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Board of Adjustment Quasi-Judicial Procedure Training

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Types of Quasi-Judicial Decisions

- Board of Adjustment:
 - Variances--UDO § 4.22.2
 - Appeals of staff decisions or interpretations--UDO § 4.22.1
 - Reasonable accommodation variance--UDO § 4.21 and 4.22
 - Appeals of Development Agreements that are terminated or modified because of Developer's material breach--UDO § 4.13
- City Council:
 - Special Use Permits-- UDO § 4.20
 - Reasonable Accommodation-- UDO § 4.21



Who May Appear at the Hearing?

- Individual applicants, for themselves or through an attorney.
- Those opposed to an application, for themselves or through an attorney.
 - Must demonstrate they have standing to participate as a party.
 - Other witnesses may present evidence that is not repetitive at the discretion of the Board.
- Corporations and other business entities must be represented by an attorney.



How Formal Does the Hearing have to be?

- Due process protections must be observed, including the right to present evidence and to test evidence through cross examination.
- The formal rules of evidence do not apply (although they are a good reference).
- City Staff may transmit written documents and other exhibits to the BOA prior to the hearing (i.e. staff report) but must also distribute to the applicant as well.
- Typically, the evidence is 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.
 - Timeliness of appeal or whether a party has standing.
- 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.



Responsibilities of the Board

- Board members carry the high burden 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 and Recuse themselves?

- 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 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 Board members.
- If an objection is raised and that Board member does not recuse themselves, Board shall rule on the objection by majority vote (UDO § 3.2.3)



Parties and Witnesses



Standing- UDO § 4.23.1.9

- An individual must have standing to:
 - Act as a party appealing a staff decision,
 - Cross-examine adverse witnesses,
 - Make legal arguments, motions or objections to testimony or evidence,
 - Challenge the impartiality of a decision-maker, and
 - Appeal quasi-judicial decisions to superior court

The Board is not required to allow individuals who do not have standing to participate as a party but may allow them to provide evidence and testimony on the matter, so long as its not repetitive.



Examples of Parties that have Standing

- 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 variance.
- An association organized to promote the interest of a particular area so long as at least one member would have standing
 - i.e. HOA



Evidence of Special Damages for Standing

- Central Issue: Has the individual who alleges standing show that his or her damages are distinct from those damages to the public at large?
- Factors to consider
 - Proximity to the location
 - while proximity in and of itself is insufficient, it does bear some weight on the issue.
 - Decrease in property value and other direct adverse effects on the property.
 - Vague or general allegations of decreased property value not enough
 - Secondary Impacts
 - Must show secondary adverse impacts particular to his or her property.
i.e. impacts related to traffic, parking, security, stormwater runoff, littering, and noise

When should the Board consider if a party has standing?

- Typically at the beginning of the hearing before evidence is presented (although this can be done during the hearing as well).
- Most of the time it is clear who has standing– i.e. property owner, applicant, administrative official whose decision is being appealed.
- Other situations is less clear
 - Neighbor appealing an administrative official's decision.
 - Opponents to a variance request.
- Board should make a finding as to whether or not the individual will suffer special damages. If board does not rule formally, it has implicitly ruled the person has standing.



The Hearing



General Standard and Burden of Proof

The **applicant** has the burden of proving compliance with the UDO or that the standards for approval will be met.

- Variance– burden present sufficient evidence to establish practical difficulties or undue hardships.
 - UDO § 4.22.2
- Appeals of Staff Decisions– burden producing evidence to show an error was made.
 - UDO § 4.22.1



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. § 160D-1402(j)(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.”



Lay Versus Expert Testimony- UDO § 4.23.1.10

- General Rule: Anyone with material or personal knowledge can provide factual information, but only experts can provide opinion testimony.
- Expert testimony is mandatory in 3 situations (G.S. § 160D-1402(j)(3)):
 - 1. Testimony regarding the use of property in a particular way would affect the value of other property;
 - 2. Testimony regarding the increase in traffic from a proposed development would pose a danger to public safety;
 - 3. Matters about which only expert testimony would generally be admissible under the rules of evidence.




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 (so long as they have standing).
- The rights of cross-examination and presentation of rebuttal evidence are deemed waived if not raised at the hearing.



Building the Record

- NC law requires every quasi-judicial decision to be based on evidence in the record.
- Documents and physical evidence such as maps, drawings, reports, models, charts, or photographs should be retained and made part of the record.
- While not as strict as the formal rules of evidence, BOA needs assurance the evidence is reliable.



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.
- Board cannot consider any evidence or information that is not properly included in the hearing record or presented after the hearing is closed
- 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.



Variance UDO § 4.22.2

Burden is on the Applicant to produce substantial, competent and material evidence to show that:

- 1. Unnecessary hardship would result from the strict application of the UDO.
- 2. The hardship results from conditions that are peculiar to the property, such as location, size, or topography.
- 3. The hardship did not result from actions taken by the applicant or the property owner.
- 4. The requested variance is consistent with the spirit, purpose, and intent of UDO, such that public safety is secured, and substantial justice is achieved.
- The board may impose reasonable conditions to a variance approval so long as reasonably related to the variance
 - Needs to be consented to in writing by the applicant.



Things to keep in mind with Variances

- Unnecessary Hardship---Must show more than an inconvenience to property owner but doesn't have to prove no reasonable use of the property w/out variance.
- Peculiar to Property---Cannot be a hardship shared by the neighborhood or community.
- Hardship not self created
 - 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.
 - Restrictive covenants and other physical and legal limitations may be a factor in determining hardship.
- Public Safety and "Substantial Justice Achieved"– Board may consider impacts variance will have on the community and the potential harms it may create.
- Variances that change the use of property that is otherwise not permitted by ordinance are illegal in N.C.

Variance Reasonable Accommodation– UDO § 4.21

The BOA may grant a person a variance when necessary and appropriate to make a reasonable accommodation under the Federal Fair Housing Act for a person with a disability.

Reasonable

- Would not undermine the purpose and effects of existing zoning regulations.
- Will not impose significant financial and administrative burdens upon the City.

Necessary

- Provide direct or meaningful therapeutic amelioration of the effects of the particular disability, handicap, or institutionalized persons; and
- Would afford handicapped or disable persons' equal opportunity to enjoy and use housing in residential districts in the City.



Appeals of Staff Decisions-- UDO § 4.22.1

Appealable

- Any zoning staff decisions that are administrative may be appealed.
 - G.S. 160D-405
 - Only have 30 days to appeal from written notice of decision
- Examples
 - notice of violation,
 - formal interpretation of the UDO,
 - denial or revocation of zoning permit,

Not Appealable

- Letter stating basic zoning requirements of a property
- Verbal opinion about how an ordinance might be interpreted
- Inaction by a staff
 - But party may seek a court order to require staff action that is not discretionary.



Appeals of Staff Decisions, continued

- Staff person who made the decision is required to compile the record and send to the BOA and appealing party in advance of hearing.
 - Includes all docs and exhibits used to support their decision.
- Staff person who made the decision must appear as a witness at the hearing.
- Board should not consider any constitutional arguments by the applicant as to the validity of the zoning ordinance.
- The BOA may reverse or affirm (wholly or partly) or may modify the decision appealed from.
- The BOA shall have all the powers that the official who made the decision.



Rules for Ordinance Interpretation

- While the staff's interpretation is entitled to "due consideration," an interpretation of a provision in the ordinance is reviewed *de novo* (considering the matter anew).
- Rules of Ordinance Interpretation (in order of importance):
 1. The main goal is to give effect to the intent of the legislative body that enacted the ordinance (i.e. the City Council)
 2. Absent a definition in the ordinance, the plain meaning of a word controls.
 3. The ordinance should be construed as a whole.
 4. Ordinances should be interpreted to avoid absurd consequences.
 5. If conflicting provisions cannot be reconciled, the later adopted provision prevails.
 6. "[W]hen the ordinance restricts property rights, restrictions not clearly included within the ordinance should not be implied."

Appeals of Terminated Development Agreements- UDO § 4.13.9

- There is an appeal process to the BOA if a Development Agreement with the City is terminated or modified due to the developer's failure to cure a “material breach” of the agreement.
- If the City determines that the developer has committed a material breach of the agreement, it must:
 - Notify the developer;
 - Set forth the reasons for the breach;
 - And provide developer a reasonable amount of time to cure
- If developer fails to cure, the City may terminate or modify the agreement, give notice, and that decision may be appealed to the BOA.



Deliberation and Motions



Deliberation

- Once all evidence is presented the Board Chair must close the public hearing for deliberation amongst the Board members to render a decision.
 - Once closed no new evidence may be presented by the Board can still ask clarifying questions.
 - If more evidence is needed, the Board must re-open the public hearing
- ** Important- the Board's decision cannot be based on personal preference or based on facts or evidence outside of the record from the hearing.
- Board members should reference the applicable standards and evidence from the hearing in their deliberation.



Dos and Don'ts When Deliberating

- Don't offer comments framed as personal opinions.
 - E.g., that begin with “I like...,” “I don't like...,” or “I feel...”
- Don't comment on facts or evidence that is immaterial or that was not otherwise discussed or in the record from the hearing.
- Do frame comments and deliberations with applicable facts and standards.
 - E.g., “Based on the testimony from Mr. Smith...,” “Based on the variance standard of unnecessary hardship...”
- Do offer direct comments about how the request does or does not meet the City's UDO
 - E.g., “With regard to hardship would result from strict application of the ordinance...”
 - “The hardship the applicant would suffer was not self created because...”



Motions

- After deliberation, a motion needs to be made that reflects the following:
 - 1. Outcome---to approve (approve with conditions) or deny the application; AND
 - 2. must clearly indicate why it concluded that the UDO standards were or were not met.
- This is important b/c if the decision is ever appealed, the reviewing court needs to understand why the board decided as it did.
- If a motion is made at the beginning of the deliberation before discussion, that is okay and the Board can proceed to deliberate on that motion.
- However common practice is to deliberate and discuss before a member makes a motion on how to decide the case.



Framing Motions

- When multiple standards must be met (like a variance) it is important for the Board to be clear about which standards are or are not met.
- 2 options:
 - 1. Have a separate motion and vote on each standard separately which can help provide clarity but is not required. Sometimes helpful if the issue has contested facts.
 - 2. Consolidate the standards into one single motion but needs to be clear on which ones have or have not been met.
 - “Standards 1 through 4 have been met because...”
 - “Standards 1 through 3 have been met but standard 4 has not been met because...”



Motions for Variances

- For variances, the law requires a supermajority of 4/5 of the Board for approval.
- Thus, it is not necessary to make an additional motion to deny a variance if the motion to approve fails to get the required 4/5 majority.
- Alternatively, a motion to deny a variance only needs a simple majority.
- Board members voting in the minority will sometime need to outline their findings.
 - E.g., if a majority of the board, but not the super majority, support the variance, the minority members should outline the evidence that was critical to their decision to oppose the variance.



Voting

- All members are entitled to vote, unless disqualified or recused.
 - i.e. conflict of interest
- All decisions require a majority vote, except for variance which requires 4/5 vote for approval.
 - Need 6 out of the 7 board members.
- For variances, members who are absent count towards the total members of the Board, however recused/disqualified members or vacant positions do not count.
 - If one member absent and no alternate, would need all 6 members to vote in favor of variance (instead of 5).



Rendering a Decision

- The BOA must make **findings of fact and conclusions of law as to each standard** 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 delivered to all relevant parties.
- Decisions become final when filed with the Clerk to the Board.
- *Res Judicata* applies. In other words, a denial may be reconsidered only if there is a material change in the applicable standards or conditions