

A large, stylized, light blue 'b' logo is positioned on the left side of the slide. It features a thick vertical bar on the left and a series of concentric, rounded shapes on the right that form the bowl of the letter.

Town of Aberdeen Historic Preservation Commission

April 19, 2021



Outline of Presentation

- I. Overview of the HPC
 - a. HPC's authority under State and local law
 - b. Recommendations
 - c. Decisions on Certificates of Appropriateness
- II. Quasi-Judicial Procedure
 - I. Evidence
 - II. Parties and "Standing"
- III. Evidentiary Hearings



I. Overview of the HPC



What is the Historic Preservation Commission?

The General Assembly has determined that the heritage of North Carolina is one of the State's most important and valuable assets.

(See, N.C.GS. 160D-940)

Therefore, the General Assembly authorized the creation of historic preservation commissions in order to safeguard and promote the use and conservation of historic districts and landmarks.

(See, N.C.G.S. 160D-940(1) &(2))



What does the Historic Preservation Commission do?

Historic preservation commissions are granted 11 distinct powers by the North Carolina General Statutes.

Under the North Carolina General Statutes, those powers include:

- The power to “review and act upon proposals for alterations, demolitions, or new construction within historic districts, or for the alteration or demolition of designated landmarks, pursuant to [N.C.G.S. 160D, Article 9, Part 4.]”

(See, N.C.G.S. 160D-942)



What does the Historic Preservation Commission do, continued...

The UDO expands on the powers granted to the HPC by State law, and expressly authorizes the HCP to (among other powers):

- Review and decide applications for... Certificates of Appropriateness; and
- Review and make recommendation on the following, when they involve land located within the local historical overlay (LHO) district:
(a) conditional zonings; (b) planned developments; (c) special uses; (d) variances; and (e) zoning map amendments.

(See, UDO Sec. 2.2.5(A)(1) & (2))



What decisions does the HPC make?

Typically, the HPC will make recommendations to other decision-making boards or will make decisions on Certificates of Appropriateness.

Recommendations:

- Recommendations given by the HPC on conditional zonings, planned developments, special uses, variances, and zoning map amendments. (UDO Secs. 2.2.5(A)(2) and 2.4.8)
- These decisions are nonbinding.

Certificates of Appropriateness:

- Decisions on Certificates of Appropriateness. (UDO Sec. 2.5.4(C)(5)(b)).
- These decisions are binding and require the HPC to follow Quasi-Judicial Procedure.



Recommendations

The HPC’s recommendations are based on a review of the standards applicable to the application under review and require the HPC to make recommendations to the final decision-making board.

Type of Decision Under Review	Applicable Standards
Conditional Zoning	UDO Sec. 2.5.5
Planned Development	UDO Sec. 2.5.9
Special Use	UDO Sec. 2.5.12
Variance	UDO Sec. 2.5.16
Zoning Map Amendment	UDO Sec. 2.5.20



Recommendations, continued...

When the UDO requires the HPC to make a recommendation, the HPC should follow the procedures outlined in Section 2.4.8 of the UDO.

The HPC should follow these general guidelines:

Members conducting a review and providing a recommendation should act in accordance with the following guidelines:

1. **No Prejudice.** Consider the application without prejudice.
2. **No Commitment Prior to Review.** Make no commitment or agreement or take a public position on an application or on any proposed condition until the application is reviewed during the meeting.
3. **Acknowledgement.** Acknowledge any information obtained outside the public meeting that they believe has influenced their evaluation of the application.

(See, UDO Sec. 2.4.8(B))



How are Recommendations made?

Per Section 2.4.8(D) of the UDO:

1. A decision to recommend approval shall be decided by a simple majority of a quorum present.
2. A tie vote by members of the PB shall be forwarded to the Board of Commissioners without a recommendation.
3. Zoning map amendment, conditional zoning, special use, and text amendment applications receiving a recommendation for denial by the PB shall require a simple majority vote of the Board of Commissioners members present and voting to be approved.

Unless an application is deferred or continued in accordance with Section 2.4.13, Deferral and Continuance, a vote or recommendation on an application shall be made within 60 days from the date of the initial meeting where it is considered.

If the HPC fails to make a recommendation in the time allotted, the application shall be forwarded to the Board of Commissioners without a recommendation from the HPC.




Certificates of Appropriateness

Certificates of Appropriateness are required before any property owner or developer:

- (1) makes certain exterior changes to property located within a Local Historic Overlay district; or
- (2) makes certain changes to streets, utilities, or other structures located within a LHO district.

(See, UDO Sec. 2.5.4(A)).

- 1. Making an architectural or environmental change to the exterior features of a property.
 - (a) For the purposes of this section, "architectural or environmental change" means the erection, construction, alteration, reconstruction, restoration, moving, removal, or demolition of all or part of a building or other structure, or an appurtenant fixture.
 - (b) For purposes of this section, "exterior features" means the architectural style, general design and general arrangement of the exterior of a building or other structure, including the kind and texture and color of building materials, the size and scale of a building or structure, and the type and style of all windows, doors, light fixtures, steps, pavement, masonry walls, fences, decks, signs, and other appurtenant features. It is also deemed to include major replacement or redesign of landscaping, and the removal of mature trees.
- 2. Any changes in the character of street paving, street width, utility installations or removals, street lighting, street trees, walls, fences, sidewalks, or to the exterior of buildings or structures on property or streets in which the Town and all public utilities have a fee or other interest.



Certificates of Appropriateness, continued...

The HPC's decisions on COA applications are based on whether the applicant produces sufficient evidence to convince the HPC that the proposed development meets the Certificate of Appropriateness Review Standards, found in Section 2.5.4(D) of the UDO.

D. Certificate of Appropriateness Review Standards

1. A certificate of appropriateness shall be approved upon a finding the applicant demonstrates the proposed development complies with the guidelines set forth in the *Design Review Guidelines-Historic Districts Aberdeen, North Carolina*, and is otherwise congruous with the special character of the LHO district.
2. In making its decision on the application the HPC shall not consider the interior arrangement of a building or structure.



How are COA decisions made?

The HPC **must** follow **Quasi-Judicial Procedure** when making decisions on Certificates of Appropriateness. (See, UDO Sec. 2.5.4(C)(5)).

- These decisions are made by applying the Town's UDO standards and the Aberdeen Design Review Guidelines to unique set of facts and involve some discretion by the decision maker.
- Quasi-Judicial hearings are like miniature court hearings where the HPC is the decision maker applying facts to a standard of law.



II. Quasi-Judicial Procedure



What is “Quasi-Judicial Procedure”?

“Quasi-Judicial Procedure” refers to the process that must be followed when a decision involves the exercise of discretion in determining whether a particular application meets subjective standards.

These types of decisions are “court-like” and involve special due process requirements, like:

- Special notice requirements;
- Special evidentiary requirements;
- Special conflict of interest standards.



Quasi-Judicial Procedure

Quasi-Judicial Decisions must be based on “competent, material, and substantial evidence in the record.”

(See, N.C.G.S. 160D-406(j)).

Quasi-Judicial Decisions by the HPC must be made by a vote of a majority of the HPC Members.

(See, N.C.G.S. 160D-406(i)).

Only those who would have “standing to appeal” have the right to participate as a party in a Quasi-Judicial evidentiary hearing.

(See, N.C.G.S. 160D-406(d)).



Quasi-Judicial Procedure & Evidence

Quasi-Judicial Decisions must be based on “competent, material, and substantial **evidence** in the record.”

(See, N.C.G.S. 160D-406(j)).

Competent Evidence – Evidence that is sufficiently trustworthy.

- Sworn testimony, expert witness testimony, testimony by witnesses with personal knowledge.

Material Evidence – Evidence that is relevant to the HPC’s decision and tends to prove a matter in dispute.

- Evidence that discusses the applicable review standards.

Substantial Evidence – Evidence that is enough for a reasonable person to rely on.



Quasi-Judicial Procedure & Evidence, continued...

Quasi-Judicial Decisions must be based on “competent, material, and substantial **evidence** in the record.”

(See, N.C.G.S. 160D-406(j)).

Competent Evidence – Evidence that is sufficiently trustworthy.

- Expert witnesses are permitted to testify about their opinions, but lay witnesses cannot.
- Under G.S. 160D-1402, lay witnesses cannot testify on the following issues:
 - Whether the use of property in a particular way affects the value of other property.
 - Whether the increase in vehicular traffic resulting from a proposed development poses a danger to the public safety.
 - Matters about which only expert testimony would generally be admissible under the rules of evidence.



Quasi-Judicial Procedure & Evidence, continued...

Quasi-Judicial Decisions must be based on “competent, material, and substantial evidence in **the record**.”

(See, N.C.G.S. 160D-406(j)).

The HPC can **only** rely on evidence & testimony presented during the Evidentiary Hearing.



Quasi-Judicial Procedure & “Standing”


Only those who would have “standing to appeal” have the right to participate as a party in a Quasi-Judicial evidentiary hearing.

(See, N.C.G.S. 160D-406(d)).

People with “Standing to appeal”:

- The applicant
- A person with a legal interest in the subject property.
 - i.e. ownership, lease interest, option K to purchase, or an interest created by an easement, restriction, or covenant.
- A person who will suffer special damages as a result of the decision.
 - i.e. those opposed to a COA request.
- An association organized to promote the interest of a particular area so long as at least one member would have standing
 - i.e. HOA

(See, N.C.G.S. 160D-1402(c)).



Quasi-Judicial Procedure & “Standing”, continued...

Only those who would have “standing to appeal” have the right to **participate as a party** in a Quasi-Judicial evidentiary hearing.

(See, N.C.G.S. 160D-406(d)).

A person who may “participate as a party” has the right to:

1. Cross-examine witnesses;
2. Object to evidence;
3. Offer rebuttal;
4. Challenge the impartiality of HPC Members;
5. Appeal the final quasi-judicial decision.



III. Evidentiary Hearings



Purpose of Evidentiary Hearings

Evidentiary hearings give the HPC an opportunity to:

1. Gather & consider sworn testimony and other evidence that relates to a COA application.
2. Question Town Staff, the Applicant, and any other witnesses.
3. Discuss whether the evidence presented is “competent, material, and substantial.”



Typical Evidentiary Hearing

1. The HPC will open the public hearing to receive and consider evidence on a Certificate of Appropriateness.
2. HPC Members should disclose any conflicts of interest.
3. The Chair will swear in witnesses.
4. The HPC should consider and decide on questions of standing, objections, and other preliminary matters.
5. Parties may present their evidence and cross-examine witnesses.
6. The HPC should close the public hearing, deliberate evidence presented, and may vote on the application.



Responsibilities of the Chair

- The Chair presides over the hearing and recognizes speakers and members of the HPC before they may be heard & should swear in witnesses.
- The Chair rules on objections or requests.
 - Except for objections based on conflicts of interest, which are decided by a majority vote of the HPC. (See, N.C.G.S. 160D-109(e)).
- 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.



Conflicts of Interest

- HPC Members carry the high burden of being the decision-makers so they must conduct themselves fairly and with impartiality.
- Should not conduct independent factual research or investigate into the request under consideration.
- Must disclose relevant information including,
 - *Ex parte* communications;
 - Site visits;
 - Personal knowledge or professional expertise relative to the case
 - Possible conflicts of interest
- Any disclosures or potential COI should be done at the start of the public hearing on the record before evidence is presented.



When should a Board Member be conflicted out of the hearing?

- Bias--having a fixed opinion prior to the hearing that is not susceptible to change.
- Undisclosed *ex parte* communications.
- Conflict of Interest:
 - A close familial, business, or other associational relationship with an affected person, or
 - A financial interest in the outcome of the matter.
- Undisclosed site visits taken by individual HPC Members
- Undisclosed, specialized relevant knowledge
- The Issue of whether a Board member is impartial can be raised during the hearing by a party or other HPC Members.
- N.C.G.S. 160D-109(e) permits the HPC to vote whether to recuse a Member or not, if an objection is raised to that Member's participation on the grounds of a Conflict of Interest.



Oaths

The HPC should rely only on sworn testimony, since that helps to ensure that the testimony is “competent”.

Boards may decide how to swear in witnesses, but the critical factor is that the witness must affirm that they will tell the truth.



Preliminary Matters

Before the Parties present their evidence, the HPC should decide on any preliminary matters, like:

- Objections based on alleged conflicts of interest; and
- “Standing” & the right to participate as a party; and
- Representation by an attorney.



Preliminary Matters & “Standing”

Sometimes, a person who is not the applicant may wish to participate as a party. In that case, the HPC must determine whether they have “standing to appeal.”

To determine if someone has “standing”, the HPC should ask

- Does the person own or reside on nearby property?
- Does the person believe that the proposed COA will harm their property value?
- Does the person believe that the proposed development will adversely impact them or their use of their own property?

After receiving the person’s testimony & evidence, the HPC should consider whether it is “competent, material, and substantial” and should take a vote.



Preliminary Matters & Representation

- Individual applicants may represent themselves or may be represented by an attorney.
- Those opposed to an application may represent themselves or may be represented by an attorney.
 - Must demonstrate they have standing to participate.
- Corporations and other business entities must be represented by an attorney.
- If the applicant wants a nonlawyer to act their representative at the hearing, the HPC must vote on whether to allow the representation, and the request may be denied.



Presentation of Evidence

The HPC should allow Town Staff, the Applicant, and any other Party with “Standing” to present their evidence and cross examine any witnesses.

Typically, the presentations go in the following order:

1. Town Staff
2. Applicant
3. Other Parties with “Standing”



Rebuttal Evidence

- If the applicant meets their burden of production, the **burden shifts** to opponents to present substantial, competent and material evidence to the contrary.
- The opponents can direct examine and cross-examine witnesses.
- The rights of cross-examination and presentation of rebuttal evidence are deemed waived if not raised at the hearing.



Consideration of Evidence and Deliberation

After all Parties have had a chance to present their evidence, the HPC should:

1. Discuss all of the evidence presented to determine which evidence is “competent” and “material” and which evidence is not.
2. Determine whether the evidence presented is “substantial” enough to convince the HPC that the COA review criteria are met.
3. If so, consider whether there is any convincing evidence that tends to demonstrate that the COA review criteria are not met.
4. Make a decision and take any necessary votes.