


Planning Board Meeting

NOVEMBER 23, 2020

Discussion of Planning Board Serving Dual Role as Board of Adjustment

The background features abstract, overlapping geometric shapes in various shades of blue, ranging from light sky blue to deep navy blue. The shapes are primarily triangles and polygons, creating a dynamic, modern aesthetic. The text is centered on a white background that is partially framed by these blue shapes.

Planning Board (Original) Meeting May 22, 2017, 6PM

Discussion of Planning Board Serving Dual Role as Board of Adjustment

Roles and Types of Decisions

▶ Legislative

- ▶ Affect entire community, set general policies applicable through zoning or other ordinances
- ▶ Include decisions to adopt, amend, or repeal ordinances
- ▶ Decisions generally made by the local governing Body (Board of Commissioners)

▶ Quasi-judicial

- ▶ Decisions involved application of ordinance policies to individual situations
- ▶ Variances, special and conditional use permit, appeals, and interpretations
- ▶ Decisions involve finding of facts and the exercise of judgement and discretion in applying predetermined policies to the situation
- ▶ Decision often assigned to Board of Adjustment but can be assigned to Planning Board or the Governing Board

▶ Advisory

- ▶ Made by bodies that may recommend decisions on a matter but have no final decision making authority, (i.e. Planning Board)

▶ Administrative

- ▶ Made by staff on day to day discretionary matters related to ordinances and permits

Differences Between Legislative & Quasi-judicial Decisions

	Legislative	Quasi-Judicial
Decision-Maker	Only Governing Board (others may advise)	Board of Adjustment, Planning or Governing Board
Notice of Hearing	Newspaper, mailed notice to owners and neighbors, posted notice for map amendments, actual notice to owner if others initiate map amendment	Mailed notice to applicant, owner and abutting owners, posted notice, others as ordinance mandates
Type of Hearing	Legislative	Evidentiary
Speakers at Hearings	Can reasonably limit # of speakers and time	Witnesses are presenting testimony, can limit to relevant evidence that isn't 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

Differences Between Legislative & Quasi-judicial Decisions

	Legislative	Quasi-Judicial
Findings	None required (statement on rationale for zoning amendments)	Written findings of fact required; must determine facts
Voting	Simple majority, $\frac{3}{4}$ if protest petition filed on rezoning	Simple majority except $\frac{4}{5}$ to grant a variance
Standard for Decision	Establishes standards	Can only apply standards previously set in statute and ordinance
Conditions	Not allowed, except with conditional zoning districts	Allowed if based on standard in ordinance
Time to initiate judicial review	2 months to file challenge of map amendment, 1 year from standing for text amendment	30 days to file challenge
Conflict of Interest	Requires direct, substantial and readily identifiable financial interest to disqualify	Any financial interest, personal bias, or undisclosed ex parte communication disqualifies; impartiality required
Creation of Vested Right	None	Yes, if substantial expenditures are made in reliance on it

Preliminary Matters: Notice of Hearings

- ▶ Must give notice of quasi-judicial hearing to all parties of case
 - ▶ The applicant
 - ▶ Owner of affected property
 - ▶ Owner of abutting properties
 - ▶ Anyone else required to receive notice under the ordinance
 - ▶ Posted notice
- ▶ Boards of Adjustment are subject to state open meetings law
 - ▶ Case can not be deliberated in a private session
- ▶ Liability
 - ▶ Members of the Board of Adjustment are public officers and as such have limited exposure to personal liability as a result of board actions
 - ▶ Do have exposure to liability for intention torts (denying permit because of personal vendetta against applicant)

Quasi-Judicial Hearings and Decisions

- ▶ **Collecting Evidence**
 - ▶ Boards do have authority to issue subpoenas for quasi-judicial proceedings
- ▶ **Burden**
 - ▶ Person requesting a variance or special/conditional use permit has the burden of producing sufficient evidence for the board to conclude standards have been met
- ▶ **Oaths**
 - ▶ Those offering testimony are usually put under oath (staff, applicant, those in favor or opposed)
 - ▶ Reminds witnesses the necessity of presenting factual information not opinions
- ▶ **Cross-Examination**
 - ▶ Parties have the right to cross-examine witnesses
- ▶ **Hearsay**
 - ▶ Statement about the facts made by someone not present and available for cross examination generally not allowed

Quasi-Judicial Hearings and Decisions

- ▶ Opinions
 - ▶ Should only be offered by a properly qualified expert witness
- ▶ False Testimony
 - ▶ Subject to criminal charges for perjury is person deliberately gives false testimony under oath for zoning hearing
- ▶ Outside Evidence
 - ▶ Affected person(s) have legal right to hear all information presented to board members
 - ▶ Decision making body not allowed to discuss case or gather evidence outside of the hearing
- ▶ Time Limits
 - ▶ Arbitrary time limit on hearing cannot be used, but repetitious or irrelevant testimony can be barred
- ▶ Exhibits
 - ▶ Witnesses may present exhibits as evidence which becomes part of the record

Quasi-Judicial Hearings and Decisions

- ▶ Exhibits
 - ▶ The application for permit and any correspondence submitted as part of the application file should be entered into the hearing record
- ▶ Quality of Evidence
 - ▶ Must be substantial, competent and material evidence to support each critical factual determination
- ▶ Record
 - ▶ Complete records must be kept of hearings including detailed minutes

Summarizing Evidence and Findings

▶ Findings

- ▶ Board's decision must be reduced to writing
- ▶ Decision must determine any contested facts and apply facts to the applicable standards
- ▶ Findings of fact
- ▶ Written decision must be signed by the board chair and filed with board clerk
- ▶ Decision must be mailed to the application, property owner and anyone else requesting copy

Voting on a Decision

- ▶ Quorum and Voting
 - ▶ Generally majority of board is a quorum
 - ▶ Most decisions require simple majority but a variance requires a four-fifths vote
- ▶ Precedents
 - ▶ Prior decisions not legally binding on board
 - ▶ Each case must be decided on its own merits
 - ▶ Board should be aware of previous decisions and as general rule similar cases should usually produce similar results
 - ▶ If a different result reached for very similar fact situation, the written decision should clearly explain why the conclusion was different
- ▶ Rehearing's
 - ▶ Generally board may not hear quasi-judicial case a second time
 - ▶ Appeals of the initial decision may be made to the courts
 - ▶ If application substantially different or significant change of conditions a new hearing may be held

Voting on a Decision

- ▶ Conflicts of Interest
 - ▶ Parties have legal right to impartial decision maker
 - ▶ Financial impact, bias, undisclosed ex parte communications, close family or business ties disqualify members from participating.
 - ▶ Nonparticipation includes the discussion as well as voting
- ▶ Participation in Continued Hearing
 - ▶ Member may miss part of hearing but be present when a vote is called
 - ▶ If absent at presentation of evidence or new member appointed after evidence presented, member can vote if member had full access to the record of evidence presented in members absence

Standards for Particular Types of Quasi-judicial Decisions

- ▶ Variances
 - ▶ Gives owner permission to do something that is contrary to the ordinance
- ▶ Standards
 - ▶ Granted only if **all** three of the following general standards are met
 - ▶ Applicant must show strict application of the rules would create unnecessary hardships
 - ▶ Applicant must show that the variance would be consistent with the intent and purpose of the ordinance (no use variance allowed or extending nonconformities)
 - ▶ Application must show that the variance would be consistent with the overall public welfare and that substantial justice will be done

Standards for Particular Types of Quasi-judicial Decisions

▶ Special and Conditional Use Permits

- ▶ In the Town of Emerald Isle, special use permits are heard before the Board of Commissioners (see UNC School of Government handout for further information)

▶ Appeals and Interpretations

- ▶ Only hear actual cases where final staff decision has been issued and is being appealed
- ▶ Only persons with standing to make judicial appeal can appeal a staff decision
- ▶ Appeal filed with Town Clerk and must state grounds for appeal
- ▶ Appeals must be filed within 30 days from receipt of the notice of decision
- ▶ The board makes its own independent assessment of what the terms of the ordinance mean
- ▶ The board should consider the professional judgement of staff but the question of what the ordinance means is a question of law for which the board must make its own decisions

Imposition of Conditions

- ▶ See UNC School of Government Handout

Town of Emerald Isle Board of Adjustment Overview Section 2.2.3

- ▶ Membership
 - ▶ Five regular members and two alternate members
- ▶ Organization, Rules, Meetings, Records
 - ▶ Meetings held at a regular meeting place and open to the public
 - ▶ Adopt rules governing organization and for all proceedings before it
 - ▶ Elect chairman and vice chairman on an annual basis and establish regular meeting date and time
 - ▶ Town Planner is secretary to the Board
 - ▶ Quorum shall consist of 4 members, quorum must be present to take final action on any matter
 - ▶ Alternate members can attend any meeting and while serving in the absence of a regular member may exercise all the power and duties of a regular member

Town of Emerald Isle Board of Adjustment Overview Section 2.2.3

- ▶ Organization, Rules, Meetings, Records
 - ▶ All appeals, interpretation and variance request shall be filed with the Town Planner
 - ▶ The Town Planner shall transmit all applications and records pertaining to a request to the Board
 - ▶ Public notice required for hearing, published in newspaper of general circulation in the Town at least once for 2 successive weeks prior to hearing
 - ▶ An appointed member missing 3 consecutive meetings without the member being excused by majority vote of the Board shall be removed by the Commissioners

Town of Emerald Isle Board of Adjustment Overview Section 2.2.3

▶ Powers and Duties

▶ Appeal of Administrative Decisions and Interpretations

- ▶ Hear and decide appeals where it is alleged that there is an error in and order, requirement, decision or determination pursuant to the UDO made by the Town Planner or and interpretation of the UDO made by the Town Planner
- ▶ Simple majority vote needed (UDO references 4/5ths but this is incorrect)

▶ Interpretation of Zoning Map

- ▶ To interpret the location of lines on the Official Zoning Map where it appears lines are unclear. Interpretations shall comply with the following
 - ▶ Boundaries delineated by the centerline of streets, highways, or alleys shall follow such centerlines
 - ▶ Boundaries delineated by lot lines shall follow such lot lines
 - ▶ Boundaries shown parallel to or as extensions of features indicated in this subsection shall be interpreted as such. Distances not specifically indicated on the Official Zoning Map shall be determined by the scale of the map
 - ▶ Where the actual location of existing physical or natural features vary from those shown on the Official Zoning Map or in other circumstances not covered by this subsection, the Town Planner shall have the authority to interpret the district boundaries

Town of Emerald Isle Board of Adjustment Overview Section 2.2.3

▶ Powers and Duties

▶ Variances

▶ [Section 2.4.17](#) (Hyperlink to Section 2.4.17 of UDO)

▶ Appeals from Board of Adjustment

▶ Appeals from decisions of the Board shall be to the Carteret County Superior Court

▶ Conflict of Interest

▶ Member shall abstain from voting on any matter in which the member has a direct or indirect financial interest, or in which the applicant or any related party with a material role in the matter being heard by the Board is related to a member by blood or marriage or in any other situation defined as a conflict of interest by the laws of North Carolina

▶ Compensation

▶ All members may be compensated from time to time as deemed appropriate by the Commissioners