

The following two questions were sent to Rich Ducker with the UNC School of Government. The words in black were written by DCA staff. The words in blue are Mr. Ducker's responses to the questions. Mr. Ducker's contact information is posted below.

QUESTION ONE

The scenario:

The County BOA has recently heard cases in which attorneys present evidence on behalf of the applicant. The attorneys are making 2-3 hour presentations per case. The board chair has attempted to limit the presentations/testimony. The attorneys protest on the grounds that one cannot limit testimony in a quasi-judicial proceeding. They ask to have this formally noted in the record.

The question:

In its simplest form, the question is this: Can a BOA limit testimony to a prescribed time frame and if so under what parameters?

It has been our understating that one cannot restrict the time a party has to speak during a quasi-judicial proceeding. However, one can stop the person when the information is repetitive or and the "board is not required to listen to evidence that is incompetent, irrelevant, immaterial, or unduly repetitious....No evidence should be received that has no reasonable tendency to prove or disprove a matter before the board or, if accepted, would have only minimal weight on the decision. "

From where does the no time-limit for speakers at a quasi-judicial proceeding originate? I assume it is a court case because it is not in the statutes.

I know of at least one community (a large city) that has time limits written into their rules of procedure, similar to public comment at legislative hearing. Is it advisable for a town/county to have written time limits?

The solution:

Here's what I see as the solution...but you guys know more than I, so please correct me where I am wrong.

Either in opening statements or before each case is heard, the Chair should state that the board will hear evidence pertaining to the case. The Chair should also state that the board will limit discussion to what is competent, relevant, material and not unduly repetitious. They could then prepare the presenter that they may be asked to move on to the next piece of evidence if the BOA determines that the evidence is not competent, relevant, etc.

The problem with the solution:

The problem with the solution is this...How does a board member know if and when the information is relevant, material, etc.? I can see how a board member may feel that something is irrelevant and the

applicant sees it as very relevant. Should the board put itself in the position of making this call during a meeting? It seems to set up an adversarial relationship between presenters and the board. I guess the board needs to be able to justify why the information is irrelevant, etc.

Question One:

It is generally understood that in a judicial proceeding in which due process is accorded to the parties they must have adequate time to present the facts of the case and to make the necessary arguments. Since our courts have also generally accorded due process rights to the applicant (if not also to other parties) in quasi-judicial proceedings, it is widely assumed that a party in these proceedings must be given the full opportunity to be heard.

This principle is, of course, subject to the idea that the board is not required to hear evidence that is incompetent, immaterial, or unduly repetitious.

The fly in the legal ointment is a North Carolina Court of Appeals case of *Howard v. City of Kinston*, 148 N.C. App. 238, 558 S.E.2d 221 (2002). In that case the court upheld Kinston's denial of a conditional-use permit for an apartment complex. The record showed that the city council (which heard the matter) limited the time for individuals to present evidence to three minutes each, groups to five minutes each, and each side to a total of five witnesses. Over the developer's objection, the court ruled that the city did not abuse its discretion in limiting the testimony.

It is true that quasi-judicial proceedings are not necessarily held to the same procedural standards as apply in a judicial proceeding. (That's what the term "quasi" is all about.) However, the bothersome thing about the *Howard* case is the fact that the key case the *Howard* court cited for the proposition that testimony could be arbitrarily limited was a case involving a rezoning, a legislative action where the rules of procedural due process do not apply.

I am uneasy about relying too heavily on *Howard*. I do not think it is wise to establish limits on the time that is allocated to a particular witness nor to establish limits on the number of people who testify. As a practical matter, a board never knows for sure what may come out of someone's mouth until that someone opens it. Given the often disorganized, diverse way those opposing a project proceed it is often not possible to predict what usable evidence will come from what direction.

One other consideration is the nature of the due process rights that third parties (often neighbors and environmental groups) possess. Our courts have not been particularly clear about the extent to which third parties have the same due process rights as the applicant. Limitations on testimony are more likely to compromise the effectiveness of third parties than they are to compromise the interests of the applicant. The more courts minimize the rights of third parties, the more they are likely to sanction limits on testimony.

I think your "solution" is practical and workable and is consistent with what I would recommend. But as you point out, it is difficult to ferret out what is irrelevant testimony and information. The only practical solution is when in doubt, let it in. There is relatively little risk in letting

in irrelevant information; there is some risk in making judgments on the fly to restrict testimony. Yes, I know that this means longer, possibly more contentious meetings, but that may be better than the alternative.

Finally, there is a lot a good chair, armed with a gavel or loud voice or the willingness to run a tight ship, can do. More power to the chair.

QUESTION TWO

The scenario:

Attorneys that come before the BOA representing applicants are hired to represent the applicant's position and best interest. In the attorney's attempt to represent their client's best interest, there are times when the information presented is less than truthful. This creates a conflict in that attorneys are sworn in and thereby agree to tell the truth. It is not possible to have attorneys present information without being sworn in because the evidence they produce would be inadmissible *because* they are not sworn in.

These are comments from the person who asked this questions: Lawyers aren't actually giving testimony of fact but rather eliciting testimony, so therefore, is there a real need to swear them in. If not sworn in then it appears to me 1) they can follow their professional mandate to best serve their client's interests while not taking an oath to tell the whole truth which may prevent them from doing this 2) allow us to place more limits on them in terms of how much time they have etc. because they are not a directly vested party, but rather a tool being utilized by a vested party.

The questions:

What recourse does a BOA have to address this conflict? How does a board deal with the fact that they are not getting truthful information from someone who is sworn in?

The solution:

After thinking about it, my solution is to accept that the board may not receive the best, most truthful information from an attorney (or anyone trying to have the outcome of the case decided in their favor). The BOAs job is to wade through the entire body of evidence to pull out the most competent, relevant, and material facts that support/disprove the standards.

If a BOA member knows that someone is blatantly lying the recourse is to charge that person with a misdemeanor as provided for in the statutes—correct?

Question Two:

Except for circumstances that are not relevant for our purposes, attorneys acting in a judicial or quasi-judicial proceeding are not expected to offer testimony. They are, however, expected to

orchestrate the presentation of oral written, and visual evidence that will make it possible for the client to prevail on the basis of the law. Since they are expected to argue the significant of facts and the like presented by others, they normally do not offer testimony of their own. Thus attorneys should not be expected to be sworn in. The whole idea of swearing in an attorney probably suggests that the attorney is doing something beyond his or her proper, legitimate role.

Nonetheless attorneys do have the right to highlight and summarize evidence and testimony offered by others and to make arguments as to what relevance facts can have when the law is applied. Thus the question is not so much whether attorneys are telling the truth as it is whether the attorney is summarizing a version of the truth already presented by someone else or whether the attorney is somehow trying to declare his or her own personal version of the truth. The former is perfectly legitimate; the latter is not unless the attorney wishes to act as a witness and be sworn. Even in “closing arguments” we would expect the attorney to cast evidence and testimony in the light most favorable to his or her client. If the attorney has minimized key items of information or exaggerated the significance of other facts, or even tried to cast opinions as “facts,” some of that is to be expected as part of the zealous representation of the interests of the client. Let’s face it: many, many aspects of quasi-judicial zoning cases involve figuring out what the future holds, which is often not easy and is at least subject to varying degrees of interpretation.

Courts speak not so much in terms of whether people are lying as they talk about the credibility of witness testimony and the like. One of the functions of the local board is to determine the credibility of witnesses (are they in a position to know whereof they speak, are their statements of facts colored by personal opinions or prejudices, etc.). Can a board refuse to believe a witness and reject the evidence presented by that person as being incompetent or irrelevant or lacking in credibility or weight? Absolutely. For most people a reminder by the chair that they are under oath is sufficient. For most attorneys a reminder by the chair to stick to the facts already presented by others also should be sufficient.

Yes, if a person while under oath during a proceeding before the board of adjustment willfully swears falsely, it is a criminal misdemeanor. The trick is proving it and getting the district attorney’s office to attach importance to the matter.

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