

## Quasi-Judicial Decisions

Regional Board Workshops  
Adam Lovelady / David Owens  
Spring 2017



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**SOG RESOURCES**



<https://www.sog.unc.edu/resources/microsites/planning-and-development-regulation>

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## Quasi-Judicial Handbook

A Guide for Boards  
Making Development  
Regulation Decisions

David Owens &  
Adam Lovelady

Coming Late 2017



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## Continuing Education Credit

CZO Credit (3 hours)

Certified Local Government (CLG Credit)  
(Historic Preservation)

AICP CM (3.5 CM; 1.5 law)

Charlotte #9125195

Asheville #9125196

Wilson #9125196

Wilmington #9125197



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## Outline

- Quasi-Judicial Decisions in General
- Preparing for the Hearing
- Conduction the Evidentiary Hearing
- Making the Decision



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## QUASI-JUDICIAL DECISIONS



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## Quasi-Judicial Decision

Process of adjudicating how the general law applies to a particular situation based on an evidentiary record




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Decision	Standard
Special Use Permit/ Conditional Use Permit	Ordinance standard (commonly property values, plan conformity, harmony with area, etc.)
Variance	Statutory standard for hardship
Certificate of Appropriateness	Not incongruous with the character of the district or landmark
Appeal of Administrative Decision	Interpretation of the ordinance




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## Open Meetings and Public Records

### Public Meeting

- Anytime a majority of the board gathers, in person or electronically, to conduct public business
- Open to the public; standard notice requirements
- Full and accurate minutes
- Limited allowance for closed session
- At social occasions avoid discussion of public business

### Public Records

- Any record made or received in the transaction of public business
- Letter, email, photographs
- Subject to disclosure




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**PREPARING FOR THE HEARING**



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**Notice**

- Mailed Notice
- Posted Notice (Sign)
- Any Additional Ordinance Requirements



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**Initial Evidence**

- Application
- Staff Analysis
- Site Visits



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Bias

Board member cannot have a fixed opinion that is not susceptible to change


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Conflicts of Interest

- a close familial, business, or other associational relationship with an affected person
- a financial interest in the outcome of the matter


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Ex Parte Communication

- Contacts with a party outside of the hearing
- Should be avoided
- Must be disclosed


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## Decision-Makers

- A. Board Member **Allen** reviewed the application materials, he read the staff report, and he drove to the site so the applicant could show him around.
- B. At a recent Rotary Club meeting, Board Member **Barbara** gave a presentation about historic preservation. Among other things she said, "The old parts of town need all the help they can get. I'm not turning down anybody that wants to invest in our town. Especially in the historic district."
- C. Board Member **Chris** owns the property in the historic district. He went to high school with the applicant. His brother-in-law's cousin is a business partner with the applicant.
- D. Planning Board Member **Debra** didn't do a thing. She heard those lawyers from the School of Government talk about bias and ex parte communications so she did not visit the site, nor did she review the application materials or staff report. She arrived with a clear mind and a clean conscience.




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## CONDUCTING THE EVIDENTIARY HEARING




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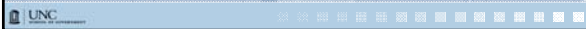
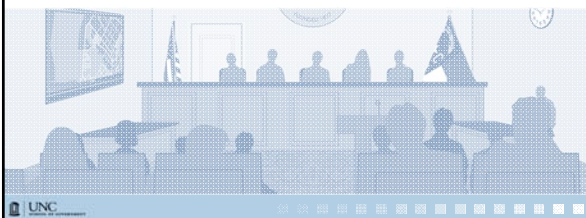
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## Roles

- Board Chair
- Board Members
- Staff
- Parties
- Attorneys




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## Witnesses and Parties

Applicant's experts, planning staff, interested citizens (no property interest in outcome)

Individual or entity with a clearly defined interest in the outcome

Providing testimony and evidence for the record

Making legal arguments in addition to providing to testimony and evidence

Individual does not have a right to speak (May be called by party or permitted by board)

Due process right to present evidence, make legal arguments, and appeal




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## Parties with legal standing

Applicant

Person who will suffer special damages

Owner (or other individual with rights in subject property)

- Proximity
- Property value impact
- Other adverse effects

City or county whose decision is being appealed

Homeowners association or neighborhood group

- at least one member with individual standing
- AND association not formed in response to the particular dispute




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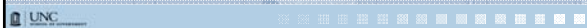
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## Common Order

- Opening
- Introduction of the case (staff or chair)
- Applicant presents
- Other parties present
- Non-party witnesses present
- Rebuttal from applicant and other parties
- Deliberation
- Decision




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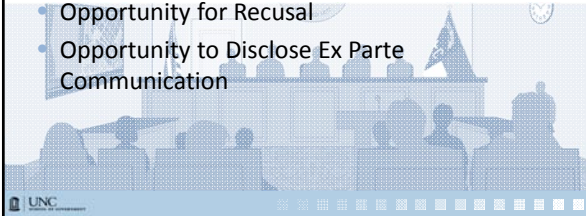
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## Opening

- (Swearing In Witnesses)
- Description of the Hearing
- Description of the Standards
- Opportunity for Recusal
- Opportunity to Disclose Ex Parte Communication




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## Evaluating the Evidence

“Every quasi-judicial decision shall be based upon **competent, material, and substantial** evidence in the record.”



- Trustworthy and reliable
- Related to the standards
- Sufficient to support a conclusion

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### Good witness testimony is

- Sworn or affirmed
- Factual testimony
- Focused on standards and land use impacts
- Supported by
  - first hand knowledge
  - documentary evidence

### Not this

- Unsworn
- Personal opinion
- Focused on owner or residents
- Supported by
  - Mere speculation
  - Vague assertions
  - Unsubstantiated fears




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## Opinion Evidence

### Expert Witnesses

- Property Values
- Projected Traffic Impacts
- Other technical matters




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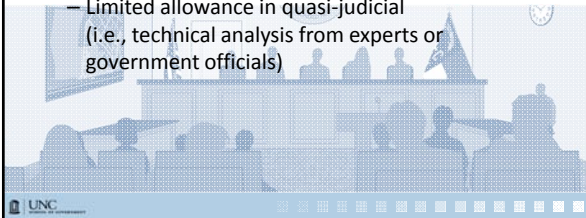
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## Outside Evidence

- Witnesses should be present at the hearing
- Hearsay
  - Prohibited under formal rules of evidence
  - Limited allowance in quasi-judicial (i.e., technical analysis from experts or government officials)




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## Evaluating the Evidence

- A. A petition signed by 10 owners of nearby agricultural land. The petition states that the project is out-of-character for the neighborhood and provides maps and photos for context.
- B. Sworn testimony from an interested citizen (who happens to be an appraiser) about how, in his opinion, the recycling facility will injure neighboring property values.
- C. Sworn testimony from the owner of neighboring industrial property about the industrial character of the area, and how she supports the metal recycling facility.
- D. Sworn testimony from a neighbor voicing concerns about the criminal activity at other metal recycling facilities.




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# MAKING THE DECISION



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## Deliberation

- In open session
- Focused on the applicable standards
- Based on the evidence in the record



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## Burden

- Generally, applicant bears the burden
- Burden shifts to opponents after applicant provides evidence to support his or her case



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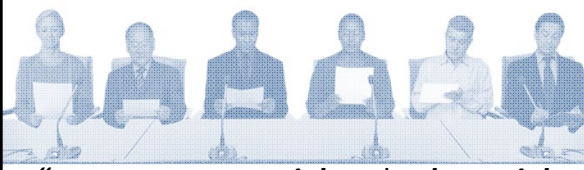
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***“competent, material, and substantial evidence in the record.”***

- Trustworthy and reliable
- Related to the standards
- Sufficient to support a conclusion

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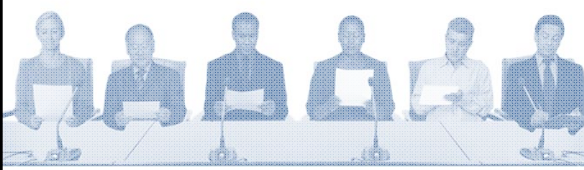
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**Determine Contested Facts**

- Based on the evidence in the record . . .
  - What makes the situation peculiar to the site? (for a variance)
  - What is the character of the area? (for a special use permit)
  - Was the activity a commercial operation? (for an appeal of enforcement)

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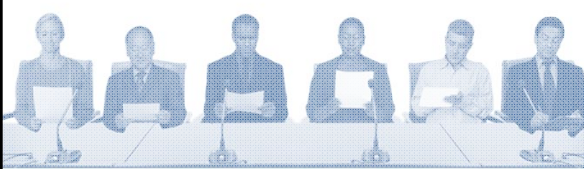
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**Apply the Standards**

Given the facts, is there unnecessary hardship? (for variance)

Given the facts, is the proposal incongruous? (for COA)

Given the facts, was the administrative decision correct? (for appeal of staff determination)

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## Conditions

- Related to the standards
- May bring a development into compliance (that would have been denied otherwise)

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## Motion(s)

- Findings of Fact (sometimes separate)
- Approve, approve with conditions, or deny
- Include reasoning based on the evidence and standards
- Different from decision document

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CASE #5146  
APPROVAL

I move that, based upon the staff report, testimony and evidence presented at the hearing, the Winston-Salem Zoning Board of Adjustment find:

(1) Unnecessary findings would result from the other application of the Ordinance.

(2) The findings would result in conditions that are not in the public interest.

(3) The findings would not result from evidence shown by the applicant or the property owner.

(4) The findings would not result from evidence shown by the applicant or the property owner.

(5) The proposed variance is consistent with the spirit, purpose, and intent of the Ordinance, with the public safety, health, and substantial justice.

Based upon the foregoing findings of fact, I further move that the Winston-Salem Zoning Board of Adjustment grant a variance of the Ordinance to the applicant.

CASE #5146  
DENIAL

I move that, based upon the staff report, testimony and evidence presented at the hearing, the Winston-Salem Zoning Board of Adjustment find:

(1) The findings would result from evidence shown by the applicant or the property owner.

(2) The findings would result from evidence shown by the applicant or the property owner.

(3) The findings would result from evidence shown by the applicant or the property owner.

(4) The findings would result from evidence shown by the applicant or the property owner.

(5) The findings would result from evidence shown by the applicant or the property owner.

Based upon the foregoing findings of fact, I further move that the Winston-Salem Zoning Board of Adjustment deny the application for a variance of the Ordinance to the applicant.

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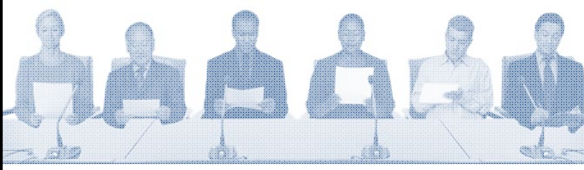
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## Voting

- Simple majority, generally
- 4/5 majority for a variance
- Include absent members in calculation
- Exclude empty seats and conflicts

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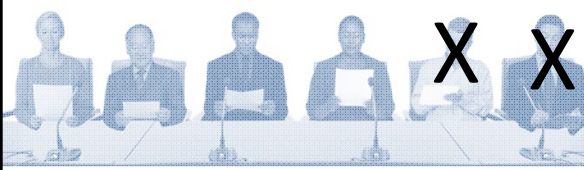
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<p><b><u>Absent</u></b> Vote 3-1 Motion fails</p> <p>3/6 is not a majority of the board</p>	<p><b><u>One conflict, one vacant</u></b> Vote 3-1 Motion carries</p> <p>3/4 is a majority of the board (conflicts and vacancies not counted)</p>
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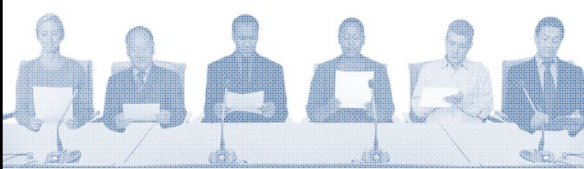
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## Written Decision

- May prepare draft decision prior to hearing
- Final decision document prepared after the meeting (may be by staff or attorney)
- Accurately reflect action and reasoning of the board
- Signed by chair or authorized member
- Need more than meeting minutes

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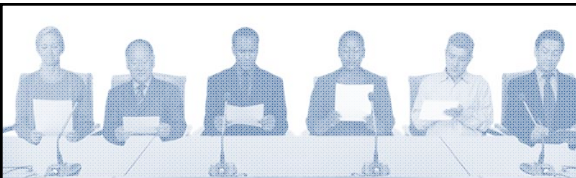
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## Notice of Decision

- Email, first class mail, or personal delivery
- Staff certifies delivery for the record (i.e., clerk affidavit)





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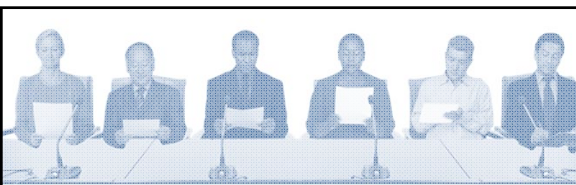
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## Appeals

- 30 days from effective date
- To Superior Court
- On the record





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## Making the Decision

- A. Board Member **Hank** hates to ruffle feathers among neighbors. "Let's just table this discussion and see if the neighbors can work it out. Or, let's at least take a recess so we can discuss this in private."
- B. Board Member **Jane** stated that she is concerned about the legitimate land use impacts on the neighbors and thinks conditions are needed. In addition to the vegetative buffering (a condition recommended by staff and consented by the applicant), Jane recommended: "We need a condition to limit who this applies to. Something like 'This variance is only valid while Melissa owns the property.'"
- C. Board Member **Karl** stated: "Melissa provided evidence that she meets the standards. While I am sympathetic to Nathan's perspective, we are bound to grant the variance."
- D. The board voted unanimously to approve the variance. The next week the town planner wrote a letter stating simply "Your variance is approved. Preliminary minutes from the hearing attached."




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## Questions

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