BOARD OF ADJUSTMENT WORKSHOP
JUNE 11, 2010

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Division of Community Assistance
Western Regional Office

Western Carolina University
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2

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3

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Today's Program

5

- Board of Adjustment Functions
- Types of Cases & Standards for Review
- Quasi-judicial Hearing Procedures
- Lunch
- Variance Scenario
- Variance Scenario Wrap-up
- Questions and Answers

6

Board of Adjustment Functions

Board of Adjustment Functions

7

- Statutory Authority
- Government Roles in Zoning
- Legislative vs. Quasi-judicial Decisions
- Board of Adjustment Duties

Board of Adjustment Statutory Authority

8

- **Cities/Towns**
  North Carolina General Statutes, Chapter 160A, Article 19 - Planning & Regulation of Development, Part 3 – Zoning, §160A-388 - Board of Adjustment
- **Counties**
  North Carolina General Statutes, Chapter 153A, Article 18 - Planning & Regulation of Development, Part 3 – Zoning, §153A-345 - Board of Adjustment

Government Roles in Zoning

9

Participants	Primary Role
Governing Board	Legislative
Planning Board	Advisory
Board of Adjustment	Quasi-judicial
Staff	Administrative

Legislative vs. Quasi-judicial Decisions

10

Differences related to:

- Notice of hearing
- Type of hearing
- Speakers at hearing
- Evidence
- Findings
- Voting
- Standards for decisions
- Conditions
- Time to initiate judicial review
- Conflicts of interest
- Creation of vested rights

Board of Adjustment Duties

11

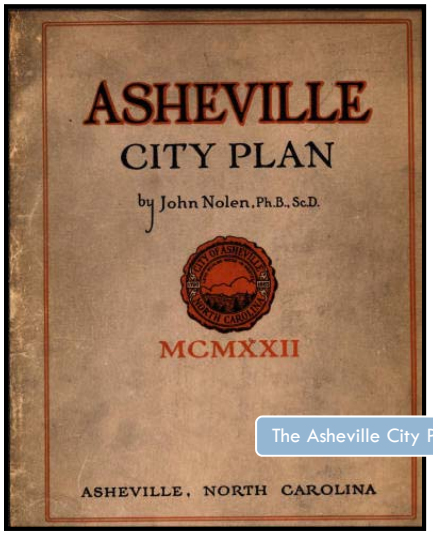
- **Primary Role / Decisions: <u>Quasi-judicial</u>**
  - Hear appeals
  - Interpret zoning ordinance
  - Consider variances from ordinance standards
  - May review special/conditional use permits
- **Other Roles / Decisions: <u>Advisory</u>**
  - May recommend ordinance review
  - May have other assigned duties

TYPES OF CASES & STANDARDS FOR REVIEW

13

The Perfect Zoning Ordinance

Never needs to change…



The Asheville City Plan, 1922

Addresses every possible situation…

Is easy for officials to administer…

Keeps all constituents happy, all of the time…

Why Have a Board of Adjustment?

18

Zoning ordinances change over time

- Interpretations
- Communication with planning and governing boards

Zoning ordinances can't address everything

- Variances
- Conditional use permits

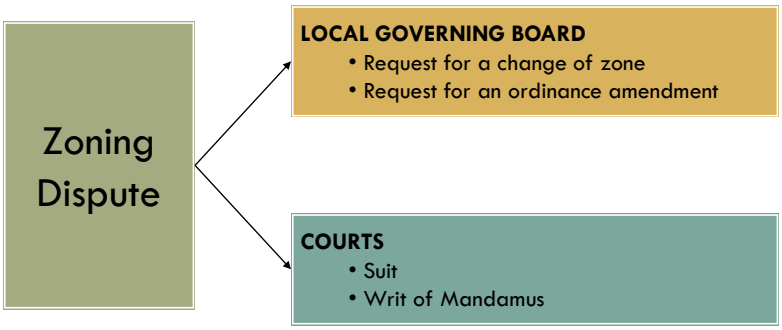
Not every decision is clear or made correctly

- Interpretations
- Appeals

The board of adjustment provides citizens with due process

Without the BOA

19



Types of Cases

20

- Appeals and Interpretations
- Conditional (or Special) Use Permits
- Variances
- Other Duties
  - Recommend Zoning Ordinance Changes
  - Hear Appeals from Other Boards
    - Historic Resources, Minimum Housing Codes
  - Other Duties as Assigned by Governing Board

21

Interpretations and Appeals

Interpretation: What is it?

22

- Occurs when the BOA looks at the ***wording, meaning, and intent*** of an ordinance and applies the ordinance wording, meaning, and intent to the facts of the case.
- BOA members need interpretation skills.

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FACT SHEET

Number 12 May 1998

How to Interpret an Ordinance

1. Purpose--To give effect to the intent of the governing body (i.e., the county board, city council, village board or town board).

2. Source--The primary source is the language of the ordinance itself.

3. How to approach--Familiarize yourself with the structure of the ordinances and codes. Look at the table of contents and index. Check for definitions, rules of interpretation, charts or tables. Pay particular attention to statements of purpose or intent.

4. Parts of ordinance--Understand the numbering system, terms and abbreviations used to structure the ordinance/code. This can be confusing, but is essential to interpretation. The following example from the Wisconsin Statutes shows that references follow a highly structured scheme that must be mastered in order to determine the law's meaning.

a. **Example**: In the Wisconsin Statutes, "62.23(7)(i)2r.a." refers to---

i. Chapter--ch. 62

ii. Section--s. 62.23 or sec. 62.23. [Literally it's "section 23 of chapter 62," but usage is to say "section 62 point 23."]

iii. Subsection--sub. (7)

iv. Paragraph--par. (i)

v. Subdivision--subd. 2r. [The use of "r" in "2r" reflects the amendment process which added subdivisions between existing subds. 2 and 3. The subdivisions added by amendment are subds. 2m. and 2r.]

vi. Subdivision paragraph--subd. 2r.a.

b. **Internal references**. The entire citation is not used internally in the Wisconsin Statutes. For example, in a subsection, reference is made to other subsections within the same section, without repeating the section number. Example: sec. 59.69(4) refers to "sub. (4e)" rather than "sec. 59.69(4e)."

c. **Local usage**. Your community's own organizational system must be understood in order to interpret its ordinances.

5. Determining intent--The interpreter looks to the language, context, subject matter, purpose, scope and history. First start with the language of the ordinance, applicable definitions, purpose statements, etc. If the meaning is still unclear, look to similar provisions to help determine intent.

a. In almost all cases, the meaning can be determined by staying within the "four corners of the document."

b. In limited cases, when the meaning cannot be otherwise determined, reference may be made to "extrinsic" evidence, but care should be taken that the information is objective and contained in a record. For example, a staff report explaining an ordinance amendment and the previous language may be examined to determine intent, but the opinion testimony of a governing body member may not be relied upon to interpret the meaning of an ordinance in a quasi-judicial proceeding (i.e., when a body applies the ordinance to specific facts, as in a zoning variance.)

6. Plain meaning rule--Use the plain, dictionary meaning of words that are not defined. Technical words are used in their technical sense. Of course, if a word is defined, use that meaning.

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Interpretation Tips

- Familiarize yourself with the ordinance
- Know how to determine intent
  - Language, definitions, purpose statements
  - Four corners of the document
  - Look for a reliable outside source (something that is contained in a record)
- Use the plain meaning rule (dictionary definition)
- Harmonize

Appeal Example

24

"The petitioner is challenging a recent staff decision that identified a proposed business use as an "Electronic Gaming Operation" which is not listed as a permitted use in most commercial zoning districts.

The petitioner is, instead, proposing the argument that the use should be classified as a "Recreation Uses, Commercial Indoor" which is listed as a permitted use in the Highway Business District"

Appeals

25

- An official determination is required (in most cases).
- The board must not vary the ordinance.
- Each case is considered on its own merits.
- Interpretations may establish precedents.
- Advisory opinions cannot be given.
- The more gray areas an ordinance includes, the more interpretations will be needed.
- BOA may be responsible for interpreting the zoning map.

Things to Remember…

26

- BOA is responsible for correcting mistakes or abuses of discretion of the Zoning Administrator.
- Advisory opinions cannot be given.
- The more gray areas an ordinance includes, the more interpretations will be needed.
- BOA may be responsible for interpreting the zoning map.

27

Conditional Use Permits

The Name Game

28

Conditional Use Permit (CUP) =

Special Use Permit (SUP) =

Special Exception

They are the same thing.

CUP – What is it?

29

- The CUP allows a certain activity provided for in the ordinance to be established at a particular location within a zoning district if the applicant can demonstrate that certain ordinance requirements are met.
- In other words, the use is not permitted by right.
- It is common for governing boards to issue CUPs. Process remains the same.

EXAMPLE

Burke County

Communication Towers

In allowed districts, communication towers of 75 feet or more require that a Conditional Use Permit be granted by the Board of Adjustment.

CUP Standards for Review

30

Two Types of Standards for Review in the Zoning Ordinance

GENERAL

Apply to all cases seeking a CUP.

Allows for discretion.

SPECIFIC

Apply to specific cases seeking a CUP, as written in the zoning ordinance.

Examples: Lot sizes, buffering, landscaping, setbacks, signage, parking, ingress/egress.

Standards of Review - Burke County

31

- Will be harmonious with and in accordance with the general objectives, or any specific objective of the County's Comprehensive Plan and/or Zoning Ordinance.
- Will be designed, constructed, operated, and maintained so as to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity and that such use will not change the essential character of the same area.
- Will not be hazardous or disturbing to existing or future neighboring areas.
- Will be served by essential public facilities and services such as highways, streets, police and fire protection, drainage structures, refuse disposal, water and sewers, and schools; or that the persons or agencies responsible for the establishment of the proposed use shall be able to provide adequately any such services.
- Will not create excessive additional requirements at public costs for public facilities and services and will not be detrimental to the economic welfare of the community.
- Will not involve uses, activities, processes, materials, equipment and conditions of operation that will be detrimental to any persons, property or the general welfare by reason of excessive production to traffic, noise, smoke, fumes, glare, odors, or water pollution.
- Will have vehicular approaches to the property which shall be designed as not to create any interference with traffic on surrounding public streets or roads.
- Will not result in the destruction, loss or damage of a natural scenic or historical feature of major importance.

Standards of Review - Henderson County

32

General Requirements

- The use will not adversely affect the health and safety of persons residing or working in the neighborhood.
- The use will not be detrimental to the public welfare or injurious to property or public improvements in the neighborhood.

Specific (If Applicable)

- Satisfactory ingress and egress to property and proposed structures thereon, with particular reference to pedestrian safety and convenience, automotive, traffic flow and control;
- Provision of off-street parking and loading areas where required, with particular attention to the items above and the economic, noise, glare, and odor effects of the conditional use on adjoining properties in the area;
- Utilities with reference to locations, availability, and compatibility;
- Buffering with reference to type, location, and dimensions;
- Playgrounds, open spaces, yards, landscaping, access ways, pedestrian ways with reference to location, size, and suitability;
- Buildings and structures with reference to location, size, and use.

Common Themes
CUP Standards for Review

33

- Protects public health, safety, and welfare
- Ensures that standards in the ordinance are met
- The value of adjoining or abutting property is not substantially injured
- The use is a public necessity
- The location and character of the use is in harmony with the area

CUP – Salvage Yard

CUP Standards - Salvage Yard

35

- ✓ Application is complete.
- ✓ The proposed use is among those listed in the Table of Permissible Uses as a conditional use.
- ✓ The conditions proposed meet or exceed the minimum requirements of this ordinance .
- The conditional use will not endanger the public health or safety.
- The conditional use will not injure the value of adjoining or abutting property and will be in harmony with the area in which it is located.
- The conditional use will be in conformity with the Land Use Plan and other officially adopted plans.
- The conditional use will not exceed the county's ability to provide adequate public facilities.

The conditional use will not endanger the public health or safety.	1. Applicant must secure all state permits necessary for the operation of a salvage yard and must remain in compliance with state and local regulations. 2. There will be no hazardous material, trash, or waste product kept on the site.
The use will not injure the value of adjoining or abutting property and will be in harmony with the area.	The adjacent properties are zoned heavy manufacturing and the parcels are located in an established industrial park, so the proposed development should have no negative impact on adjoining property.
The conditional use will be in conformity with the Land Use Plan and other officially adopted plans.	This request is consistent with officially adopted plans. *[Insert appropriate references to address why the request is or is not consistent]*
The conditional use will not exceed the county's ability to provide adequate public facilities.	The proposed use will not exceed the county's ability to provide adequate public facilities.

CUP - Using Conditions

37

CUP may have conditions placed upon it under the following circumstances.

Must be reasonable, must relate to testimony.

Specific to the development proposal.

Allow the board to make the findings that enable the board to grant the permit.

A permit may be considered void if one or more of the conditions are not met.

Conditions run with the land.

Conditions – Salvage Yard

38

- That the two lots be recombined into one lot.
- Hazardous waste or trash and waste shall not be stored or disposed of on this site.
- No portions of the operation, including stockpile material, will be visible from Caratoke Highway to the greatest extent practicable…consistent with Land Use Policy CA1 regarding appearance of development along Caratoke Highway.
- The two driveways shown on 176 Windchaser Way are within nine feet of each other…used a section of their UDO for support.
- No stockpile exceed 25 feet in height.

39

Variances

Variance: What is it?

40

- A variance grants relief from the ordinance in cases of hardship - those cases where the rules of the zoning ordinance fail to fit a particular situation.
- Allows a property owner to make use of her property, even though it may conflict with the ordinance.

Variance Guiding Rules

41

- Statutory language such as "practical difficulties or unnecessary hardships" is vague.

Therefore,

- Court cases over time have created rules to guide when variances should be granted.

Variance Guiding Rules - Cont'd

42

- BOA ***cannot rewrite the ordinance - may vary the application of the ordinance*** in a particular case.
- If an ordinance standard causes hardship throughout the community the BOA should recommend a zoning amendment.
- Variances can be conditioned.
- Variances should not be granted freely.

Variance Standards for Review

43

- There are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the ordinance.
  - There would be no reasonable return or use of the property without the variance.
  - The hardship results from application of the ordinance.
  - The hardship is suffered by the property.
  - The hardship is peculiar to the property.
  - The hardship is not self-created.

Variance Standards for Review

44

- The variance is in harmony with the general purpose and intent of the ordinance and preserves its spirit.

Variance Standards for Review

45

- In the granting of the variance the public safety and welfare have been assured and substantial justice has been done.

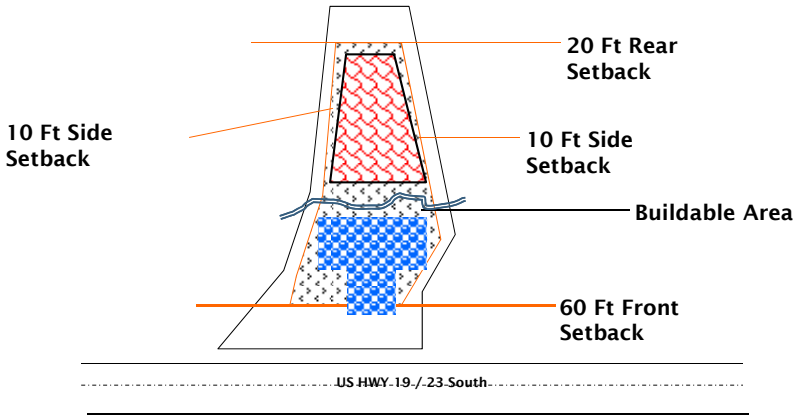
Variance Example

46

Zoning Ordinance Dimensional Requirements for R-B Business District			
Ordinance Standards		**Actual Dimensions**	
Minimum Lot Size:	20,000 sqft	**Lot size:**	20,100 sqft
Minimum Lot Width	100 ft minimum mean lot size	**Mean lot width**	102 sqft
Front Setback:	Greatest of: --60 ft from center of 19/23 --20 ft from edge of right of way	**Applicable Setback:**	60 ft from center of 19/23 **Need a variance to go 3 feet into front setback.**
Rear Setback:	20 feet	**Rear setback:**	20 ft
Side Setback:	10 feet	**Side setback**	10 ft
Coverage:	Not greater that 50% of total lot area	**Building size:**	less than 50% of total lot area
Other:	Height and parking	**Other:**	Meets other requirements

Variance Example - Cont'd

47



Things to Remember…

48

- Use variances are not allowed.
  - Now stated in NC General Statutes.
- Variances should not be a common occurrence.
- Variances can expire if it is a condition or a standard in the ordinance.

QUASI-JUDICIAL HEARING PROCEDURES

Topics

50

- Housekeeping
- Conflicts of Interest
- Meeting Format
- Collecting Evidence
- Decision-making
- Building a Record

Housekeeping

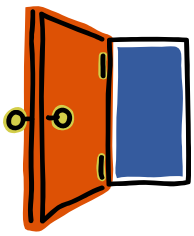
51

- Bylaws / Rules of Procedure
  - Quorum - majority vs. 4/5ths.
- Ordinance(s)
  - Be familiar with local ordinance(s).
- Hearing notice
  - Four kinds of notice: newspaper publication, signs, written and oral.

Housekeeping

52

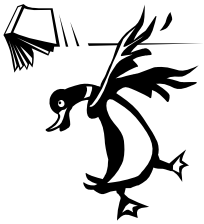
- ETJ members
  - Proportional representation
  - Equal rights and privileges?
- Alternate members
  - ETJ "inside" and "outside" members
- Open meetings law
  - May not deliberate in private



Conflicts of Interest

53

- Legal right to impartial decision-maker
  - Must avoid actual and perceived conflicts of interest
- Why is this important?
  - Public trust
  - Don't duck responsibility to vote



Meeting Format

54

- Swearing in / administering oaths
  - Only sworn testimony can / should be used in making a decision

- Using scripts and forms
  - Helps citizens understand; you to remember
  - Provides an outline

Collecting Evidence

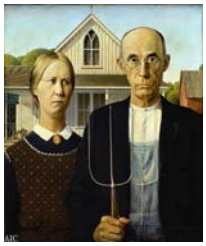
55

- Board member packets
- Ex parte communication
  - All communication "outside the presence of the other party"
- Site visits

Collecting Evidence

56

- Standing
  - Who has the right to participate in a hearing?
  - "Special damages"
  - G.S. 160A-393 and G.S. 153A-349
- Witnesses



Collecting Evidence

57

- Type of evidence
  - "Competent, material, and substantial"* evidence needed
  - Findings can't be based on conjecture
  - "Expert testimony" vs. "opinion" - SOG Law Blog http://sogweb.sog.unc.edu/blogs/localgovt/?p=1160
  - What evidence to admit?

* 1963 N.C. Supreme Court Case - Jarrell v. Board of Adjustment

Collecting Evidence

58

- Hearsay
  - Statement not made at hearing admitted as evidence
  - Petitions
- Time limits for speakers
  - Can't be used as in other board meetings
  - Can limit repetitious or irrelevant testimony

Collecting Evidence

59

- Cross-examination
  - Reasonable procedures can be established
- Burden of proof
  - Person asking has burden

- Exhibits
  - Permit application, correspondence, etc.
  - Make sure exhibits are identified in minutes

Decision-making

60

- Facts
- Findings of fact
  - Written findings of fact are required; board must document basis for its decision
- Board needs to do two things:
  - Determine the facts/findings
  - Draw conclusions

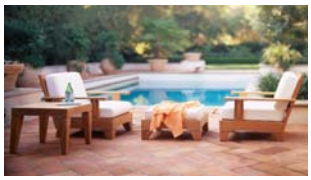
Decision-making

61

- What is a finding of fact?

Finding of Fact:

"The applicant installed the swimming pool and deck in May of 2010 without a permit and located it closer than 10 feet to the property line, thereby violating the side-yard setback regulation in effect at that time."



Decision-making

62

- What is a conclusion of law?

Conclusion of law:

"Any hardship suffered by the applicant by the application of the ordinance is self-imposed because the applicant knew or should have known that the applicable setback regulations prohibited him from locating the deck within the required setback."

Decision-making

63

- Who prepares findings of fact?
  - Applicant; staff; BOA attorney; BOA members; clerk to board

Question:

1. Are there practical difficulties and unnecessary hardship in the way of carrying out the strict letter of the chapter?

Answer:

Yes. The site has a stream running through it….

No. The site is level and there are no obstacles….

Yes and No. Although the site is level, there is a State-designated "Champion Tree" in the setback ….

Decision-making

64

- Decisions
  - Less detail vs. more detail
  - Forms

- Motions
  - Four-fifths vote in favor of applicant required

Decision-making

65

- Precedents
  - If different findings made, explain in decision
- Participation in continued hearings
  - Member may miss part of hearing but still vote
  - Full access to record required: minutes, exhibits, tape, etc.

After the Meeting

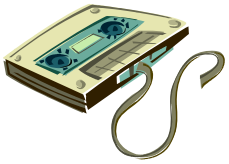
66

- Complete "Findings"
- Prepare "Order"
- Write letter to applicant

Building a Record

67

- Complete record required
  - Detailed minutes are necessary
  - Tape recording?
  - The record should:
    - Summarize facts presented
    - State findings of fact
    - Include decision, plus record, by name, of vote



Building a Record

68

- If BOA decision appealed, Superior Court must be able to answer the following questions from the record alone:
  - What action was requested of the board (appeal, variance, conditional use permit, etc.)?
  - What sections of the ordinance are relevant?
  - What procedures were followed at the hearing?
  - What evidence was presented or considered?
  - How did the board interpret the ordinance or other matters of law?
  - What was the final decision; on what findings of fact and conclusions did that decision rest?

69

Materials, Tools and Extras

For copies of today's training materials:

- Go to the DCA website: www.nccommerce.com/wro
- Scroll to the bottom of the page, click on "WRO TRAINING LIBRARY," scroll to "Board of Adjustment Training Materials," and click on the appropriate training date.
- It will take about a week to post.

Variance Activity Room Assignments

Yellow - Room 121

Green - Room 122

Blue - Room 123

Red - Room 156