

A Citizens Guide to Quasi-judicial Decisions



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Decisions on variances, special use permits, and conditional use permits and appeals of administrative decisions made by the zoning administrator require special handling. These decisions involve determining the facts of the case and exercising some degree of judgment and discretion. They are called quasi-judicial decisions, and they are subject to rather demanding procedural rules set forth by the courts, including the requirement of a formal evidentiary hearing. These rules apply to all citizen boards making quasi-judicial decisions, including the city council or board of county commissioners.

Quasi-judicial zoning decisions differ from legislative zoning decisions (such as a rezoning) in a fundamental manner - these decisions involve applying zoning policies rather than setting new policies. In quasi-judicial decisions, the board making the decision must act much like a court to apply the zoning ordinance (the law) to a specific case.

This fundamental difference leads to a very different set of procedures that must be followed by the board. When new policies are being set, as with a zoning text amendment or a rezoning, the law is designed to make sure there is wide public notice and opportunity to comment. On the other hand, when the policies already set out in the ordinance are being applied to an individual case, the legal requirements shift to a focus on securing fair and impartial hearing on the merits of the case.

These differences in legal requirements for different types of zoning, decisions often confuse citizen board members as well as citizens participating in the hearing. In legislative zoning hearings, citizens can appear and say whatever is on their minds. Community opinions and attitudes are important, legitimate considerations. In evidentiary hearings for quasi-judicial zoning decisions, however, the purpose of the

hearing is to gather legally acceptable evidence in order to establish sufficient facts to apply to the ordinance. The fact that a hundred angry citizens appear expressing the opinion that the proposed special use permit would be the worst thing to ever happen to the town should have little, if any, bearing on the decision. The question before the board is whether the proposal meets the standards in the ordinance, not whether it is popular among citizenry.

Citizen boards must keep this difference clearly in mind. Furthermore, it is very helpful if the purpose and limitations of the hearing are fully explained to those appearing at these hearings. A handout for the applicants and neighbors can explain the ground rules for evidentiary hearings and help avoid misunderstandings and legal errors in how these hearings are conducted.

A board making a quasi-judicial decision must do two things. First it must determine the facts of the case. In this task, the board acts much like a jury in a court proceeding. Second, it must apply the standards in the ordinance to those facts. In this task the board acts much like a judge in applying the law (in this case the standards in the zoning ordinance) to a given set of facts. The terminology used by the statutes and zoning ordinances sometimes leads to confusion about these two responsibilities. For example, the ordinance may provide that a special use permit shall be issued “upon the board finding that the project will not have a significant adverse affect on neighboring property values.” Even though the ordinance uses the term “finding,” this is really the standard that is to be applied. The board must be careful to both “find the facts”- what exactly are the impacts on neighboring property values and why - and to make a “finding” - a conclusion as to whether any adverse impacts are significant.

Most quasi-judicial zoning decisions are made by boards of adjustment. However, North Carolina law also allows these decisions to be made by the planning board or the governing board. They must not, however, be assigned to a single staff member because state statutes require the decision to be made by a board. The rules discussed here apply whenever a quasi-judicial zoning decision is involved, regardless of which citizen board makes the decision.

EVIDENTIARY HEARINGS

Hearings on quasi-judicial zoning matters must be conducted in a fair and impartial manner. While the formal rules of evidence that apply in court need not be rigorously followed, zoning evidentiary hearings are serious proceedings that significantly affect the legal rights of parties. In conducting these hearings, the following guidelines apply.

Open meetings. The state’s open meetings law applies to boards making quasi-judicial decisions. This means that the regular meeting schedule must be filed with the city or county clerk, additional notice is required for special meetings, and all of the hearing and the board’s deliberations must be conducted in open, public session. The board may not go into a closed session to discuss the case after receiving the evidence.

Parties. Unlike a court proceeding, quasi-judicial zoning hearings do not have formal plaintiffs and defendants. The person who initiates the action (an applicant for a special or conditional use permit, a person appealing the zoning officer’s determination or requesting a variance) is a “party” to the proceeding and has legal rights that must be protected. A person who is directly affected by the decision (such as a neighbor whose property value would be affected) may also ask to participate in the hearing and can be considered a party. Members of the general public are not “parties”. A person who is interested in the matter but who also does not have a personal stake in the outcome (such as a likely effect on his or her property value) may attend and observe the hearing, but they have no legal right to offer evidence, ask questions, or otherwise directly participate in the matter. Only the parties whose legal rights are directly affected are entitled to participate. As a practical matter, many presiding officers will allow a person who is not a party to present evidence, but care must be used to be sure it is relevant to the case.

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 a permit. 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 he or she begins to testify. While oaths may be waived if all 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, he or she may affirm rather than swear an oath. The oath is generally administered by the chair of the board receiving the testimony (it may also be administered by a 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. If a statement is being used as evidence to establish a fact, the person making that statement should be present at the hearing to testify and be subject to cross examination. If a statement from a person who is not present is offered and it is the best evidence available, it can be received by the board. But the board may well decide to limit the weight or credibility it gives such evidence, and critical findings of fact should not be based on hearsay evidence.

Opinions. Boards need facts for their findings, not opinions. Opinion evidence (unless offered by a properly qualified expert witness) is generally not allowed and cannot be the basis for critical findings. A witness offering an opinion would need to present the factual information upon which the opinion is based.

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 the board members and 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 special knowledge about a site or case, the member should disclose that at the hearing. A member who fails to disclose any ex parte communications is prohibited from participating in the case.

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 five 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 elicit 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 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.

Conflict of interest. If an individual board member has a strong personal interest in a case, he or she must not participate in that case. “Personal interest” includes

a financial interest in the outcome, a close personal, family, or business relation with the parties, a predetermined opinion about the outcome (the disqualifying bias), or undisclosed outside communications about the case. It is a good practice, though not legally required, for a member with a conflict of interest to physically leave the room while that case is being handled by the board.

Voting. State statutes impose a special voting requirement for some quasi-judicial decisions. A four-fifths vote rather than a simple majority is required in order for a zoning board of adjustment to grant a variance, issue a special use permit, or overturn a zoning administrator’s determination. If the city council, county board of commissioners, or a planning board is the decision-making body for special use permits or conditional use permits, however, a simple majority vote suffices.

A “four-fifths vote” means four-fifths of the entire board must vote in favor of the proposal, not just four-fifths of those present and voting. In the case of a ten-member board of adjustment with two members absent, a unanimous, eight-to-zero vote would be necessary (eight being four-fifths of the entire ten-member board). Vacant seats and the seats of members who are disqualified from voting due to a conflict of interest are not considered in making the four-fifths calculation.

This supermajority requirement is an additional reason that most boards of adjustment have alternate members who can take an absent or disqualified member’s place.

Written decision. After taking evidence, the board must make written findings of fact. This is necessary to let the parties - and, if the matter is appealed, the courts - know what the board concluded about the facts of the case. A simple written conclusion that the standards were or were not met is not sufficient, nor is a letter just stating the permit has been issued or denied. The findings need to provide enough detail to let the reader know what the board determined the key facts to be.

The board must also provide a written decision applying these facts to the standards of the ordinance. A formal written copy of the decision must be mailed to the applicant and mailed to those present at the hearing who made a written request for a copy, and a

formal copy must be filed with the city or county office specified in the ordinance. The time period for appeals to court only starts to run when the written decision is both mailed and filed.

The question of how to adopt findings when a minority of the board prevails requires particular attention. For example, if a five-member board of adjustment votes three to two to grant a variance, the variance is denied because it did not receive the required four-fifths majority. The minutes and written decision need to clearly set forth why the two dissenters voted as they did, but there is no requirement that a majority of the board agrees with or officially adopts those views.

Record keeping. Complete records must be kept of all hearings.

Precedent. 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. Once a final decision is reached on a quasi-judicial zoning decision, the same matter cannot be brought back to the board for a rehearing. Unless there is a different application or conditions have changed on the site or in the ordinance, a board does not have the legal authority to rehear these cases. This is unlike a legislative rezoning decision where the same petition can be reconsidered after a waiting period set by the ordinance.

Liability. Board members 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 hearing) and for willful misconduct (such as intentionally denying a permit that should have been issued because of personal vendetta against the applicant). Good faith mistakes or errors in judgment do not expose members to personal liability.

Appeals. Appeals of quasi-judicial decisions go directly to court. An applicant may not appeal a board of adjustment’s decision to the governing board.

Attorneys. The state bar has advised that representing a party at the evidentiary hearing in a quasi-judicial matter - presenting evidence, cross-examining witnesses, advising as to the evidence needed - is the “practice of law” and should only be done by licensed attorneys. Parties are not required to have lawyers and are free to represent themselves.

JUDICIAL REVIEW

Once a final binding decision has been rendered on any of these quasi-judicial zoning decisions, a person who is directly affected by the decision can appeal that decision to superior court in the county where the decision was made. Such an appeal of a zoning decision to court must be filed within thirty days of the date that the final decision is mailed to the parties or officially filed with the city or county, whichever is later.

The superior court does not conduct a new hearing to determine the facts. Rather, it sits as an appeals court and bases its decision on the factual record established at the evidentiary hearing conducted by the local citizen board. This is one of the reasons it is important that adequate evidence be presented at the board hearing and that good records be kept of those proceedings. Probably the most frequent reason a citizen board’s quasi-judicial zoning decision is overruled by the courts is that there was inadequate evidence in the record to support the board’s findings of fact.

Other factors considered by the courts when they review these zoning decisions are whether proper procedures were followed in the decision-making process, whether there were errors made in interpreting the law, and whether the decision was “arbitrary and capricious”. On this latter point, the court may not substitute its judgment for that of the citizen board; it does not second-guess a close call or consider whether the citizen board made the “right” decision. But if there is no rational basis for the decision, the court can overturn it.