

Board of Adjustment Workshop

Foothills Higher Education Center, Morganton, NC
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Statutory Authority for Establishing Boards of Adjustment in North Carolina

Note: The excerpts from the North Carolina General Statutes provided below are from the North Carolina General Assembly Web site [<http://www.ncleg.net/gascripts/statutes/Statutes.asp>] and are as updated through the 2009 session.

Cities and Towns

North Carolina General Statutes Chapter 160A: Cities and Towns

Article 19: Planning and Regulation of Development

Part 3. Zoning.

§ 160A-388. Board of adjustment.

(a) The city council may provide for the appointment and compensation of a board of adjustment consisting of five or more members, each to be appointed for three years. In appointing the original members of such board, or in the filling of vacancies caused by the expiration of the terms of existing members, the council may appoint certain members for less than three years to the end that thereafter the terms of all members shall not expire at the same time. The council may, in its discretion, appoint and provide compensation for alternate members to serve on the board in the absence or temporary disqualification of any regular member or to fill a vacancy pending appointment of a member. Alternate members shall be appointed for the same term, at the same time, and in the same manner as regular members. Each alternate member, while attending any regular or special meeting of the board and serving on behalf of any regular member, shall have and may exercise all the powers and duties of a regular member. A city may designate a planning board or governing board to perform any or all of the duties of a board of adjustment in addition to its other duties.

(b) A zoning ordinance or those provisions of a unified development ordinance adopted pursuant to the authority granted in this Part shall provide that the board of adjustment shall hear and decide appeals from and review any order, requirement, decision, or determination made by an administrative official charged with the enforcement of that ordinance. An appeal may be taken by any person aggrieved or by an officer, department, board, or bureau of the city. Appeals shall be taken within times prescribed by the board of adjustment by general rule, by filing with the officer from whom the appeal is taken and with the board of adjustment a notice of appeal, specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken. An appeal stays all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board of adjustment, after notice of appeal has been filed with him, that because of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property or that because the violation charged is transitory in nature a stay would seriously interfere with enforcement of the ordinance. In that case proceedings shall not be stayed except by a restraining order, which may be granted by the board of adjustment or by a court of record on application, on notice to the officer from whom the

appeal is taken and on due cause shown. The board of adjustment shall fix a reasonable time for the hearing of the appeal, give due notice thereof to the parties, and decide it within a reasonable time. The board of adjustment may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination appealed from, and shall make any order, requirement, decision, or determination that in its opinion ought to be made in the premises. To this end the board shall have all the powers of the officer from whom the appeal is taken.

(c) The zoning ordinance may provide that the board of adjustment may permit special exceptions to the zoning regulations in specified classes of cases or situations as provided in subsection (d) of this section, not including variances in permitted uses, and that the board may use special and conditional use permits, all to be in accordance with the principles, conditions, safeguards, and procedures specified in the ordinance. The ordinance may also authorize the board to interpret zoning maps and pass upon disputed questions of lot lines or district boundary lines and similar questions as they arise in the administration of the ordinance. The board shall hear and decide all matters referred to it or upon which it is required to pass under any zoning ordinance.

(d) When practical difficulties or unnecessary hardships would result from carrying out the strict letter of a zoning ordinance, the board of adjustment shall have the power to vary or modify any of the regulations or provisions of the ordinance so that the spirit of the ordinance shall be observed, public safety and welfare secured, and substantial justice done. No change in permitted uses may be authorized by variance. Appropriate conditions, which must be reasonably related to the condition or circumstance that gives rise to the need for a variance, may be imposed on any approval issued by the board.

(e) The concurring vote of four-fifths of the members of the board shall be necessary to reverse any order, requirement, decision, or determination of any administrative official charged with the enforcement of an ordinance adopted pursuant to this Part, or to decide in favor of the applicant any matter upon which it is required to pass under any ordinance, or to grant a variance from the provisions of the ordinance. For the purposes of this subsection, vacant positions on the board and members who are disqualified from voting on a quasi-judicial matter shall not be considered "members of the board" for calculation of the requisite supermajority if there are no qualified alternates available to take the place of such members.

(e1) A member of the board or any other body exercising quasi-judicial functions pursuant to this Article shall not participate in or vote on any quasi-judicial matter in a manner that would violate affected persons' constitutional rights to an impartial decision maker. Impermissible conflicts include, but are not limited to, a member having a fixed opinion prior to hearing the matter that is not susceptible to change, undisclosed ex parte communications, a close familial, business, or other associational relationship with an affected person, or a financial interest in the outcome of the matter. If an objection is raised to a member's participation and that member does not recuse himself or herself, the remaining members shall by majority vote rule on the objection.

(e2) Every decision of the board shall be subject to review by the superior court by proceedings in the nature of certiorari. Any petition for review by the superior court shall be filed with the clerk of superior court within 30 days after the decision of the board is filed in such office as the ordinance specifies, or after a written copy thereof is delivered to every aggrieved party who has filed a written request for such copy with the secretary or chairman of the board at the time of its hearing of the case, whichever is later. The decision of the board may be delivered

to the aggrieved party either by personal service or by registered mail or certified mail return receipt requested.

(f) The chairman of the board of adjustment or any member temporarily acting as chairman, is authorized in his official capacity to administer oaths to witnesses in any matter coming before the board.

(g) The board of adjustment may subpoena witnesses and compel the production of evidence. If a person fails or refuses to obey a subpoena issued pursuant to this subsection, the board of adjustment may apply to the General Court of Justice for an order requiring that its order be obeyed, and the court shall have jurisdiction to issue these orders after notice to all proper parties. No testimony of any witness before the board of adjustment pursuant to a subpoena issued in exercise of the power conferred by this subsection may be used against the witness in the trial of any civil or criminal action other than a prosecution for false swearing committed on the examination. Any person who, while under oath during a proceeding before the board of adjustment, willfully swears falsely, is guilty of a Class 1 misdemeanor. (1923, c. 250, s. 7; C.S., s. 2776(x); 1929, c. 94, s. 1; 1947, c. 311; 1949, c. 979, ss. 1, 2; 1963, c. 1058, s. 3; 1965, c. 864, s. 2; 1967, c. 197, s. 1; 1971, c. 698, s. 1; 1977, c. 912, ss. 9-12; 1979, c. 50; 1979, 2nd Sess., c. 1247, s. 37; 1981, c. 891, s. 7; 1985, c. 397, s. 2; c. 689, s. 30; 1991, c. 512, s. 2; 1993, c. 539, s. 1088; 1994, Ex. Sess., c. 24, s. 14(c); 2005-418, s. 8(a); 2009-421, s. 5.)

Counties

North Carolina General Statutes Chapter 153A: Counties

Article 18: Planning and Regulation of Development

Part 3. Zoning

§ 153A-345. Board of adjustment.

(a) The board of commissioners may provide for the appointment and compensation, if any, of a board of adjustment consisting of at least five members, each to be appointed for three years. In appointing the original members of the board, or in filling vacancies caused by the expiration of the terms of existing members, the board of commissioners may appoint some members for less than three years to the end that thereafter the terms of all members do not expire at the same time. The board of commissioners may provide for the appointment and compensation, if any, of alternate members to serve on the board in the absence or temporary disqualification of any regular member or to fill a vacancy pending appointment of a member. Alternate members shall be appointed for the same term, at the same time, and in the same manner as regular members. Each alternate member, while attending any regular or special meeting of the board and serving on behalf of a regular member, has and may exercise all the powers and duties of a regular member. If the board of commissioners does not zone the entire territorial jurisdiction of the county, each designated zoning area shall have at least one resident as a member of the board of adjustment.

A county may designate a planning board or the board of county commissioners to perform any or all of the duties of a board of adjustment in addition to its other duties.

(b) A zoning ordinance or those provisions of a unified development ordinance adopted pursuant to the authority granted in this Part shall provide that the board of adjustment shall hear and decide appeals from and review any order, requirement, decision, or determination made by

an administrative official charged with the enforcement of that ordinance. Any person aggrieved or any officer, department, board, or bureau of the county may take an appeal. Appeals shall be taken within times prescribed by the board of adjustment by general rule, by filing with the officer from whom the appeal is taken and with the board of adjustment a notice of appeal, specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which action appealed from was taken. An appeal stays all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board of adjustment, after notice of appeal has been filed with him, that because of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property or that because the violation charged is transitory in nature a stay would seriously interfere with enforcement of the ordinance. In that case proceedings may not be stayed except by a restraining order, which may be granted by the board of adjustment or by a court of record on application, on notice to the officer from whom the appeal is taken and on due cause shown. The board of adjustment shall fix a reasonable time for the hearing of the appeal, give due notice of the appeal to the parties, and decide the appeal within a reasonable time. The board of adjustment may reverse or affirm, in whole or in part, or may modify the order, requirement, decision, or determination appealed from, and shall make any order, requirement, decision, or determination that in its opinion ought to be made in the circumstances. To this end the board has all of the powers of the officer from whom the appeal is taken.

(c) The zoning ordinance may provide that the board of adjustment may permit special exceptions to the zoning regulations in specified classes of cases or situations as provided in subsection (d) of this section, not including variances in permitted uses, and that the board may use special and conditional use permits, all to be in accordance with the principles, conditions, safeguards, and procedures specified in the ordinance. The ordinance may also authorize the board to interpret zoning maps and pass upon disputed questions of lot lines or district boundary lines and similar questions that may arise in the administration of the ordinance. The board shall hear and decide all matters referred to it or upon which it is required to pass under the zoning ordinance.

(d) When practical difficulties or unnecessary hardships would result from carrying out the strict letter of a zoning ordinance, the board of adjustment shall have the power to vary or modify any regulation or provision of the ordinance so that the spirit of the ordinance is observed, public safety and welfare secured, and substantial justice done. No change in permitted uses may be authorized by variance. Appropriate conditions, which must be reasonably related to the condition or circumstance that gives rise to the need for a variance, may be imposed on any approval issued by the board.

(e) The board of adjustment, by a vote of four-fifths of its members, may reverse any order, requirement, decision, or determination of an administrative officer charged with enforcing an ordinance adopted pursuant to this Part, or may decide in favor of the applicant a matter upon which the board is required to pass under the ordinance, or may grant a variance from the provisions of the ordinance. For the purposes of this subsection, vacant positions on the board and members who are disqualified from voting on a quasi-judicial matter shall not be considered "members of the board" for calculation of the requisite supermajority if there are no qualified alternates available to take the place of such members.

(e1) A member of the board or any other body exercising quasi-judicial functions pursuant to this Article shall not participate in or vote on any quasi-judicial matter in a manner that would

violate affected persons' constitutional rights to an impartial decision maker. Impermissible conflicts include, but are not limited to, a member having a fixed opinion prior to hearing the matter that is not susceptible to change, undisclosed ex parte communications, a close familial, business, or other associational relationship with an affected person, or a financial interest in the outcome of the matter. If an objection is raised to a member's participation and that member does not recuse himself or herself, the remaining members shall by majority vote rule on the objection.

(e2) Each decision of the board is subject to review by the superior court by proceedings in the nature of certiorari. Any petition for review by the superior court shall be filed with the clerk of superior court within 30 days after the decision of the board is filed in such office as the ordinance specifies, or after a written copy thereof is delivered to every aggrieved party who has filed a written request for such copy with the secretary or chairman of the board at the time of its hearing of the case, whichever is later. The decision of the board may be delivered to the aggrieved party either by personal service or by registered mail or certified mail return receipt requested.

(f) The chairman of the board of adjustment or any member temporarily acting as chairman may in his official capacity administer oaths to witnesses in any matter coming before the board.

(g) The board of adjustment may subpoena witnesses and compel the production of evidence. If a person fails or refuses to obey a subpoena issued pursuant to this subsection, the board of adjustment may apply to the General Court of Justice for an order requiring that its order be obeyed, and the court shall have jurisdiction to issue these orders after notice to all proper parties. No testimony of any witness before the board of adjustment pursuant to a subpoena issued in exercise of the power conferred by this subsection may be used against the witness in the trial of any civil or criminal action other than a prosecution for false swearing committed on the examination. Any person who, while under oath during a proceeding before the board of adjustment, willfully swears falsely, is guilty of a Class 1 misdemeanor. (1959, c. 1006, s. 1; 1965, c. 194, s. 4; 1967, c. 1208, ss. 5-7; 1973, c. 822, s. 1; 1979, c. 611, s. 4; c. 635; 1981, c. 891, s. 8; 1985, c. 397, s. 1; 2005-418, s. 8(b); 2009-421, s. 6.)

North Carolina General Statutes
on
Appeals of Quasi-Judicial Decisions to Superior Court

Note: The excerpts from the North Carolina General Statutes provided below are from the North Carolina General Assembly Web site [<http://www.ncleg.net/gascripts/statutes/Statutes.asp>] and are as updated through the 2009 session.

Cities and Towns

North Carolina General Statutes Chapter 160A: Cities and Towns

Article 19: Planning and Regulation of Development

Part 3. Zoning.

§ 160A-393. Appeals in the nature of certiorari.

(a) Applicability. – This section applies to appeals of quasi-judicial decisions of decision-making boards when that appeal is to superior court and in the nature of certiorari as required by this Article.

(b) For purposes of this section, the following terms mean:

- (1) Decision-making board. – A city council, planning board, board of adjustment, or other board making quasi-judicial decisions appointed by the city council under this Article or under comparable provisions of any local act or any interlocal agreement authorized by law.
- (2) Person. – Any legal entity authorized to bring suit in the legal entity's name.
- (3) Quasi-judicial decision. – A decision involving the finding of facts regarding a specific application of an ordinance and the exercise of discretion when applying the standards of the ordinance. Quasi-judicial decisions include decisions involving variances, special and conditional use permits, and appeals of administrative determinations. Decisions on the approval of site plans are quasi-judicial in nature if the ordinance authorizes a decision-making board to approve or deny the site plan based not only upon whether the application complies with the specific requirements set forth in the ordinance, but also on whether the application complies with one or more generally stated standards requiring a discretionary decision on the findings of fact to be made by the decision-making board.

(c) Filing the Petition. – An appeal in the nature of certiorari shall be initiated by filing with the superior court a petition for writ of certiorari. The petition shall:

- (1) State the facts that demonstrate that the petitioner has standing to seek review.
- (2) Set forth the grounds upon which the petitioner contends that an error was made.
- (3) Set forth with particularity the allegations and facts, if any, in support of allegations that, as the result of impermissible conflict as described in G.S. 160A-388(e1), or locally adopted conflict rules, the decision-making body was not sufficiently impartial to comply with due process principles.

(4) Set forth the relief the petitioner seeks.

(d) Standing. – A petition may be filed under this section only by a petitioner who has standing to challenge the decision being appealed. The following persons shall have standing to file a petition under this section:

(1) Any person meeting any of the following criteria:

- a. Has an ownership interest in the property that is the subject of the decision being appealed, a leasehold interest in the property that is the subject of the decision being appealed, or an interest created by easement, restriction, or covenant in the property that is the subject of the decision being appealed.
- b. Has an option or contract to purchase the property that is the subject of the decision being appealed.
- c. Was an applicant before the decision-making board whose decision is being appealed.

(2) Any other person who will suffer special damages as the result of the decision being appealed.

(3) An incorporated or unincorporated association to which owners or lessees of property in a designated area belong by virtue of their owning or leasing property in that area, or an association otherwise organized to protect and foster the interest of the particular neighborhood or local area, so long as at least one of the members of the association would have standing as an individual to challenge the decision being appealed, and the association was not created in response to the particular development or issue that is the subject of the appeal.

(4) A city whose decision-making board has made a decision that the council believes improperly grants a variance from or is otherwise inconsistent with the proper interpretation of an ordinance adopted by that council.

(e) Respondent. – The respondent named in the petition shall be the city whose decision-making board made the decision that is being appealed, except that if the petitioner is a city that has filed a petition pursuant to subdivision (4) of subsection (d) of this section, then the respondent shall be the decision-making board. If the petitioner is not the applicant before the decision-making board whose decision is being appealed, the petitioner shall also name that applicant as a respondent. Any petitioner may name as a respondent any person with an ownership or leasehold interest in the property that is the subject of the decision being appealed who participated in the hearing, or was an applicant, before the decision-making board.

(f) Writ of Certiorari. – Upon filing the petition, the petitioner shall present the petition and a proposed writ of certiorari to the clerk of superior court of the county in which the matter arose. The writ shall direct the respondent city, or the respondent decision-making board if the petitioner is a city that has filed a petition pursuant to subdivision (4) of subsection (d) of this section, to prepare and certify to the court the record of proceedings below within a specified date. The writ shall also direct that the petitioner shall serve the petition and the writ upon each respondent named therein in the manner provided for service of a complaint under Rule 4(j) of the Rules of Civil Procedure, except that, if the respondent is a decision-making board, the petition and the writ shall be served upon the chair of that decision-making board. Rule 4(j)(5)d. of the Rules of Civil Procedure shall apply in the event the chair of a decision-making board cannot be found. No summons shall be issued. The clerk shall issue the writ without notice to the

respondent or respondents if the petition has been properly filed and the writ is in proper form. A copy of the executed writ shall be filed with the court.

(g) Answer to the Petition. – The respondent may, but need not, file an answer to the petition, except that, if the respondent contends that any petitioner lacks standing to bring the appeal, that contention must be set forth in an answer served on all petitioners at least 30 days prior to the hearing on the petition.

(h) Intervention. – Rule 24 of the Rules of Civil Procedure shall govern motions to intervene as a petitioner or respondent in an action initiated under this section with the following exceptions:

- (1) Any person described in subdivision (1) of subsection (d) of this section shall have standing to intervene and shall be allowed to intervene as a matter of right.
- (2) Any person, other than one described in subdivision (1) of subsection (d) of this section, who seeks to intervene as a petitioner must demonstrate that the person would have had standing to challenge the decision being appealed in accordance with subdivisions (2) through (4) of subsection (d) of this section.
- (3) Any person, other than one described in subdivision (d)(1) of this section, who seeks to intervene as a respondent must demonstrate that the person would have had standing to file a petition in accordance with subdivisions (2) through (4) of subsection (d) of this section if the decision-making board had made a decision that is consistent with the relief sought by the petitioner.

(i) The Record. – The record shall consist of all documents and exhibits submitted to the decision-making board whose decision is being appealed, together with the minutes of the meeting or meetings at which the decision being appealed was considered. Upon request of any party, the record shall also contain an audio or videotape of the meeting or meetings at which the decision being appealed was considered if such a recording was made. Any party may also include in the record a transcript of the proceedings, which shall be prepared at the cost of the party choosing to include it. The parties may agree, or the court may direct, that matters unnecessary to the court's decision be deleted from the record or that matters other than those specified herein be included. The record shall be bound and paginated or otherwise organized for the convenience of the parties and the court. A copy of the record shall be served by the municipal respondent, or the respondent decision-making board, upon all petitioners within three days after it is filed with the court.

(j) Hearing on the Record. – The court shall hear and decide all issues raised by the petition by reviewing the record submitted in accordance with subsection (h) of this section. Except that the court may, in its discretion, allow the record to be supplemented with affidavits, testimony of witnesses, or documentary or other evidence if, and to the extent that, the record is not adequate to allow an appropriate determination of the following issues:

- (1) Whether a petitioner or intervenor has standing.
- (2) Whether, as a result of impermissible conflict as described in G.S. 160A-388(e1), or locally adopted conflict rules, the decision-making body was not sufficiently impartial to comply with due process principles.
- (3) Whether the decision-making body erred for the reasons set forth in sub-subdivisions a. and b. of subdivision (1) of subsection (k) of this section.

(k) Scope of Review.

- (1) When reviewing the decision of a decision-making board under the provisions of this section, the court shall ensure that the rights of petitioners have not been prejudiced because the decision-making body's findings, inferences, conclusions, or decisions were:
 - a. In violation of constitutional provisions, including those protecting procedural due process rights.
 - b. In excess of the statutory authority conferred upon the city or the authority conferred upon the decision-making board by ordinance.
 - c. Inconsistent with applicable procedures specified by statute or ordinance.
 - d. Affected by other error of law.
 - e. Unsupported by substantial competent evidence in view of the entire record.
 - f. Arbitrary or capricious.
- (2) When the issue before the court is whether the decision-making board erred in interpreting an ordinance, the court shall review that issue de novo. The court shall consider the interpretation of the decision-making board, but is not bound by that interpretation, and may freely substitute its judgment as appropriate.
- (3) The term "competent evidence," as used in this subsection, shall not preclude reliance by the decision-making board on evidence that would not be admissible under the rules of evidence as applied in the trial division of the General Court of Justice if (i) the evidence was admitted without objection or (ii) the evidence appears to be sufficiently trustworthy and was admitted under such circumstances that it was reasonable for the decision-making board to rely upon it. The term "competent evidence," as used in this subsection, shall not be deemed to include the opinion testimony of lay witnesses as to any of the following:
 - a. The use of property in a particular way would affect the value of other property.
 - b. The increase in vehicular traffic resulting from a proposed development would pose a danger to the public safety.
 - c. Matters about which only expert testimony would generally be admissible under the rules of evidence.

(1) Decision of the Court. – Following its review of the decision-making board in accordance with subsection (k) of this section, the court may affirm the decision, reverse the decision and remand the case with appropriate instructions, or remand the case for further proceedings. If the court does not affirm the decision below in its entirety, then the court shall be guided by the following in determining what relief should be granted to the petitioners:

- (1) If the court concludes that the error committed by the decision-making board is procedural only, the court may remand the case for further proceedings to correct the procedural error.
- (2) If the court concludes that the decision-making board has erred by failing to make findings of fact such that the court cannot properly perform its function, then the court may remand the case with appropriate instructions so long as the record contains substantial competent evidence that could support the

decision below with appropriate findings of fact. However, findings of fact are not necessary when the record sufficiently reveals the basis for the decision below or when the material facts are undisputed and the case presents only an issue of law.

- (3) If the court concludes that the decision by the decision-making board is not supported by substantial competent evidence in the record or is based upon an error of law, then the court may remand the case with an order that directs the decision-making board to take whatever action should have been taken had the error not been committed or to take such other action as is necessary to correct the error. Specifically:
- a. If the court concludes that a permit was wrongfully denied because the denial was not based on substantial competent evidence or was otherwise based on an error of law, the court may remand with instructions that the permit be issued, subject to reasonable and appropriate conditions.
 - b. If the court concludes that a permit was wrongfully issued because the issuance was not based on substantial competent evidence or was otherwise based on an error of law, the court may remand with instructions that the permit be revoked.

(m) Ancillary Injunctive Relief. – Upon motion of a party to a proceeding under this section, and under appropriate circumstances, the court may issue an injunctive order requiring any other party to that proceeding to take certain action or refrain from taking action that is consistent with the court's decision on the merits of the appeal. (2009-421, s. 1(a).)

Counties

North Carolina General Statutes Chapter 153A: Counties

Article 18: Planning and Regulation of Development

Part 3. Zoning

§ 153A-349. Appeals in the nature of certiorari.

(a) Whenever appeals of quasi-judicial decisions of decision-making boards are to superior court and in the nature of certiorari as required by this Article, the provisions of G.S. 160A-393 shall be applicable to those appeals.

(b) For purposes of this section, as used in G.S. 160A-393, the term "city council" shall be deemed to refer to the "board of commissioners," and the term "city" or "municipal" shall be deemed to refer to the "county."

(c) For purposes of this section, the "impermissible conflict as described in G.S. 160A-388(e1)" shall mean "impermissible conflict as described in G.S. 153A-345(e1)." (2009-421, s. 1(b).)

Board of Adjustment Training Material

by

David W. Owens, Professor of Public Law and Government,
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(Revised by the North Carolina Department of Commerce, Division of Community Assistance)

Note to users:

The document that follows is a revised version of a handout prepared by David W. Owens, Professor of Public Law and Government in the School of Government at the University of North Carolina at Chapel Hill, for a June 23, 2005 training he conducted (via teleconference) for boards of adjustment. David Owens has granted the North Carolina Department of Commerce, Division of Community Assistance (DCA), Western Regional Office (WRO), permission to use his handout for training purposes.

In 2005, the North Carolina General Assembly adopted amendments to the planning and zoning statutes, including those applicable to boards of adjustment (G.S. 160A-388 and G.S. 153A-345). Most of the amendments took effect on January 1, 2006. In 2009, the General Assembly made some minor amendments to G.S. 160A-388 and G.S. 153A-345 and enacted two new sections, G.S. 160A-393 and G.S. 153A-349, regarding judicial review of quasi-judicial decisions. DCA WRO staff members have updated various sections of the original handout by David Owens to reflect the amendments to state statutes. Such updates as well as other minor changes are included in the attached document.

The document by David Owens contains a variety of “problems for discussion” which he used during the teleconference. DCA has provided suggested answers and additional information on such discussion items in an attached document.

*The NC Department of Commerce, Division of Community Assistance, Western Regional Office
Revised June 2010*

I. Types of Zoning Decisions

Zoning 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 zoning decisions affect the entire community by setting general policies applicable through the zoning ordinance. They include decisions to adopt, amend, or repeal the zoning 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 zoning 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.

Quasi-judicial decisions involve the application of zoning policies to individual situations. Examples include variances, special- and conditional-use permits (even if issued by the governing board or planning 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 zoning 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.

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. As of January 1, 2006, state statutes require that planning boards provide governing boards with written comments on the consistency of proposed zoning amendments with comprehensive and other locally adopted plans.

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 a zoning ordinance, including issuing basic permits, interpreting the zoning 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.

Local Government Planning Functions and Types of Decisions

<u>Agency</u>	<u>Primary Role</u>	<u>Other Possibilities</u>
GOVERNING BOARD: (city council, county board of commissioners)	<i>Legislative decisions:</i> adopts ordinances, amendments, policy statements, budgets; approves acquisitions; makes appointments to other bodies.	May also serve as planning board; may serve as board of adjustment; may approve subdivision plats and special or conditional use permits.
PLANNING BOARD: (planning board; planning commission; planning committee of governing board)	<i>Advisory decisions:</i> sponsors planning studies; recommends policies, advises governing board; coordinates public participation; must recommend initial zoning ordinance; must review zoning amendments to determine consistency with the comprehensive plan and any other relevant plans.	May also serve as board of adjustment; may approve special use permits; may approve or review subdivision plats.
BOARD OF ADJUSTMENT:	<i>Quasi-judicial decisions:</i> hears zoning appeals, variances, special or conditional use permits.	May also serve as planning board; may advise governing board on need for zoning ordinance amendments.
STAFF: (planning department, inspections department, community development department)	<i>Administrative decisions:</i> issues permits, conducts technical studies, initiates enforcement and monitoring; advises manager.	May also approve subdivision plats.

Some Key Differences Between Legislative and Quasi-Judicial Zoning Decisions

	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, and, for map amendments, mailed notice to owners and neighbors and on-site posting of property required	Only notice to parties required unless ordinance mandates otherwise
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
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 (however, for zoning amendment decisions, governing board must adopt statement addressing plan consistency, reasonableness and public interests furthered)	Written findings of fact required
Voting	Simple majority, but if protest petition filed on rezoning (not applicable to counties), 3/4 required	4/5 to decide in favor of applicant, but if special/conditional use permit is issued by governing board or planning board, only a simple majority required
Standard for decision	Creates standard	Can only apply standards previously set in ordinance
Conditions	Not allowed (unless part of a conditional zoning approval if based on adopted ordinances, plans, expected impacts, etc., and if mutually acceptable to applicant and government)	Allowed if based on standard in ordinance
Time to initiate judicial review	Two months to file challenge	30 days to file challenge
Conflict of interest	Requires direct financial interest to disqualify	A fixed opinion that is unlikely to change, undisclosed ex parte communications, a close familial, business or other associational relationship with an affected person or any financial interest disqualifies
Creation of vested right	No (but may for conditional zoning approvals, if substantial expenditures are made in reliance on them)	Yes, if substantial expenditures are made in reliance on it

II. Preliminary Matters

Board membership. State law requires that a board of adjustment have at least five members and that members be appointed to three-year terms. Members may be removed from the board during their term only for cause. If a city exercises extraterritorial jurisdiction, it must provide for appointment of ETJ members to the board. Most boards have alternate members who participate in a case when regular members are absent or must be excused due to a conflict.

Notice of hearings. A local government must give due *notice* of its hearings to all parties to the case. Individual mail notice is the usual method of doing this. The zoning statutes impose no special 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 sign on the site, 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 seven 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. Board of adjustment members 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.

III. Collecting Evidence

Subpoenas. City boards conducting these hearings have the authority to issue subpoenas to compel testimony or production of evidence deemed necessary to determine the matter. Effective January 1, 2006, county boards now have explicit statutory authority to issue subpoenas as well, as a result of amendments to state statutes adopted by the General Assembly in August of 2005.

Burden. The person requesting a variance or special/conditional 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 a permit. 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, many 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 of the board receiving the testimony (it may also be administered by the city or county clerk or 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 and opinion evidence (unless offered by a properly qualified expert witness) 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.

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 special 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 a Realtor 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 weight to accord each piece of evidence.

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. Though not legally required to do so, most boards make audiotapes of the hearings in case a transcript is needed if the case is appealed to the courts.

Some Problems for Discussion: Hearing Procedures

1. A special use permit application is scheduled to come before your board next week. Are any of the following contacts improper?

a. The applicant is a casual acquaintance of a board member. She sees the member at a social gathering and tells her a little bit about her case.

b. The applicant's attorney calls a board member the week before the hearing and gives him "strictly factual" background information about the case.

c. A board member stops by town hall the day before the hearing to get a quick briefing on the cases that are coming up from the staff.

d. A board member drives by the site the morning of the hearing to get a first hand view of the property.

e. A board member drives by the site and stop to get a closer look. A neighbor comes over and talks about conditions at the site.

2. Your board is considering a variance petition. A representative of the neighbors appears at the hearing and presents a petition signed by 50 neighbors opposing the variance. Can the board consider the petition?

IV. Summarizing Evidence and Findings

Findings. *Written findings of fact* are required. The board must specify what it determines the facts to be and must document the basis for the decision. Simply repeating the standards for the ordinance and noting each is met is generally not sufficient, especially where there is conflicting evidence. 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.”

Some Practical Issues Relative to Findings of Fact

1. What format is used for the written findings of fact?
 - Separate document
 - Part of minutes
2. Who prepares the proposed findings?
 - Zoning staff
 - Applicant
 - BOA’s attorney
 - BOA members
 - Clerk to board
3. When are draft findings prepared?
 - Prior to the hearing
 - At the conclusion of the hearing
 - After the hearing
4. When are the findings approved by the Board?
 - At the conclusion of the hearing
 - When the chair signs after the meeting
 - When the board approves its minutes at a subsequent meeting

Sample findings. A sample of the written findings for a simple variance is set out below.

Sample Findings of Fact for a Simple Variance

Findings of Fact

1. Mary Smith is the owner of a parcel located at 575 E. Front St. in Owensboro, N.C. and has owned this parcel since September 1967.
2. The lot at 575 E. Front St. has the following dimensions: 150 feet frontage on E. Front St. and a depth of 250 feet, as is shown on Attachment 1, the applicant's site plan.
3. The lot at 575 E. Front St. is currently vacant.
4. The lot at 575 E. Front St. is currently zoned R-1, which is a single family residential zoning district with required side yard setbacks of fifteen feet. The lot has been zoned R-1 since the adoption of the Owensboro zoning ordinance in 1975.
5. There are wetlands along the east and rear portions of the lot, extending some 60 feet from the east property line. The wetlands are accurately depicted on Attachment 1.
6. On June 1, 2005, Mary Smith applied for a certificate of zoning compliance and building permit for a single-family residence at 575 E. Front St.
7. On June 7, 2005 Bernard Simmons, town zoning inspector, denied the permit application of Mary Smith on the basis that the proposed structure would violate the side yard setbacks on the west side of the property.
8. On June 15, 2005 Mary Smith submitted a complete petition for a variance of five feet from the side yard setback requirement in order to locate a residence as depicted in Attachment 2, Smith petition for a variance.
9. On July 16, 2005, the Owensboro Board of Adjustment conducted a duly advertised and noticed hearing on the Smith variance petition.
10. State and federal permit requirements prevent location of any residential structure on or over the wetlands depicted in Attachment 1.
11. There is insufficient space on the lot to construct a residence of the size required by restrictive covenants and in a manner compatible with the surrounding property while avoiding the wetland area and meeting the side yard setback.
12. If no residence can be constructed on the lot, there is no other practical use of the lot that has reasonable value.
13. Construction of a residence ten feet from the west side property line will not have a negative impact on the adjoining property.
14. Construction of a residence ten feet from the west property line will not impair emergency vehicle access, create a fire hazard, or otherwise be contrary to public health and safety.

Conclusion and Findings

1. Based on the application, the evidence submitted, and the above findings of fact, the board of adjustment by unanimous vote of 5-0 on July 16, 2005 concludes that Mary Smith meets each of the four standards set forth for a variance in Section 10.4 of the Owensboro Zoning Ordinance.

2. Mary Smith is hereby granted a variance to construct a residence to be located ten feet from the west property line of her lot at 575 E. Front St., Owensboro, N.C.
3. This variance is conditioned upon a requirement that the ten feet between the residence depicted on Attachment 2 and the west property line be maintained as an undisturbed vegetated buffer.

Board Chair

I certify that the above decision was filed with the clerk to the board of adjustment on _____, 2005 and mailed to the petitioner and each person making a written request for a copy of the decision at the hearing. The mailed copies were deposited in the U.S. Mail with postage affixed, addressed to the attached list of recipients, on _____, 2005.

Clerk to the Board of Adjustment

V. Voting on a Decision

Quorum and voting. The statutes do not set a special *quorum* for boards of adjustment. Some ordinances specify a majority of the board; others use a higher four-fifths requirement. Per the statutes, many decisions of the board - such as granting a variance, granting a special or conditional use permit, or overruling a determination of the zoning administrator - require a *four-fifths majority* vote. A few local governments have local legislation that changes the required majority. Amendments to the statutes effective January 1, 2006, specify that vacant positions on the board and members who are disqualified from voting on a quasi-judicial matter shall not be considered “members of the board” for purposes of calculating the requisite four-fifths vote if there are no qualified alternates to take the place of such members.

Voting Calculations

1. You have a five-member board of adjustment. One member is absent and no alternate is present. A motion to grant a variance is adopted by a 3-1 vote. Does the petitioner get the variance?
2. You have a five-member board. A motion is made to deny a variance. That motion passes by a 3-2 vote. Is the variance denied?
3. You have a ten-member board with no alternates. Two members have been recused from consideration of a variance due to a conflict of interest. A motion to grant a variance is adopted by a 7-1 vote. Does the petitioner get the variance?

Precedents. Prior decisions are not legally binding on a board of adjustment. 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 of adjustment may not hear a 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 gives parties to a quasi-judicial decision a legal right to an *impartial decision maker*. Thus boards of adjustment must avoid conflicts of interest.

North Carolina courts have held that a direct and substantial financial impact disqualifies a member from participating. In addition to financial impact, bias (defined as a predetermined opinion that is not susceptible to change) and close family or business ties also disqualify members from participating. Nonparticipation includes the discussion as well as voting. Amendments to state statutes effective January 1, 2006 codify past court decisions regarding conflicts of interest. The statutes now specify that no board member is to take part in the hearing, consideration, or determination of any case in which he has a fixed opinion prior to hearing the matter that is not susceptible to change, undisclosed ex parte communications, a close familial, business, or other associational relationship with an affected person, or a financial interest in the outcome of the matter. If an objection is raised as to a member's participation and that member does not recuse himself, the remaining members are to rule, by majority vote, on the objection.

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.

Some Problems for Discussion: Conflicts

A special use permit comes before your board of adjustment. Is it permissible for a board member to participate in the board's decision in the following instances?

- a. The board member is a Realtor who has listed the property for sale and this permit would likely double the asking price of the property.

- b. The applicant is the board member's father-in-law.

- c. The applicant is the board member's church.

- d. In a case where a board member has a conflict of interest, can the member abstain from voting but participate in the debate and discussion prior to the vote being called?

VI. 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 allow 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 of 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.

1. To qualify for a variance, the applicant must show that strict application of the rules would create *practical difficulties and unnecessary hardships*. Tests used to determine unnecessary hardship include:

- No reasonable use of the property without variance
- Hardship results from application of ordinance
- Hardship is suffered by the property
- Hardship is not self-created
- Hardship is peculiar to the property

2. The applicant must also 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. Finally, 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 a 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.

Some Problems for Discussion: Variances

Your board is considering a variance petition. Are any of the following factors sufficient to qualify the applicant for a variance?

a. It will cost an extra \$3,000 in construction cost in order to get a driveway in, avoid some wetlands on the site, and still meet the setback requirements, so a setback variance is requested that would reduce those costs to \$1,000.

b. The applicant is physically incapacitated and asks for relief from the elevation requirement in a flood hazard area.

c. The ordinance does not allow off-premise advertising. The applicant has a commercial building site that is not visible from the road. They ask for a variance to put a sign up on the adjoining lot, which is visible from the road.

Special and Conditional 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.

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 the 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.

Some Problems for Discussion: Special and Conditional Use Permits

Your board is considering an application for a special use permit. Your ordinance includes the four general standards for the permit set out on the previous page. How would you deal with the following evidence?

a. The person who lives next door to the proposed project appears at the hearing and says the project would harm her property values. She offers a petition signed by most of the property owners on the block stating they oppose the project and believe it would hurt their property values.

b. A person who lives down the street from the proposed project appears at the hearing and asks the project be denied because of its traffic impacts. He states that he has lived on this street for ten years, he has frequently seen children playing in the street, and any increase in traffic would be hazardous.

c. A large contingent of neighbors and community activists appear to oppose a special use permit for a proposed tavern. They unanimously and strongly contend this is an unsuitable and unseemly use for this site and would be detrimental to the strong family values established in this predominately residential area. They also note that a previous nightclub owned by the applicant elsewhere in the town had numerous problems with the law and unruly patrons before it closed a few years ago.

Appeals and Interpretations

Real cases required. A board of adjustment is not allowed to issue advisory opinions. The board may only hear actual cases where an initial staff decision has already been issued and is being appealed.

Time. Appeals must be filed within the time period set by the ordinance. The board cannot waive this deadline. If no time is set, they must be filed 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.

VII. Judicial Appeals of Quasi-judicial Decisions

Quasi-judicial zoning decisions can be appealed to *superior court* (not to the governing board). Appeals must be made within 30 days of mailing a written decision to the parties (and anyone who requested a written decision at the hearing) and filing of the written decision with the board's clerk, whichever is later (the time is not measured from the date of decision).

In 2009, the North Carolina General Assembly amended the General Statutes to add G.S. 160A-393 for cities and G.S. 153A-349 for counties in order to codify procedures for judicial review of local government quasi-judicial land use decisions. The new statutes outline what a petition for writ of certiorari must contain and specify the entities that have standing to submit such petitions. Court review is based on the record developed at the local government board's hearing, however the court may allow the record to be supplemented with affidavits or testimony regarding standing, alleged impermissible conflicts of interest, and the legal issues of constitutionality or statutory authority for the decision.

The statutes referenced above codify the scope of review to be used by the court for appeals of quasi-judicial decisions. The court may consider whether a board's decision violated constitutional provisions, exceeded statutory authority, was inconsistent with statutory or ordinance procedures, was affected by an error of law, was unsupported by substantial, competent evidence in the record, or was arbitrary and capricious. The statutes address the deference the court should give to ordinance interpretations by local government boards, board consideration of hearsay evidence and opinion testimony by lay witnesses, and remedies available for the court's consideration.

Note : *Copies of G.S. 160A-393 and G.S. 153A-349, both titled "Appeals in the nature of certiorari," can be found on pages 8 through 12 of this packet.*

VIII. Informal Considerations for Board of Adjustment Effectiveness

Try to assure that all board members, parties, and those attending meetings and hearing *understand the role* of the board and its legal responsibilities.

Put key items in *writing*. Among these are:

- By-laws or rules of procedure, including the board's policies on avoiding conflicts of interest;
- Minutes of each meeting; and
- Findings and conclusions on each individual quasi-judicial decision.

Conduct *effective meetings and hearings*. The board should generally have and follow a regular meeting schedule. Each meeting should have a clear agenda and should be conducted following the board's rules of procedure. It is helpful to include an explanation of rules and purposes of sessions to the public at the beginning of each session. A brochure or handout on board procedures is also very helpful.

Reserve time for *training and planning*. Consider work sessions, retreats, outside speakers and continuing education for key issues.

Suggested Answers/Additional Information on Problems for Discussion in Training Material by David W. Owens

III. Collecting Evidence

Some Problems for Discussion: Hearing Procedures

1. a. This counts as ex-parte communication; it is the responsibility of the board member to tell the applicant that no discussion is permissible and to change the subject. If you should be so unfortunate to run into an applicant who can't take a hint and persists in giving you information, say it again and if the applicant continues to talk, then walk away from the discussion. At the hearing, state that you saw the applicant at a social gathering, asked the applicant not to discuss the case and state what (if anything) you heard the applicant say to you before you asked them not to talk about the case.
1. b. Although attorneys should know better, sometimes they are not completely familiar with quasi-judicial proceedings and so they may not realize what they are doing is considered to be ex parte communication. Consequently, the attorney should be told right away that what he is doing is considered to be ex parte communication, and any information he has to give should be given to all board members at the hearing itself, not in a private phone conversation.
1. c. What is the purpose of the "quick briefing?" Is it to ask the staff person what the relevant sections of the zoning ordinance are to review? This would not be ex-parte communication. However, if the board member wants to get the opinion of the staff on whether a particular case meets the standards for a variance for example, then the board member should be informed to ask that question at the hearing so everyone hears the answer at the same time.
1. d. Driving by the site is perfectly permissible and makes sense, but you should announce the fact that you went to the site when the hearing begins and describe what you saw.
1. e. If a neighbor comes over to talk about site conditions, it is the responsibility of the board member to inform the neighbor that you cannot discuss the case outside of the hearing, and encourage the neighbor to please come to the hearing and make any comments or give information at that time. You should also state at the hearing that you went to visit the site and a neighbor came over to speak with you, and you informed the neighbor that you cannot speak about the case outside of the hearing and asked him or her to come to the meeting if he or she had any information to share with the board members.
2. No, the board cannot consider the petition to be evidence. The relevant matters to consider are the facts of the case and whether the request meets the ordinance requirements for a variance. However, it is not necessary for the board chair to announce in loud tones that petitions are not evidence; instead, he or she may accept them graciously, and then the board would/should not consider them as true evidence during the deliberations.

V. Voting on a Decision

Voting Calculations

1. This is a bit of a trick question. The membership of the board remains five, because an absence is not considered a vacancy. To get four-fifths of five, multiply five by 0.8 and the result is 4, which means there must be four votes in favor, so in this example the petitioner would not get the variance. This illustrates why it is a good idea to have alternates available.

But what if it were a true vacancy and not just an absence - would that change the outcome? If a five-member BOA is reduced by one because of a vacancy and no alternate is available, then that person is no longer considered a “member of the board” to calculate the required supermajority of four-fifths of its members. In other words, in this example with a five-member board, the membership for purposes of voting is now four but the four-fifths rule still applies. To get four-fifths of 4, multiply 4 by 0.8 and the result is 3.2; you must round up, which means all four must vote in favor, so in this example the petitioner would not get the variance.

2. A motion to grant a variance must pass by four votes on a five-member board, so a 3-2 vote to deny means the motion carries to deny. To be clear and consistent, some boards make it a practice to always make the motion in the affirmative, regardless of whether the member making the motion supports the project or not, so the results are always clear to everyone.
3. A ten-member board with two recused now has a membership of 8; multiply 8 by four-fifths (0.8) and the result is 6.4; when you round up this means 7 votes are needed, so the variance is approved.

Some Problems for Discussion: Conflicts

- a. The Realtor clearly has a financial interest in the outcome of the case and therefore must not participate in the discussion or vote. The board member/Realtor should not be in the room at the time of the discussion or vote to truly not be involved in the outcome.
- b. When the applicant is the board member’s father-in-law, this is a close familial relationship; therefore the board member must not participate in the discussion or vote.
- c. When the applicant is the board member’s church, this would be a close associational relationship; therefore the board member must not participate in the discussion or vote.
- d. When there is a conflict, the member must not participate in the discussion before the vote as well as not vote. To truly not be a part of the discussion, the member should leave the room so no one could say he or she was participating through facial expressions, head-shaking, or other body language.

VI. Standards for Particular Types of Quasi-judicial Decisions

Some Problems for Discussion: Variances

- a. Simply because it will cost some money in order to meet ordinance requirements, it is not a “hardship” meeting the ordinance requirement so the variance is not justified. For example, assuming the construction is for a driveway for a new house on a lot recently purchased by the person requesting the variance, conceivably the cost of the lot could have been reduced by \$3,000 to make up for the fact that it was going to cost more to develop the property and still comply with the regulations requirements. An added financial cost is not included in the case law for what constitutes a hardship that has been established through the years.
- b. The fact that the applicant is physically incapacitated is not a hardship meeting the ordinance requirement. The flood hazard is still real, and waiving the requirement will make it more dangerous for the person living there and potentially for others, such as the people who might have to attempt a rescue. In other words, as a board member in this case you may feel deeply sympathetic towards the person asking for the variance, but your actions could have life-threatening consequences. It would be better to see if there is some kind of emergency funding assistance so the person could afford to meet the regulations, or perhaps the person should think about finding a place to live that is outside of the flood hazard area if elevating to meet the standard is extremely difficult given the applicant’s disability (such as having a wheelchair ramp that is very long).
- c. Because the ordinance does not allow off-premise advertising, granting a variance to put a sign up on the adjoining lot would constitute a use variance which is illegal. A better approach would be to examine whether an amendment to the sign ordinance is in order. Certainly, the applicant’s business will suffer without a sign indicating where it is. What are the special circumstances regarding the lot that have caused the sign dilemma for this business? These unusual facts could be identified, for example because it is a flag lot or subdivided before there were requirements for access and there is not adequate room to provide a driveway and safely put up a sign. A new definition could be added to the ordinance, such as “special business identification sign” that establishes these conditions. When they are present, and with the permission of the adjacent property owner, a sign could be erected that is not actually on the applicant’s property, but it is not defined as an off-premise advertising sign.

Some Problems for Discussion: Special and Conditional Use Permits

- a. Petitions reflect opinions, and Board of Adjustment decisions must rest on the standards that are in the ordinance and the facts of the particular case. To make a successful argument that the use will lower property values, a person with expertise in the area, such as a Realtor or certified property appraiser, should offer his or her sworn testimony along with specific market studies or property appraisals at the hearing. A petition should not be relied on as evidence as part of the decision-making process.
- b. The fact that some children play in the street is not an adequate reason to turn down a project. Streets are for the movement of vehicles, not playgrounds for children. If this property owner wants to make a case for another objection, for example that the road is not adequate to handle the traffic this particular project will generate, then a person with

expertise in traffic modeling should be consulted. The Board could ask staff to see if an engineer from NCDOT might testify at the hearing regarding trip generation rates and what kind of traffic a development of this size would be expected to generate, or the property owner could hire a traffic engineer to address this issue. Another solution might be to ask NCDOT to place a sign advising motorists of “Children at Play.”

- c. The first places to look for guidance would be the comprehensive plan and zoning ordinance. Does the plan address this neighborhood in some way, referring to its strong residential character for example? Are there specific standards in the zoning ordinance that taverns must meet in order to obtain a special/conditional use permit? It is not relevant to this particular hearing that a previous nightspot owned by the applicant several years ago had problems - the circumstances are different because this business is in a different location. Testimony relating to those problems should not be considered as evidence at this hearing.

*Document prepared by:
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Additional Resources

North Carolina Association of Zoning Officials (NCAZO)

The NCAZO Web site, <http://www.ncazo.org/>, has information about the organization, legislation, upcoming meetings and conferences, zoning official certification courses and more.

North Carolina Department of Commerce, Division of Community Assistance (DCA)

The DCA Community Planning Program provides land use planning, training and facilitation services to local governments. Link to regional office and other information from its Web site, <http://www.nccommerce.com/en/CommunityServices/CommunityPlanningAssistance/CommunityPlanningProgram/index.htm>.

North Carolina General Statutes

The North Carolina General Assembly Web site, <http://www.ncleg.net>, provides look-up capabilities for general statutes, bills, session laws, etc. See column on right side of page.

University of North Carolina School of Government (Institute of Government)

School of Government (SOG) faculty and staff assist local governments by providing training, research and advice on a variety of topics. Its Web site, <http://www.sog.unc.edu/>, includes information on courses for public officials, publications, etc.

Examples of SOG publications and training materials include:

Boards of Adjustment Workshop, August 2000: Course Materials and Videotapes (features presentations by SOG faculty members Richard D. Ducker and David W. Owens), 2001.

Introduction to Zoning, 3rd ed., by David W. Owens, 2007.

Land Use Law in North Carolina, by David W. Owens, 2006.

Legal Responsibilities of the Local Zoning Administrator, 2nd ed., by Philip P. Green, Jr., 1987.

Legislative Zoning Decisions: Legal Aspects, 2nd ed., by David W. Owens, 1999.

Open Meetings and Local Governments in North Carolina: Some Questions and Answers, 6th ed., by David M. Lawrence, 2002.

Planning and Development-Related Legislation 2009

<http://www.sog.unc.edu/pubs/electronicversions/pdfs/pzlb17.pdf>.

Special Use Permits in North Carolina Zoning, Special Series No. 22, by David W. Owens, April 2007.

Survey of Experience with Zoning Variances, Special Series No. 18, by David Owens and Adam Brueggeman, February 2004.

The Zoning Board of Adjustment in North Carolina, 2nd ed., by Michael B. Brough and Philip P. Green, Jr., 1984.

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