



Board of Adjustment Basics

September 16, 2019



Topics

1. Types of Local Government Land Use Decisions
2. Board of Adjustment Overview
3. Quasi-Judicial Procedure



Part I: Board of Adjustment Overview



N.C. Gen. Stat. Chapter 160D

- In 2019 the General Assembly approved S.L. 2019-111, which adopts Chapter 160D.
- 160D modernizes the municipal statutes and will have some effect on the Boards of Adjustment.
- 160D is effective January 1, 2021.



Types of Local Government Land Use Decisions

1. Legislative
2. Quasi-Judicial
3. Administrative
4. Advisory



Legislative Decisions

- This type of decision generally involves broad policy decisions.
- The governing board has broad discretion to approve or deny legislative requests.
- Includes zoning map amendments (i.e. general district and conditional rezonings) and ordinance text amendments.



Quasi-Judicial Decisions

- These decisions are made by applying the local government's ordinance standards to unique facts and involve some discretion by the decision maker.
- Includes variances, appeals of staff decisions, and special use and conditional use permits.
- Subdivision plat approvals may be administrative decisions or quasi-judicial decisions.



Administrative

- These are sometimes called ministerial decisions.
- Local government staff makes these decisions.
- There is little discretion to approve or deny.
- Includes zoning compliance permits, building permits, and others.
- Subdivision plat approvals may be administrative decisions or quasi-judicial decisions.



Advisory Decisions and Nonbinding Resolutions

- These decisions are nonbinding.
- An advisory opinion is any recommendation given by a local government advisory board, for example a zoning recommendation given by the Planning Board.
- The governing board can also adopt nonbinding resolutions.



An Overview of the Board of Adjustment

- Hears appeals of administrative decisions.
- Considers variance requests.
- May consider special use and conditional use permits applications.



The Board of Adjustment

- The Board must have five or more members. See, N.C. Gen. Stat. § 160A-388(a)
- The Board may also include alternate members. *Id.*
- Municipal boards of adjustment must have proportional representation. See, N.C. Gen. Stat. § 160A-362.



What Governs and Guides the Board of Adjustment?

- G.S. § 160A-388 (applies to municipalities and counties).
- Local zoning, subdivision, and other applicable ordinances.
- Rules of procedure, if any have been adopted.
- All matters before the Board of Adjustment are quasi-judicial.
- Your own experience and common sense are also important.



Voting

- All members are entitled to vote, unless disqualified.
- All motions require a majority vote to pass, except for variance.
- Granting a variance requires a four-fifths majority vote. See, G.S. § 160A-388(e)(1).



Voting

- Members may be excused from voting due to a conflict of interest. See, G.S. § 160A-388(e)(1).
- Vacant positions on the BOA and members who are disqualified from voting on a matter are not considered members of the board for calculation of the requisite majority if there are no alternates to take their place. See, G.S. § 160A-388(e)(1).



Appeals

- *De novo* review.
- On appeals, you have the same authority as the Zoning Officer, no more or less.

See, G.S. 160A-388(b1)(8).



Standards for Granting a Variance

G.S. § 160A-388(d)

“When **unnecessary hardships** would result from carrying out the strict letter of a zoning ordinance, the Board of Adjustment **shall vary** any of the provisions of the ordinance upon a showing of all of the following:

- (1) **Unnecessary hardship** would result from the strict application of the ordinance. It shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property.
- (2) The hardship results from **conditions that are peculiar to the property**, such as location, size, or topography. Hardships resulting from personal circumstances . . . [or] conditions that are common to the neighborhood or the general public, may not be the basis for granting a variance.”



Standards for Granting a Variance

G.S. § 160A-388(d)

“(3) The hardship **did not result from actions taken by the applicant or the property owner**. The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship.

(4) The requested variance is **consistent** with the spirit, purpose, and intent of the ordinance, such that public safety is secured, and substantial justice is achieved.”



Standards for Granting a Variance

G.S. § 160A-388(d)

- “No change in permitted uses may be authorized by variance.”
- “Appropriate conditions may be imposed . . . provided that the conditions are reasonably related to the variance.”



Part II: Quasi-Judicial Procedure



Quasi-Judicial Procedure In General

- “Quasi-judicial decisions involve the application of ordinance policies to individual situations rather than the adoption of new policies.”*
- Hearings are like miniature court hearings.
- Due process rights must be protected.
- The Board must base its decision only substantial, competent and material evidence in the record.

*David W. Owens. *Land Use Law in North Carolina*, 2nd ed., p. 5 (UNC-School of Government 2011).



Prior to the Hearing...

Always check for possible conflicts of interest. These might include:

- A financial interest in the outcome of the matter;
- Having a fixed opinion prior to the hearing that is not susceptible to change; or
- A close familial, business, or other associational relationship with an affected person.



Conflicts of Interest, Continued

A conflict of interest might also include:

- Undisclosed *ex parte* communications;
- Site visits taken by individual members; and
- Undisclosed specialized, relevant knowledge.

See, G.S. § 160A-388(e)(2)



How Formal Does the Hearing Have to Be?

- Due process protections must be observed, including the rights to present evidence and to test evidence through cross examination.
- The rules of evidence do not apply (although they are a good reference).
- Written documents and other exhibits should be submitted prior to the hearing if possible, but evidence may also be submitted during the hearing.



Responsibilities of the Chair

- The Chair presides over the hearing and recognizes speakers and members of the Board before they may be heard.
- The Chair rules on objections or requests.
- It is advisable to allow every speaker to be heard, but the Chair may limit and/or cut off testimony that is irrelevant, repetitive, incompetent, inflammatory, or hearsay.



Responsibilities of the Chair, Continued

- The Chair may also place reasonable limitations on the presentation of evidence and arguments. But the applicant must be given sufficient opportunity to present the evidence needed to support the application.
- Practice Tip: If the Chair knows that a particular hearing will be contentious, he or she may, with the advice of the Board's attorney, work with the parties to establish hearing guidelines prior to the hearing.



Evidence and Testimony

- All witnesses and presenting staff must be sworn in.
- Decisions must be based on substantial, competent and material evidence in the record.
- The parties can direct examine and cross-examine witnesses.
- After the public hearing has been closed, no new evidence may be introduced, but Board members may ask clarifying questions.



Competent, Material, and Substantial Evidence

- Competent Evidence: Evidence given by someone qualified to provide. Especially important for expert testimony. See, N.C. Gen. Stat. § 160A-393(k)(3).
- Material Evidence: Evidence that is relevant to question before the Board.
- Substantial Evidence: “That which a reasonable mind would regard as sufficiently supporting a specific result.”*

*Owens. p. 146 (Quoting, *CG&T Corp. v. Bd. of Adjustment*, 105 N.C. App. 32, 40, 411 S.E.2d 655, 660 (1992)).



Lay Versus Expert Testimony

- A “lay person” is a person without professional or specialized knowledge on the subject. Opinion testimony by a lay person is generally NOT permitted unless it is accompanied by corroborating factual evidence.
- An “expert” is someone whose education, skill, and experience qualifies them to testify to their opinion about a particular issue.
- NOTE: the Board should ask about the expert witness’s qualifications before allowing him or her to testify as an expert.



Lay Versus Expert Testimony, Continued

- General Rule: Anyone with material knowledge can provide factual information, but only experts can provide opinion testimony.
- Lay witnesses can provide opinion testimony, but this testimony is generally incompetent unless it is corroborated by competent evidence.



Lay Versus Expert Testimony, Continued

Per G.S. § 160A-393(k)(3), expert testimony is required for the following subjects:

- Testimony regarding how the use of property in a particular way would affect the value of other property;
- Testimony regarding how the increase in vehicular traffic resulting from a proposed development would affect public safety; and
- Other matters about which only expert testimony would generally be admissible under the rules of evidence.



You don't have to be a Lawyer to Cross-Examine Someone...

- The Board can only base its decision on what is in the record.
- If you, as a Board member, think evidence is missing on a key point, you should ask as many questions as necessary to get evidence in the record on that issue.



Rendering a Decision

Precedent: “The general rule is that prior decisions are not legally binding on the Board. However, similar cases should generally produce similar results, and it is incumbent on a Board to know how and why prior cases have been decided.”*


Res Judicata applies. A denial may be reconsidered only if there is a material change in the applicable standards or conditions.

*Owens, p. 158.



Rendering a Decision, Continued

- The Board must make **findings of fact and conclusions of law** for approvals. The better practice is to do the same for denials.
- Key factual findings cannot be based solely on nonexpert opinion evidence and/or unsupported allegations.
- Final decisions must be made in **writing**, be signed by the Chair or other duly authorized Board member and be delivered to all relevant parties.
- Decisions become final when filed with the Clerk to the Board.



Need More Information? Have Questions?

- Contact the Board's Attorney and/or your Planning Department staff.
- An excellent resource is *The Quasi-Judicial Handbook* (2017) by David Owens and Adam Lovelady and available from the UNC-School of Government.