards to assure that these decisions are made in the public interest. The law on conflicts of interest defines when it is permissible for an official to take those personal interests into account in a zoning decision and when those personal interests mandate that the official not participate.

Conflict of Interest Standards

The resolution of conflict of interest issues when it comes to zoning decisions depends on two factors – what type of zoning decision is involved and what type of personal interest is involved. First, the rules vary depending on whether the decision is characterized as legislative (such as a rezoning or text amendment) or quasi-judicial (such as a special or conditional use permit). Second, the rules also vary depending on the type of personal interest involved. Our topic for today is bias, but there are differing rules for other types of personal interest, such as financial conflicts of interest, personal relationships with affected persons, and the like.

The North Carolina Supreme Court has summarized the general rule on conflicts of interest for boards making land use regulatory decisions, first setting out the standard for legislative decisions and then for quasi-judicial decisions:

> "With legislative zoning decisions, an elected official with a direct and substantial financial interest in a zoning decision may not participate in making that decision. Where there is a specific, substantial, and readily identifiable financial impact on a member, nonparticipation is required. Additional considerations beyond these financial interests require nonparticipation in quasi-judicial zoning decisions. A fixed opinion that is not susceptible to change may well constitute impermissible bias, as will undisclosed ex parte communication or a close familial or business relationship with an applicant."

County of Lancaster v. Mecklenburg County, 334 N.C. 496, 511, 434 S.E.2d 604, 614 (1993). It is important to note that the prohibition against bias is included for quasi-judicial decisions, but not for legislative decisions. This is because the parties have a due process right to an impartial decision-maker with quasi-judicial decisions, but not with legislative ones.

The same rules on conflicts of interest in land use decision-making are also now in the statutes. In 2005 the zoning statutes were amended to address conflicts of interest in both legislative and quasi-judicial settings, codifying the rules set out in the County of Lancaster case.

G.S. 160A-381(d) and 153A-340(g) provide that members of city councils and county boards of commissioners "shall not vote on any zoning map or text amendment where the outcome of the matter being considered is reasonably likely to have a direct, substantial, and readily identifiable financial impact on the member." These statutes apply the same standard to appointed boards making recommendations on legislative decisions (such as a planning board comment on a proposed rezoning). For a more detailed review of the statutes dealing with board member voting and financial conflicts of interest, see this **blog post** from my colleague Frayda Bluestein.

G.S. 160A-388(e1) and 153A-345(e1) provide that members of boards making quasi-judicial land use decisions "shall not participate in or vote on any quasi-judicial matter in a manner that would violate affected persons' constitutional rights to an impartial decision-maker. Impermissible conflicts include, but are not limited to, a member having a fixed opinion prior to hearing the matter that is not susceptible to change, undisclosed ex parte communications, a close familial, business, or other associational relationship with an affected party, or a financial interest in the outcome of the matter." It is important to note that, as was the case with the court decision, the statutory standard for quasi-judicial zoning decisions explicitly references the constitutional due process right for impartiality.

Bias and Legislative Decisions

The decision involved in the problem posed at the outset is a legislative zoning decision – rezoning a parcel from residential to commercial use. The type of conflict is a lack of impartiality. We do not have any financial conflicts of interest, but we do have two council members with a bias.

Decisions on rezonings require policy judgment by elected officials. These officials' personal knowledge, positions on issues of importance to the community, and judgment about the preferred course for the community are important and valid components of the decision-making process. Expression of opinions, bias, and contacts with citizens about a matter before a rezoning hearing do not disqualify a member from voting on a legislative decision. Brown v. Town of Davidson, 113 N.C. App. 553, 556, 439 S.E.2d 206, 208 (1994).

While there is no requirement for impartiality on issues of public policy choices, there are constitutional protections from bias based on race, ethnicity, or religion. It would be impermissible, for example, to deny a rezoning for a place of worship based on which particular religion would be practiced there. Also, a person can establish a constitutional violation in those rare instances where it is established that the decision was based solely on personal animosity towards the applicant rather than any plausible public policy rationale.

With our rezoning issue, it is legally permissible for both council members to freely debate and vote on the matter even though they have announced how they intend to vote prior to the rezoning hearing. If a person is concerned with policy bias and the judgment being exercised by these elected officials, the appropriate remedy is the ballot box, not a law suit.

Bias and Quasi-Judicial Decisions

By contrast, we would have an entirely different conclusion had the council been hearing a special or conditional use permit application instead of a rezoning. Bias by a decision-maker is a serious issue with quasi-judicial zoning decisions.

When a board decides a special and conditional use permit application, those directly affected by the decision have a constitutionally protected right to an impartial decision-maker. Board members must fairly apply the standards in the ordinance to the facts presented, whether or not they agree with those standards. A board member whose opinion about the case is fixed and not susceptible to change has an impermissible bias and must not vote on the matter. Further, a member with a bias must not even participate in hearing or the deliberation of the case. This rule applies to any board making a quasi-judicial decision, be it a city council, board of county commissioners, planning board, or board of adjustment.

Determining when a person has an impermissible bias in these cases can be difficult. If, as with our rezoning example, a council member boldly announces their intended vote on a special use permit application prior to hearing the evidence, they clearly have a fixed opinion and must not participate in the case. On the other hand, simply knowing some of the parties or expressing an opinion about the general policies involved with a case is generally not impermissible bias if the member can fairly state they will make a decision based on the evidence presented and the standards in the ordinance. But exactly where the line is between impermissible bias and permissible general opinions that do not affect a vote is not always entirely clear. The statute on judicial review of quasi-judicial zoning decisions recognizes the complications in determining whether bias exists, as G.S. 160A-393(j) allows the hearing record on review to be supplemented with affidavits, testimony, or documents to determine if members of the decision-making board were sufficiently impartial.

So, was it a good idea for our two city council members to announce how they intended to vote on a rezoning prior to the public hearing? That is a question of judgment the courts leave to the council members and ultimately to the voting public. But it is clear that lack of impartiality in a legislative matter is not a legal problem. Unless the outcome of the rezoning vote will have a substantial financial impact on Mr. Burger or Ms. Street, they are not required to approach the rezoning hearing with an open and impartial mind. They are free to bring their public policy preferences to the hearing and, if they wish, to fully disclose their voting intentions in advance. But they need to be careful not to do the same next time they hear a special use permit application.

Coates' Canons Blog: Building the Record for a Quasi-Judicial Decision

By Adam Lovelady

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"Every quasi-judicial decision shall be based upon competent, material, and substantial evidence ***in the record***" (NCGS 160A-388(e2)). Without such evidence, the decision is arbitrary and an abuse of the discretion vested in the board (Godfrey v. Zoning Board of Adjustment, 317 N.C. 51 (1986)). So what is the record? What evidence goes in that record? And how is the evidence obtained? This blog explores those and other questions.

Evidentiary Hearings, Generally

For a typical quasi-judicial decision—a special or conditional use permit or a variance—the decision-making board is acting like a trial court. The board holds an evidentiary hearing to accept and review documents and testimony. The board is determining the facts and ruling on the law. The board is answering the broad question: Does the evidence show that the applicant meets the standards for the variance or permit? Through the evidentiary hearing, the board builds the record upon which the decision is based. And, if the decision is appealed, the superior court will base its review upon that record.

According to NCGS 160A-393, the record created by the evidentiary hearing "shall consist of all documents and exhibits submitted to the decision-making board . . . together with the minutes of the meeting or meetings at which the decision being appealed was considered." This may include the application; the staff report; photographs, plans, and diagrams; studies and reports prepared by the applicant; exhibits presented by opposing parties; and all of the testimony at the evidentiary hearing. In other words, the record includes all of the materials and input that is presented to the board.

The evidentiary hearing may be taped (audio and/or video), but there is no requirement for taping. If a tape is made and the quasi-judicial decision is appealed to superior court, then any party may request that a tape be included in the record. Additionally, a party may request that a transcript be included in the record on appeal. The requesting party bears the cost of producing the transcript (NCGS 160A-393(i)).

What if the tape messes up? In Fehrenbacher v. City of Durham, __ N.C. App. __, COA14-712 (February 3, 2015), the city taping equipment malfunctioned and failed to record the first hour of testimony. The court noted that affidavits from the neighbors covered the substance of the missing testimony, and moreover, the statutory requirement states that tapes may be requested "if such a recording was made." In this case, a recording was not made for a portion, and there is no obligation to create a recording.

Distinguishing Evidence within the Record

We need to make a clear distinction, here. The record of a quasi-judicial decision is composed of various pieces of evidence. Some of that evidence in the record is good: the application, factual testimony from opposing parties, expert opinion testimony. Some of that evidence in the record is incompetent, immaterial, and insubstantial. This may include unqualified speculative opinion, a petition from neighbors, hearsay evidence, or irrelevant facts, for example. For this discussion, I will call that insufficient evidence. In other blogs, my colleagues David Owens and Rich Ducker have written about distinguishing good evidence from insufficient evidence and the details of sworn testimony, opinion evidence, expert evidence, and ex parte evidence.

Legally, the board must base its decision on competent, material, and substantial evidence in the record—good evidence. But, in practice and as a result of the process, the record may include incompetent, immaterial, or insubstantial evidence. So what do we do with all of the insufficient evidence? Do we strike it from the record?

No. Insufficient evidence may remain in the record, but may not be the basis of the quasi-judicial decision. Quasi-judicial boards must adhere to the procedural requirements of constitutional due process, but boards are not required to follow the strict rules of evidence that apply in a courtroom. Some informality is allowed for the quasi-judicial board. As such, courts allow that the inclusion of some insufficient evidence as part of the record is not a due process violation.

"The question is whether there is substantial evidence in *the whole record* to support the findings and conclusions." Where the court has determined that the record includes competent, material, and substantial evidence to support the Board's decision, the admission of other arguably incompetent evidence does not infringe upon the parties' due process rights (Dobo v. Zoning Bd. of Adjustment of City of Wilmington, 149 N.C. App. 701, 709-10, 562 S.E.2d 108, 114 (2002)rev'd on other ground, 356 N.C. 656, 576 S.E.2d 324 (2003)).

To be clear the board cannot base its decision upon insufficient evidence in the record. Where an applicant presents evidence to show the he meets the standards for a special use permit, the burden shifts to opponents to produce evidence to the contrary. If neighbors produce nothing more than unrelated comments and speculative opinions (insufficient evidence), then the board does not have sufficient evidence to deny the permit. The board must approve the permit. (Blair Investments, LLC v. Roanoke Rapids City Council, 752 S.E.2d 524 (N.C. Ct. App. 2013)).

Getting the Evidence

Application and Evidentiary Hearing. Generally, the evidence creating the record is provided by the parties, either in advance of the hearing (with the application) or as part of the evidentiary hearing. Indeed, the burden typically is on the applicant to present the evidence that they meet the applicable standards.

Administrative Record.In addition to the typical evidentiary hearings described above, the board of adjustment is tasked with handling appeals from decisions made by zoning administrators and historic preservation commissions. David Owens has written about these types of appeals to the board of adjustment. When that happens, the case comes to the board of adjustment with a record.

Consider an appeal of an administrative decision such as issuing a notice of violation or making a formal interpretation of the ordinance. When an administrative decision is appealed, the zoning administrator who made the decision "shall transmit to the board all documents and exhibits constituting the record." The zoning administrator also must provide the record to the appealing party and owner of the property (NCGS 160A-388(b1)).

Preservation Commission Record.When a decision from the historic preservation commission is appealed to the board of adjustment, the preservation commission should transmit to the board of adjustment the record of its decision, including all documents, exhibits, and minutes. Tapes and transcripts, if any, may be included.

For these appeals from the preservation commission, the board of adjustment is acting as an appeals court. The technical scope of review is outlined at NC General Statute 160A-393(k). In sum, the board reviews the record to determine whether there is sufficient evidence to support the decision made by the preservation commission, and to determine whether the actions taken were authorized and appropriate under the law. The board of adjustment may hear legal arguments from the parties, but the board does not take new factual evidence or testimony.

Subpoena. In some cases, though, the quasi-judicial board may need to compel production of evidence. Under NC General Statute 160A-388(g) boards of adjustment and other boards making quasi-judicial decisions are authorized to subpoena witnesses and compel the production of evidence. A party to the case may request that the chair of the board subpoena a witness or compel evidence. The chair makes the decision about issuing subpoenas; that decision may be appealed to the full board. If a party fails to comply, the board or the party requesting may seek an order requiring compliance from the General Court of Justice.

Appeals to Court—Supplementing the Record

When a decision from a quasi-judicial board is appealed to superior court, the reviewing court is acting like an appeals court. Generally, the court must base its decision on the record that was before the decision-making board.

But, for certain topics, the court may supplement the record. The reviewing court may “allow the record to be supplemented with affidavits, testimony of witnesses, or documentary or other evidence if, and to the extent that, the record is not adequate to allow an appropriate determination” of specific legal standards:

- legal standing
- conflicts of interest
- actions that are unconstitutional or in excess of the board’s statutory authority

Additionally, under NC General Statute160A-393(i), the court may direct that matters be deleted from or added to the record (Fehrenbacher, __ N.C. App. __, COA14-712 (February 3, 2015)).

Conclusion

As stated in the statutes and case law, “[e]very quasi-judicial decision shall be based upon competent, material, and substantial evidence in the record.” The record is all of the materials and input that is presented to the board, including the application, exhibits, testimony, and related materials. The record for a quasi-judicial decision may include some insufficient evidence, but the board may not base its decision on it. If necessary, the quasi-judicial board may subpoena witnesses and compel production of evidence for the record. In the case of appeals to the board of adjustment, the case comes with its own record. And, in the case of appeals from the quasi-judicial decision, the superior court must rely on the record before the board and may supplement the record for certain topics.

Links

- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-388.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-393.html

Coates' Canons Blog: Do You Have to Swear to Tell the Truth to the Board of Adjustment?

By David Owens

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Hector Peabody is fuming. Several months ago one of his neighbors called town hall and complained that he was running an illegal kennel in his backyard. Sure, he raised plot hounds, kept them in a pen out back and the dogs barked from time to time. Even though he occasionally sold some of the hounds, Hector considered this a hobby. But his neighbor, Mr. Sherman, had called town hall and complained. After inspecting his pens and asking him about his dogs, the town cited Mr. Peabody for a zoning violation. So here he was sitting through a lengthy zoning board of adjustment hearing on his appeal. Now his disgruntled neighbor was going on and on about how many dogs were there, how they howled all night long, and such.

Mr. Peabody finally had enough. He stands up and addresses the board. “Mr. Chairman, I’m sorry to interrupt, but this is just malarkey. Sherman and I had a falling out years ago and he brought this ridiculous complaint just to harass me. I can put up with that. But now he’s lying about my dogs and that’s too much. What he just said is plain wrong. I want you to put this kid under oath or make him sit down and be quiet.”

Apart from the lack of good order and decorum, does Mr. Peabody have a point? Does the neighbor need to sworn in to tell the board what he has seen going on in his neighbor’s back yard?

When the board of adjustment hears an appeal, it is acting in a quasi-judicial capacity. The same is true when it hears a variance or when the town council evaluates an application for a special or conditional use permit. For these quasi-judicial matters, the board must conduct an evidentiary hearing to gather evidence as to the facts of the case. The rules for these hearings are designed to be sure that the ultimate decision is based on good quality, reliable evidence in the record in order to protect the due process rights of the persons affected by the decision.

Sworn testimony is one of the important rules for conducting a valid quasi-judicial hearing. Placing a witness under oath reminds that person that this is a serious matter and they have an obligation speak accurately and truthfully, without speculation or exaggeration. It is a Class 1 misdemeanor for a person to testify falsely under oath in an evidentiary hearing on a quasi-judicial land use regulatory matter. G.S. 160A-388(g) and 153A-345(g); [G.S. 160A-388(f) as of Oct. 1, 2013]. The use of sworn testimony distinguishes these evidentiary hearings from the more familiar and less formal public hearing on a legislative rezoning or other ordinance amendment. In the legislative public hearing a person speaking is free to express their opinion as to the wisdom or desirability of an action, while in an evidentiary hearings the person speaking is a witness testifying as to the facts of the case. The legislative hearing is an opportunity for members of the public to speak their minds and give their opinions. The quasi-judicial hearing is about obtaining and evaluating the evidence necessary for making a fair and legally supportable decision.

Who should be sworn in?

Generally, all persons presenting evidence to a board making a quasi-judicial decision should be under oath. Jarrell v. Board of Adjustment, 258 N.C. 476, 128 S.E.2d 879 (1963). This includes the applicant, neighbors, governmental staff members, and any other person who may be presenting information to the board, such as a surveyor, engineer, or real estate agent.

An oath of office is not a substitute for an oath for testimonial purposes. A zoning administrator or board member may have taken an oath to faithfully execute the duties of their office, but they must take a separate oath for the presentation of evidence.

The same is true for an attorney who is testifying. An attorney for a party sometimes directly presents facts and information to the board (as opposed to simply questioning witnesses and making arguments to the board). The State Bar's rules of professional conduct limit the role of the lawyer as a witness. Although an attorney should generally not appear as a witness in a case that he or she is trying, testimony is not absolutely prohibited. Robinhood Trails Neighbors v. Winston-Salem Board of Adjustment, 44 N.C. App. 539, 261 S.E.2d 520, review denied, 299 N.C. 737, 267 S.E.2d 663 (1980). If an attorney does testify as to the facts in a case, the attorney should be sworn as a witness.

Who administers the oath?

The chair of the board (and any member serving as the chair) is authorized to administer the oath in quasi-judicial proceedings. G.S. 153A-345(f); 160A-388(f). Any notary public can also administer this oath. G.S. 10B-14(a)(2). As of October 1, 2013, the statutes also allow the clerk to the board receiving the testimony to administer the oath. S.L. 2013-126.

Each witness may be sworn at the time of testifying. An alternative frequently used is to swear in all of the witnesses who intend to testify at the beginning of the hearing. If a witness was sworn at the beginning of the hearing, the chair should at the outset of that witnesses' testimony confirm that fact and remind the person that they are testifying under oath.

Form of the oath

The form that is usually used is the same as for civil cases. G.S. 11-11. A standard practice is to have the person administering the oath do so as follows: "Do you swear [or affirm] that the evidence you shall give to the board in this action shall be the truth, the whole truth, and nothing but the truth, so help you God?"

Persons with religious objections may affirm rather than swear an oath.

Can the oath be waived?

If all the parties agree or fail to object, the right to have witnesses under oath may be waived. In Craver v. Board of Adjustment, 267 N.C. 40, 147 S.E.2d 599 (1966), the court noted that witnesses should be sworn, but that when the applicant was present at the quasi-judicial hearing, his own testimony was not sworn, and a full and open discussion ensued, the unsuccessful applicant cannot then object that the witnesses were not sworn. The court has similarly held that when a petitioner appears at a quasi-judicial hearing accompanied by counsel, offers unsworn testimony, and does not object to unsworn testimony (or seek to cross-examine the witness or to offer rebuttal evidence), the petitioner cannot object to such on judicial review. Howard v. City of Kinston, 148 N.C. App. 238, 244, 558 S.E.2d 221, 226 (2002). G.S. 160A-393(k)(3) codifies this by providing that "competent evidence" for a quasi-judicial matter includes evidence admitted without objection, provided it appears to be sufficiently trustworthy.

Even if the right to have sworn testimony is waived, the board must still have competent, material, and substantial evidence in the record as a foundation for its findings on any contested facts. Thus the standard practice of most boards conducting quasi-judicial hearings is to place all persons offering testimony under oath.

Administration of oaths to all witnesses testifying in an evidentiary land use hearing serves an important function. It is more than just a time consuming formality. Most evidentiary hearings are conducted with a degree of informality. It is not the same as appearing in a courtroom before a judge in robes. But the board is charged with fairly, accurately, and impartially determining the facts of the case. The decisions substantially affect the rights of the applicant and neighbors. The oath firmly reminds participants of the solemn obligation to tell the truth, the whole truth, and nothing but the truth.

Coates' Canons Blog: Can Time Limits be Imposed on Speakers at a Zoning Hearing?

By David Owens

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The county board of commissioners is holding a public hearing on a controversial rezoning. A sizable contingent of neighbors who oppose the project are present. Many have signed up to tell the commissioners just how terrible it would be if the rezoning were to be approved. Anticipating that opposition, the developer has brought nearly as many folks to speak in favor of the rezoning. Looking out over the restless crowd awaiting the commencement of the hearing, it appears the board is in for a long evening.

Would it be legally permissible for the board to set time limits for the speakers at this rezoning hearing, say three minutes per speaker? How about an overall time limit, such as giving the proponents and opponents 30 minutes each? If so, could those same time limit rules be applied next month to a similarly controversial hearing on a special use permit?

For the rezoning, reasonable time limits are perfectly acceptable. For the special use permit, not so much so.

At the outset it is critical to distinguish these two different types of public hearings. For legislative zoning decisions – the decision to adopt, amend, or repeal an ordinance – state statutes mandate a public hearing to gather public comments on the wisdom and desirability of the policy being proposed. For quasi-judicial zoning decisions – the decision on a special or conditional use permit or variance – the decision-making board must conduct a hearing to gather factual evidence as to whether the particular application meets the standards set out in the ordinance. These are two very different types of hearings. The first is designed to solicit public opinion while the second is designed to gather quality factual evidence. This difference leads to different rules explored in prior blog posts, such as **limits on receiving information outside the formal hearing,** the **presentation of opinions by the speaker,** and even **who is entitled to speak at the hearing**. This difference also results in somewhat different considerations in determining whether and how to have time limits for those speaking at zoning hearings.

Legislative hearings

Public hearings on legislative land use regulatory decisions have been mandatory since zoning was first authorized in 1923. The law mandates a formal hearing before the governing board prior to a decision to adopt, amend, or repeal a zoning ordinance. G.S. 160A-364; 153A-323. Since a zoning map is part of the zoning ordinance, amending the map to rezone a parcel of land is a legislative decision that mandates a public hearing.

This hearing is a legislative hearing. The purpose of a legislative hearing is to secure broad public comment on the proposed action. The governing board is receiving comments, not hearing evidence.

The general statutory guidance for legislative public hearings is G.S. 160A-81 for cities and G.S. 153A-52 for counties. These statutes allow the governing board to

> adopt reasonable rules governing the conduct of the public hearing, including but not limited to rules (i) fixing the maximum time allotted to each speaker, (ii) providing for the designation of spokesmen for groups of persons supporting or opposing the same positions, (iii) providing for the selection of delegates from groups of persons supporting or opposing the same positions when the number of persons wishing to attend the hearing exceeds the capacity of the hall, and (iv) providing for the maintenance of order and decorum in the conduct of the hearing.

So, reasonable rules may be established to limit the number of speakers and the amount of time each speaker is given, provided that the hearing is conducted in a fair and reasonable fashion. Speakers can also be required to limit their

remarks to those addressing the subject of the hearing.

This principle was confirmed in Freeland v. Orange County, 273 N.C. 452, 160 S.E.2d 282 (1968). Some 500 citizens attended the required public hearing on the adoption of zoning for the Chapel Hill Township. The chair allotted one hour each to the proponents and the opponents of the zoning ordinance, with each side also having fifteen minutes for rebuttal. Sixteen proponents and fifteen opponents were heard. In a show of hands it appeared that the attendees at the hearing were by a four-to-one ratio opposed to the adoption of zoning. Some 200 attendees indicated that they wished to speak but were not allowed to do so because of the time limitation. The court upheld this procedure, ruling that the legislative intent was to mandate a hearing and provide a "fair opportunity" for those in attendance to present their views. However, the governing board was allowed to establish an "orderly procedure" for the hearing, for "[t]he General Assembly did not contemplate that all persons entertaining the same views would have an unqualified right to iterate and reiterate these views in **endless repetition**." Id. at 457, 160 S.E.2d at 286.

In our example, the county board can limit both the time allowed for individual speakers and the overall time allowed for all speakers. If this is to be done, it is advisable for the board to have clear, fair rules on this point and to make those rules available to all concerned persons. If the rules go beyond time limits for individual speakers, some attention needs to be given to how speakers are selected. For example, many cities and counties have a sign-up sheet available a set time prior to the start of the hearing and take speakers in the order of sign-up. Some provision also needs to be made to assure that proponents of one side of a controversial issue are not allowed to monopolize the hearing to the exclusion of opposing points of view. It is preferable if these rules are adopted and distributed well before a controversial hearing arises, but at a minimum they should be announced and explained at the outset of the hearing.

Evidentiary hearings

The hearing required for a quasi-judicial decision is an altogether different type of hearing. Beyond the use of the term "hearing," these evidentiary hearings have little in common with the more familiar legislative hearing. It is certainly a "public hearing" in the sense that it must be held in compliance with open meetings and public records laws and any notice provisions in the applicable ordinance. But it is not a "public hearing" in the traditional sense of being an opportunity for all members of the public to appear and express their views on a pending public policy choice. The purpose of an evidentiary hearing on a quasi-judicial zoning matter is not to gather public opinions and suggestions as to the policy to be applied. The policy is already set in the ordinance. The board making the decision must apply those existing policies to a specific application. Rather, the purpose of the evidentiary hearing is to gather legally sufficient factual evidence to apply those standards to the application.

Our courts have held that since quasi-judicial zoning decisions affect the property rights of the applicant and other affected persons, due process requires that certain procedural safeguards be observed. The hearing is a principal means of securing the required substantial, competent, and material evidence to support the board's factual findings. In Jarrell v. Board of Adjustment, 258 N.C. 476, 128 S.E.2d 879 (1963), the court held that a degree of informality is allowed in the conduct of evidentiary hearings for quasi-judicial zoning decisions and that the technical rules of evidence applicable in court proceedings need not be strictly followed. But the court went on to hold that notwithstanding this latitude, basic due process rights require a board's critical factual findings to be based on competent and substantial evidence that is properly in the hearing record. In Humble Oil & Refining Co. v. Board of Aldermen the court held that a party whose rights are being determined in a quasi-judicial zoning matter must be provided an opportunity "to offer evidence, cross-examine adverse witnesses, inspect documents, and offer evidence in explanation and rebuttal." 284 N.C. 458, 470, 202 S.E.2d 129, 137 (1974).

Given these legal requirements, do the parties at these hearings have a legal right to present any and all of the testimony they want? No. The right to present evidence is tempered by the fact that the board can and should exclude irrelevant and immaterial testimony. Witnesses should be admonished to keep their testimony to presentation of evidence that will establish whether or not the application meets the standards in the ordinance. There is also no need to hear the same evidence repeated multiple times. The courts have noted that time limits on presentations, requiring groups of persons with common interests to designate a spokesperson, and admonitions to avoid repetitive, irrelevant, or incompetent testimony are all acceptable means of providing the necessary structure to these proceedings. Howard v. City of Kinston, 148 N.C. App. 238, 558 S.E.2d 221 (2002).

If time limits are set for presentation of evidence in a quasi-judicial zoning matter, those limits must be reasonable. While

strict time limits may well be appropriate for legislative decisions, care must be taken not to unduly limit the presentation of the substantial, competent, material evidence that is necessary to support a quasi-judicial decision. Any time limit applied in a way that precludes a party from fairly presenting or challenging legally sufficient evidence is inappropriate. It is entirely appropriate to direct a witness to get to the point and to avoid repetition. It is entirely appropriate to limit redundant testimony from multiple witnesses. It is equally important, however, to observe the constitutional requirement that parties' rights to present relevant testimony be respected. This is one of the reasons that time limits in evidentiary hearings are generally applied on an ad hoc basis by the presiding officer rather than being predetermined in rules of procedure.

In sum, reasonable time limits for speakers at zoning hearings can be applied. For legislative matters, boards have greater latitude in setting these limits. The time limits chosen in a legislative decision context should balance the needs to secure detailed public input on policy choices, to hear from a broad range of speakers, and to make efficient use of the board's time. Fairly applied time limits on speakers can help accomplish this. For quasi-judicial matters, time limits may be suggested, but they must be set in the context of allowing affected parties to adequately present relevant facts to the board. If the time limit would preclude presentation or challenging of relevant evidence, the time limit must give way to those constitutional rights.

Links

- www.youtube.com/watch?v=2GOYYbiEul0&feature=related

Coates' Canons Blog: Can I Be Heard? Who Gets to Speak at a Hearing on a Quasi-judicial Matter?

By David Owens

Article: http://canons.sog.unc.edu/?p=6322

This entry was posted on February 15, 2012 and is filed under Land Use & Code Enforcement, Open Government, Public Hearings

The town council makes decisions on special use permit applications under the Macomb zoning ordinance. The council is in the midst of a hearing on an application from Malcolm Tucker for a special use permit to build a new shopping center. The town planner has summarized the nature of the project and the applicable town standards. Tucker's project planner has testified about all the studies and reports they prepared to show compliance with the town standards. At this point Clara Edwards stands up and asks to be heard. Clara lives on the other side of town, but word is she plans to run for Mayor next time around. In any event, she has lately taken to showing up at most town council meetings and offering her views on whatever is before the council. Tucker, who has a long and acrimonious relationship with Edwards, objects to allowing her to speak. Addressing the council, Tucker says, "Madame Mayor, I submit that Mrs. Edwards has no right to testify about my project. She's not the applicant. She doesn't live or own property anywhere near the site. She is just a meddlesome busybody sticking her nose where it doesn't belong. You and I know she just wants to irritate me and bollix up this process. So, I respectfully request we move along and that you ask Ms. Edwards to take a seat."

Should the Mayor grant Malcolm's request or should she let Clara speak on the application?

Should Clara Edwards be allowed to testify?

The law on this point is not altogether clear. It is likely Mrs. Edwards should be allowed to speak, but the Mayor should limit her to relevant testimony about the application.

At the outset, it is important to note the nature of the proceeding before the town council. Here the council is making a quasi-judicial decision, not a legislative decision. The purpose of the hearing is not to seek citizen comments on the desirability of a policy choice. When the council is considering a special use permit application, the purpose of the hearing is to gather evidence as to whether or not this particular application is consistent with the standards set forth in the ordinance. If the applicant can produce competent, substantial evidence that the standards are met, the applicant is legally entitled to the permit. The council may deny the permit only if there is substantial evidence in the record that the standards would not be met.

If this were a *legislative* matter, such as a proposed rezoning or an amendment to the standards for approval of a special use permit, the council would have to hold a public hearing to solicit public comment on the wisdom of the matter. Any person could offer comments, send in written comments, or even chat with the council members about the matter prior to

the hearing. Our statutes have long emphasized the importance of seeking public comments prior to making these legislative decisions. The zoning statues mandate two published notices of the hearing. If a rezoning is involved, the statutes require mailed notice of the hearing to neighbors and posting the site. The council is also required to submit all proposed zoning amendments to the planning board for review and comment. All of this is designed to solicit broad public input prior to making a legislative decision. Mrs. Edwards (and everybody else) is not only allowed to give the council a piece of her mind at a hearing on a legislative matter, it would be illegal for the council to act without offering her that opportunity. A council can certainly impose reasonable limits on public comments at legislative hearings, such as reasonable time limits or that comments be germane to the issues presented. But for the most part those presenting comments are free to express their views on the matter.

A hearing on a *quasi-judicial* matter is altogether different. With a special or conditional use permit, the purpose of the hearing is not to solicit public opinion and comment about proposed policies. The policies have already been set and are in the ordinance. Instead, the council holds an evidentiary hearing to gather facts regarding whether this application meets the standards. The applicant has a constitutional right to present evidence, to cross-examine witnesses, and to present rebuttal evidence. In addition, persons who would be directly and substantially affected by the decision have a right to participate in the hearing. These persons include immediate neighbors whose property values (or use and enjoyment of their property) would be adversely affected. These persons are effectively also “parties” and have the right to present testimony, cross-examine witnesses, and otherwise participate in the hearing. Persons who are not parties to the case do not have a constitutional or statutory right to present evidence to the council.

In fact, since parties to the case have a constitutional right to have the decision based only on properly received material evidence, receipt of irrelevant evidence is problematic unless it is clear that the council has not relied on it in making a decision. Often the presiding officer will give witnesses some latitude in their testimony as most witnesses are not experienced in these procedures and it would be improper to prevent someone from presenting relevant information. Still, it is appropriate to remind witnesses to stick to the relevant facts should they begin to stray too far afield. If irrelevant testimony is presented, the board should make it clear that such evidence was not considered when it makes its factual findings.

The complicating fact here is that local government hearings on quasi-judicial matters are not conducted with the formality of a court proceeding. Most often the staff simply presents a summary of the application and applicable standards, the applicant summarizes its case, and any neighbors present are recognized to make comments on the case. Most of the cross-examination is in the form of questions from council members. At this stage persons are not formally designated as “parties.” The legal standing to participate (establishing that they are in fact an “aggrieved” person who would suffer some special damages distinct from the community at large) is rarely raised at this point. Most of the time neither the applicant nor the neighbors are represented by attorneys. [For a detailed report from N.C. cities and counties on their experiences with special and conditional use permit hearings, click **here**.] As a practical matter, the board hearing one of these quasi-judicial matters is more concerned with acquiring quality evidence than identifying “parties” and relying on only the parties to present that information. After all, Mrs. Edwards may be a witness who has highly relevant information to present even if she is not herself a “party” to the case or has been called as a witness by one of the parties

While some degree of informality is appropriate, it is important for all involved to remember the purpose of the hearing in a quasi-judicial matter – securing high quality, reliable facts. As Justice Susie Sharp noted in a landmark zoning case involving a city council’s consideration of a special use permit, “Notwithstanding the latitude allowed municipal boards, . . . [the board] can dispense with no essential element of a fair trial.” *Humble Oil & Refining Co. v. Board of Aldermen*, 284 N.C. 458, 470-71 (1974).

So, should the Mayor allow Mrs. Edwards to speak the hearing on Mr. Tucker’s special use permit application? Assuming Mrs. Edwards lives on the other side of town and has no nearby property that would be affected by this decision, she has no legal right to present evidence at the hearing. She is not a “party” in the case and is unlikely to have legal standing to challenge the decision in court. But given the informality of these proceedings and the legitimate need to get relevant information in the record, those citizens who wish to offer testimony are generally allowed to do so.

To protect the rights of the applicant and those who could be parties, however, it is incumbent on the town to impose some limits on Mrs. Edwards and others who testify at these hearings. They should be sworn in as witnesses. They should be limited to offering relevant testimony. It is important that the presiding officer remind persons testifying at these hearing that this is not the time or place to offer policy suggestions, opinions about the wisdom of the existing ordinance, or

anything else irrelevant to whether the project under consideration meets the standards in the ordinance. Unless they are formally qualified as expert witnesses, they should be limited to offering factual testimony, not offering opinions. These procedural safeguards protect and balance the interests of citizens in presenting information to the board and the constitutional rights of the parties.

These safeguards run counter to the expectations of many persons. Folks are used to being able to freely speak their minds at the comment period in governmental meetings. It is important then that those conducting quasi-judicial hearings clearly explain that the constitutional rights of the parties impose some constraints on the usual expectations of free expression. Some local governments have short pamphlets that explain this; others have the presiding officer explain it at the beginning of each hearing. It may even be appropriate for the presiding officer (or one of the parties) to ask a non-party witness asking to speak about the nature of their proposed testimony to determine whether it may be considered by the board. However it is done, it is important that the applicant, the neighbors, the board members, and the public have a common understanding of the rules governing these hearing and that everyone make a good faith effort to observe these basic rules of fairness.

Links

- sogweb.sog.unc.edu/blogs/localgovt/?attachment_id=6326
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Coates' Canons Blog: Quasi-Judicial Zoning Decisions and Property Values: Whose Opinion Counts?

By Richard Ducker

Article: http://canons.sog.unc.edu/?p=6874

This entry was posted on October 11, 2012 and is filed under Land Use & Code Enforcement

How many times have you been to a public hearing and heard opponents to a particular zoning proposal say that it will cause the values of their property to decline? The impact on property values is a theme that runs through most zoning decisions. Developers want to create value in their own real property and are wary of property use restrictions that have the opposite result. Owners of neighboring property sometimes benefit from nearby development because a rising tide of property values elsewhere may lift the boats of neighbors as well. Often, however, there is a tendency for neighbors to think that development projects on other people's land will have negative, perhaps unintended, consequences for the use and value of one's own land. But does the opinion of a lay person on such matters count in a quasi-judicial forum? This blog concerns the ability of property owners to offer legally competent opinions about the impact of such zoning decisions on their own property.

Quasi-Judicial, Judicial, and Legislative Hearings

As you might expect, the evidentiary rules concerning these three types of hearings differ. First, there are legislative decisions such as rezoning decisions. These hearings are not evidentiary hearings. Decision-makers are free to take opinions and assertions as well as facts into account. Participants in rezoning hearings are free to offer their personal, non-expert opinions, and the local governing board is under no obligation to adopt findings of fact and conclusions of law to justify their decision.

In contrast, the rules of evidence that apply to state administrative agencies and local zoning boards acting in a quasi-judicial capacity are similar to but generally not always as strict as those that apply in a courtroom. One of the key comparisons concerns the treatment of testimony offered by lay and expert witnesses. To the dismay of some zoning boards of adjustment, governing boards, and planning boards, the relatively strict rules of evidence that apply in court concerning property-value evidence and expert testimony also apply to quasi-judicial zoning decisions.

Competent Evidence

Local boards making quasi-judicial zoning decisions must base their decisions on material, substantial, and competent evidence. Competent evidence is simply evidence that is admissible before the local board or court that is making a zoning decision. Opinion evidence is generally inadmissible when the witness is unqualified to express an opinion because he lacks the necessary experience or factual knowledge to form the proper basis for it. In certain instances lay opinion about property values can qualify as competent evidence, but in many more cases it will not.

Effect of Zoning Restriction upon Value of One's Own Property

Obviously zoning regulations and decisions may affect one's own property. In North Carolina an owner of real property is generally competent to testify as to the value of her own property even though her knowledge on the subject would not qualify her as a witness were she not the owner. For example, in Responsible Citizens v. City of Asheville, 308 N.C. 255, 302 S.E.3d 204 (1983), the North Carolina Supreme Court held that it was an error for the trial court to exclude the testimony of three property owners concerning the damaging effect of a flood hazard ordnance on the value of their respective properties. This rule applies unless it appears that the owner clearly does not know the market value of her own property. An owner is generally expected to know what price the owner paid for the property and the uses to which the property may be put and to have a reasonably good idea of what it is worth. It is understood, of course, that the owner's opinion of the value of her own property may be subject to bias depending on whether it is in her interest to claim

an appreciated value or depreciated value.

Testifying about the effect of a zoning decision on the value of one's own property is authorized when an owner is challenging the validity of zoning that applies to her own land in court. Moreover, statements by the owner can be competent evidence in a quasi-judicial proceeding such as, for example, one in which the owner has applied for a zoning variance.

However, the ability of a property owner to provide competent evidence about how a development proposal affects the value of other property is far different.

The Effect of a Zoning Decision with Respect to Property A on the Value of Property B

Suppose that the local development ordinance requires that the sponsor of a particular type of development project obtain a special-use permit in order to proceed. One of the ordinance standards requires that in order to qualify for the permit, the applicant must demonstrate that the project as proposed "will not substantially diminish the value of adjoining property." A neighbor, who owns property that adjoins the subject site, wishes to offer his opinion that the project would, in fact, diminish the value of his property by a certain amount. Would the neighbor's testimony qualify as competent evidence? No, not unless the neighbor qualified as an expert for purposes of ascertaining the effect of the project (and the existing zoning) on the neighbor's land. G.S. 160A-393 (k)(3)a. (made applicable to counties by G.S. 153A-349) provides that "competent evidence" is deemed to exclude "the opinion testimony of lay witnesses" as to how the "use of property in a particular way would affect the value of other property." The statute, adopted in 2009, appears to be consistent with prior law.

If lay testimony is not competent evidence, then what sort of expertise is required to qualify as an expert when it comes to estimating future changes in property values? An expert witness must first establish that he is in fact an expert. Then the expert must establish an adequate basis upon which his opinions are provided. Generally an expert witness is one qualified by knowledge, skill, experience, training, or education to provide specialized knowledge to help with the understanding of evidence or the determination of facts. In a court of law whether someone qualifies as an expert is largely a question of fact to be determined by the trial court judge. Whether someone qualifies as an expert in a proceeding before a local quasi-judicial board may be determined by the board acting through its chair. An expert witness does not need to be a specialist, to be engaged in a particular profession, or to be licensed by a North Carolina licensing board. Appraisers, realtors, real estate brokers, and general contractors have all offered expert testimony concerning the impact on other properties of proposed development projects in cases that have reached our appellate courts. But experts from certain professions do not enjoy categorically favored status. In the North Carolina Court of Appeals case of Mann Media, Inc. v. Randolph County Planning Board, the court accepted the testimony of a real estate appraiser as substantial and competent, but rejected the testimony of a realtor and a building contractor who testified for opponents. The appeals court ruled the appraiser's testimony competent "because petitioners' appraiser is a professional appraiser whose skill was acknowledged even by the opponent realtor described above." The North Carolina Supreme Court rejected this reasoning, ruling that the appraiser failed to conduct the analysis necessary to support his opinions; therefore his evidence was not competent.

Substantial Evidence Based on Adequate Analysis

In a remarkable number of North Carolina appellate court cases involving local quasi-judicial zoning decisions the issue has not been whether a particular individual was qualified to provide an expert opinion. Instead the issue has concerned whether the expert witness had conducted adequate studies and analysis to establish the basis for his opinion and whether they proved or disproved the ordinance standard concerning property values. In Mann Media none of the experts addressed the impact of a proposed telecommunication tower on "the value of adjoining or abutting property" as required by the ordinance because they failed to review any actual comparable property sales in that area. In Sun Suites Holdings, LLC v. Board of Aldermen of Garner, two witnesses failed to present "any factual data or background, such as certified appraisals or market studies, supporting their naked opinions." In yet another North Carolina Court of Appeals case, Humane Society of Moore County, Inc. v. Town of Southern Pines, an appraiser retained by opponents undertook seven case studies and surveys to try to isolate the impact of a proposed animal training facility/shelter on the values of abutting and adjoining property; all were found by the court to be immaterial or insubstantial. Finally, in Weaverville Partners, LLC v. Town of Weaverville Board of Adjustment, an ordinance standard for a special-use permit for multi-family residential complexes required that property values in the "neighborhood" not be "substantially diminished." The Court of Appeals

held that a realtor's study of single-family residential values near existing multi-family projects failed to demonstrate that the values were substantially diminished by their close proximity to existing complexes.

Certain conclusions seem clear. Ordinance standards requiring proof that a project will not substantially diminish the value of adjacent or adjoining properties are more demanding than many planners and attorneys seem to assume. It is also possible that the time and effort required to establish an adequate analytical basis for expert testimony in this arena may be more costly than many have thought. Finally, many North Carolina zoning ordinances that use the "no-substantial-diminution-in-the-value-of-adjoining properties" standard for special-use permits put the initial burden of proof on the applicant. If the applicant fails to provide substantial, material, and competent evidence addressing the "no-substantial-diminution" standard, thus initially establishing a prima-facie case, then the zoning board must deny the permit. That is true regardless of whether opponents present any evidence on point or not.

It is ironic that neighborhood groups and those who advocate for third-party intervention in zoning disputes have tended to view the prohibition in G.S. 160A-393(k) a. on certain kinds of lay testimony as a substantial obstacle to their efforts. Given the apparent difficulty that real estate professionals have in conducting the proper analytical studies that can serve as bases for their expert opinions, those lay persons who might be emboldened to try their hand at estimating the impact of someone else's development project on the value of their own property may not realize how fortunate they are that G.S. 160A-393(k) a. discourages them from trying.

So, yes, the way many zoning ordinances are worded, it is the opinions of experts that really count in typical quasi-judicial zoning hearings. If this is to change, either the standards governing special-use permits need to be rewritten or development project opponents need to become adept at pointing out the flaws in the expert opinions of others.

Links

- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160A-393
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=153A-349
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Coates' Canons Blog: Placing conditions on a conditional or special use permit approval.

By David Owens

Article: http://canons.sog.unc.edu/?p=1646

This entry was posted on January 13, 2010 and is filed under Land Use & Code Enforcement

The town council is holding a hearing on a special use permit application that would allow a small shopping center. The proposed site is on a major road and is adjacent to an existing residential neighborhood. At the hearing detailed information is presented on the traffic impacts of the project, including a required traffic impact analysis, testimony from the applicant's traffic engineer, and information from town staff. This evidence suggests the project as submitted needs to be modified to add a turning lane on the fronting street and a new traffic signal at the adjoining side street. The applicant is agreeable to adding these as conditions for approval. However, a large and vocal group of neighborhood residents appear at the hearing and object to the potential for additional traffic that might use the adjacent residential street. They ask the council to add a condition that limits vehicular access to the site to a single entry from the main frontage road and to prohibit vehicular access to the site from the adjoining side streets. The applicant objects to this condition, saying his tenants demand at least two points of entry and egress from the site and that there is not enough frontage on the main road for that, thus necessitating access from the side street. The council is, however, sympathetic to the neighborhood concerns and imposes the condition. The applicant then sues to strike the condition limiting access from the side street. **What condition is this condition in**?

The lawyerly response is, "It depends." But it is probably not in very good shape.

Conditional and special use permits allow the local government to approve a particular use if, after a detailed review, the unit determines that the standards for that use are met by an individual application. The law in North Carolina is clear that conditions can be added to special and conditional use permits by the decision-making board. The statutes specifically allow a board to impose "reasonable and appropriate conditions and safeguards" on these permits," so the consent of the applicant is not required for conditions. G.S. 160A-381(c); 160A-388(c); 153A-340(a); and 153A-345(c). Almost all of the zoning ordinances adopted by North Carolina cities and counties have provisions for special and conditional use permits – 93% of the jurisdictions responding to a 2004 **SOG survey** reported use of this zoning tool. The survey indicates that most all of the cities and counties that use special and conditional use permits take advantage of this authority. Only 10% of the responding jurisdictions reported that they never or only rarely impose conditions on these permits.

But there are at least four important limitations on imposing these conditions —

- The ordinance must provide authority and set a process to impose conditions;
- The ordinance must include standards the conditions will address;
- Substantial evidence in the record must support conditions actually imposed; and
- Conditions that impose an exaction must be reasonable related and proportionate to the impact of the development.

Authority and process in the ordinance. As the state statues specifically authorize conditions, most ordinances do not have detailed provisions on this point. But any process in the ordinance must be followed. Still, it is worth taking a careful look at an ordinance on this point. A recent case (**Northwest Property Group, LLC v. Town of Carrboro**) with facts not too different from the example noted above wound up in the court of appeals on the issue of whether the town council had followed the process required by its ordinance to impose conditions. The key question in the case was whether the Carrboro ordinance allowed the imposition of any conditions after the town council voted to find the application met all the standards of the ordinance. A divided court held the ordinance allowed the town to do so, but remanded the case for new findings on whether the challenged condition was supported by the evidence in the record.

Standards in the ordinance. A condition cannot be imposed just because the council thinks it would be a good idea or

because the neighbors want it. The board does not have unlimited discretion here. Any condition that is imposed must be based on bringing the project into compliance with standards that are included in the ordinance. For example, if the ordinance says a project authorized by a special use permit must not significantly increase traffic in adjoining neighborhoods, the proposed condition in our example would be within the scope of what could be required. If the ordinance has a more general standard that the project not have a significant adverse impact on public safety, the traffic impacts that affect safety could be the subject of a permit condition if needed to protect public safety. But it is critical that all conditions be based on meeting a relevant standard in the ordinance and that the condition reasonably relate to that standard.

Evidence in the record. This requirement is most likely to pose a problem for the contested condition in our example. When passing on special or conditional use permits, the decision-making board takes evidence in a formal hearing to determine if the standards are met. The courts require that there be substantial, competent, and material evidence in the record to support the board's findings on the permit decision. If the traffic impact analysis and testimony from the traffic engineer and town staff do not support the limit on access from the side street, where does the evidence to justify it come from? The fact that the neighbors asked for it is not enough. There must be some credible evidence presented to the board that without the condition the requirements of the ordinance would not be met. As noted in a prior **post**, this is particularly required when the issues are property value or traffic impacts. So in our example, the critical question would be whether there are facts in the record to support a conclusion that the side road access to the shopping center would create a relevant problem in meeting the requirements of the ordinance.

Exactions proportional. The U.S. Supreme Court has held that a condition that requires the developer to make a payment, donate land, or construct improvements as a condition of a regulatory approval is limited by the Takings Clause of the Constitution. This limitation that requires that the exaction be reasonably related to the impacts of the development and be no more than an amount proportional to the impacts of the proposed project. This factor not an issue in our example, so we can leave that issue for a later post (see pages 40-41 of **Land Use Law in North Carolina** for a summary of the law on this point).

It is vitally important that the applicant, the neighbors, and the decision-making board understand these limitations at the outset of consideration of a special use permit. If the applicant objects to the imposition of a condition, only those conditions that meet these limitations can be imposed. Even if the applicant accepts a condition, the applicant can later challenge it in court if there was no authority to impose it or if it is an unconstitutional condition. Attention to these limitations is therefore necessary to assure that conditions needed for special and conditional use permits are lawfully imposed and enforceable.

Links

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Coates' Canons Blog: Can the Board Go Into a Closed Session to Deliberate a Quasi-Judicial Decision?

By David Owens

Article: http://canons.sog.unc.edu/?p=6967

This entry was posted on January 16, 2013 and is filed under Board Member Powers & Authority, Board Structure & Procedures, Land Use & Code Enforcement, Motions, Minutes, & Hearings

The board of adjustment is hearing a hotly contested appeal. The zoning administrator interpreted a somewhat ambiguous provision in the zoning ordinance to allow a controversial land use. Irate neighbors appealed that determination to the board of adjustment. The case quickly turned into one of the hottest land use disputes in recent town's history, garnering multiple front page stories in the local paper and a spot on the local TV news.

The board held two lengthy hearings to gather facts about the issue. They received substantial amounts of conflicting evidence, some from expert witnesses and much from concerned neighbors. Some of the board members are uncertain how to resolve questions about the facts and how to weigh the conflicting testimony. They're not really sure whether they can even consider the opinions of the neighbors in making their decision. Attorneys for the land owner and the neighbors presented detailed legal arguments that have left some of the board members more than a little confused.

After all of the evidence had been received, the board began to discuss the case. The board's confusion and uncertainty about how to resolve the case was quickly apparent to the board chair. She knew this was an important case with significant impact for the owner, the neighbors, and the town. She also knew there was a good chance the board's decision would be appealed to the courts. She realized it would be difficult to have a frank discussion among the members with a large crowd of neighbors, the applicant, and the press looking on. There were also a couple of questions about the law she had for the board's attorney and was concerned he might not be able to answer candidly in open session. It occurs to her that they might best resolve all of these issues in closed session. At the next break in the board's discussion, she says, "Now that we have concluded receipt of all evidence in this matter, I would like to move into closed session for board deliberation and to receive counsel from our attorney about the legal issues involved." One of the board members responds, "Great idea. I would like to second that motion, but I'd first like to find out from our attorney whether this is permissible."

Would it be legal for the board to move into a closed session to conduct its deliberations? What about to talk with their lawyer?

The answers are no, to the first question, and yes to the second..

When a city or county board is making a decision on an appeal, a variance request, or a special or conditional use permit application, it is in many respects acting in a judicial capacity. That is why these types of decisions are classified as "quasi-judicial." In the judicial system juries hear testimony about the facts and then retire to the jury room for private deliberations. City and county boards making quasi-judicial decisions would sometimes like to apply that analogy and be able to deliberate cases in private after receipt of the evidence.

The state's **open meetings law** does not allow such a closed session. Public bodies – including boards of adjustment and planning boards, as well as city councils and county boards of commissioners – must conduct all of their business in open session unless the law specifically authorizes a closed session.

G.S. 143-318.11 sets out nine specific purposes for which a public body may meet in closed session. Most of these include narrowly drawn provisions regarding personnel matters and contract negotiations. There is simply no authorization for a closed discussion by a local government board deliberating a pending quasi-judicial decision, no matter how contentious or complicated the case might be. G.S. 143-318.18(7) exempts state agencies making quasi-judicial decisions from the open meetings act for those meetings held solely for the purpose of making a decision in an adjudicatory proceeding. But that exception does not apply to local government boards.

What about getting legal advice from the board's attorney? In our example we have a case that may well be headed for court and the board would like to get candid legal advice to avoid making a legal error that would result in having their decision overturned or returned for corrections.

G.S. 143-318.11(a)(3) allows a closed session to consult with the board's attorney, but only "in order to preserve the attorney-client privilege." A critical question then is the range of discussion protected by this privilege. The court addressed this attorney-client privilege exception to the open meetings law in **Multimedia Publishing of North Carolina, Inc. v. Henderson County**, 136 N.C. App. 567, 525 S.E.2d 786, *review denied*, 351 N.C. 474, 543 S.E.2d 492 (2000). The county board had gone into closed session with their attorney to discuss a proposed moratorium on new racetracks while new noise regulations were being developed and considered. The court noted that while board's attorney must be present for there to be a privileged conversation, the attorney's presence in and of itself does not justify a closed session. Only the provision of protected legal advice justifies a closed session, not a general policy discussion with the attorney. The court held that a pending or threatened claim or suit against the board was not necessary to invoke the attorney-client privilege so long as legal advice was being discussed. The court ruled the burden is on the board to provide some "objective indicia" that the exemption is applicable. When this case was again before the court after a remand, the court held that it was permissible for the board to consult with their attorney in closed session regarding the statutory authority for the ordinance, the legally permissible length of a moratorium, and the wording of the terms of the moratorium (as distinct from any general discussion about the propriety of a moratorium). **Multimedia Publishing of North Carolina, Inc. v. Henderson County**, 145 N.C. App. 365, 550 S.E.2d 846 (2001). The court affirmed this analysis in a case involving enforcement of Charlotte's minimum housing code, **Carolina Holdings, Inc. v. Housing Appeals Board**, 149 N.C. App. 579, 561 S.E.2d 541, *review denied*, 356 N.C. 298, 570 S.E.2d 499 (2002). In this case the board held a series of six hearings on the appeal of an order to demolish parts of a dilapidated apartment complex. The court held it was permissible for the board to meet with its attorney in closed session at several of the hearings in order to discuss matters within the attorney-client privilege. Board consultation with their attorney in private on constitutional and legal challenges that might result from particular enforcement actions being considered was held to be permissible. David Lawrence has a more detailed discussion of closed sessions under the attorney-client exemption in this 2002 **bulletin**.

So in our example, the board cannot go into closed session to deliberate or to discuss the case among themselves. Prior to adoption of the open meeting law, it was common for some boards to conduct their deliberations in private, returning to open session to vote and announce their conclusions. That is simply no longer legally permissible in North Carolina. No matter how messy or complicated, the public has a legal right to hear the board's discussion and deliberation.

On the other hand, the board can go into closed session for the narrow purpose of a privileged legal discussion with their attorney. To do so, the board must specify the purpose of such private consultation and adopt a motion to go into closed session while in open session. The minutes of the closed session must provide a general account of the meeting (discussed in Frayda Bluestein's blog posts **here** and **here**). It is very important that the discussion in the closed portion of the meeting be limited to only privileged legal consultation. This is a limited exception to the open meetings law and cannot be used to shield board deliberations or general policy discussion from public scrutiny.

Links

- www.ncleg.net/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_143/Article_33C.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-318.11.html
- www.aoc.state.nc.us/www/public/coa/opinions/2000/990520-1.htm
- www.aoc.state.nc.us/www/public/coa/opinions/2001/001106-1.htm
- www.aoc.state.nc.us/www/public/coa/opinions/2002/010460-1.htm
- www.sogpubs.unc.edu/electronicversions/pdfs/lglb103.pdf

Coates' Canons Blog: Requirements for Quasi-Judicial Decision Documents

By David Owens

Article: http://canons.sog.unc.edu/?p=7750

This entry was posted on July 08, 2014 and is filed under Land Use & Code Enforcement, Quasi-Judicial Decisions, Zoning

The town council has just voted to approve a highly controversial special use permit for a new apartment complex. Getting to this point was a long process – two lengthy hearings and a third night of debate and deliberation by the council. There was much discussion about the traffic impacts, whether the evidence showed whether the project would harm neighboring property values, and the adequacy of potential permit conditions. But the council eventually reached a general consensus and voted 6-1 to approve the permit with a long list of detailed conditions. With business concluded, the council meeting was adjourned.

As folks were filing out of the council chambers, the property owner turns to his attorney. “It seemed like this day would never come. Can’t tell you how relieved I am they finally saw things our way. I’m good to go now, right?” In another corner of the room, the chair of the neighborhood association, who had led the fight against the project, likewise turned to her attorney. “What just happened? They left out the most important condition we asked for. No way the evidence justifies that. We appeal now, right?”

Both attorneys tell their clients to sit tight and wait for the final decision. Is that right? Didn’t the council just take a conclusive vote? Isn’t that final?

Not quite. The decision is not final and effective until it is reduced to writing and filed. And the period to appeal doesn’t start until the written decision is delivered.

When a board makes a quasi-judicial decision – deciding a special or conditional use permit, a variance, or an appeal of a staff determination – the courts have long held that a key due process right of the parties is the right to know the basis of the decision. As Justice Susie Sharp noted in the 1974 landmark case *Humble Oil & Refining Co. v. Board of Aldermen*, “[I]n allowing or denying the application, it [the decision-making board] must state the basic facts on which it relied with sufficient specificity to inform the parties, as well as the court, what induced its decision.” 284 N.C. 458, 471, 202 S.E.2d 129, 138 (1974).

In 2013 the General Assembly codified this rule and provided guidance as to how it must be accomplished. **G.S. 160A-388(e2)** sets these specific requirements for quasi-judicial decisions. These requirements apply to both cities and counties and apply to every board that makes quasi-judicial zoning decisions, be it the city council, county board of commissioners, board of adjustment, or the planning board. These requirements are:

1. The decision must be reduced to writing and it must reflect the board’s determination of contested facts and their application to the applicable standards;
2. The written decision must be signed by the board chair or other authorized board member;
3. The decision is not effective until it is filed with the board’s clerk or other officer designated by ordinance;
4. Proper notice of the decision must be delivered to the parties; and,
5. The time for appeal does not start to run until the decision is filed and delivered.

Preparing the Written Decision

It used to be common that the board’s decision was not put in writing until the minutes of the meeting were prepared and approved. In our 2002-03 **survey on variances**, 48% of the responding jurisdictions reported the first draft of their written decision was included in the meeting minutes. Our 2004-05 **survey on special and conditional use permits** had similar results – 52% of responding jurisdictions reported the meeting minutes were the initial written version of the required

findings for the decision. Given the 2013 legislation noted above, that practice is likely to be less and less common in North Carolina and really should no longer be used.

Some city and county boards ask the parties or the staff to prepare draft decisions prior to the hearing. These are often referred to as “proposed findings of fact and conclusions of law.” Having such a draft is legally permissible, but it is not required. Draft decisions are often a helpful forecast of evidence expected to be in the hearing record. They allow board members to assess during the hearing whether or not the evidence presented supports the proposed factual findings and decision. These draft decisions can then be discussed, amended, and adopted after the evidentiary hearing.

If a draft decision document has not been submitted in advance, a written decision document should be prepared immediately after the meeting. It is simply not practical for the oral motion made at the meeting to be adequate for these purposes. Rather, the staff or the board’s attorney prepares a draft written decision that accurately reflects the action taken by the board. A few local governments offer the prevailing party the opportunity to draft the decision document, as is often done in court proceedings. And in some places the board chair drafts the document. But in most instances it is the staff to the board or the board’s attorney who drafts the written decision.

When the written decision document is complete, the chair of the board reviews it to verify that it accurately reflects the board’s decision. After any needed edits are made, the chair (or other duly authorized member of the board) approves and signs the document. At that point the decision is ready to be filed. The signed decision must be filed with the clerk to the board making the decision (although the law does allow the ordinance to specify another officer, such as the zoning administrator, to receive and file the written decision).

There are several problems with the older practice of using the board minutes as the official decision document. For one thing, the statute quoted above now requires all quasi-judicial decisions to be made within a “reasonable time.” Waiting a month or two for production and approval of meeting minutes may not be all that reasonable. Plus the chair must sign the individual decision document. So many jurisdictions are moving to the practice of having a separate, discrete decision document for each quasi-judicial decision that is prepared, signed, and filed as soon as feasible after the decision has been made.

Effective Date of Decision

The decision is effective when the signed copy is filed with the clerk to the board. It is important that the official receiving the filed decision clearly stamp it with the date received, as this is the official effective date of the decision.

If the written decision is delivered by email or personal service the same day it is filed, that is also the date the clock starts to run for filing a judicial appeal (but as explained below, the deadline for filing an appeal depends on the delivery date as well as the official effective date).

Delivery of the Decision

Once the written decision is signed and filed, a copy must be delivered to the parties. A copy must be provided to:

1. The applicant;
2. The property owner if that person was not the applicant; and
3. Any other person who has submitted a written request for a copy prior to the effective date of the decision. This is often a neighbor or other person who participated in the hearing. It is a common practice in many jurisdictions to provide an opportunity at the hearing for those present to make a written request for the decision.

The law allows for delivery of the decision by email, first class mail, or personal delivery. The person who handles delivery of the decision is required to certify for the record that it has been done. This is usually done by the clerk signing an affidavit for the case file that the decision was delivered on a specified date, indicating who it went to and how it was delivered.

Time for Making an Appeal

Final decisions on quasi-judicial matters may be appealed to superior court. There is a relatively short time allowed to bring an appeal. A judicial appeal must be filed with the clerk of superior court within 30 days.

The 30 day clock, however, does not start to run until the decision is effective and is delivered. So it is the later of two events that start the clock running – filing the signed written decision with the clerk or the delivery of the signed written decision as described above. If first class mail is used to deliver the written decision, three days is added from the mailing date to the time allowed to file with courts.

Conclusion

The attorneys' advice in our example at the outset was correct. Once the board voted, the parties know what the outcome of the application will be. But the decision is not final and effective until it is reduced to writing in a way that explains how the board resolved contested facts and applied the facts to the required standards for the decision. Both the applicant and the neighbors need to wait for the written decision before taking whatever next steps they deem appropriate.

Links

- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160a-388
- sogpubs.unc.edu//electronicversions/pdfs/zonvar.pdf?
- www.sog.unc.edu/sites/www.sog.unc.edu/files/SS_22_v4b.pdf

Coates' Canons Blog: The Who, What, and When of Appeals TO the Board of Adjustment

By David Owens

Article: http://canons.sog.unc.edu/?p=7432

This entry was posted on November 25, 2013 and is filed under Open Government, Public Records (Personnel)

Consider these three scenarios regarding potential appeals to the zoning board of adjustment.

1. *Scenario 1*. Marge Simpson has worked for decades to improve her neighborhood. Several years ago the town adopted a new plan that called for the neighborhood to retain its predominately residential character, but to add some appropriately sized retail and office uses. The zoning code was then amended to allow "neighborhood scale retail" as a permitted use along the major street that traverses the neighborhood. Marge just read in the paper that town staff had approved permits for a new national chain office supply store in the neighborhood, about ten blocks from her house. She is outraged, believing this in no way qualifies as a "neighborhood scale" business. The next day she files an appeal of the staff's interpretation of the ordinance. Can the board hear her appeal?
2. *Scenario 2*. Suppose Marge had learned of the store's plans when they first applied for a permit, prior to any staff action on the application and that she makes her complaint about the interpretation at that time. In this situation, suppose the staff studies the plan and the ordinance and is undecided about how the term "neighborhood scale retail" should be interpreted. Rather than decide what is clearly a political hot potato, the staff decides it would be best to take this to the board of adjustment and let the board make the call. Can the board hear the staff appeal?
3. *Scenario 3*. Suppose the national chain store got their certificate of zoning compliance and building permit from the staff with the matter never making the paper. A few weeks after getting the permit the site is cleared and graded, but no other site work is done. A couple of months later, as the utility lines are being installed on the site, the applicant posts a sign announcing this as the future site of the chain store. The next week a delegation from the neighborhood goes to the planning office and asks for details about what is being built. After seeing the site plan for the chain store, they appeal the zoning interpretation that allowed this as a permitted use. Can the board hear their appeal at this point in the development process?

The short answer is that only one of these appeals can be heard by the board of adjustment.

Standing: Who Can Appeal?

Scenario 1 raises the question of who can bring an appeal to the board of adjustment. A person with the legal right to initiate an appeal is said to have "standing" to initiate the appeal. A person with standing is entitled to be a "party" in the appeal.

Unlike a court proceeding, a quasi-judicial case coming to the board of adjustment does not have formal plaintiffs and defendants. The person who initiates the action (an applicant for a special or conditional use permit, a person appealing the zoning officer's determination or requesting a variance) is a "party" to the proceeding. To qualify to become a party, a person must be directly affected by the decision in a way different from the public at large.

A definition of standing has been written into the zoning statutes. G.S. 160A-393(d) defines who has standing to appeal a zoning decision to the courts. As of October 2013, G.S. 160A-388(b1)(1) applies this same definition to determine who has standing to make an appeal TO the board of adjustment (prior to the 2013 amendments to this statute, the standard was that "persons aggrieved" by the decision could appeal to the board).

Who qualifies for standing under this definition? The statute sets out four groups who qualify:

1. The owner of the property, someone with an option to purchase the property, and the applicant for a development approval.

2. Any other person who will suffer "special damages" as a result of the decision being appealed. A number of court cases have addressed what is necessary to establish "special damages." While physical proximity in and of itself is not sufficient, that is an important factor. An allegation that the action would diminish the property value of the person is not necessary, but it is the "damage" that is most frequently alleged. The court in *Mangum v. Raleigh Board of Adjustment*, 362 N.C. 640, 669 S.E.2d 279 (2008), held that allegations of parking, stormwater runoff, and crime problems, as well as property value impacts, could establish "special damages."
3. An association of neighborhood property owners that would be affected, provided that at least one of the association members would have standing as an individual and that the association was not formed in response to the particular application being appealed.
4. The unit of local government that has made the decision being appealed.

Members of the general public are not "parties" for the purpose s of an appeal to the board of adjustment. A person who is interested in the matter but who does not have a personal stake in the outcome may attend and observe the hearing, but they have no legal right to initiate an appeal.

In our case, Marge has a great interest in community affairs. She has actively participated in developing the plan and the implementing ordinance amendments. But despite the depth of her commitment to neighborhood improvement, she can only initiate the appeal to the board of adjustment if she can establish "special damages" to her property that are distinct from the public at large. Since her property is ten blocks or so away, it is unlikely that she could credibly do so. She might approach a more nearby neighbor who would directly be affected by the traffic, noise, lights, and stormwater runoff from the proposed chain store and see if they would be interested in filing an appeal. But she cannot do it on her own. So in our first situation, the board would have to dismiss Marge's appeal for lack of **standing**.

Final, Binding Staff Decision: What Can Be Appealed?

An important role of the board of adjustment is hearing appeals of staff decisions. Appeals of decisions implementing zoning or unified development ordinances must go to the board of adjustment. Appeals from any other development regulation ordinance may also be assigned to the board of adjustment. G.S. 160A-388(b1). Significantly, however, G.S. 160A-388(a1) now codifies the existing rule from case law that staff "decisions" that can be appealed must be a "final and binding order, requirement, or determination." Some of the case law dealt with appeals to the board and others with defining a decision that creates vested rights, as both topics address the question of which staff decisions are final and binding.

In Scenario 2 the staff sought an advisory opinion from the board. Is this permissible? In short, no. Boards of adjustment do not have the jurisdiction to issue advisory decisions. A staff letter that offers a non-binding interpretation is not appealable to the board of adjustment. *In re Appeal of the Society for the Preservation of Historic Oakwood*, 153 N.C.App. 737, 571 S.E.2d 588 (2002). Neither is a staff assurance that a waiver to a regulatory requirement would be granted if requested. *Wilson v. Mebane Board of Adjustment*, 212 N.C.App. 176, 710 S.E.2d 403 (2011). The staff cannot send an interpretation question to the board prior to making a staff decision. *Tate v. Board of Adjustment*, 83 N.C.App. 512, 350 S.E.2d 873 (1986).

By contrast, a ruling from the staff that a particular height limit is met by an approved structure or a ruling that a specific use can be carried out on a specified site can be appealed. *Meir v. City of Charlotte*, 206 N.C. App. 471, 698 S.E.2d 704 (2010); *S.T. Wooten Corp. Board of Adjustment*, 210 N.C. App. 633, 711 S.E.2d 158 (2011). Sometimes there is a fine line between decisions that can be appealed and those that cannot. This is discussed in more detail in earlier posts **here** and **here**.

In Scenario 2, the staff wants to ask the board of adjustment for an interpretation of an ambiguous provision of the ordinance prior to ruling on that question. That would clearly be an advisory opinion and the board of adjustment simply has no jurisdiction to take it up. The staff can certainly discuss the potential interpretation informally with the planning board or even the governing board, but it cannot seek a formal opinion from the board of adjustment. So in our second situation, the board would have to dismiss the staff appeal for lack of jurisdiction.

Time Limit to Appeal: When Can an Appeal be Filed?

In Scenario 3 we see multiple steps in development approval and construction: issuance of a certificate of zoning

compliance and building permit, site preparation, starting construction, and posting a sign. The question is when in this process does the time for an appeal to the board of adjustment start to run?

When the staff makes a final, binding determination, notice of that decision is to be provided in writing to the owner of the affected property and to the person who requested the determination if that person was not the landowner. The decision can be delivered personally, by email, or by first-class mail. The owner and any other person with standing then have thirty days from receipt of the written decision to appeal to the board of adjustment (prior to the 2013 amendments to G.S. 160A-388, each local government set its own time limit for appeals). The appeal is filed with the city or county clerk. This aspect of the when the clock for an appeal starts to run is usually clear – when the applicant or owner receives the written notice of the decision.

This same thirty day period for filing appeals to the board of adjustment applies to anyone else with standing to make an appeal. G.S. 160A-388(b1)(3). Since only the landowner and person requesting the determination automatically get a personal notice of the decision, a question arises as to when this thirty-day period to appeal starts to run for other parties. The period to appeal for these persons begins to run when they have actual or constructive notice of the determination. Typical means by which constructive notice is provided to neighbors are initiation of site preparation, delivery of construction materials to the site, or other work that would clearly indicate that the requested determination had been made.

In Scenario 3, it is likely that the neighbors got no actual notice that the staff had determined the chain store was a "neighborhood scale retail" use allowed by the ordinance. This would not be unusual, as neither the applicant nor the city have any legal obligation to send routine building permit applications or decisions to the neighbors. Even the site clearing and grading would not have alerted the neighbors as to what was going up on the site. If it turns out the neighbors had no actual knowledge of the nature of the use that had been permitted prior to the developer posting the "future site" sign, that would likely be the constructive notice to the neighbors that would start the appeal clock running. So in the third scenario, if the neighbors appealed within thirty days of learning of the staff decision by seeing the sign, their appeal would be timely even though it came several months after the decision had actually been made.

Since the date of constructive notice is often ambiguous, the statutes now allow the owner or developer an option to provide certainty on this point. G.S. 160A-388(b1)(4) allows the landowner or applicant the option of prominently posting the affected site with a sign notifying neighbors that a zoning or subdivision decision has been made. Provided the sign remains up for at least ten days, the sign is deemed to be constructive notice of the decision as of the date it was initially posted. The owner posting the sign must verify the posting to the zoning official who made the determination. In situation three, if the owner had posted such a sign immediately upon receiving their zoning verification and building permit, that would have started the clock running and an appeal filed several months later would have to be dismissed for being untimely. Without that posting, the clock only starts to run when the neighbors know or should have known of the determination – in this instance that would likely not happen prior to posting the "future site" sign.

The lesson here is that while the board of adjustment can hear many appeals, the law does impose limits on its jurisdiction. It can only take up appeals filed by persons with standing, only final and binding staff decisions can be heard, and any appeal must be filed in a timely fashion.

Links

- www.youtube.com/watch?v=xhtzMwA5gJI

Coates' Canons Blog: A Conditional What? Clarifying Some Confusing Zoning Terminology

By David Owens

Article: http://canons.sog.unc.edu/?p=6916

This entry was posted on November 13, 2012 and is filed under Land Use & Code Enforcement

A contemporary zoning ordinance can be a complicated proposition. A small town or rural county's ordinance often runs over 100 pages. Some of the zoning ordinances in our larger cities approach (and if a few instances pass) 1,000 pages. All of the details can be confusing even for the staff and board members who work with it every day. Imagine how it must perplex the landowner, neighbor, or developer who is picking it up for the first time and trying to figure how it applies to a particular project.

One common dimension of the confusion with zoning ordinances stems from an unfortunate use of very similar terminology to describe very different things. In North Carolina land use law the leading example, and our topic for this post, is the use of the terms "*conditional use permit*," "*conditional use district*" zones, and "*conditional zoning*." These three things sound alike, but in the world of zoning they are very different.

Just what are these three things? A conditional use permit is an approval issued upon an applicant establishing that standards set out in the zoning ordinance have been met. A conditional use district rezoning involves two decisions – a rezoning to a district that has only conditional uses (and no permitted uses) plus concurrent consideration of a conditional use permit. A conditional zoning attaches individual, site-specific conditions to the rezoning and does not involve a separate conditional use permit. While the chart below summarizes these differences, it is easy to see why confusion arises.

Conditional use permit	Quasi-judicial permit
Conditional use district	Rezoning plus quasi-judicial permit
Conditional zoning	Rezoning only, but with conditions

So let's look at each of these in a little more detail.

Conditional Use Permits

The first of these terms to enter the zoning lexicon was the "conditional use permit." In the zoning ordinances of eighty years ago, a specific land use was either permitted in a particular zoning district or it was prohibited in that district. For example, a single family home was permitted (sometimes referred to as a "use by right") in a residential zoning district, while commercial and industrial land uses were prohibited in that zoning district. If you asked if a specific land use was permitted to be located on a specific parcel, the answer was yes or no, depending on whether or not it was a permitted use there. Simple rules for a simpler time.

But about fifty years ago many local governments decided they needed more nuanced land use rules – that we needed to add "maybe" to the options of "yes" or "no." The idea was to add some flexibility to zoning ordinances while retaining oversight of individual projects. For example, a city might want to allow a small multi-family building to be located in some portions of a residential zoning district. This use would not be suitable for every location in the district, but with a case-by-case review it could be allowed in some locations within the district.

The "conditional use permit" was zoning's answer as to how to accomplish this. Rather than making small multi-family buildings a permitted use in the zoning district, the zoning ordinance would allow it only where it could be established that specified conditions would be met, hence the name "conditional use permit." Over 90% of the zoning ordinances in North Carolina now include provisions for some conditional use permits. And to add one more layer of confusion, the law allows **individual "conditions"** to be added to any quasi-judicial approval – not just for conditional use permits — including

zoning variances and certificates of appropriateness under historic district regulations.

In addition to the concept itself, two factors related to this innovation immediately added complexity and confusion to the zoning world.

First, the conditions specified in the ordinance that determine whether or not the use would be permitted usually included discretionary standards. For example, the zoning ordinance could condition whether a use would be allowed on a particular parcel upon a determination that it would be harmonious with the surrounding neighborhood and that it would not have a significant adverse impact on neighboring property values. Our courts soon ruled that since a person has a legal right to their permit upon establishing that the conditions have been met and since facts have to be ascertained to determine if the standards involving judgment and discretion have been met, the board making these decisions must follow quasi-judicial procedures. This means a number of complex limitations on the decision-making process are required – testimony by witnesses under oath and subject to cross-examination, having substantial evidence in the record to support factual findings, limits on **opinion testimony** and gathering **evidence outside the hearing**, mandates for **impartiality** by decision-makers, requirements for a written decision that adequately explains how the decision was reached, and so forth. These requirements and how they are followed are described in more detail in this **report**.

Second, the terminology used for this “maybe” of the zoning world has from the outset been confusing. Many ordinances use the term “conditional use permit” to describe this type of approval. Others use the term “special use permit.” Still others call them “special exceptions.” Even more mystifying, some ordinances provide for both “conditional use permits” and “special use permits.” The key thing to remember is that all three of these terms describe the same thing. There is no legal difference between the three. For the most part it is just a matter of local preference which of the three is used in any particular ordinance.

The rationale for some ordinances having both conditional use permits and special use permits is straightforward. Under North Carolina law a zoning ordinance can assign final decision-making on these permits to the governing board, the board of adjustment, or the planning board. Some ordinances assign some of these to one board and others to a different board. For example, most of the permits may be assigned to the board of adjustment but a few more sensitive ones (such as projects with more than 100,000 sq. ft. of floor space) may be assigned to the governing board. In those situations, the ordinance may use the term “conditional use permit” for all of those that go to the board of adjustment and “special use permit” for those going to the city council. This is just a convenience and there remains no legal difference (other than the decision-making board) between the two differently named permits. But this differing terminology has been a source of confusion for decades.

Conditional Use District Zoning

North Carolina land use law prohibits imposing individual, site-specific conditions on a regular rezoning to a conventional zoning district. If city or county governing board considers only a particular proposed project rather than the full range of uses that would be allowed in the new zoning district, the courts will invalidate the rezoning if it is challenged in court. If an owner promises the governing board that the new zoning would be used only for a particular project, that promise is not binding. Once the property is rezoned, the owner (and anyone the person may sell the property to) can undertake any use permitted in the new zoning district. In addition, any special conditions imposed on a conventional rezoning—such as requiring a buffer strip of a certain size—are not enforceable. Only those standards that apply to all property in the zoning district are legally enforceable. In this situation, the North Carolina courts will generally uphold the rezoning but without the invalid condition. These limits on zoning are described in more detail in this **earlier post**.

These limits on the use of conditions with a standard rezoning led in the 1980’s to use of a new zoning tool in this state – the “conditional use district zone” (also called a “special use district zone” by some ordinances). A conditional use district rezoning is initiated when the owner asks for a rezoning to a new zoning district that does not have any automatically permitted uses, only uses allowed by the issuance of a conditional use permit. In the usual conditional use district rezoning process, the owner applies for a special or conditional use permit for a particular project at the same time the rezoning is requested and the two decisions (the rezoning and the permit) are considered in a single proceeding. This process is also described in more detail in an **earlier post**.

Conditional use district zoning is a complicated process. Although the rezoning request and the permit application are processed at the same time, the governing board treats the two proposals as legally independent, separate decisions. All

of the detailed conditions and specific restrictions on the project are attached to the conditional use permit (which is legal) rather than to the rezoning itself (which would not be enforceable). The board must make two decisions that have different procedural requirements, but usually the board attempts to make both at the same time and with a single hearing.

Conditional Zoning

The legal complexity and formality of the procedures required for conditional use district zoning led to an alternative that is increasingly common in North Carolina — "conditional zoning." In the last decade both the courts and the legislature have approved use of purely legislative conditional zoning. This is different from a conditional use district in that there is no accompanying conditional use permit. All of the site specific standards and conditions (sometimes including a site plan) are incorporated into the zoning district regulations. Conditional zoning is proving to be very popular with elected officials, landowners, and many neighbors because it allows zoning to be tailored more carefully to a particular situation. In some of the state's larger cities, 80 to 90 percent of the rezonings use conditional zoning.

State law only allows conditional zoning and conditional use districts at the owner's request; they cannot be imposed without the owner's agreement. Also, the individual conditions and site-specific standards that can be imposed are limited to those needed to bring a project into compliance with city and county ordinances and adopted plans and those addressing the impacts reasonably expected to be generated by use of the site. Conditional zoning is not exempt from a spot zoning challenge. If the new district is relatively small—and virtually all of these are—the local government must assure that all of the factors defining **reasonable spot zoning** are fully considered and that the public hearing record reflects that consideration.

So, while these three terms sound very similar, they are in fact very different. Some zoning ordinances use all three terms, so a user must pay careful attention to exactly which term is being used. But once you have the distinctions down, you are well on the way to becoming a zoning pro. After all, not just anybody knows the difference between conditional use permits, conditional use district zoning, and conditional zoning.

Links

- www.sog.unc.edu/sites/www.sog.unc.edu/files/SS_22_v4b.pdf

Coates' Canons Blog: Variance Standards: What is hardship? And when is it unnecessary?

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Generally, development regulations like zoning and subdivision standards apply equally to all properties. But sometimes a particular property is unfairly burdened by the general rules, creating an unnecessary hardship for the owner. The general statutes authorize the local board of adjustment to grant a variance from the rules in those limited circumstances. But what is an unnecessary hardship? Recent amendments to the state statute clarify what can (and what can't) qualify as unnecessary hardship. This blog explores those new standards.

General Statute section 160A-388(d) sets forth the standards for granting a zoning variance (The standards also may be applied to subdivision and other development regulation). These mandatory standards apply to zoning variances for all counties and municipalities in the state, and the new standards override any contrary ordinance provisions that may have been in place prior to 2013. For a summary of the other changes to the board of adjustment statute, see this blog from my colleague David Owens.

Under the new statute a board of adjustment *shall* vary the provisions of the zoning ordinance if strict application of the ordinance would create unnecessary hardship. In order to obtain the variance, the applicant must show all of the following:

- Unnecessary hardship would result from the strict application of the ordinance
- The hardship results from conditions that are peculiar to the property
- The hardship is not a self-created hardship

Additionally, the applicant must show that the variance will

- Be consistent with the intent of the ordinance
- Secure public safety
- Achieve substantial justice

Finally, the statute prohibits any use variance.

To be sure, a variance is not a free pass from regulations or a tool to subvert the zoning ordinances. In order to obtain a variance, the applicant bears the burden of providing competent, substantial and relevant evidence to convince the decision-making board that the property meets all of the statutory standards for a variance. Merely showing some hardship is insufficient.

Let's consider each of the standards in more detail.

Unnecessary Hardship from Strict Application

Whenever there is regulation, there is some level of necessary hardship and inconvenience shared by all of the community. An applicant for a variance must show *unnecessary* hardship. What is enough hardship? Unfortunately, there is no simple formula. It is determined on a case-by-case basis. That is why the board of adjustment holds a quasi-judicial hearing and considers the evidence presented.

The hardship must be more than mere inconvenience or a preference for a more lenient standard. Cost of compliance may be a factor, but cost is not determinative. It is not enough for an applicant to say that development will cost more in order to comply. The applicant must show the substantial and undue nature of that additional cost as compared to others

subject to the same restriction.

Under the old statutes, many jurisdictions applied a standard that the applicant must show that there is no reasonable use of the property without a variance. Under current statutes, that stringent standard is no longer allowed. A property owner can prove unnecessary hardship, even if the owner has some reasonable use of the property without the variance.

Peculiar to the Property

The unnecessary hardship must be peculiar to the property, not general to the neighborhood or community. Such peculiar characteristics might arise, for example, from location of the property, size or shape of the lot, or topography or water features on the site.

Imagine a lot that narrows dramatically toward the front yard and where the side yard setbacks prohibit the property owner from building an addition. The hardship (not being allowed to build an addition) flows from the strict application of the ordinance (the setback) and is peculiar to the property (because of the shape of the lot). A variance may be appropriate if the owner presents evidence to show she meets all of the standards.

By contrast, a variance is not the appropriate remedy for a condition or hardship that is shared by the neighborhood or the community as a whole. Consider that same narrowing lot. If all of the houses on the street shared that hardship, a variance would not be appropriate. Such conditions should be addressed through an ordinance amendment.

Hardships that result from personal circumstances may not be the basis for granting a variance. The board is looking at the nature of the property and the land use ordinances, not the nature of the applicant and their circumstances. Bringing an elderly parent to live with the family, for example, is a change in personal circumstance, not a condition peculiar to the property.

The reverse is also true. An applicant's personal circumstances cannot be the basis for denying a variance. The board should consider the property, not the applicant's bank account and ability to cover the cost of the hardship. Moreover, the fact that the applicant owns property nearby is irrelevant to the consideration of whether this particular property deserves a variance (*Williams v. N.C. Dept. of Env. & Nat. Resources*, 144 N.C. App 479, 548 S.E. 2d 793 (2001))

Not Self-Created Hardship

You can't shoot yourself in the foot and then ask for a variance. The hardship must not result from actions taken by the applicant or property owner.

So what is self-created? Suppose a property owner sells part of a conforming lot and makes the remainder of the lot nonconforming. The hardship (limitations on the non-conforming lot) was self-created (by the owner selling the sliver off the parcel. The owner may not seek a variance for building on the substandard lot. Similarly, where an owner failed to seek zoning and building permits and then incorrectly placed foundation footings in the setback, the hardship is self-created. No variance is allowed. Ignorance of the law is no excuse.

What if the owner relied in good faith on seemingly valid surveys and obtained building permits? After construction began, a neighbor objected, citing a new survey and arguing that the foundation wall is within the setback. Is the owner's hardship self-imposed? Our North Carolina courts have held that hardships resulting from such good faith reliance on surveys and permits are eligible for a variance (*Turik v. Town of Surf City*, 182 N.C. App. 427, 642 S.E.2d 251 (2007)).

An important statutory provision applies here: "The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship." For example, if the original owner had a legitimate case for a variance, someone buying the lot from that owner would have the same legal position as the original owner. They could seek a variance. This rule aligns with the broader zoning concept that land-use permissions run with the land, and land-use decisions are based on the property and impacts of development, not based on the particular owner. Is this a loophole for an unscrupulous owner to overcome the limit on variances for self-created hardship by selling the property to a spouse or sham LLC? Maybe, but the requirement for substantial justice (discussed below) probably protects from someone gaming the system.

Restrictive covenants and other legal limitations *may* be a factor in determining hardship. Consider a property that has limited development ability due to a privately-imposed covenant for a street setback and a publicly-imposed stream setback. Can the owner seek a variance from the public stream setback? The NC Court of Appeals—interpreting a specific local ordinance—found that the board should consider physical *and* legal conditions of the property, including restrictive covenants (*Chapel Hill Title & Abstract Co., Inc. v. Town of Chapel Hill*, 362 N.C. 649, 669 S.E.2d 286 (2008)).

Let me emphasize that covenants and other legal limitations *may* be a factor. In that case, the decision was based on the local ordinance, and the decision pre-dated the statutory variance standards. A self-imposed legal limitation—like an easement across a property that limits buildable area—that was created after a zoning ordinance limitation became effective, could be viewed as a self-imposed hardship so that no variance should be granted.

Ordinance Purpose, Public Safety, and Substantial Justice

In addition to those standards for "unnecessary hardship," the statutory standard for granting a variance requires the applicant to show that "[t]he requested variance is consistent with the spirit, purpose, and intent of the ordinance, such that public safety is secured, and substantial justice is achieved."

Where an ordinance expresses a clear intent, a variance cannot subvert that intent. But, alternatively, a variance may help to give effect to the ordinance intent. In one North Carolina case, an applicant was seeking a variance to allow an additional sign at a secondary entrance. Among other things, the ordinance purpose was to provide "adequate and effective signage," "prevent driver confusion," and "allow for flexibility to meet individual needs for business identification." The purpose, the court found, called for the flexibility that the applicant sought, and the variance was allowed. (*Premier Plastic Surgery Ctr., PLLC v. Bd. of Adjustment for Town of Matthews*, 213 N.C. App. 364, 369, 713 S.E.2d 511, 515 (2011)).

The applicant also must show that the variance does not harm public safety. Even if an applicant met the standard for unnecessary hardship, a variance may be denied for public safety concerns. A property owner may prove an unnecessary hardship exists from limitations on on-site drives and parking for a commercial use. But, if neighbors presented expert evidence that the increased traffic and stormwater effects will harm public safety, the board may be justified in denying the variance.

Additionally, the statute requires the applicant to show that through the variance "substantial justice is achieved." The concept of substantial justice raises issue of fairness for the community and neighbors. This concept echoes the requirement that hardship must be peculiar to the property—not shared by the community. If everyone bears this hardship, then one lucky person should not be relieved through a variance. Similarly, the justice standard draws upon a notion of precedence. Suppose Joe sought a variance last year and was denied. If Karl is seeking variance this year that is essentially the same request for a similar property, then the variance outcome should be the same.

The substantial justice standard also can play in favor of the applicant. If an applicant relies in good faith on a city permit, and that permit turned out to be wrongly issued, the applicant would have no vested rights in that mistakenly issued permit. Substantial justice might argue for allowing a variance for the applicant.

No Use Variance

North Carolina courts long ago established that use variances are not permitted, and that rule is now part of the statutory standards. If a land use is not permitted on the property, a variance cannot be used to, in effect, amend the ordinance and allow the use. If only single family residences are permitted in a district, a variance cannot permit a duplex (*Sherrill v. Town of Wrightsville Beach*, 76 N.C. App. 646, 334 S.E.2d 103 (1985)).

If the use is already permitted on the property, a variance to allow the expansion of the permitted use is permissible. So, for example, if a sign is permitted for a commercial property, a variance to permit an additional sign is allowable. It is an area variance, not a use variance. (*Premier Plastic Surgery Ctr., PLLC v. Bd. of Adjustment for Town of Matthews*, 213 N.C. App. 364, 713 S.E.2d 511 (2011)).

Conclusion

Making decisions about variances is a hard job. How much hardship is enough hardship? Is justice being served? Does the variance preserve the spirit of the ordinance? Rarely are there clear answers for these questions. Seeking those answers is the hard task of the board of adjustment. The applicant must present competent, material, and substantial evidence that they meet all of the standards. And the board must consider the issues on a case-by-case basis; they must weigh the evidence, apply the required statutory standards, and decide if a variance is warranted.

Links

- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160A-388