UNC
SCHOOL OF GOVERNMENT

Background Material for Board of Adjustment

David W. Owens

February, 2014

Legal topic(s)

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.

Summary:

Background Material for Board of Adjustment Workshops

February 2014

Roles and Types of Decisions

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 decisions affect the entire community by setting general policies applicable through the zoning or other ordinance. They include decisions to adopt, amend, or repeal the 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 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 ordinance policies to individual situations. Examples include variances, special- and conditional-use permits (even if issued by the governing 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 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. There are few rules set by state law or by the courts on how advisory decisions are made.

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 an ordinance, including issuing basic permits, interpreting the 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.

Some Key Differences Between Legislative and Quasi-judicial 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; mailed notice to owners and neighbors and 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 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 (statement on rationale required for zoning amendments)	Written findings of fact required; must determine contested facts
Voting	Simple majority, but 3/4 required if protest petition filed on rezoning	Simple majority except 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	Two months to file challenge map amendment; one 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

TYPICAL ALLOCATION OF LOCAL GOVERNMENT PLANNING FUNCTIONS

Agency	Primary role	Other possibilities
GOVERNING BOARD: (city council, county board of commissioners)	Legislative decisions: adopts ordinances, amendments, policy statements, budgets; approves acquisitions; makes appointments to other bodies	May also serve as planning board; may approve plats and special use permits
PLANNING BOARD: (planning board; planning commission; planning committee of governing board)	Advisory decisions: sponsors planning studies; recommends policies, advises governing board; coordinates public participation; must recommend initial zoning ordinance	May also serve as board of adjustment; may approve or review plats
BOARD OF ADJUSTMENT:	Quasi-judicial decisions: hears zoning appeals, variances, special and conditional use permits	
STAFF: (Planning department, inspections department, community development department)	Administrative decisions: issues permits, conducts technical studies, initiates enforcement; advises manager	

Preliminary Matters

Notice of hearings. A local government must give notice of its quasi-judicial hearings to all parties to the case. State law requires individual mailed notice to:

1. The applicant;
2. The owner of the affected property;
3. The owner of abutting properties; and
4. Anyone else required to receive notice under the ordinance.

The mailed notice must be deposited in the mail at least 10 but not more than 25 days prior to the date of the hearing. A notice must also be posted on the site within the same time period. The zoning statutes impose no 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 wider mailing, 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 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. Members of boards making quasi-judicial decisions 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.

Quasi-Judicial Hearings and Decisions

Collecting Evidence

Subpoenas. Boards conducting these hearings have the authority to issue subpoenas to compel testimony or production of evidence deemed necessary to determine the matter. Requests for subpoenas and objections to subpoenas are made to the board chair prior to the hearing, who then rules on and issues the subpoena. Objections to the chair's rulings may be taken to the full board.

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 approval. 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, most 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 or clerk of the board receiving the testimony (it may also be administered 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 (a statement about the facts made by someone who is not present and available for cross-examination) 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.

Opinions. Opinion evidence generally should be offered only by a properly qualified expert witness. The statutes specifically prohibit use of opinion testimony by nonexperts on how a project would affect property values, how traffic would affect public safety, and any other matter for which only expert testimony would be permitted in court.

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 personal 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 an appraiser 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 weigh 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. An audio or video tape of the hearing should be made, though that is not mandated by statute. Any party may request the tape be included in the record of the hearing. Any party may include a transcript of the hearing in the record if the case is appealed to the courts, with the cost of the transcript being borne by the party requesting it.

Summarizing Evidence and Findings

Findings. The board's decision must be reduced to writing. The written decision must determine any contested facts and apply the facts to the applicable standards. Simply repeating the standards for the ordinance and noting each is met is generally not sufficient. 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." An example of the findings for a simple variance decision is attached at the end of these materials.

The written decision must be signed by the board chair and filed with the clerk to the board. It is effective upon filing. The decision must be mailed to the applicant, the property owner, and anyone else who requested a copy in writing prior to the effective date of the decision. It can be delivered by email, first class mail, or personal delivery.

Voting on a Decision

Quorum and voting. The general rule is that a majority of the board is a quorum. Most decisions of the board of adjustment require a simple majority of the board, but a variance requires a four-fifths majority (a few local government charters vary this requirement). Members who are recused due to a conflict of interest and seats that are vacant are not considered when computing the required majority.

Precedents. Prior decisions are not legally binding on a board. 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 may not hear a quasi-judicial 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 and the statutes give parties to a quasi-judicial decision a legal right to an impartial decision maker. Thus boards must avoid conflicts of interest. In addition to financial impact, bias (defined as a predetermined opinion that is not susceptible to change), undisclosed ex parte communications about the case, and close family or business ties also disqualify members from participating. Nonparticipation includes the discussion as well as voting.

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.

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 allows 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 for 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. The applicant must show that strict application of the rules would create unnecessary hardships. State law provides several tests regarding unnecessary hardships:

- It is not necessary to show that no reasonable use can be made of the property without a variance, but the hardship must be real and substantial. Mere inconvenience or additional expense is not adequate.

- The hardship must be peculiar to the property, such as the property's location, size, or topography. Conditions common to the neighborhood or the public are not sufficient.
- The hardship must not have been self-created. Purchase of the property knowing it may be eligible for a variance is not a self-created hardship.

2. The applicant must 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. 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 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.

Variances must be allowed in a zoning ordinance. Other development regulations may provide for variances, but that is not required. If they are allowed, the variance standards are the same as set out above for zoning.

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 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.

Appeals and Interpretations

Determination required. A board of adjustment is not allowed to issue advisory opinions. The board may only hear actual cases where a staff decision has been issued and is being appealed. The staff must have made a final, binding determination to trigger appeal rights. The staff determination must be in writing and provided to the person who is subject to the decision and to the property owner if that is a different person. The notice of the determination may be provided by email, first class mail, or personal delivery. The staff person who made the determination must appear at the hearing as a witness.

Standing. Only persons with standing to make a judicial appeal can appeal a staff determination. An appeal is filed with the city clerk and must state the grounds for appeal.

Time. Appeals must be filed within 30 days from receipt of the notice of the determination. The board cannot waive this deadline. A person with standing who did not receive the written determination has 30 days from receipt of actual or constructive notice to file an appeal to the board. A landowner receiving a determination has the option of posting the site with a notice that a determination has been made. If the owner's posting remains in place for ten days, that provides constructive notice to neighbors and the public that a determination has been made, thereby starting the 30 day period to appeal to the board as of the date of initial posting of the sign. The board must hear and resolve appeals 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.

Alternate dispute resolution. The parties may agree to mediation or other forms of alternate dispute resolution and the ordinance may include procedures to facilitate and manage such voluntary action.

Imposition of Conditions

Quasi-judicial Decisions

Conditions can be (and usually are) imposed on quasi-judicial approvals such as special and conditional use permits and variances.

However, the conditions are limited to those needed to bring the project into compliance with the standards specified in the ordinance for that decision. For example, a design change may be need to make the project "harmonious" with the surrounding neighborhood or a buffer may be needed to prevent harm to neighboring property values (assuming those are standards applicable to that decision).

Exactions

Exactions are requirements imposed as a part of a development approval that a land owner/developer provides a public improvement at its own expense.

Typical forms of exactions include:

- Dedication of land for streets and utility easements
- Construction of specified public improvements, such as roads, sidewalks, water and sewer lines
- Dedication of land for open space
- Dedication of land and construction of facilities for parks
- Setting aside land for future government purchase for school sites

There are two key legal issues with any exaction. First, is the amount of the exaction constitutional? Second, is there statutory authority to impose it?

On the constitutional issue, there must be a rational relation or nexus to needs generated by project. The amount or size of the exaction must also be no more than that which is roughly proportional to the public facility needs generated by the development being approved. The determination of whether an exaction is proper must be made on an individualized basis. The burden of proving an exaction is constitutional is on the government.

On the statutory authority front, the subdivision statutes have detailed provisions on what land dedications, public improvements, and fees in lieu can be imposed. The zoning statute also addresses street, utility, and recreational exactions.

References

Additional information is available on the NC Planning web page maintained by the School of Government. Log on at: http://www.sog.unc.edu/organizations/planning/

The page includes links to various resources, such as frequently asked questions, legislative summaries, and digests of recent court cases. The "Publications" link at that page sets out a number of resources. A few are noted below.

Sample Online Reports

A Survey of Experiences with Zoning Variances (Special Series No. 18, Feb. 2004)

Special Use Permits in North Carolina Zoning (Special Series No. 22, April 2007)

Books available include:

Introduction to Zoning and Development Regulation (4th. ed. 2013)

Land Use Law in North Carolina (2d ed. 2011)

Blog

The School of Government also has a blog on local government law issues, Coates' Canons, that regularly addresses planning and land use law issues. The blog is online at:

http://sogweb.sog.unc.edu/blogs/localgovt . See particularly posts by Richard Ducker, Adam Lovelady, and David Owens.

UNC
SCHOOL OF GOVERNMENT

Knapp-Sanders Building
Campus Box 3330, UNC Chapel Hill
Chapel Hill, NC 27599-3330
T: 919 966 5381 | F: 919 962 0654