

**Board of Adjustment Training**  
**Unanswered Questions**  
**December 6, 2007**

**Q. Can board members (or whole board) put conditions on a CUP if the thing the conditions cover were not discussed during the evidentiary phase of the hearing? (i.e. lighting required for a storage facility when lightning was not mentioned by anyone anytime)**

A. Conditions should be based on evidence presented at the hearing. However, board members are free to introduce the topic by asking questions during the hearing to get the topic in the record. There needs to be a real connection between the desired condition and the standards in the ordinance. The conditions should enable the board to make findings of fact and conclusions that support granting a permit.

**Q. Can board members act as opposition (devil's advocate) if none is present?**

A. Board members may ask any questions they want. However, in playing devil's advocate, one would not want to ask questions that would make a case for the applicant nor would one want to appear to be leading the decision in one direction. One may want to say, "I'm going play devils advocate and ask..." Questioning should help lead the board to a fair and impartial decision.

**Q. When [an applicant] fills out an application, how do we educate them [about] the way to fulfill the "burden of proof" when presenting evidence and reduce their anxiety?**

A. It is not the role of the board of adjustment members to educate the applicant as to how to complete the application—the application should be completed before it gets to the Board. Also, remember that board members need to avoid ex parte communications. If a board member directs an applicant, this may be considered to be ex parte communication.

It *is* staff's role to let the applicant know what to expect by explaining what a quasi-judicial process entails, what the standards are, and that decisions must be based on facts and evidence. Some communities use brochures to explain the quasi-judicial process. Staff members should not be too leading because they are often a witness or a party to the case.

**Q. If a permit denial is issued because a standard in the ordinance cannot be met because there is a practical difficulty or an unnecessary hardship, why does the applicant ask for a variance and not an appeal?**

A. Ultimately, the applicant is in need of a remedy for her situation. If the standard that cannot be met is due to "practical difficulties or unnecessary hardships," the

applicant may qualify for a variance. The variance, if issued, would be a way to remedy the permit denial. A decision on an appeal of the administrator's decision would only provide a remedy if the board found the administrator had erred. If the board agrees with the permit denial, the applicant couldn't proceed unless the plan is changed to meet the ordinance or a variance is obtained.

**Q. If a case is continued because the board wants more information on a specific fact or piece of evidence, can conversation be restricted to only addressing that piece of evidence or does the meeting continue as it did before the meeting was continued?**

A. If a meeting is continued, the board cannot restrict the conversation to a single topic or piece of evidence. In quasi-judicial hearings, time-limits for speakers are not allowed. Also, that new information presented at the continued meeting may lead to more questions, evidence, and cross-examination. Finally, don't forget that the board chair can point out when information has already been presented if topics are being repeated.

**Q. How much weight does one give to the amount of money an applicant has invested in a project before it comes the case comes before the BOA?**

A. None, really. Factors related to the application of the ordinance to the property are more relevant than the applicant's personal situation. The following court case may provide some guidance. You may want to consult your board attorney for further interpretation of this case.

**“Showcase Realty and Construction Co. v. City of Fayetteville, 155 N.C. App. 548, 573 S.E.2d 737 (2002)**

*Variances, Evidence, Findings*

The city issued a special use permit for a mini-storage facility with a required front setback of fifty feet and a side setback of thirty feet. During the course of construction a question arose as to whether the required setbacks were being observed. Construction was halted and a survey revealed the concrete slab for the buildings were placed with only a twenty-five foot front setback and a twenty-nine foot side setback. The owner then petitioned for a variance. The owner testified at the variance hearing that he thought the setback was to be measured from the road rather than the right-of-way, that he relied on the contractor and inspections staff to properly site the structure, and that he had expended all of his funds on the improperly located structure and could not afford its relocation. The staff testified that an incorrect measurement could have been made due to road construction underway at the time the structure was located on the site. The plaintiff, the adjoining landowner, testified that if the building were completed as located it block views of his undeveloped commercial property, reduce the value

of his business, and force stormwater drainage onto his property. The board issued a variance and the trial court upheld this decision.

The court conducted a whole record review and invalidated the variance as unsupported by adequate evidence in the record. Here the ordinance amplified on the statutory language requiring a showing of “practical difficulties or unnecessary hardships” to specify the board must find the owner could “secure no reasonable return from, or make no reasonable use of, his property.” The court held there were only conclusory statements in the record. ***Financial hardship alone is insufficient to establish an “unnecessary” hardship; rather, evidence that no reasonable use or return could be made without a variance is necessary.*** The ordinance also required a showing that the variance would not impair an adequate supply of light and air to surrounding properties and would not impair their established property values. The court similarly found there was a lack of evidence in the record to support findings on these standards.

*Source: School of Government 2002 Land Use Litigation Summary:*  
<http://www.sog.unc.edu/organizations/planning/litigation/Litig-02.htm>

**Q. Does anyone have the right to cross-examine witnesses?**

A. Only those who are determined to have standing have the right to cross-examine witnesses. If your board lets everyone speak at a hearing, whether they have standing or not, it is important that the chair and board members know if the person truly has standing if the person wishes to cross-examine other witnesses or parties. This is why it is good to establish standing at the beginning of the meeting.

**Q. How long do you have to keep the actual case files of cases presented to the BOA?**

A. Below are links to the NC Records Retention Schedules

COUNTIES: Go to page 63 of this document to access Planning and Zoning Records:

[http://www.ah.dcr.state.nc.us/records/local/countyManagement\\_2006.pdf](http://www.ah.dcr.state.nc.us/records/local/countyManagement_2006.pdf)

CITIES:

Go to page 60 of this document to access Planning, Zoning, and Community Development Records:

<http://www.ah.dcr.state.nc.us/records/local/municipalschedulefinal.pdf>