Quasi-Judicial Decisions

Regional Board Workshops
Adam Lovelady / David Owens
Spring 2017

Quasi-Judicial Handbook
A Guide for Boards Making Development Regulation Decisions
David Owens & Adam Lovelady
Coming Late 2017

SOG RESOURCES

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

Outline

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

QUASI-JUDICIAL DECISIONS
Quasi-Judicial Decision

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

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

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
PREPARING FOR THE HEARING

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

Initial Evidence
- Application
- Staff Analysis
- Site Visits
Bias
Board member cannot have a fixed opinion that is not susceptible to change

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

Ex Parte Communication
- Contacts with a party outside of the hearing
- Should be avoided
- Must be disclosed
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.

CONDUCTING THE EVIDENTIARY HEARING

Roles

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

Parties with legal standing

Applicant | Person who will suffer special damages
---|---
Owner (or other individual with rights in subject property) | — Proximity
City or county whose decision is being appealed | — Property value impact
 | — Other adverse effects
Homeowners association or neighborhood group | Boys or county whose decision is being appealed
 | — at least one member with individual standing
 | — AND association not formed in response to the particular dispute

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
Opening

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

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

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
Opinion Evidence

Expert Witnesses

- Property Values
- Projected Traffic Impacts
- Other technical matters

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)

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.
MAKING THE DECISION

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

Burden
- Generally, applicant bears the burden
- Burden shifts to opponents after applicant provides evidence to support his or her case
“competent, material, and substantial evidence in the record.”

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

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)

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)
Conditions

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

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
Voting

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

Absent
Vote 3-1
Motion fails
3/6 is not a majority of the board

One conflict, one vacant
Vote 3-1
Motion carries
3/4 is a majority of the board (conflicts and vacancies not counted)

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
Notice of Decision

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

Appeals

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

Questions

Adam Lovelady  
919-962-6712  
adamlovelady@sog.unc.edu

David Owens  
919-966-4208  
owens@sog.unc.edu

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

https://canons.sog.unc.edu/