TOWN OF WAYNESVILLE
Zoning Board of Adjustment

9 South Main Street
Waynesville, NC 28786
Phone (828) 456-8647 • Fax (828) 452-1492
www.waynesvillenc.gov

TOWN OF WAYNESVILLE
ZONING BOARD OF ADJUSTMENT
REGULAR MEETING
Town Hall – 9 South Main Street, Waynesville, NC 28786
Tuesday, November 5, 2024, 5:30 PM

A. CALL TO ORDER:

1. Welcome/Announcements/Introductions

2. Adoption of Minutes (as presented or amended) from the Special Called Meeting on August 15, 2024.

B. BUSINESS ITEMS:

1. Training on Quasi-Judicial Procedures conducted by Board Attorney Ron Sneed.

Training attachments:

1) Table of Process Types for the Town of Waynesville.

2) Town of Waynesville Land Development Standards, Table 15.2.3- Permit/Process Type.

3) Joyce, Jim. "Making Quasi-Judicial Decisions." *Coates' Canons NC Local Government Law*, UNC School of Government, 4 Apr. 2023, https://canons.sog.unc.edu/2023/04/making-quasi-judicial-decisions/

4) Owens, David. "Can I Be Heard? Who Gets to Speak at a Hearing on a Quasi-Judicial Matter?" *Coates' Canons NC Local Government Law*, UNC School of Government, 15 Feb. 2012, last revised 13 June 2022, https://canons.sog.unc.edu/2012/02/can-i-be-heard/

5) Owens, David W. "Background Material for Board of Adjustment." *Legal Summaries*, UNC School of Government, Jan. 2022, https://www.sog.unc.edu/resources/legal-summaries/background-material-board-adjustment

6) Owens, David W. "Variance: Application of Unnecessary Hardship Standard." *Planning and Development Regulation*, UNC School of Government, 2023, adapted from *Owens, Land Use Law in North Carolina* (4th ed.), https://www.sog.unc.edu/resources/microsites/planning-and-development-regulation/variance-application-unnecessary-hardship-standard

C. ADJOURN.

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MINUTES OF THE TOWN OF WAYNESVILLE ZONING BOARD OF ADJUSTMENT
Special Called Meeting
Town Hall – 9 South Main St., Waynesville, NC 28786
August 15th, 2024

THE TOWN OF WAYNESVILLE ZONING BOARD OF ADJUSTMENT held a Special Called meeting on August 15th, 2024, at 5:30 p.m. in the Town Hall Board Room at 9 South Main Street, Waynesville, NC. 28786.

A. CALL TO ORDER

1. Welcome/Calendar/Announcements

The following members were present:
Joshua Morgan, Chair
Edward Moore, Vice Chair
Judi Donovan
Henry Kidder
John Mason

The following staff were present:
Olga Grooman, Assistant Development Services Director
Alex Mumby, Land Use Administrator
Esther Coulter, Administrative Assistant

The following Attorney were present:
Ron Sneed, Attorney for the Board

Chairman Joshua Morgan welcomed everyone and called the meeting to order at 5:33 p.m.

Assistant Development Services Director Olga Grooman introduced the new Land Use Administrator Alex Mumby. Mr. Mumby shared some background information about himself with the board. Ms. Grooman stated that no application had been received for next month's agenda.

A motion was made by Vice Chairman Edward Moore, seconded by Board member John Mason to approve the July 2, 2024, meeting minutes as presented. The motion carried unanimously.

Chairman Joshua Morgan read through the process and procedures for the quasi-judicial public hearings. All parties were sworn in.

Chairman Joshua Morgan open the public hearing at 5:41p.m.

B. BUSINESS:

1. Public Hearing to consider a variance for the ground sign height limit and setback, Sections 11.6.1 and 11.7.1(B) of the Land Development Standards (LDS). The subject property is Enterprise Rent-A-Car, located at 670 Russ Avenue in Waynesville, NC (PIN 8616-31-1519).

Assistant Development Services Director Olga Grooman stated that the subject property at 670 Russ Avenue (PIN 8616-31-1519) contains an Enterprise Rent-A-Car business. Ms. Grooman explained that due to the expansion work off Russ Avenue, the NC DOT has acquired a permanent utility easement (PUE) for a natural gas line and a temporary construction easement across the property's frontage. After the utility work is completed, no permanent structures, including ground signs, are allowed to be located within the area of easement.

The ground sign needs to be relocated outside of the permanent utility easement, which places it closer to the building and closer to the side property line. The variance is needed to relocate the sign in a way that allows it to remain visible from the roadway and behind the Starbucks sign, while meeting the site conditions and constraints caused by the NC DOT's project.

Ms. Grooman stated that according to the applicant, it is not feasible to place the sign outside the 10-ft buffer due to the gas line, the slope of the property, and the need to relocate the water backflow preventer. Instead, the new sign would be placed at the bottom of the slope, 3-4 ft. from the side property line.

Ms. Grooman explained that the maximum allowed height for a ground sign in Russ Avenue Regional Center District (RA-RC) is 8 ft, measured from the highest point of a sign face to the highest adjacent grade at the base of the sign. The applicant is seeking a variance to accommodate a 15-ft high sign to ensure its visibility behind the Starbucks's sign. Additionally, no ground sign can be in any required buffer yard, within a sight triangle, or within 10 feet of a side property line. The proposed sign complies with the sight triangle provisions, but it needs to be located less than 10 ft from the side property line to accommodate above-the-ground utility lines, provide space to relocate the water backflow preventer, and allow for the installation of bollards to protect against vehicles. A variance is required for the sign's placement 3-4 ft from the side property line.

Ms. Grooman explained that the requested variances would allow Enterprise Rent-A-Car business to replace the existing 8-ft ground sign with a 15-ft high (10 ft from the parking lot grade) sign that will be located within a 3-4-ft side setback to the property line. The size of the sign face will remain compliant at 45 sf. The applicant offered the following comments regarding the findings that must be considered by the Zoning Board of Adjustment (LDS 15.13, NC GS 160D-705(d)):

a) *Unnecessary hardship would result from the strict application of the regulation. It is not necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property.*

Without the variance, the sign would not be visible to northbound traffic. To accommodate the NC DOT's permanent utility easement and provide clearance for the above-the-ground utility lines, the sign needs to be moved down the 5-ft slope, closer to the side property line. The sign will need to be located near the southeast boundary of the property. The only other feasible location for the sign to be outside the 10-ft buffer area is on the northwest side of the property, but it will be blocked from the view of northbound traffic by the building.

b) *The hardship results from conditions that are peculiar to the property, such as location, size, or topography. Hardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the neighborhood or the public, may not be the basis for granting a variance. A variance may be granted when necessary and appropriate to make a reasonable accommodation under the Federal Fair Housing Act for a person with a disability.*

The placement of the sign is greatly constrained by utility services and topography. The only street frontage that the property has is on Russ Avenue, and the applicant must account for all the NC DOT's easements, existing utilities, and site's topography.

c) *The hardship did not result from actions taken by the applicant or the property owner. The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance is not a self-created hardship.*

The building, existing utilities, and the slope of the property were in place when the applicants became owners of the property. The new utility easement was taken by the NC DOT without the consent of the applicant.

d) *The requested variance is consistent with the spirit, purpose, and intent of the regulation, such that public safety is secured, and substantial justice is achieved.*

The requested sign height and side setback variances are consistent with the spirit, purpose, and intent of the ordinances, such as public safety is secured, and substantial justice is achieved because the sign will perform its purpose by allowing the passing traffic to clearly see the sign from both directions on Russ Avenue. The design ensures that the visibility of the sign remains unobstructed, as the signs of other businesses on Russ Avenue have.

Items Entered as Evidence:

- *Staff Report*
- *Application: narrative, payment*
- *Maps: property, zoning, street view, NC DOT easements*
- *Public notices*

- *LDS Section 11.3 Computation of Signage Area*
- *Town of Waynesville LDS, NC Building and Fire Codes, and NC GS 160D by reference*

Applicant: Duncan Haggart

Mr. Haggart told the board that he purchased the property in 2021. Mr. Haggart explained the history of the property's lot lines and different DOT's easement circumstances. Mr. Haggart answered all the board's questions about the details of the project, DOT's easements, and explained that he was not losing any parking spots, and he did not talk to the neighboring property- Starbucks.

Chairman Joshua Morgan asked if anyone of the public wished to speak.

Chairman Joshua Morgan asked for a motion to close the public hearing at 6:17 p.m.

A motion was made by Board member Henry Kidder, seconded by Vice Chairman Edward Moore to close the public hearing. The motion carried unanimously.

The Board deliberated. Board member John Mason expressed gratitude to all the entrepreneurs in the town and stated that the proposed sign represented a good balance. Board Chairman Joshua Morgan reiterated that the applicant struggled with the NC DOT's easements as well as compliance with the town's ordinances.

A motion was made by Board member Henry Kidder, seconded by Board member John Mason to approve the variances requested to allow an increase of the sign height to fifteen feet and to allow the location of the new sign within three feet of the property boundary. The motion carried unanimously.

C. ADJOURN

Chairman Joshua Morgan adjourned the meeting at 6:22 p.m.

Joshua Morgan, Chairman ***Esther Coulter, Administrative Assistant***

Town of Waynesville Process Types

Process Type	Example	General Requirements
Administrative • Staff • Planning Board	**Staff:** Minor Site Plan Minor Subdivision Grading Permit Floodplain Permit Stormwater Permit Temporary Use Permit Land Development Permit Certificate of Appropriateness (minor work) **Planning Board:** Major Site Plan Major Subdivision	Clear, objective criteria Compliant with ordinance or not Consistent with the 2035 Comp. Plan Adequate infrastructure exists *The proposed development either meets the standards or not. We refer to [it] as a use "by right"* (UNC SOG).
Legislative • Planning Board (recommendation) • Town Council (approval) • Historic Preservation Commission (HPC)	**Planning Board then Town Council:** Conditional District Rezoning Map Amendment (rezoning) Text Amendment **HPC then Town Council:** Designation of Historic Landmarks	Consistent with plans and policies Reasonable and in the public interest Some discretion, but must be *grounded land use considerations* (UNC SOG).
Quasi-Judicial • Planning Board • Zoning Board of Adjustment (ZBA) • HPC	**Planning Board:** Special Use Permit **ZBA:** Variance Appeal of Administrative Decision **HPC:** Certificate of Appropriateness (major work)	Special requests Decisions are based on the standards of the ordinance, but they involve judgement and discretion Consideration may be given to the character of the neighborhood, public health, general welfare, etc. Specific statutory criteria for variance Special conditions may be imposed

7.

15.2.3 Permit/Process Type.

Permit/ Process Type	Section	Permit/Process Type	Reviewing Agency	Public Notification (15.3)	Approving Agency	Appeal Process	Permit Period	Permit Extension
Certificate of LDS Compliance	15.6.1	Administrative	Admin.	None	Admin.	BOA	12 months	Re-submit
Temporary Use Permit	15.6.2	Administrative	Admin.	None	Admin.	BOA	See 4.6	n/a
Certificate of Occupancy	15.6.3	Administrative	Admin.	None	Admin.	BOA	n/a	n/a
Modification of Dimensional Standards	15.6.4	Administrative	Admin.	None	Admin.	BOA	n/a	n/a
Grading Permit	15.7.1	Administrative	Admin.	None	Admin.	BOA	12 months	Re-submit
Floodplain Development Permit	15.7.2	Administrative	Admin.	None	Admin.	BOA	12 months	Re-submit
Stormwater Permit	15.7.3	Administrative	Admin.	None	Admin.	BOA	12 months	Re-submit
Site Plan/Design Review (Minor)	15.8.1	Administrative	Admin.	None	Admin.	BOA	2 years	Up to 3 years max.*
Site Plan/Design Review (Major)	15.8.2	Administrative	Admin.	1,2,4	Planning Board	Superior Court	2 years	Up to 3 years max.*
Subdivision (Minor)	15.9.1	Administrative	Admin.	None	Admin.	Superior Court**	30 days to file plat	Re-submit
Subdivision (Major)	**See 15.9.2, 15.9.3, and 15.9.4**							
Subdivision (Major)- Preliminary Plat	15.9.3	Administrative	Admin.	1,2,4	Planning Board	Superior Court**	2 years to final plat	Up to 3 years max.*
Subdivision (Major)- Final Plat	15.9.4	Administrative	Admin.	None	Admin.	Superior Court**	30 days to file plat	Re-submit
Special Use Permit	15.10	Quasi-Judicial	Planning Board	1,2,3,5	Planning Board	Superior Court	2 years	Up to 3 years max.*

Designation of Historic Landmarks/Districts	15.11.1	Legislative	HPC	1,2,3	Town Council	Superior Court	n/a	n/a
Certificate of Appropriateness (Minor)	15.11.2	Administrative	Admin.	None	Admin.	HPC	12 months	Re-submit
Certificate of Appropriateness (Major)	15.11.3	Quasi-Judicial	Admin.	1,2,3,4	HPC	BOA	12 months	Re-submit
Appeal of Administrative Decision	15.12	Quasi-Judicial	BOA	1,3,4	BOA	Superior Court	30 days to Appeal	n/a
Variance	15.13	Quasi-Judicial	BOA	1,3,4	BOA	Superior Court	30 days to Appeal	n/a
Text Amendment	15.14	Legislative	Planning Board	1,2,3	Town Council	Superior Court	n/a	n/a
Map Amendment (Rezoning)	15.14	Legislative	Planning Board	1,2,3,4	Town Council	Superior Court	n/a	n/a
Conditional District	15.15	Legislative	Planning Board	1,2,5	Town Council	Superior Court	2 years	Up to 3 years max.*

* See Section 15.16.3

** *160D-1403(b)*

Admin—Administrator (14.1) / Town Council (14.2) / BOA—Board of Adjustment (14.4) / HPC—Historic Preservation Commission (14.5) / Superior Court of North Carolina

15.2.4 Completeness Review.

A. **Sufficiency to be Determined by Administrator:** All applications shall be sufficient for processing before the Administrator is required to review the application. An application shall be sufficient for processing when it contains all of the information necessary to decide whether or not the development as proposed will comply with all of the requirements of this ordinance.

B. **Application Information:** The presumption shall be that all of the information required in the application forms is necessary to satisfy the requirements of this section. However, it is recognized that each application is unique, and therefore more or less information may be required according to the needs of the particular case.

C. **Evidence of Authority:** The Director may require an applicant to present evidence of authority to submit the application.

D. **Application Deadline:** Applications sufficient for processing shall be submitted to the Administrator in accordance with the published calendar schedule. Schedules indicating submittal dates shall be developed each year and made available to the public.

(Ord. of 5-27-2014(2))

Coates' Canons NC Local Government Law

Making Quasi-Judicial Decisions

Published: 04/04/23

Author Name: Jim Joyce (https://canons.sog.unc.edu/post-author/jim-joyce/)

Imagine, if you will: A long, contentious hearing over a controversial variance request has finally come to a close. The Board took careful steps to follow appropriate procedures related to notice, impartiality, and communication between board members and the public. Now it is time for the Board to deliberate, weigh its evidence, and reach a decision. This post addresses how they do so.

Quasi-judicial decisions (including the controversial variance request mentioned above) center around two things: the standards the Board* must apply and the evidence in the record that relates to those standards.

> *I will refer to a board of adjustment in the rest of this post as "the Board" for ease of reference. The body making a quasi-judicial decision in any given jurisdiction could be a board of adjustment or it could be a planning board or governing board that serves as the board of adjustment. Regardless of the form of the Board, these rules are the same.

Readers familiar with legislative decisions will recognize that these standards make quasi-judicial decisions quite different from legislative ones. Readers not familiar with the types of development regulatory decisions are encouraged to check out THIS (https://canons.sog.unc.edu/2021/08/types-of-development-decisions/) post by Adam Lovelady. Governing boards do not make legislative decisions based on statutory or ordinance standards (in fact, they often set those standards). Instead, governing boards make legislative decisions based on policy reasoning and their political perspectives. On the other hand, quasi-judicial decisions *do* have guiding standards that the local or state government has set through the legislative process. The Board must apply those standards regardless of policy preferences or political pressures.

Oxford Languages defines "quasi-" as "being partly or almost" and defines "judicial" as "of, by, or appropriate to a court or judge." So a decision that is "quasi-judicial" is one that is partly like a court's decision. As a result, any Board making a quasi-judicial

decision must follow certain procedural rules that protect the rights of the parties, a bit like a court might do. Some of those rules refer to the hearing process. Others refer to the way the Board decides the case once the evidence is in. Below are the key rules about how deliberation should take place, what evidence should be the basis of the Board's decision, what decisions the Board can make, how they take action to reach their decision, and how the final decision gets formalized.

10.

Deliberations must happen in public.

Once the presentation of evidence is complete, it is time for the Board to review the evidence and discuss how they will decide the matter. A Board is a public body making a public decision about an individual's property rights. Consequently, North Carolina open meetings laws apply to their deliberations. A bit more on open meetings laws can be found in THIS (https://canons.sog.unc.edu/2022/03/is-my-open-meeting-open-enough/) blog by Kristina Wilson, and much more can be found in THIS

(https://www.sog.unc.edu/publications/books/open-meetings-and-local-governments-north-carolina-some-questions-and-answers-eighth-edition-2017) book by Frayda Bluestein.

11.

Because open meetings laws apply to the Board acting in a quasi-judicial capacity, all of the Board's debate must happen during open session. There are very limited exceptions for boards to go into closed session and most do not apply to quasi-judicial proceedings. For this reason, the Board may not go into closed session to discuss the case privately.

A Board may continue the quasi-judicial item until a subsequent meeting, but this path is fraught with peril and should only be undertaken very carefully. Specifically, Board members must not engage in any discussion, deliberation, or fact-gathering between meetings. Such activity could violate the due process rights that must be afforded to an applicant or property owner in a quasi-judicial matter.

Another danger with continuance is whether additional evidence can be taken at the next meeting. Here, whether the hearing is closed or not becomes a significant factor. If the Board holds the hearing open from one meeting to the next, it can accept new evidence at the continued hearing. If the Board closes the hearing, on the other hand, it has moved on to the deliberation phase and can accept no new evidence.

The decision must be based on competent, material, and substantial evidence in the record.

"Every quasi-judicial decision shall be based upon competent, material, and substantial evidence in the record." G.S. 160D-406(j). This concept is included in the statutory rules regarding quasi-judicial procedures and is repeated in just about every case concerning quasi-judicial decision-making. So what counts as "competent, material, and substantial evidence in the record"? What *can* serve as the basis for answering a quasi-judicial question? Let us look at each term in that phrase:

First, **competent evidence** is trustworthy, reliable evidence. For documents, the rules are much looser than they would be in a court of law, but a Facebook post from an unknown source or the neighborhood conspiracy theorist might not be competent. When it comes to testimony, the witness should have first-hand knowledge of the matter about which they are speaking. For instance, I know what my neighborhood

looks like and in a general sense how often people and cars come by. On the other hand, can I talk about traffic in Waxhaw if I only have heard about it from my cousin's roommate's best friend? Probably not. 12.

Another key point relates to opinion testimony. Much like in an actual court hearing, opinions about what might happen in the future should be given by experts. This is particularly true—and most commonly encountered—when the issue is impact on traffic or property values. Evidence about what a given quasi-judicial proposal *would* have on traffic in the future is a matter of opinion, and that opinion must come from a traffic engineer or similar expert who has analyzed the project. Likewise, evidence about what could happen to property values must come in the form of testimony and a report from an appraiser or similar expert who has appraised the property. For a deeper discussion of who can provide evidence at a quasi-judicial hearing, see THIS POST (https://canons.sog.unc.edu/2012/02/can-i-be-heard-who-gets-to-speak-at-a-hearing-on-a-quasi-judiciial-matter/) by David Owens.

Second, **material evidence** is that which relates to the questions the board has to answer. Regardless of whether the matter is a special use permit, variance, or other quasi-judicial approval, there are certain standards that apply to the decision. Material evidence should relate to those standards or to the land use impacts of the proposal.

This is one place where the process can be challenging for boards that also have to make other types of land use decisions. With quasi-judicial decisions, a Board must leave the politics aside. In special use permit cases, a political decision has already been made that a certain use should be allowed under certain conditions. For variance cases, this decision has been made at the state level. A quasi-judicial hearing is not the time to revisit these policy questions. Even if dozens of people are at the meeting with matching t-shirts and signs, their presence is probably not material evidence. Public opinion can be divided or even firmly against a quasi-judicial proposal, but it is not material to the core decision of whether the evidence matches the applicable standards.

Next, **sufficient evidence** is any evidence that tends to support a finding that the relevant standard is met. What evidence is sufficient, as discussed in more detail in THIS (https://canons.sog.unc.edu/2022/03/whats-a-scintilla-recent-nc-court-decisions-clarify-quasi-judicial-evidence-standards/) blog post, depends on the context. Generally, evidence is sufficient if it tends to help a side meet their burden of proof.

The burden of proof in a quasi-judicial matter is a bit like a seesaw. The burden is first on the applicant. Imagine the seesaw board tipped toward away from the applicant. If nothing happens, the seesaw will remain pointing in the other direction and the

applicant does not get the approval they seek. However, if the applicant provides enough evidence to make its "*prima facie*" case – if they provide enough evidence that a board *could* find in their favor on *each* of the applicable criteria – the burden shifts to opponents of the proposal. In the seesaw analogy, imagine the applicant piling enough evidence on their end of the seesaw that it tips in their direction. Once the applicant has made this *prima facie* case and the burden shifts, any opponents of the proposal must pile up some evidence on their side of the seesaw. If they do not provide competent, material, and substantial evidence in response, the Board lacks authority to deny the application. It is only when there is evidence on both ends of this metaphorical seesaw that the Board is called upon to weigh the evidence.

Finally, the evidence needs to be **on the record**. The Board should not be gathering or receiving evidence outside of the public evidentiary hearing. The applicant has a legal right (due process again) to respond to evidence presented in their case, so any evidence that might be the basis for the board's decision should be in the documentary record or presented at the evidentiary hearing.

One topic that comes up from time to time regarding evidence on the record is the question of site visits. Some Board members like to see a site for themselves to understand its particular conditions. These are generally permissible, but since they happen outside of the hearing, they must be disclosed to the rest of the Board and to the public. Further, any key findings should be identified so that they can be discussed in the hearing.

Keeping evidence on the record can also be tricky when it comes to *ex parte* communications. These occur when a Board member speaks with someone about the substance of the hearing outside of the hearing. These communications are to be

avoided where possible, and disclosed where they cannot be avoided. The decision still must be made on the evidence in the hearing and on the record, but this disclosure allows an applicant to be aware of and to respond to all evidence in the case.

When reviewing evidence and reaching its decision, the board needs to focus on the competent, material, and substantial evidence that was presented to it during the evidentiary hearing and in any earlier documentation provided in the record (e.g., application materials and responses to requests for additional information).

The Board has a few options for how to act.

Once the Board has heard and weighed all of the evidence, what can they do with it? The answer depends on whether the quasi-judicial matter is an appeal of an administrative action or a development approval (such as a special use permit, variance, or certificate of appropriateness). In either situation, however, the Board has a few options available to it.

For **appeals of administrative decisions**, the board deciding an administrative appeal has a great deal of flexibility. In addition to simply affirming or reversing the challenged administrative decision, they can choose to affirm part of the decision but reverse another part, modify the decision appealed from, and make whatever other orders, determinations, etc. that the original decision-maker could make. In other words, the Board can mold the administrative outcome into what the board thought it should have been, at least within the bounds of the original decision-maker's discretion. See N.C. Gen. Stat. § 160D-406(j).

For **development approvals**, the board has three choices: it can approve the application, deny it, or approve it subject to certain conditions. The range of conditions is limited, however – N.C. Gen. Stat. § 160D-705(d) allows "[a]ppropriate conditions" to be placed on a variance approval if those conditions are reasonably related to the variance, and N.C. Gen. Stat. § 160D-705(c) allows a board of adjustment to put "[r]easonable and appropriate conditions and safeguards" on special use permit approvals. Conditions that are reasonable and appropriate tend to be those that relate to the standards the ordinance provides for making the decision or to the land use impacts of the proposed project. For special use permits, N.C. Gen. Stat. § 160D-705(c) specifically prohibits any conditions that are outside the scope of the local

government's authority, including taxes, impact fees, regulation of certain residential building design elements, and driveway improvements in excess of NC DOT limitations.

When a condition is not related to the ordinance standards that apply to the application or to the land use impacts of the proposed project, that condition is at risk of being challenged and even reversed by a court. Conditions also must not be out of proportion with the project's impact or outside the scope of the government's authority to impose.

Most quasi-judicial decisions require a simple majority vote; variances require a 4/5 supermajority.

N.C. General Statute 160D-406(i) requires the vote of four-fifths (that is, 80%) of the board to grant a variance, but states that a simple majority is required to decide other quasi-judicial matters. In making these calculations, one does not count members of the board who have conflicts of interest or vacant board positions.

To provide an example, if Boroville has a nine-member board, eight members must vote to approve a variance petition in order to grant it (seven of nine is about 78%, which is just under 4/5, so we need that eighth vote to get over the four-fifths threshold). For other quasi-judicial matters, five votes (five is just over half of nine) are required to decide the question. But what if there is an open seat, and one of the board members has a conflict of interest? Since G.S. 160D-406(i) requires us not to count the board member who is conflicted out or the vacant position, we calculate the number of

votes we need out of the (9-2=7) seven remaining. Six out of seven (roughly 85%) would be enough to approve a variance and four would be enough to make any other quasi-judicial decision.

There must be a written decision that explains how the board reached their decision.

Once the requisite proportion of the board has agreed on a result, their decision must be put into writing and finalized. The decision is not final and effective until it has been reduced to writing, approved by the board, and filed with the clerk to the board. Only then does it become effective, and only then does the clock for the timeline to challenge the decision begin to run.

When it comes to drafting the decision document, one of the first questions that might arise is how much detail must be in the written decision. Of course, there is no hard-and-fast rule, but here are a few points to keep in mind:

- One, General Statute 160D-406(j) requires that the decision "reflect the board's determination of contested facts and their application to the applicable standards."
- Second, North Carolina courts have maintained, at least since 1974's *Humble Oil & Refining Co. v. Board of Aldermen*, 284 N.C. 458, 202 S.E.2d 129 (1974), that the parties have a right to know the basis of the board's decision.
- Third, any appeal of the decision will be based on the Board's record. A reviewing court will look to the decision document and recording of the hearing rather than call Board members to testify. For this reason, it is essential to explain the Board's reasoning in the decision document. On the other hand, if the document makes clear what the Board decided and why, it should be sufficient in most cases.

Because this document often takes some significant time and energy to assemble, many boards ask the applicant, staff, or their attorney to prepare a draft decision in the form of proposed findings of fact and conclusions of law. In some cases, boards might allow the prevailing party in the matter to draft the decision document. If there is no proposed set of findings and conclusions in advance, the board's staff or attorney can prepare the document after the meeting. Regardless of how or by whom the decision is drafted, it must accurately reflect the action the board took and its general reasoning. A simple checklist of whether each standard has been met is not sufficient. The decision must include some explanation of *how* each standard is met or not met, whether the decision is to approve, to approve with conditions, or to deny the application.

Once the decision document is complete, the statutes require that it "be approved by the board and signed by the chair or other duly authorized member of the board." G.S. 160D-406(j). Exactly *how* the board must approve the decision is not specified. Some

boards may circulate the decision by email for each member's approval, while others might vote to approve a final draft of the decision at its next meeting following the vote. While the latter procedure assures that the written decision is approved in a public meeting, it also has the effect of delaying the effective date of the approval – recall that the decision is not effective before it has been finalized and filed. Once the document is approved, it is signed by the board chair (or another authorized member), can be filed with the clerk, and becomes effective.

17.

These points and more related to the requirements for the final decision document are discussed in THIS (https://canons.sog.unc.edu/2014/07/requirements-for-quasi-judicial-decision-documents/) David Owens blog post.

Distribution and final steps

Once the written decision has been finalized and filed, the Board must provide copies of the decision to the applicant, landowner, and anyone who has submitted a written (including e-mail) request for a copy. Whoever is providing the notice "shall certify to the local government that proper notice has been made, and the certificate shall be deemed conclusive in the absence of fraud." This certification can be important, as it serves as the beginning of the time to file any appeals.

Concluding comments

Although there are several steps to making a quasi-judicial decision and reducing it to a final written document, the operation can be straightforward if taken one step at a time. The vote must happen in a public meeting; the result must be based on competent, material, and substantial evidence in the record; a written document must memorialize the board's decision; and that decision must be appropriately filed and distributed. Following these general principles will help assure a legal, defensible, and appropriate quasi-judicial decision.

https://canons.sog.unc.edu/2012/02/can-i-be-heard-who-gets-to-speak-at-a-hearing-on-a-quasi-judiciial-matter/

UNC SCHOOL OF GOVERNMENT

Coates' Canons NC Local Government Law

Can I Be Heard? Who Gets to Speak at a Hearing on a Quasi-judicial Matter?

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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 she 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?

The law allows, but does not require, the board to allow Mrs. Edwards to testify. In most cities and counties in North Carolina, the board would allow her to speak but would admonish her that she can only present 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 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. See this **post** for more on the procedures required for legislative decisions.

A hearing on a *quasi-judicial* matter is altogether different. With a special use permit or variance, the purpose of the hearing is not to solicit public opinion and comment about proposed policies. The policies have already been set. 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. See this **post** for more on who has formal standing to participate as a party. 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 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 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? Prior ot 2019 the statutes were silent on this question. But G.S. **160D-406(d)** now says that parties have a right to present evidence and that "Other witnesses may present competent, material, and substantial evidence that is not repetitive as allowed by the board."

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 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 the presiding officer at an evidentiary 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.

23.

Background Material for Board of Adjustment

David W. Owens

January, 2022

Legal topic(s)

Decisions can be grouped into four categories: legislative, quasi-judicial, advisory, and administrative. Often the body charged with making the decision varies according to the type of decision involved. Governing boards usually make legislative decisions but can also make quasi-judicial decisions. Planning boards usually make advisory decisions but can also make quasi-judicial decisions. However, more important than which *board* is making the decision, the rules that must be followed change depending on the *type* of decision involved, and these rules apply no matter which board is making the decision. This is a brief summary of the rules to be followed by any board making quasi-judicial decisions under a local development regulation.

Summary:

Background Material for Board of Adjustment Workshops

(Last updated: January 2022)

[Note: For more details on this topic, see Owens and Lovelady, Quasi-Judicial Handbook: A Guide for Boards Making Development Regulation Decisions (2017)]

Roles and Types of Decisions

Decisions can be grouped into four categories: legislative, quasi-judicial, advisory, and administrative. Often the body charged with making the decision varies according to the type of decision involved. Governing boards usually make legislative decisions but can also make quasi-judicial decisions. Planning boards usually make advisory decisions but can also make quasi-judicial decisions. However, more important than which board is making the decision, the rules that must be followed change depending on the type of decision involved, and these rules apply no matter which board is making the decision. Therefore knowing the type of decision is vital to determining what decision-making process should be used.

Legislative decisions affect the entire community by setting general policies applicable through the zoning or other ordinance. They include decisions to adopt, amend, or repeal the ordinance. The zoning map is a part of the zoning ordinance, so amending the map to rezone even an individual parcel is considered a legislative decision. Because legislative decisions have such an important impact on landowners, neighbors, and the public, state law mandates broad public notice and hearing requirements for these decisions. Broad public discussion and careful deliberation are encouraged and substantial discretion on these decisions is allowed. These decisions are generally made by the local government body, which "legislates" or sets policy. The statutory provisions for adoption and amendment of development regulations are in Article 6 of Chapter 160D of the General Statutes, particularly G.S. 160D-601.

Quasi-judicial decisions involve the application of ordinance policies to individual situations. Examples include variances, special- and conditional-use permits (even if issued by the governing board), appeals, and interpretations. These decisions involve two key elements—the finding of facts regarding the specific proposal and the exercise of judgment and discretion in applying predetermined policies to the situation. Since quasi-judicial decisions do not involve setting new policies, the broad public notice requirements that exist for legislative decisions do not apply. However, the courts have imposed fairly strict procedural requirements on these decisions in order to protect the legal rights of the parties involved. Quasi-judicial decisions are most often assigned to boards of adjustment, appointed by the governing board. But these decisions can also be assigned to the planning board or to the governing board itself. The principal statutory provision for quasi-judicial procedures is G.S. 160D-406.

Advisory decisions are made by bodies that may recommend decisions on a matter but have no final decision-making authority over it. The most common example is the advice on rezoning petitions given by planning boards to the city council or board of county commissioners. There are few rules set by state law or by the courts on how advisory decisions are made. G.S. 160D-604 mandates advisory review of all zoning regulation amendments.

Administrative decisions are typically made by professional staff in various government departments. Such decisions cover the day-to-day non-discretionary matters related to the implementation of an ordinance, including issuing basic permits, interpreting the ordinance, and enforcing it. Examples include issuing a certificate of zoning compliance for a permitted use or a notice of violation. These decisions may be appealed to the board of adjustment. The principal statutory provisions for administration of development regulations are in Article 4 of Chapter 160D of the General Statutes.

Some Key Differences Between Legislative and Quasi-judicial Decisions

	Legislative	Quasi-judicial

	Legislative	Quasi-Judicial
Decision-maker	Only governing board can decide (others may advise)	Can be board of adjustment, planning board, or governing board
Notice of hearing	Newspaper; mailed notice to owners and neighbors and posted notice for map amendments	Mailed notice to applicant, owner, and abutting owners; posted notice; others as ordinance mandates
Type of hearing	Legislative	Evidentiary
Speakers at hearings	Can reasonably limit number of speakers, time for speakers	Witnesses are presenting testimony, can limit to relevant evidence that is not repetitious; may allow non-party testimony at discretion of board
Evidence	None required; members free to discuss issue outside of hearing	Must have substantial, competent, material evidence in record; witnesses under oath, subject to cross-examination; no ex parte communication allowed
Findings	None required (statement on plan consistency and rationale required for zoning amendments)	Written findings of fact required; must determine contested facts
Voting	Simple majority of entire board	Simple majority of entire board except 4/5 to grant a variance
Standard for decision	Establishes standards	Can only apply standards previously set in statute and ordinance
Conditions	Not allowed, except with conditional zoning	Allowed if based on standard in ordinance
Time to initiate judicial review	Two months to file challenge map amendment; one year from standing for text amendment	30 days to file challenge

Conflict of interest	Direct, substantial, and readily identifiable financial interest or close relationship with applicant	Any financial interest, close relationship with applicant, personal bias, or undisclosed ex parte communication disqualifies; impartiality required
Creation of vested right	None	Yes, if substantial expenditures are made in reliance on it

TYPICAL ALLOCATION OF LOCAL GOVERNMENT PLANNING FUNCTIONS

Agency	Primary role	Other possibilities
GOVERNING BOARD: (city council, county board of commissioners)	Legislative decisions: adopts ordinances, amendments, policy statements, budgets; approves acquisitions; makes appointments to other bodies	May also serve as planning board; may approve plats and special use permits
PLANNING BOARD: (planning board; planning commission; planning committee of governing board)	Advisory decisions: sponsors planning studies; recommends policies, advises governing board; coordinates public participation; must recommend initial zoning ordinance	May also serve as board of adjustment; may approve or review plats
BOARD OF ADJUSTMENT:	Quasi-judicial decisions: hears zoning appeals, variances, special use permits	

STAFF: (Planning department, inspections department, community development department)	Administrative decisions: issues permits, conducts technical studies, initiates enforcement; advises manager	

Preliminary Matters

Notice of hearings. A local government must give notice of its quasi-judicial hearings to all parties to the case. State law requires individual mailed notice to:

1. The applicant;
2. The owner of the affected property;
3. The owner of abutting properties; and
4. Anyone else required to receive notice under the ordinance.

The mailed notice must be deposited in the mail at least 10 but not more than 25 days prior to the date of the hearing. A notice must also be posted on the site within the same time period. The zoning statutes impose no published notice requirements for quasi-judicial decisions (unlike proposed zoning amendments). If a zoning ordinance itself requires additional notice, such as publication in the newspaper or a wider mailing, that additional notice is mandatory. The open meetings law also has requirements for meeting notices. Once a hearing has been opened, it may be continued to a later date if that is necessary to receive additional evidence. Additional notice of the continued hearing is not required by law, but many boards provide it.

Open meetings law. Boards of adjustment are subject to the state open meetings law [G.S. 143-318.9 to 143-318.18]. All meetings of a majority of the board, or any committees of the board, for the purpose of conducting business must be open to the public. Closed sessions may be held only for narrow purposes set forth by statute (e.g., receiving legal advice regarding pending litigation). A board may not retire to a private session to deliberate a case. Public notice must be provided for all meetings (regular schedule filed with clerk, special meetings notice posted and mailed to media).

Liability. Members of boards making quasi-judicial decisions are "public officers" and, as such, have limited exposure to personal liability as a result of board actions. Members do have exposure to liability for intentional torts (such as assaulting someone during a board meeting) and for willful misconduct (such as

intentionally denying a permit that should have been issued because of a personal vendetta against the applicant). Good faith mistakes or errors in judgment do not expose members to personal liability. 28.

Quasi-Judicial Hearings and Decisions

Collecting Evidence

Subpoenas. Boards conducting these hearings have the authority to issue subpoenas to compel testimony or production of evidence deemed necessary to determine the matter. Requests for subpoenas and objections to subpoenas are made to the board chair prior to the hearing, who then rules on and issues the subpoena. Objections to the chair's rulings may be taken to the full board.

Burden. The person requesting a variance or special use permit has the burden of producing sufficient evidence for the board to conclude the standards have been met. If insufficient evidence is presented, the application must be denied (or the board can continue the hearing to a later date to receive additional evidence). Once sufficient evidence is presented that the standards are met, the applicant is entitled to approval. If conflicting evidence is presented, the board must determine which facts it believes are correct.

Oaths. Those offering testimony are usually put under oath. This reminds witnesses of the seriousness of the matter and the necessity of presenting factual information, not opinions or speculation. All of the witnesses may be sworn in at one time at the beginning of the hearing or each witness may be sworn in as they begin to testify. While oaths may be waived if all of the parties agree, most local governments routinely swear in all witnesses, including the staff members and attorneys who are making presentations. If a witness has religious objections to taking an oath, they may affirm rather than swear an oath. The oath is generally administered by the chair or clerk of the board receiving the testimony (it may also be administered by any notary public).

Cross-examination. Parties have the right to cross-examine witnesses. The board can establish reasonable procedures for this, such as allowing questions to be posed only by a single representative of a party. Board members are also free to pose questions to anyone presenting evidence.

Hearsay. Hearsay evidence (a statement about the facts made by someone who is not present and available for cross-examination) is generally not allowed. If that is the best evidence available the board can receive it, but the board may well decide to limit the weight or credibility it gives such evidence.

Opinions. Opinion evidence generally should be offered only by a properly qualified expert witness. The statutes specifically prohibit use of opinion testimony by nonexperts on how a project would affect property values, how traffic would affect public safety, and any other matter for which only expert testimony would be permitted in court. 29.

False testimony. A person who deliberately gives false testimony under oath in a zoning hearing is subject to criminal charges for perjury.

Outside evidence. Persons affected by a decision have the legal right to hear all of the information presented to board members, to know all of the "facts" being considered by the board. Therefore members of the decision-making body are not allowed to discuss the case or gather evidence outside of the hearing (what the courts term ex parte communication). Only facts presented to the full board at the hearing may be considered. It is permissible for board members to view the site in question before the hearing, but they should not talk about the case with the applicant, neighbors, or staff outside of the hearing. If a member has personal knowledge about a site or case, the member should disclose that at the hearing.

Time limits. While unduly repetitious or irrelevant testimony can be barred, an arbitrary time limit on the hearing cannot be used. It would not be appropriate, for example, to limit each side in a variance proceeding to ten minutes to present their case. It is acceptable to allow only a single witness representing a group with similar concerns.

Exhibits. Witnesses may present documents, photos, maps, or other exhibits. Once presented for consideration by the board, exhibits are evidence in the hearing and become part of the record (and must be retained by the board). Each exhibit should be clearly labeled and numbered as it is received into evidence.

The application for the permit and any correspondence submitted as part of the application file should also be entered into the hearing record and may be considered by the board. Most application forms are designed to solicit sufficient information for a decision. It is a good practice to have a person familiar with the information in the application (usually the applicant or an agent of the applicant) available to answer any questions the board may have about the written submissions.

Quality of evidence. There must be "substantial, competent, and material evidence" to support each critical factual determination. Key points need to be substantiated by the factual evidence in the hearing record; the findings cannot be based on conjecture or assumptions. For example, for the board to find that neighboring property values would be significantly reduced by a proposed project, there must be some testimony in the record to support that finding, such as testimony from an appraiser about the impacts of a

similar project elsewhere in town or presentation of facts that would allow a reasonable person to conclude property values would go down. Where conflicting evidence is presented, the board has the responsibility of deciding how much weigh to accord each piece of evidence. 30.

Record. Complete records must be kept of the hearings. Detailed minutes must be kept noting the identity of witnesses and giving a complete summary of their testimony. Any exhibits presented should be retained by the board and become a part of the file on that case. An audio or video tape of the hearing should be made, though that is not mandated by statute. Any party may request the tape be included in the record of the hearing. Any party may include a transcript of the hearing in the record if the case is appealed to the courts, with the cost of the transcript being borne by the party requesting it.

Summarizing Evidence and Findings

Findings. The board's decision must be reduced to writing. The written decision must determine any contested facts and apply the facts to the applicable standards. Simply repeating the standards for the ordinance and noting each is met is generally not sufficient. It is useful for the staff and board to have a clear and common set of terminology relative to "standards," "findings," "findings of fact," "decisions," and "orders." An example of the findings for a simple variance decision is attached at the end of these materials.

The written decision must be signed by the board chair and filed with the clerk to the board. It is effective upon filing. The decision must be mailed to the applicant, the property owner, and anyone else who requested a copy in writing prior to the effective date of the decision. It can be delivered by email, first class mail, or personal delivery.

Voting on a Decision

Quorum and voting. The general rule is that a majority of the board is a quorum. Most decisions of the board of adjustment require a simple majority of the board, but a variance requires a four-fifths majority (a few local government charters vary this requirement). Members who are recused due to a conflict of interest and seats that are vacant are not considered when computing the required majority.

Precedents. Prior decisions are not legally binding on a board. Each case must be decided on its own individual merits. Subtle differences in individual facts and situations can lead to differing results. However, a board should be aware of previous decisions and, as a general rule, similar cases should usually produce similar results. If a board reaches a different result for a very similar fact situation, the board's written decision must clearly explain why there was a different conclusion.

Rehearings. As a general rule, a board may not hear a quasi-judicial case a second time. The applicant and other affected parties must present their evidence at the initial hearing. Appeals of the initial decision may be made to the courts, not back to the board. If there is a substantially different application, or there has been a significant change of conditions on the site or in the ordinance, a new hearing may be held. Some boards allow a case to be withdrawn without a formal decision anytime up to a vote; others do not allow withdrawal after the hearing begins and some limit withdrawal after publication of notice of the hearing.

Conflicts of interest. The Constitution and the statutes give parties to a quasi-judicial decision a legal right to an impartial decision maker. Thus boards must avoid conflicts of interest. In addition to financial impact, bias (defined as a predetermined opinion that is not susceptible to change), undisclosed ex parte communications about the case, and close family or business ties also disqualify members from participating. Nonparticipation includes the discussion as well as voting.

Participation in continued hearing. If a hearing is continued or conducted over several days, a member may miss part of the hearing, but be present when a vote is called. The courts allow a member who was not physically present for the presentation of all evidence to vote, but only if the member had full access to the record of evidence presented in the member's absence (such as an opportunity to read the minutes, see the exhibits, or listen to a tape). This is also allowed for a new member appointed after some of the evidence was presented. Some jurisdictions have local legislation or rules of procedure that disqualify a member who did not actually hear all of the evidence from voting on that case.

Standards for Particular Types of Quasi-judicial Decisions

Variances

Purpose. A zoning variance gives an owner permission to do something that is contrary to the requirements of the zoning ordinance. Variances are a safety valve in zoning that allows adjustment of the rules to fit individual unanticipated situations. The standards for obtaining a variance are very strict, as this is one of the most powerful tools available to boards of adjustment and can be subject to substantial abuse if not carefully administered. Variances must not be used as a substitute for amendments to the zoning ordinance. Members of boards of adjustment must be careful not to substitute their judgment for what the zoning ordinance should be for that of the elected officials who are responsible for adoption of the ordinance.

Standards. A variance may be granted only if all three of these general standards are met. Meeting one of the standards, but not the others, is insufficient. 32.

1. The applicant must show that strict application of the rules would create unnecessary hardships. State law provides several tests regarding unnecessary hardships:

- It is not necessary to show that no reasonable use can be made of the property without a variance, but the hardship must be real and substantial. Mere inconvenience or additional expense is not adequate.
- The hardship must be peculiar to the property, such as the property's location, size, or topography. Conditions common to the neighborhood or the public are not sufficient.
- The hardship must not have been self-created. Purchase of the property knowing it may be eligible for a variance is not a self-created hardship.

2. The applicant must show that the variance would be consistent with intent and purpose of ordinance. This means:

No "use variances" can be allowed

Nonconformities may not extend beyond what the ordinance allows

3. The applicant must show that the variance would be consistent with the overall public welfare and that substantial justice will be done. The variance must not create nuisance or violation of other laws.

Conditions may be applied to variances and the conditions may be enforced, but only conditions related to variance standards may be imposed.

Variances must be allowed in a zoning ordinance. Other development regulations may provide for variances, but that is not required. If they are allowed, the variance standards are the same as set out above for zoning.

Special Use Permits

Standards. The decision-making standards must be included in the text of the ordinance. They cannot be developed on a case-by-case basis. The decision to grant or deny the permit, or to impose conditions on an approval, must be based on the standards that are actually in the ordinance and that are clearly indicated as the standards to be applied to this decision. 33.

The standards must provide sufficient guidance for decision. The applicant and neighbors, the board making the decision, and a court reviewing the decision all need to know what the ordinance requires for approval. The courts have held there is inadequate guidance if the ordinance only provides an extremely general standard, such as that the project be in the public interest or that it be consistent with the purposes of the ordinance. The courts have approved use of four relatively general standards that are now incorporated into many North Carolina zoning ordinances. These are that the project:

1. Not materially endanger the public health and safety,

2. Meet all required conditions and specifications,

3. Not substantially injure the value of adjoining property (or be a public necessity), and

4. Be in harmony with the surrounding area and in general conformance with the comprehensive plan.

Specific standards may also be included. Typical specific standards include minimum lot sizes, buffering or landscaping requirements, special setbacks, and the like. Many ordinances use a combination of general and specific standards.

Burden. The burden of proof in these cases is allocated as follows: The applicant must present evidence that standards in ordinance are met. It is not the staff's responsibility to produce this basic information. Often application forms are required that will elicit most of this information. If the applicant presents sufficient evidence that the standards are met, the applicant is legally entitled to a permit. If contradictory evidence is presented, the board must make findings and then apply the standards.

Conditions. Individual conditions may be applied. These conditions are fully enforceable. A board may only impose conditions related to the standards that are already in the ordinance.

Appeals and Interpretations

Determination required. A board of adjustment is not allowed to issue advisory opinions. The board may only hear actual cases where a staff decision has been issued and is being appealed. The staff must have made a final, binding determination to trigger appeal rights. The staff determination must be in writing and provided to the person who is subject to the decision and to the property owner if that is a different person. The notice of the determination may be provided by email, first class mail, or personal delivery. The staff person who made the determination must appear at the hearing as a witness. 34.

Standing. Only persons with standing to make a judicial appeal can appeal a staff determination. An appeal is filed with the city clerk and must state the grounds for appeal.

Time. Appeals must be filed within 30 days from receipt of the notice of the determination. The board cannot waive this deadline. A person with standing who did not receive the written determination has 30 days from receipt of actual or constructive notice to file an appeal to the board. A landowner receiving a determination has the option of posting the site with a notice that a determination has been made. If the owner's posting remains in place for ten days, that provides constructive notice to neighbors and the public that a determination has been made, thereby starting the 30 day period to appeal to the board as of the date of initial posting of the sign. The board must hear and resolve appeals within a reasonable time.

Deference. The board of adjustment makes its own independent assessment of what the terms of the ordinance mean. The board should give due consideration to the professional judgment of the zoning administrator, taking into account his or her training and experience. But the question of what the ordinance means is a question of law for which the board must make its own decision. In making this determination the key goal should be giving full effect to the terms of the ordinance and the intent of the governing board that adopted it, not substituting the opinion of the board of adjustment as to what the ordinance should say.

Alternate dispute resolution. The parties may agree to mediation or other forms of alternate dispute resolution and the ordinance may include procedures to facilitate and manage such voluntary action.

Imposition of Conditions

Quasi-judicial Decisions

Conditions can be (and usually are) imposed on quasi-judicial approvals such as special and conditional use permits and variances.

However, the conditions are limited to those needed to bring the project into compliance with the standards specified in the ordinance for that decision. For example, a design change may be need to make the project "harmonious" with the surrounding neighborhood or a buffer may be needed to prevent harm to neighboring property values (assuming those are standards applicable to that decision). 35.

Exactions

Exactions are requirements imposed as a part of a development approval that a land owner/developer provides a public improvement at its own expense.

Typical forms of exactions include:

- Dedication of land for streets and utility easements
- Construction of specified public improvements, such as roads, sidewalks, water and sewer lines
- Dedication of land for open space
- Dedication of land and construction of facilities for parks
- Setting aside land for future government purchase for school sites

There are two key legal issues with any exaction. First, is the amount of the exaction constitutional? Second, is there statutory authority to impose it?

On the constitutional issue, there must be a rational relation or nexus to needs generated by project. The amount or size of the exaction must also be no more than that which is roughly proportional to the public facility needs generated by the development being approved. The determination of whether an exaction is proper must be made on an individualized basis. The burden of proving an exaction is constitutional is on the government.

On the statutory authority front, the subdivision statutes have detailed provisions on what land dedications, public improvements, and fees in lieu can be imposed. The zoning statute also addresses street, utility, and recreational exactions.

References

Additional information is available on the NC Planning web page maintained by the School of Government. Log on at: http://www.sog.unc.edu/organizations/planning/

36.

The page includes links to various resources, such as frequently asked questions, legislative summaries, and digests of recent court cases. The "Publications" link at that page sets out a number of resources. A few are noted below.

Sample Online Reports

A Survey of Experiences with Zoning Variances (Special Series No. 18, Feb. 2004)

Special Use Permits in North Carolina Zoning (Special Series No. 22, April 2007)

Books available include:

Quasi-Judicial Handbook: A Guide for Boards Making Development Regulation Decisions (2017)

Introduction to Zoning and Development Regulation (4th. ed. 2013)

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Planning and Development Regulation

Variance: Application of Unnecessary Hardship Standard

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[Adapted from Owens, Land Use Law in North Carolina (4th ed. 2023)]

Statutory Standard

The standards and limits for variances are set out in G.S. 160D-705(d). That statute provides:

When unnecessary hardships would result from carrying out the strict letter of a zoning regulation, the board of adjustment shall vary any of the provisions of the zoning regulation upon a showing of all of the following:

1. Unnecessary hardship would result from the strict application of the regulation. It shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property.
2. The hardship results from conditions that are peculiar to the property, such as location, size, or topography. Hardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the neighborhood or the general public, may not be the basis for granting a variance. A variance may be granted when necessary and appropriate to make a reasonable accommodation under the Federal Fair Housing Act for a person with a disability.
3. The hardship did not result from actions taken by the applicant or the property owner. The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance is not a self-created hardship.
4. The requested variance is consistent with the spirit, purpose, and intent of the regulation, such that public safety is secured and substantial justice is achieved.

Notably, this statute establishes an entitlement to a variance upon showing the standards are met. It states that the local government "shall vary" the regulations upon a showing that "all" of the standards are met.

Degree of Hardship Required

As historically interpreted by the courts, the most significant limitation on the variance power is the requirement that a petitioner establish that compliance with the strict terms of the ordinance would cause *unnecessary* hardship.

There is broad legal consensus that to be "unnecessary," this requisite burden must be substantial. Inherent in any regulatory scheme is the understanding that some burdens shared by all do not rise to the level of qualifying the owner for variance consideration. The courts have held with near uniformity that even though more profitable uses are available or that the cost of compliance increases the cost of development,

these factors do not constitute undue hardship. However, what constitutes the minimum reasonable use that must be allowed or when the additional costs imposed to develop in strict compliance with zoning standards become unduly excessive are the most difficult issues of judgment and discretion to be determined in variance decisions.

The first major North Carolina case on zoning variances, *Lee v. Board of Adjustment*,[1] involved a request to build a grocery store/service station in Rocky Mount in a district zoned exclusively for residential use. This case addressed the "undue" hardship required to qualify for variance consideration. Because the applicant only held an option to purchase the land, the court ruled, he would suffer no undue hardship.[2] The court noted that the applicant could simply not execute the option, thereby avoiding any hardship at all. The court also noted that there was no hardship based on the contention that the proposed use would be more profitable:

> It is erroneous to base a conclusion that the denial of an application would work an unnecessary hardship because the applicant could earn a better income from the type of building proposed.
>
> The financial situation or pecuniary hardship of a single owner affords no adequate grounds for putting forth this extraordinary power affecting other property owners as well as the public.[3]

The court in *Williams v. North Carolina Department of Environment & Natural Resources* further explored the requirement for unnecessary hardship.[4] It held that the owner's possession of other developable property nearby was irrelevant, as the variance must be considered strictly in relation to the property, not the owner of the property. The critical inquiry, the court held, was whether the property could be put to some reasonable use without a variance.

The court in *Showcase Realty & Construction Co. v. City of Fayetteville Board of Adjustment*[5] likewise held that the petitioner for a variance must present substantial evidence regarding the impact of the ordinance on the owner's ability to make reasonable use of the property. The court noted that the board could not simply rely on a conclusory statement and that the financial cost of compliance alone (in this case the relocation of an improperly placed concrete slab for a building under construction) was insufficient to establish the requisite unnecessary hardship.

In contrast, the court found sufficient hardship to justify a variance in *Turik v. Town of Surf City*.[6] The town issued a building permit, and construction was under way in accordance with that permit. The adjoining property owner then objected and submitted a new survey that, if accurate, would have resulted in the pilings of the permitted building being 7.2 inches inside the mandated setback. While not explicitly addressing the degree of hardship involved, the court noted that the hardship was real (it would require demolition or substantial alteration of the existing partially completed building) and emphasized that it was not self-created, as the owner made good-faith reliance on what appeared to be a valid survey prepared by a licensed surveyor.[7]

The General Assembly clarified the zoning-variance standard in 2013 to address the issue of whether retention of any reasonable use was disqualifying for a variance. G.S. 160D-705(d)(1) was amended to explicitly provide that a showing of no reasonable use of the property without a variance is not required.[8]

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[1]. 226 N.C. 107, 37 S.E.2d 128 (1946).

[2]. "He possesses no present right to erect a building on the lot described in his contract. To withhold from him a building permit to do what he has no present right to do cannot, in law, impose an 'undue and unnecessary hardship' upon him." *Id.* at 110, 37 S.E.2d at 131.

[3]. *Id.* (citations omitted).

[4]. 144 N.C. App. 479, 548 S.E.2d 793 (2001). The case involved judicial review of the denial of a Coastal Area Management Act variance. The terms of the variance standard in this statute are similar to those for zoning variances. This statute was amended in 2002 to delete the reference to "practical difficulties" as a variance standard, retaining only the requirement for a showing of "unnecessary hardships." S.L. 2002-68. That same amendment was later made for the zoning-variance statute. S.L. 2013-126.

[5]. 155 N.C. App. 516, 573 S.E.2d 737 (2002).

[6]. 182 N.C. App. 427, 642 S.E.2d 251 (2007).

[7]. The minimal amount of the dimensional variance sought was also of clear importance to the court, which concluded that such a small variation did not conflict with the purpose of the ordinance and would have minimal, if any, harm to the neighbor. *See also* Stealth Props., LLC v. Town of Pinebluff Bd. of Adjustment, 183 N.C. 461, 645 S.E.2d 144, *review denied*, 361 N.C. 703, 653 S.E.2d 153 (2007). This case involved a variance necessitated by a misunderstanding about which zoning district applied to the property on which the petitioner placed a modular home. The petitioner erroneously thought the property was in a zoning district that required a fifteen-foot setback. The property was actually in a district requiring a twenty-five-foot setback. The petitioner's application noted a sixteen-foot setback, but the permit (a certificate of zoning compliance) noted a twenty-five-foot setback. The petitioner built at the sixteen-foot setback, and the error was not caught until construction was complete. When the certificate of occupancy was denied, a variance was sought and denied. The court held that the variance denial was not supported by substantial, competent, and material evidence since a malfunction of the recording equipment and a disagreement about the minutes led to no transcript or detailed record of the evidence being a part of the record on appeal. The court, however, held the setback requirement to be ambiguous and ordered the variance issued on remand.

[8]. This provision was added by S.L. 2013-126.