

***QUASI JUDICIAL PROCEEDING  
TRAINING MATERIALS***

CREATED BY SARAH GRACE ZAMBON  
ORIGINAL: JUNE 2007      UPDATED JANUARY 2013

## **TRAINING MATERIALS FOR ZONING BOARD OF ADJUSTMENT**

### **Role of ZBOA**

- Like a court in that the Board 1) interprets meaning of parts of ordinance that are unclear; 2) apply ordinance to factual situations; 3) correct mistakes or abuses by ordinance administrators
- State law and Henderson County Code state the powers and duties of the ZBOA are as follows:
  - Hear and decide appeals
  - Variances
  - Conditional use permits
  - Temporary uses
  - Watershed review board
  - Floodplain review board
  - Special Uses where permitted
- Board must not vary the ordinance; it can only interpret and apply what governing body has written not to vary that legislative pronouncement to fit its own ideas. (Brough and Green)
  - Decisions must be in accord with what Board thinks ordinance actually means and the intent of the ordinance.

### **Membership on Zoning Board of Adjustment**

- Minimum of five members
- Quorum
  - Consists of 3 members
  - BUT to decisions about orders, requirements, determinations cannot be made unless 5 members are present without the permission of the Applicant
  - No decisions can be made without at least 4 members
- Voting
  - Need 4/5ths

### **Open Meetings Law**

- Meetings must be open to the public
- Discussion must be in the public
- Only on very rare occasions would the ZBOA have ability to have a close session

### **Sources for Rules of Procedure**

- Board of Commissioners Rules for Quasi-Judicial Proceedings
- North Carolina state case decisions
- ZBOA Bylaws
- Roberts Rules of Order
- Brough and Green Book on Zoning Board of Adjustment in North Carolina
- Training materials and zoning articles

## QUASI JUDICIAL PROCEEDINGS

### **I. Overview of Quasi-Judicial Proceeding**

- A. Intent of Q-J: like court; affect the right of an individual
  - 1. Requirements:
    - a. Notice
    - b. Right to present evidence
    - c. Cross examination
    - d. No ex parte communication
    - e. Impartial voting
- B. Areas in Quasi-Judicial proceedings (see “cheat” sheets on each subject)
  - 1. Special Use Permits- where permitted by Henderson County Code
  - 2. Conditional Use Permits
  - 3. Variances
  - 4. Appeals
    - a. question is whether decision of Zoning Administrator or other staff is incorrect according to the Henderson County Code
    - b. Burden is on applicant to show why decision is wrong not on staff to show why decision is right
- C. Process
  - 1. Pre-Hearing
    - a. Application
    - b. Notice
    - c. Board should not form opinion of case beforehand or discuss with other members before
  - 2. Hearing
    - a. Script- open meeting, announce parties and type of action, etc
    - b. Board Disclosures
      - 1. Conflicts of Interest
        - a. Examples
          - i. Financial conflict
          - ii. Biased or fixed opinion
          - iii. Undisclosed outside contacts
          - iv. close family tie
          - v. close business tie
        - b. Most important is that you state any potential conflict to the Board for them to decide whether to excuse
        - c. If excused, CANNOT
          - i. vote
          - ii. discuss case
          - iii. question witnesses
        - d. Careful about excusing
          - i. only for serious personal or financial interest
          - ii. Quorum problems- affect outcome with recusal
    - 2. Any visits to property before meeting
    - 3. any conversations had about the case

3. Written Decision

**II. Parties**

A. Applicant

1. Who may speak for Applicant: Only Applicant or Applicant's attorney can speak for the Applicant
  - a. It cannot be the engineer, the agent for the applicant, etc- they can be called as witnesses by the Applicant but cannot represent the Applicant

B. Staff

C. Standing

1. Aggrieved Party- Applicant
2. Substantial interest/affected by the outcome- other parties
  - a. Board must hear each person who wants to be a party other than staff and Applicant
  - b. Board must determine what interest allows person to be a party
  - c. If not a party, person can still be called as a witness by a party

**III. Evidence**

A. Standard

1. Substantial, competent and material
2. Evidence must be presented for each finding of fact
3. Only evidence presented and entered at the hearing may be considered in the decision.

B. Rules of Evidence

1. At discretion of the Board to how much they apply
2. Hearsay and opinion have limited weight
  - a. Hearsay- statements by a person (either written or by another person) where person is not there to be questioned
  - b. Expert testimony- must be based on facts not general opinion

C. Types

1. Documents
  - a. Staff reports
  - b. Notice of Violation
  - c. Documentation
  - d. All must be Entered into Evidence
2. Testimony
3. Exhibits
  - a. Clerk must be given copy for the record
  - b. Authentic and relevant

D. Burden of Proof

1. Applicant must prove EACH element required for request
2. Once Applicant proves, opponent must show does not meet requirements
3. If burden NOT met, must DENY

E. Witnesses

1. Oath
2. Cross examination- opponent parties
3. Board Examination
4. Time-limits

- a. use with care, must be reasonable
- b. Henderson County has used time limits in the past but rarely
- c. standard should be whether testimony presented is repetitive, immaterial or irrelevant

F. Objections

1. can only be made by a party or party's attorney
2. Board can decide whether objection stands or is overturned- give reason for the record for decision

**IV. Board Discussion**

A. No further evidence, including testimony, or argument can be heard, even by staff

B. Discussion

1. Evidence
2. Ordinance
3. Whether Applicant met burden

**V. Decision-making**

A. Must follow standards in the Ordinance

B. Findings of Fact

1. Evidence must support each factor
2. Competing evidence must be weighed and discussed
3. Board must clearly set out basis for decision
4. Must have sufficient level of detail

C. Conclusions of Law

5. Meet each part of the Ordinance
6. If deny Applicant, must say why denied

D. Voting

7. Only members who had full access to evidence can vote, including new members can vote on decision or orders
8. Did not have to be physically present for whole hearing

E. Making Conditions

9. Reasonable
10. Related to the request
11. In the public interest- fairly broad
  - a. Reference language of statute
12. Best to ask Applicant if they agree to the proposed conditions

F. Timeframe for making decisions: 45 days after close of hearing

13. Must be in writing
14. Must be approved by same board that made original decision

**VI. Decision Review**

A. Record

1. Minutes
  - a. meeting procedures
  - b. testimony
  - c. Board discussion
  - d. Record of the vote
2. documents and evidence presented at the hearing
3. written decision of the Board

B. Precedent

1. Because ZBOA decisions are fact-specific prior decisions are not legally binding but are persuasive
2. if cases have similar facts but have different outcomes must explain why the difference

C. Review by Courts

1. Appeal
  - a. Deadline for Appeal is 30 days after decision issued
  - b. Appeals of ZBOA decisions go to courts
2. Courts will look at whether ZBOA
  - a. committed errors of law
  - b. followed statute and ordinance
  - c. followed own procedures
  - d. protected Applicant's due process
  - e. decisions based on competent, material and substantial evidence
3. Court will base decision on Record
4. Big problems include
  - a. No findings of fact
  - b. Findings not supported by the evidence in the record

## **STAFF'S ROLE IN QUASI-JUDICIAL HEARINGS**

### **Notice**

- Contents: request, property location, time, date and location of the hearing

### **Talking to Applicants**

- Tell Applicant regarding time and place of hearing, advise them that they or their attorney are the only parties who can represent the Applicant.
- Burden of proof is on the *Applicant* to prove all the elements of the request, *not on staff*
- The goal is to make staff's job easier and not prove the Applicant's case for them
  - Staff's role may be for technical stuff like zoning district, floodplain, maps, etc. but Applicant has to prove case.
- We may want to consider creating pamphlets for people on what is expected before ZBOA and what they have to prove

### **Presenting Evidence**

- Before you start presenting enter everything you have into evidence (memo, exhibits, powerpoint)- it can't be considered in the decision of the Board or the order if it has not been entered
- Staff report
  - Applicant name, property, request
  - Notice provided- dates, etc.
  - Technical information- zoning district, lot size, setbacks
  - Recommendations from any other boards or departments reviewing project
  - Remind Board of elements Applicant needs to prove and where applicable outline pro or con arguments for them
  - Bring up any possible problems you see with the application (septic system, 2 front yard setbacks, etc)
  - Propose specific questions the Board may want to answer- especially on appeals
  - Propose potential conditions for the Board
  - Look at orders to see what information usually goes in them
- Answering Board Questions- be as specific as possible- try to avoid extra information
  - We have to be very conscious of what Board can base its decision on and provide that information but avoid additional information except where asked.

### **Preparing Draft Order**

- Applicants get a temporary order at the hearing that expires upon approval of final
- Legal department will prepare and send draft to Zoning or Planning staff for comments  
A draft order may, in some instances, be sent to Applicant or Applicant's counsel



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## Confidential Memorandum

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TO: Zoning Board of Adjustment  
FROM: Sarah Grace Zambon  
DATE: 25 February 2009  
RE: Zoning Board of Adjustment Meetings  
Standing and hearsay evidence

This document is a confidential communication, between the author and the recipient(s). It is protected by attorney-client privilege, and is not subject to disclosure for at least a period of three years from the date hereof under North Carolina Public Records law, pursuant to N.C. Gen. Stat. §132-1.1.

I just wanted to quickly review two items that have come up recently and may come up again. The first is the issue of standing and the second is that of hearsay testimony.

Standing to participate in quasi-judicial hearings is required for persons to call witnesses and to testify if they are not a witness for another party. Statute states that standing must be given to an "aggrieved person". Aggrieved person has been determined to mean someone who has a special interest or would suffer a distinct harm different from the rest of the community. Examples of people with standing would be adjacent property owners, people contractual obligated to purchase the subject property dependant on the outcome of the case, the owner, or an option holder who will have the possibility of buying the property if the necessary permits are required.

It is incumbent upon the board to remind itself and all participants that a quasi-judicial hearing is a formalized means of gathering relevant evidence, not an opportunity for citizens to speak their minds, as is the case with public hearings on legislative matters. The board chair has the authority and duty to maintain decorum, to secure efficient presentation of information and use of the board's time, and to assure that testimony is limited to relevant evidence that can be considered by the board in making its required factual findings. David Owens, *Land Use Land in North Carolina*, pg 108.

Related to this is the issue of hearsay testimony. Evidence presented in a quasi-judicial proceeding must be substantial, competent, and material. In general, a person should be present to assert any evidence both to assess the above factors and to permit cross-examination by opposing parties. This Board may hear hearsay evidence if it so chose but findings of fact cannot be based solely on hearsay evidence.

It has been the practice of this board not to accept hearsay evidence. Most of the hearsay evidence presented before this board is letters sent by people who do not attend the hearing.

Based on this Board's practice regarding hearsay and the task of determining standing by parties, staff will not submit any evidence in the Board's packets that has not either been provided by staff or the applicant. The rationale for this decision is to protect the board from any accusation of bias or prejudice in reviewing communications that then are found to be inadmissible for reasons of either standing or hearsay.



## North Carolina State Bar Ethics Opinions

### Authorized Practice Advisory Opinion 2006-1

October 20, 2006

#### Quasi-Judicial Hearings on Zoning and Land Use

##### **Inquiry:**

May a person who is not a lawyer appear before planning boards, boards of adjustment, or other governmental bodies conducting quasi-judicial hearings in a representative capacity for another party?

##### **Opinion:**

At its October 2005 meeting, the Authorized Practice Committee responded to an inquiry concerning the propriety of a person who is not a lawyer appearing before planning boards, boards of adjustment, and city and county government in a representative capacity. The committee's advisory opinion distinguished appearances on legislative concerns, such as general rezoning cases and ordinance amendments, from appearances on behalf of petitioners for special use permits and variances, which are quasi-judicial matters. The committee has received comments from a number of interested parties, including architects, land use planners, and city and county attorneys as a result of that opinion. The committee is issuing this advisory opinion to supplement the prior opinion.

At its October 2005 meeting, the Authorized Practice Committee responded to an inquiry concerning the propriety of a person who is not a lawyer appearing before planning boards, boards of adjustment, and city and county government in a representative capacity. The committee's advisory opinion distinguished appearances on legislative concerns, such as general rezoning cases and ordinance amendments, from appearances on behalf of petitioners for special use permits and variances, which are quasi-judicial matters. The committee has received comments from a number of interested parties, including architects, land use planners, and city and county attorneys as a result of that opinion. The committee is issuing this advisory opinion to supplement the prior opinion.

First, the committee reiterates that the adoption of ordinances and amendments to official zoning maps (i.e. general rezoning cases) by the elected officials in city and county governments are legislative in nature and that any interested person may appear and speak on such matters before governmental bodies, even as representatives of groups or interested parties, without engaging in the unauthorized practice of law. Nonetheless, the general statutory prohibitions on unauthorized practice of law still apply even to persons who appear before governmental bodies on legislative matters. Non-lawyers may not hold themselves out as attorneys, provide legal services or advice, or draft any legal documents with regard to such matters. See N.C. Gen. Stat. 84-2.1 and 4.

The law is clear that hearings on applications for special use permits and variances under zoning ordinances, as well as appeals from staff level interpretations related to permits, are quasi-judicial proceedings. N.C. Gen. Stat. 153A-345 and 160A-381 and 388. See, *Humble Oil & Refining Co. v. Bd. of Aldermen of Chapel Hill*, 284 N.C. 458, 202 S.E.2d 129 (1974) and *Woodhouse v. Board of Comm'rs of Nags Head*, 299 N.C. 211, 261 S.E.2d 882 (1980). (For simplicity, the quasi-judicial hearings before these bodies are hereafter referenced to as a "variance hearing" unless the context indicates otherwise.) The governmental body before which the variance hearing is conducted sits in a judicial role of applying the standards of an ordinance to the particular circumstances of a particular party. Accordingly, the role of the governmental body is to receive evidence and make decisions based upon the evidence presented.

Variance hearings require the governmental body hearing the matter to observe certain formalities. Evidence, including witness evidence, is presented to the hearing body, although the Rules of Evidence need not be strictly observed. All witnesses before the body must be sworn and their testimony is subject to cross-examination. The hearing body has the power and authority to issue subpoenas to compel witness testimony. A record of the proceedings must be preserved. The

decision is to be based upon the evidence presented at an open hearing, and not on extraneous matters or personal knowledge of the members of the board. The applicant has the burden of proof. The board must make written findings of fact to support its decision. And, the decision of the board is reviewable by the courts on appeal based solely upon the record of the proceedings.

The committee believes that the law is also clear that an appearance on behalf of another person, firm, or corporation in a representative capacity for the presentation of evidence through others, cross-examination of witnesses, and argument on the law at a quasi-judicial proceeding is the practice of law. N.C. Gen. Stat. 84 2.1 and 4. Consequently, because the variance hearings are by definition quasi-judicial proceedings, the committee concludes that it is the unauthorized practice of law for someone other than a licensed attorney to appear in a representative capacity to advocate the legal position of another person, firm, or corporation that is a party to the proceeding.

The committee has been urged to recognize that architects, landscape architects, land use planners, and engineers play a vital role at these quasi-judicial proceedings by presenting necessary facts and information on behalf of their clients at variance hearings. The committee agrees that the information these professionals can present is critical to the decision before the hearing body. These professionals are subject matter experts whose expert opinions, as witnesses, must be presented to the hearing body. They are witnesses who are in the best position to explain to the hearing body the facts of the proposed design and its anticipated effects on a variety of factors, including traffic, environment, and aesthetics, within the framework of matters properly under consideration at the variance hearing. The committee does not believe that the role of legal advocate by attorneys in quasi-judicial proceedings should interfere with or inhibit the role of non-lawyer professionals who speak as witnesses and present information at these quasi-judicial proceedings. In fact, their roles should be complementary.

It is axiomatic that the committee has no authority to amend or formulate exceptions to the statutes. In issuing an advisory opinion, it simply articulates how it believes a court would ultimately resolve the question for the guidance of the public. The committee cannot recognize or create exceptions to the law as expressed by the legislature and the courts. Further, we believe, as a practical matter, that effective representation of parties in variance hearings is becoming increasingly dependent upon legal advocacy of the rights of the parties with an eye toward compiling a supportable record in the event of an appeal. These are the skills an attorney provides. While it is true that many of these hearings involve routine and non-controversial matters, even questions about matters such as the height of residential fences may become the subject matter of an appeal where the appellate courts may only consider the record produced at the variance hearing. See *Robertson v. Zoning Board of Adjustment for the City of Charlotte*, 167 N.C. App. 531, 605 S.E.2d 723 (2004). It is difficult to predict in advance when a matter may require a comprehensive record for appellate purposes. Therefore, with this further elaboration, the committee re-affirms its initial opinion expressed by letter dated October 31, 2005, that the representation of another person at a quasi-judicial hearing is the practice of law.

That said, this opinion should not be interpreted to diminish the role and expertise of land use professionals as witnesses at variance hearings. These professionals may still present their evidence in support of the position of their clients. However, they may not examine or cross-examine other witnesses or advocate the legal position of their clients.

The committee's opinion is also not intended to affect the ability of city and county planning staff to present factual information to the hearing board, including a recitation of the procedural posture of the application, and to offer such opinions as they may be qualified to make without an attorney for the government present, as the committee understands is the proper, current practice and role of the planning staff. Further, nothing in this opinion should be interpreted as limiting the ability of a corporate officer or employee from testifying on factual matters on behalf of a corporate party during a hearing or suggesting that individual parties may not represent themselves before these boards.

In sum, the committee is of the opinion that land use professionals, including architects, engineers, and land use planners, may appear and testify as to factual matters and any expert opinions that they are qualified to present at quasi-judicial proceedings, but the presentation of other evidence, including the examination and cross-examination of witnesses, making legal arguments, and the advocacy for results on behalf of others before quasi-judicial zoning and land use hearings, is the practice of law that may be performed only by licensed attorneys at law.

May a person who is not a lawyer appear before planning boards, boards of adjustment, or other governmental bodies conducting quasi-judicial hearings in a representative capacity for another party? At its October 2005 meeting, the Authorized Practice Committee responded to an inquiry concerning the propriety of a person who is not a lawyer appearing before planning boards, boards of adjustment, and city and county government in a representative capacity. The committee's advisory opinion distinguished appearances on legislative concerns, such as general rezoning cases and ordinance amendments, from appearances on behalf of petitioners for special use permits and variances, which are quasi-judicial matters. The committee has received comments from a number of interested parties, including architects, land use planners, and city and county attorneys as a result of that opinion. The committee is issuing this advisory opinion to supplement the prior opinion.

STATE OF NORTH CAROLINA  
 COUNTY OF HENDERSON

ZONING BOARD OF ADJUSTMENT  
 APPLICATION NO. \_\_\_\_\_

<p>In the Matter of the Application by</p> <p>_____</p> <p>Applicant,</p> <p>To the</p> <p>Henderson County Zoning Board of Adjustment,        Permit Authority</p>	<p><b>TEMPORARY ORDER GRANTING ZONING PERMIT</b></p>
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The Zoning Board of Adjustment for the County of Henderson, having held a public hearing on \_\_\_\_\_ of \_\_[date]\_\_\_\_, 20\_\_, to consider Application No. \_\_\_\_\_, submitted by \_\_\_\_\_[Applicant name]\_ a request for a \_\_\_\_\_[variance, conditional use permit]\_\_\_\_\_ to use the property located at \_\_\_[address]\_\_\_\_\_ (PIN: \_\_\_\_\_)

In the request the Applicant has asked for:

[short summary of the request- ie 15 foot reduction in front yard setback]

Based upon the evidence presented to the Board, the Board voted \_\_\_\_\_ to GRANT/DENY the Application and has imposed the following restriction, modifications, and conditions upon the Applicant at this time:

A formal order/permit containing the appropriate findings of fact, conclusions of law, Board determined conditions, and reflecting the above terms will be prepared for the Board and reviewed and voted on within 45 days of this hearing. The final order/permit will contain all the provisions required under North Carolina General Statute for quasi-judicial decisions and under the Henderson County Code governing land use and zoning. This temporary permit becomes null and void once the final order/permit has been approved by the Board.

The parties stipulate by their signatures (or that of their counsel) hereto that: 1) signing of this memorandum constitutes acceptance of the above conditions and permitted activity; 2) the Applicant may begin work in furtherance of this order; 3) the Applicant assumes the risk that while they may act on this permit, the final order and its conditions may differ from what is stated above, that the Board has the authority to impose said conditions, and that the Applicant must comply with the terms of the final order/permit once it is approved by the Board.

Ordered this the \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

<p>ZONING BOARD OF ADJUSTMENT:</p> <p>_____</p> <p>__ Chair</p>	<p>CLERK TO THE BOARD:</p> <p>_____</p> <p>Secretary to the Board</p>
<p>APPLICANT:</p> <p>[Print Name]:</p> <p>_____</p> <p>[Signature]:</p> <p>_____</p>	<p>_____</p>

**HENDERSON COUNTY  
CODE ENFORCEMENT DEPARTMENT  
ZONING ADMINISTRATION**

**APPEAL NOTIFICATION FORM**

Name: \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

**Under what Ordinance are you requesting an appeal:**

- \_\_\_\_\_ Flood Damage Prevention Ordinance- Board of Adjustment
- \_\_\_\_\_ Zoning Ordinance (appeal Zoning Administrator decision)
- \_\_\_\_\_ Erosion and Sedimentation Control Ordinance
- \_\_\_\_\_ Watershed Ordinance- Board of Adjustment
- \_\_\_\_\_ Nuisance Ordinance- Board of Adjustment
- \_\_\_\_\_ Animal Control Ordinance- Animal Services Appellate Board
- \_\_\_\_\_ Manufactured Home Park Ordinance- Planning Board
- \_\_\_\_\_ Solid Waste Ordinance- Board of Commissioners
- \_\_\_\_\_ Sign Ordinance- Board of Commissioners
- \_\_\_\_\_ Communications Towers Ordinance- Board of Commissioners
- \_\_\_\_\_ Other \_\_\_\_\_

Date of Violation or Order you are appealing: \_\_\_\_\_

What are the reasons for your appeal?

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**PLEASE NOTE:** Please Attach the Notice of Violation or Order being appealed when applicable.  
There is no fee to appeal these ordinances

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**FOR DEPARTMENT USE ONLY:**

Date Appeal Received: \_\_\_\_\_

Which Board hears the appeal? \_\_\_\_ Board of Adjustment; \_\_\_\_ Planning Board;  
\_\_\_\_ Board of Commissioners; \_\_\_\_ Animal Services Appellate Board

Date of Meeting Appeal will be heard: \_\_\_\_\_

\_\_\_\_\_  
Signature of Authorized Personnel

**BLANK SAMPLE QUASI-JUDICIAL ORDER**

**COUNTY OF HENDERSON  
STATE OF NORTH CAROLINA**

**SPECIAL USE PERMIT  
SUP-0X-XX**

**IN THE MATTER OF THE APPLICATION OF Corporation, LLC,  
Applicant,**

**To the**

**HENDERSON COUNTY BOARD OF ADJUSTMENT,  
Permit Authority**

**ORDER \_\_\_\_\_ SPECIAL USE PERMIT SUP-0X-XX**

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The **HENDERSON COUNTY BOARD OF ADJUSTMENT** having held a quasi-judicial public hearing on XX, XX, 20XX to consider the application submitted by **Corporation, LLC**, to request a Special Use Permit, makes the following **FINDINGS OF FACTS** and draws the following **CONCLUSIONS**:

**FINDINGS OF FACT**

- 1. A quasi-judicial public hearing was held by the Henderson County Board of Adjustment on special use permit request SUP-0X-XX. All regular members of the Board of Adjustment were present.
- 2. This Order and the approval herein, was moved by \_\_\_\_\_ and seconded by \_\_\_\_\_. The request for a special use permit was by a vote of \_\_\_\_\_.
- 3. [Applicant as Party]
- 4. [County as Party]
- 5. [Notice given]
- 6. [Other parties]
- 7. Upon inquiry by the Chairman of the Zoning Board of Adjustment, no party objected to any other persons or entities made parties to this action being a party to this action.
- 8. All parties and all witnesses presented by any party were sworn as witnesses in this proceeding on XX.
- 9. [SR requirements]
- 10. Findings of Fact:

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11. Findings of Fact:

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12. Findings of Fact:

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13. Findings of Fact:

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Findings of Fact:

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14. Findings of Fact:

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15. Findings of Fact:

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**CONCLUSIONS**

1. All parties, and all persons entitled to notice, have been given proper notice of this hearing and afforded the right to be heard.
2. All parties were properly before the Board of Adjustment and all evidence presented herein was under oath, and was not objected to by any party. All evidence relied upon in this Order was credible and reliable.
3. [authority of ZBA to hear the case]
4. Henderson County Code 200-69.B grants the Board of Adjustment the jurisdiction to hear and make special use permit decisions.
5. The special use permit does meet all the standards of the Ordinance and the special use permit should be \_\_\_\_\_ based on the reasons established below:
  - a. The regulations for the use set forth in the Land Development Code for \_\_\_\_\_ have been met by the Applicant as shown by the approval by the TRC as to the technical requirements of the SR's.
  - b. The project will \_\_\_\_\_ endanger the public health, safety, and welfare because \_\_\_\_\_.
  - c. The project will \_\_\_\_\_ substantially injure the value of property or improvements in the area because \_\_\_\_\_.
  - d. The project is \_\_\_\_\_ in harmony with the surrounding area because \_\_\_\_\_.
  - e. The project and Applicant have \_\_\_\_\_ and will \_\_\_\_\_ comply with all applicable local, state, and federal statutes, ordinances, and regulations because \_\_\_\_\_.
  - f. The project is \_\_\_\_\_ in accordance with the Comprehensive Plan, Long Range Transportation Plans and other relevant County and municipal plans as stated in Section 200A-323 of the Land Development Code because \_\_\_\_\_.
  - g. The project will \_\_\_\_\_ minimize the effects of noise, glare, dust and odor on those persons residing or working in the neighborhood of the proposed use because \_\_\_\_\_.
  - h. The Applicant shall \_\_\_\_\_ minimize the environment impacts on the neighborhood including the following groundwater, surface water, wetlands, endangered/threatened species, archeological sites, historic preservation sites and unique natural areas by complying with all required safety precautions because \_\_\_\_\_.
  - i. Appropriate provisions have been made for ingress and egress onto the property and proposed structures, off-street parking and loading areas, utilities, buffering, landscaping, and structures by \_\_\_\_\_.

Based on the foregoing FINDINGS OF FACT and CONCLUSIONS drawn, and it appearing to the HENDERSON COUNTY BOARD OF ADJUSTMENT that the Special Use Permit must be \_\_\_\_\_.

IT IS THEREFORE ORDERED by the HENDERSON COUNTY BOARD OF ADJUSTMENT as follows:

**The Applicant's Special Use Permit has been \_\_\_\_\_. The Applicant must adhere to the conditions established in this Order.**

- 1. \_\_\_\_\_
- 2. \_\_\_\_\_
- 3. \_\_\_\_\_
- 4. \_\_\_\_\_
- 5. \_\_\_\_\_
- 6. \_\_\_\_\_

ORDERED this the XX day of XX, 20XX.

THE HENDERSON COUNTY BOARD OF AJUSTMENT



## **VARIANCE APPLICATION**

### **Factors to Consider (FINDINGS OF FACT)**

- Are there practical difficulties or unnecessary hardships in meeting the letter of the law?
  - Can a reasonable return or reasonable use be gotten from the property if applicant complies with literal terms of law?
  - Where there unique circumstances related to the land?
  - Is the hardship the applicant's fault?
  
- Is the variance in harmony with the spirit and intent of the law?
  
- Will the variance protect public safety and welfare?
  
- Will the variance do substantial justice?
  
- Do NOT consider nonconforming uses in the neighborhood or other districts- they are not a reason for a variance.

### **ZONING BOARD ACTION**

#### Suggested Approval Motion

I move that the Zoning Board find and conclude that Variance application V-06-15 complies with the necessary provisions of Henderson County Zoning Ordinance.

AND

I further move that the Variance be approved subject to the following conditions:

**SPECIAL USE PERMIT**  
**SU-06-18**

**Factors to Consider (FINDINGS OF FACT)**

- Does the proposed project :
  - Adversely affect health and safety of people residing or working in the neighborhood?
  - Detrimental to public welfare?
  - Injurious to property or public improvements in neighborhood?
  
- Does the proposed project minimize glare, noise, dust, solar access and odor to those working or living in neighborhood or to property or public improvements?
  
- Does the proposed project seriously worsen traffic so as to endanger public safety?
  
- Does project comply with all applicable federal, state, and local laws, rules and regulations?
  
- Is the project consistent with the goals and objectives of Henderson County as outlined in the Comprehensive Plan?
  
- Is project consistent with any approved Official Thoroughfare Plans for Henderson County or any municipality?
  
- Does project minimize environmental impact on groundwater, surface water, wetlands, endangered and threatened species, archaeological sites, historical preservation sites and unique natural areas?
  
- \*\*\*If not all met, Board can make a condition addressing.

**BOARD ACTION**

**Suggested Motion**

I move that the Board find and conclude that Special Use application SU-XX-XX complies with the necessary provisions of the Henderson County Zoning Ordinance

**[AND]**

I further move that the Special Use Permit should be approved subject to the following conditions:

**TEMPORARY USE APPLICATION**  
**TU-07-XX**

**NOT QUASI-JUDICIAL**

**Factors to Consider (FINDINGS OF FACT)**

- What will be the fixed **expiration date**?
  
- What **use** is intended?
  - This matter does NOT include Adult establishments, hazardous waste disposal, or radioactive waste disposal.
  - Isolated racing events meet all the conditions required under §200-57(E).
  
- What **zoning district** is the permit for?
  - This matter does not provide a temporary use permit for the Open Use (OU) district except as provided for in §200-57E or is an asphalt plant, concrete plant, or chip mill.

**ZONING BOARD ACTION**

Suggested Approval Motion

I move that the Zoning Board find and conclude that the Temporary Use Permit TU-06-XX has met the necessary provisions under the Henderson County Zoning Ordinance to receive a temporary use permit.

AND

I further move that the Temporary Use Permit be approved subject to the following conditions:

AND

I move that this Temporary Use Permit shall expire on:

## **OPENING STATEMENT FOR ZBOA**

A Quasi-judicial proceeding is much like a court proceeding where an individual's rights and interests are being decided under specific rules of procedure. Parties to this case have the right to present evidence and cross examine witnesses. The burden of proof in these cases typically lies with the Applicant. The extent to which the Rules of Evidence used in courts apply is up to the discretion of the Board

Quasi-judicial proceedings are different than other public hearings in that not everyone has the right to present evidence before this Board and to become a party to this proceeding. Only those who can demonstrate that they will be affected by the outcome of the hearing may become parties. After a description of the person's interest in this case, the Board will determine whether they will be allowed to present evidence as a party. Please note, you do not have to be a party to testify if someone who is a party calls you as a witness. All parties and witnesses who intend to present evidence or testify before this Board must be sworn in.

- Parties- for which case: get name and address
- Witnesses- for which case: name and address
- Swear everyone for all hearings in

At this time we will begin our first hearing. Decisions of this Board are based upon the Henderson County Code. After we hear all the evidence, the Board will discuss the matter and may either vote on the case or continue the case to another date. The Board may direct staff to bring back a draft order for the Board to review at our next meeting. The Board's decision must be made in writing within 45 days of the conclusion of the hearing.

## **PROCEDURE FOR QUASI-JUDICIAL HEARINGS**

### I. Motion to go into Public Hearing

**"I make a motion to go into Public Hearing"**

### II. Call the Case

**"Now we are going to hold a quasi-judicial hearing on the following case:**

**Case No. \_\_\_\_\_**

**which is a (variance, conditional use, temporary use) petition"**

### III. Parties, Witnesses and Oath

- A. Board ask if anyone other than the Applicant and staff wants to be a party to this action

**" Are there people who have not been identified by the Board who wish to be parties to this action?"**

- B. Make sure Clerk has names and addresses for all parties  
C. Make sure all those testifying have be sworn in

### IV. Evidence

- A. Staff presentation  
i. Cross examination by any party starting with Applicant  
ii. Questions from the Board  
B. Applicant evidence and witnesses  
i. Cross exam by staff, other parties  
ii. Questions from the Board  
C. Other parties evidence and witnesses  
i. Cross exam by Applicant, staff, other parties  
ii. Questions from the Board  
D. Rebuttal/Closing Statements  
i. Any other Questions from Board

### V. Board discussion- No more input from public or Applicant

- A. Discuss factors from request based on Henderson County Code  
i. Look at cheat sheet for each category  
ii. Make sure to go through each factor and determine how it relates to the petition  
B. Vote  
i. Direct staff as to how to write order  
1. approval/denial  
2. evidence for each factor  
ii. Determine any conditions for an order in the case of approval  
iii. If Board not prepared to vote, can continue the decision until later meeting  
iv. Board has 45 days to make final determination in writing

### VI. Motion to go out of Public Hearing

**"I make a motion to go out of public hearing"**

**SELECTED PROVISIONS OF HENDERSON COUNTY CODE AND AUTHORIZING STATE STATUTE**

**LOCAL ORDINANCES**

**§200A-305. Henderson County Zoning Board of Adjustment**

A. Powers and Duties Pursuant to This Chapter. Without limiting any authority granted to the Zoning Board of Adjustment by law or by regulations, the Zoning Board of Adjustment shall have the following powers and duties with respect to this Chapter, to be carried out in accordance with the terms of this Chapter:

- (1) Text Amendments. To initiate *text amendments* to this Chapter by adopted motion and submittal to the *Planning Director*.
- (2) Map Amendments. To initiate *map amendments* to the Official Zoning Map by adopted motion.
- (3) Flood Damage Prevention Board. To serve as the Flood Damage Prevention Board.
- (4) Water Quality Board. To serve as the Water Quality Board.
- (5) Administrative Review. To hear and decide *appeals* where it is alleged there is error in an order, requirement, decision, determination or interpretation made by an Administrator in the enforcement of this Chapter.
- (6) Communication Facility Permits. To review and approve the granting of a *communication facility permit* by the *Communication Facilities Administrator* for any *category three (3) communication facility*;
- (7) Special Use Permits. To grant *special use* permits as authorized by this Chapter;
- (8) Temporary Use Permits. To grant *temporary use* permits referred by the *Zoning Administrator* and as authorized by this Chapter.
- (9) Variances. To hear and decide applications for approval of zoning *variances* from the terms of this Chapter, in accordance with the procedures and standards set forth in §200A-267 (Variances).
- (10) Vested Rights. To grant vested rights as authorized by this Chapter.
- (11) Additional Powers and Duties. Such additional powers and duties as may be set forth for the Zoning Board of Adjustment elsewhere in this Article and in other laws and regulations.

B. Membership. Five (5) regular members and five (5) alternate members appointed by the Board of Commissioners. Members shall be citizens of Henderson County and shall serve without pay. Alternative members may serve on individual matters based on a regular member's temporary disqualification. Vacant seats and disqualified members are not considered in calculating a 4/5 vote if there are no qualified alternates.

C. Terms. Overlapping terms of three (3) years.

D. Vacancies. Any vacancy shall be filled for the unexpired term in the same manner as the initial appointment.

E. Officers. The Zoning Board of Adjustment shall elect a Chair and Vice-Chair from its members, who shall serve for one (1) year or until reelected or until their successors are elected. The Zoning Board of Adjustment shall appoint a secretary, who may be a County officer, an employee of the County or a member of the Zoning Board of Adjustment.

F. Rules. The Zoning Board of Adjustment shall adopt rules and bylaws in accordance with the provisions of this Chapter, *NCGS §153A-345* and the *Zoning Board of Adjustment Rules of Procedure*.

G. Meetings. Meetings of the Zoning Board of Adjustment shall be held at the call of the Chair (or in his/her absence, the Vice-Chair) and at such other times as the Zoning Board of Adjustment may determine. The Chair (or in his/her absence, the Vice-Chair) may administer oaths and compel the attendance of witnesses by subpoena. All meetings or hearings of the Zoning Board of Adjustment shall be open to the public.

H. Decisions. The concurring vote of four-fifths (4/5) of the members of the Zoning Board of Adjustment shall be necessary to reverse any order, requirement or determination of the approving official or agency, or to decide in favor of the *applicant* on any matter upon which it is required to pass under this Chapter, or to affect any variation of this Chapter. On all *appeals*, applications and other matters brought before the Zoning Board of Adjustment, said Board shall inform those making *appeal* or application of its decisions and the reasons therefore. Such notification shall be in writing.

I. Records. The Zoning Board of Adjustment shall keep minutes of its proceedings, showing the vote of each member upon each question, or if absent or failing to vote, indicating that fact. Final disposition of *appeals* shall be by order indicating the reasons of the Zoning Board of Adjustment therefore, all of which shall be a public record.

**§200A-371. Quasi-Judicial Process Standards** A. Category Three (3) Communication Facility Permits, Special Use Permits, Vested Rights, Variances, and Appeals

(1) Public Hearing. Before taking any action, the appropriate Zoning Board of Adjustment (*ZBA*) shall hold a public hearing (quasi-judicial) on the application, in accordance with established procedures for quasi-judicial hearings.

(2) Newspaper None required.

(3) Mailed Notice. The *owner* of that parcel of land (related to the application) as shown on the County tax listing, and the *owners* of all parcels of land abutting that parcel of land as shown on the County tax listing, shall be mailed a notice of a public hearing on the proposed amendment by first class mail at the last addresses listed for such *owners* on the County tax abstracts. This notice must be deposited in the mail at least ten (10) but not more than 25 days prior to the date of the public hearing. The *person* or *persons* mailing such notices shall certify to the *ZBA* that fact, and such certificate shall be deemed conclusive in the absence of fraud.

(4) Posted Notice. The County shall post one or more prominent *signs* on or immediately adjacent to the subject area reasonably calculated to give public notice of the hearing. In the event that more than one (1) parcel is involved, at least one (1) *sign* shall be posted in a central location; however, the *Zoning Administrator* may post multiple *signs*. Said *sign(s)* shall be posted at least ten (10) days prior to the hearing.

(5) Conflict of Interest. A member of the *ZBA* shall not participate in or vote on any quasi-judicial matter in a manner that would violate affected *persons'* constitutional rights to an impartial decision maker. Impermissible conflicts include, but are not limited to, a member having a fixed opinion prior to hearing the matter that is not susceptible to change, undisclosed *ex parte* communications, a close familial, business, or other associational relationship with an affected *person*, or a financial interest in the outcome of the matter. If an objection is raised to a member's participation and that member does not recuse himself or herself, the remaining members shall by majority vote rule on the objection.

## **§6-25 Record of Proceedings**

- A. Electronic recordings. Henderson County will keep minutes of all meetings, and in cases in which a record on appeal could be required by a Court of record, a transcript, or an electronic recording in such a way that will be adequate to record fully the proceedings of each meeting, hearing or other proceeding.
1. Public record. Any electronic recordings are available to the public in any and all manners in which the County is capable of providing them, at a cost set by the County's fee schedule, as amended from time to time.
  2. Electronic record retention. Records shall be kept in accordance with North Carolina Public Records law and the records retention schedule established by the North Carolina Department of Cultural Resources.
  3. Meeting Summary. In instances where electronic recordings are utilized as the official minutes, boards and committees may elect to create meeting summaries including the attendance, matters discussed with any actions taken, identification of documents presented, and any votes taken. When votes are not unanimous, the meeting summary should indicate the votes of each member of the board or committee.
- B. Record on Appeal. Henderson County shall make the electronic recordings available to any appellant in order to prepare a verbatim transcript of the proceeding being appealed.
1. The appellant must make provision for the creation of a verbatim transcript from the electronic recording.
  2. The appellant's transcriptionist may have 45 days to prepare the transcript from the electronic recording and provide copies to the Clerk of Court and the respective parties. In certain circumstances, the time for preparation may be extended upon agreement of the parties and with the permission of the Court.
  3. The appellant shall bear the initial cost of transcription, subject to being taxed by the Court as a cost of any appeal.
  4. No part of this Ordinance is intended to conflict with North Carolina General Statutes or North Carolina Rules of Appellate Procedure. In any instance of conflict, the General Statutes and Rules of Appellate Procedure shall be followed.



## N.C. Gen. Stat. § 153A-345

### § 153A-345. Board of adjustment

(a) The board of commissioners may provide for the appointment and compensation, if any, of a board of adjustment consisting of at least five members, each to be appointed for three years. In appointing the original members of the board, or in filling vacancies caused by the expiration of the terms of existing members, the board of commissioners may appoint some members for less than three years to the end that thereafter the terms of all members do not expire at the same time. The board of commissioners may provide for the appointment and compensation, if any, of alternate members to serve on the board in the absence or temporary disqualification of any regular member or to fill a vacancy pending appointment of a member. Alternate members shall be appointed for the same term, at the same time, and in the same manner as regular members. Each alternate member, while attending any regular or special meeting of the board and serving on behalf of a regular member, has and may exercise all the powers and duties of a regular member. If the board of commissioners does not zone the entire territorial jurisdiction of the county, each designated zoning area shall have at least one resident as a member of the board of adjustment.

A county may designate a planning board or the board of county commissioners to perform any or all of the duties of a board of adjustment in addition to its other duties.

(b) A zoning ordinance or those provisions of a unified development ordinance adopted pursuant to the authority granted in this Part shall provide that the board of adjustment shall hear and decide appeals from and review any order, requirement, decision, or determination made by an administrative official charged with the enforcement of that ordinance. Any person aggrieved or any officer, department, board, or bureau of the county may take an appeal. Appeals shall be taken within times prescribed by the board of adjustment by general rule, by filing with the officer from whom the appeal is taken and with the board of adjustment a notice of appeal, specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which action appealed from was taken. An appeal stays all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board of adjustment, after notice of appeal has been filed with him, that because of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property or that because the violation charged is transitory in nature a stay would seriously interfere with enforcement of the ordinance. In that case proceedings may not be stayed except by a restraining order, which may be granted by the board of adjustment or by a court of record on application, on notice to the officer from whom the appeal is taken and on due cause shown. The board of adjustment shall fix a reasonable time for the hearing of the appeal, give due notice of the appeal to the parties, and decide the appeal within a reasonable time. The board of adjustment may reverse or affirm, in whole or in part, or may modify the order, requirement, decision, or determination appealed from, and shall make any order, requirement, decision, or determination that in its opinion ought to be made in the circumstances. To this end the board has all of the powers of the officer from whom the appeal is taken.

(c) The zoning ordinance may provide that the board of adjustment may permit special exceptions to the zoning regulations in specified classes of cases or situations as provided in subsection (d) of this section, not including variances in permitted uses, and that the board may use special and conditional use

permits, all to be in accordance with the principles, conditions, safeguards, and procedures specified in the ordinance. The ordinance may also authorize the board to interpret zoning maps and pass upon disputed questions of lot lines or district boundary lines and similar questions that may arise in the administration of the ordinance. The board shall hear and decide all matters referred to it or upon which it is required to pass under the zoning ordinance.

(d) When practical difficulties or unnecessary hardships would result from carrying out the strict letter of a zoning ordinance, the board of adjustment shall have the power to vary or modify any regulation or provision of the ordinance so that the spirit of the ordinance is observed, public safety and welfare secured, and substantial justice done. No change in permitted uses may be authorized by variance. Appropriate conditions, which must be reasonably related to the condition or circumstance that gives rise to the need for a variance, may be imposed on any approval issued by the board.

(e) The board of adjustment, by a vote of four-fifths of its members, may reverse any order, requirement, decision, or determination of an administrative officer charged with enforcing an ordinance adopted pursuant to this Part, or may decide in favor of the applicant a matter upon which the board is required to pass under the ordinance, or may grant a variance from the provisions of the ordinance. For the purposes of this subsection, vacant positions on the board and members who are disqualified from voting on a quasi-judicial matter shall not be considered "members of the board" for calculation of the requisite supermajority if there are no qualified alternates available to take the place of such members.

(e1) A member of the board or any other body exercising the functions of a board of adjustment shall not participate in or vote on any quasi-judicial matter in a manner that would violate affected persons' constitutional rights to an impartial decision maker. Impermissible conflicts include, but are not limited to, a member having a fixed opinion prior to hearing the matter that is not susceptible to change, undisclosed ex parte communications, a close familial, business, or other associational relationship with an affected person, or a financial interest in the outcome of the matter. If an objection is raised to a member's participation and that member does not recuse himself or herself, the remaining members shall by majority vote rule on the objection.

(e2) Each decision of the board is subject to review by the superior court by proceedings in the nature of certiorari. Any petition for review by the superior court shall be filed with the clerk of superior court within 30 days after the decision of the board is filed in such office as the ordinance specifies, or after a written copy thereof is delivered to every aggrieved party who has filed a written request for such copy with the secretary or chairman of the board at the time of its hearing of the case, whichever is later. The decision of the board may be delivered to the aggrieved party either by personal service or by registered mail or certified mail return receipt requested.

(f) The chairman of the board of adjustment or any member temporarily acting as chairman may in his official capacity administer oaths to witnesses in any matter coming before the board.

(g) The board of adjustment may subpoena witnesses and compel the production of evidence. If a person fails or refuses to obey a subpoena issued pursuant to this subsection, the board of adjustment may apply to the General Court of Justice for an order requiring that its order be obeyed, and the court shall have jurisdiction to issue these orders after notice to all proper parties. No testimony of any witness before the board of adjustment pursuant to a subpoena issued in exercise of the power conferred by this subsection

may be used against the witness in the trial of any civil or criminal action other than a prosecution for false swearing committed on the examination. Any person who, while under oath during a proceeding before the board of adjustment, willfully swears falsely, is guilty of a Class 1 misdemeanor.

## **SUMMARY OF OPEN MEETINGS LAW (NCGS 143)**

The statutes governing public meetings can be found in Chapter 143, Article 33C of the North Carolina General Statute:

1. Official meetings of public body shall be open to the public and any person is entitled to attend
  - a. Public body-any elected or appointed body of the state, city, county, etc, that 1) has more than 2 members and 2)exercises legislative, quasi-judicial, administrative or advisory function.
    - i. Does not include meeting solely among staff
  - b. Official meeting- meeting, assembly, gathering with a majority of the members of a public body for the purpose of conducting hearings, participating in deliberations, or otherwise transacting public business.
2. Public body keep full and accurate minutes
  - a. Open and closed session
  - b. Written, sound or video records- become public record
3. Closed Session- held only for specific reasons.
  - a. Some are: attorney-client privilege; personnel; economic development; purchase contract.
  - b. Closed sessions may be held with a motion citing one of the permissible purposes
4. Notice
  - a. Schedule of regular meetings with time and place kept with clerk to the Board of Commissioners (County). Usually kept with secretary or clerk.
  - b. If change meeting or add special or emergency meeting:
    - i. If announced in open meeting, no further notice required
    - ii. Special meeting- notice at least 48 hours before time of meeting, notice posted on bulletin board or meeting room and sent to sunshine list and media. Must state purpose of meeting.
    - iii. Emergency meeting- notice to media and sunshine list. Can only discuss business connected to emergency at the meeting.
5. Electronic meeting- if official meeting held by conference call or other electronic means, location and means must be provided to the public. Public wishing to participate can be charged up to \$25 dollars
6. Written ballots- public body can't vote by secret or written ballot. In rare instanced where it's allowed, ballots must be signed by member and minutes show how each member voted. Ballots must be available for public inspection until official minutes approved
7. Acting by Reference- Members can't vote on anything based on information not available to the public unless copies available to the public so that they public can understand what is going on.
8. Broadcasting- media can broadcast any part of an open meeting. Public body can restrict where equipment placed so it doesn't interfere with the meeting.
9. Remedy for violation of open meeting law
  - a. Injunctive relief may be granted to any person. The person does not have to prove special damages.
  - b. Actions taken at a meeting violating the law can be found null and void. Court will look at how much violation affected action; extent impeded access to meeting; whether violation is isolated occurrence; whether committed in bad faith (not full list of factors).
  - c. Court may award attorney fees- may be ordered to pay by individual members if intentionally or knowingly violated law.
10. Disruption of official meeting- Class 2 misdemeanor

## **SUMMARY OF PUBLIC RECORDS LAW (NCGS 132)**

The statutes governing public meetings can be found in Chapter 132 of the North Carolina General Statute:

- Public Records include all documents, letters, maps, books, photographs, recordings, etc in connection with the transaction of public business by any agency of NC government or its subdivisions.
  - Agency means any public office, officer, official, board, commission, unit of government, etc.
  - Email Lists: Electronic lists are available for inspection not for copy (New Law) - electronic mailing lists may only be used for set purpose, notify subscribers of an emergency to public health or safety, or to notify subscribers of other lists when list is going to be deleted.
- Not Public Record (not full list)
  - Attorney-client privilege
  - Tax information
  - Public enterprise billing- except when used to get a bond, ensure quality, or assist emergency services
  - Personally identifiable information
  - Trade secret
  - Account numbers for electronic payments
  - Licensed designs
  - Criminal Investigations- can be ordered by a judge
  - 911 phone number and address ID
  - Emergency response and security plans
  - Economic Incentive
- Destruction of Public Records: public record retention duration determined by Department of Cultural Resources
  - Destruction of public records otherwise- Class 3 misdemeanor
- Inspection of public records
  - Reasonable times under reasonable supervision
  - Copies permitted for reasonable fee
  - If public record mixed with confidential information, confidential should be redacted
  - Don't have to give reason for requesting document
  - May be required to make the request in writing
  - Public agencies don't have to provide inspection outside of regular business hours or to create documents that don't current exist or compile data from existing sources.

## HENDERSON COUNTY ETHICS POLICY

### **Section 1. Declaration of Policy**

(a) The Proper Operation of democratic government requires that public officials and employees be independent, impartial, and responsible to the people; that governmental decisions and policy be made publicly; that public offices not be used for personal gain; and that the public maintain confidence in the integrity of its government.

(b) In recognition of these goals, a code of ethics for Henderson County officials is hereby adopted. The purpose of this policy statement is to set forth guidelines for ethical standards of conduct for all such officials by setting forth acts or actions that are incompatible with the best interests of Henderson County.

### **Section 2. Definitions**

As used in this article, the following terms shall have the meaning indicated:

**Business Entity** means any business, proprietorship, firm, partnership, person in representative or fiduciary capacity, association, venture, trust or corporations which is organized for financial gain or profit.

**Confidential Information** means any information or knowledge which has not been made public through the regular affairs of government. Information that has become public knowledge, whether or not through the regular affairs of government, is not considered confidential information.

**County Official** means the County Manager, County Attorney, Assistant County manager, County Commissioners, officials appointed by the County Commissioners to other county boards and commissions, department heads, and any employees involved in purchasing or acquiring goods and services for the county.

**Immediate Family** means the County Official, his/her spouse, and minor children (including stepchildren and foster children).

**Interest** means direct or indirect pecuniary or material benefit, as a result of an official act, a contract, or transaction with Henderson County, accruing to:

- (i) A County Official;
- (ii) Any person in a County Official's Immediate Family;
- (iii) Any business entity in which the County Official, member of the County Official's Immediate Family, or is about to be, an officer or director;
- (iv) Any business entity in which an excess of ten (10) percent of the stock, or legal or beneficial ownership of, is controlled or owned directly or indirectly by the County Official, or the County Official's Immediate Family member; or
- (v) The primary employer (other than Henderson County) of any County Official.

For the purposes this Code, a County Official is presumed to have knowledge of the financial affairs of the County Official's Immediate Family members and primary employer. For the purpose of this policy, the County Official only has an Interest in the affairs of other Immediate Family members if the County Official has knowledge of or should have known of the Interest of the family member.

**Official Act Or Action** means any legislative, administrative, appointive, or discretionary act of any County Official.

### **Section 3. Standards of Conduct**

All County Officials as defined in this article shall be subject to and abide by the following standards of conduct.

- (a) Interest in contract or agreement. No County Official shall participate in selection or award of a contract if the contract involves the County Official's interest or the Official is prohibited from voting pursuant to N.C. Gen. Stat. § 14-234.
- (b) Use of official position. No County Official shall use his/her official position or the county's facilities for his/her private gain, or for the benefit of his interest, or for the benefit of any individual, which benefit would not be available to any other member of the public in the same or similar circumstance. No County Official shall represent any other private person, group or interest before any department, committee, or board of the county of which they are a member except in matters of purely civic or public concern. The provisions of this paragraph are not intended to prohibit a County Official from speaking before neighborhood groups and other nonprofit organizations.
- (c) Disclosure of information. No County Official shall use or disclose confidential information gained in the course of or by reason of his/her official position with the county for purposes of advancing:
  - (i) His/her interest;
  - (ii) The Interest of a business entity of which the County Official or an Immediate Family member has an Interest;
  - (iii) The financial or personal interest of a member of his/her Immediate Family;
  - (iv) The financial interest of the employer of the County Official; or
  - (v) The financial or personal interest of any citizen beyond that which is available to every other citizen.
- (d) Incompatible service. No County Official shall engage in, or accept private employment or render service for private interest, when such employment or service for private interest, when such employment or service is incompatible with the proper discharge of his/her official duties with the county or would tend to impair his/her independent judgment or action in the performance of his/her official duties with the county, unless otherwise permitted by law and unless disclosure is made as provided in this policy.
- (e) Gifts. No County Official shall directly or indirectly solicit any gift, or accept or receive any gift, whether in the form of money, services, loan, travel, entertainment, hospitality, thing or promise, or any other form, under circumstances in which a reasonable person would believe that the gift was intended to influence him/her in the performance of his/her official duties, or was intended as a reward for any official action on his/her part. Legitimate political contributions to County Officials shall not be considered as gifts under the provisions of this paragraph.

Exempted from the prohibition are reasonable honorariums for participating in meetings, advertising items or souvenirs of nominal value or meals furnished at banquets. County Officials must report in writing to the Clerk to the Board of County Commissioners all honorariums, and all gifts and favors exceeding \$100.00 in value if made by a covered contractor, subcontractor, or supplier. There is no prohibition on gifts if the circumstances make it clear that it is the personal relationship, rather than the business or the persons concerned, which is the motivating factor and where the value of the gift, entertainment, or favor is appropriate to the circumstance and consistent with the long-standing relationship. If such a gift, entertainment, or favor exceeds \$100 in value, the County Official must disclose the nature and value of the gift, entertainment, or favor in a letter to the Clerk to the Board of County Commissioners.

It shall not be a violation of this policy for any Public Official to solicit donations, contributions or support for any charitable activity which does not result in direct pecuniary benefit to the Public Official, a member of his Immediate Family, or Business Entity with which he is associated.

- (f) County Attorney to Advise. In any case where the value of a gift is in question, or when the circumstances make it unclear as to whether a thing constitutes a “gift” within the meaning of this provision, any individual may consult with the County Attorney for an opinion.
- (g) Special Treatment. No County Official shall grant any special consideration, treatment, or advantage to any citizen beyond that which is available to every other citizen.
- (h) Service on Appellate Board. No County Official may serve on a board or committee of the County which acts in an appellate capacity reviewing the acts of the County Official, or any other board or committee on which the County Official serves. As by virtue of their primary office members of the Board of Commissioners are required to serve in an *ex officio* capacity on many boards and committees of the County, this prohibition shall not apply to members of the Board of Commissioners. This provision 3(h) shall become effective one (1) month from the date of adoption.
- (i) Service on Board related to Member’s Employment. No person may serve as a member of a board or committee of the County, or as an appointee of the County on any board or committee, where such board or committee recommends or awards any funding to any employer of such person, or to any entity upon whose governing or advisory board the person serves.

**Section 4. Disclosure of Interest in Legislative Actions<sup>1</sup>**

Any County Official who has an interest in any business before the Board of County Commissioners shall publicly disclose on the record of the Board the nature and extent of such interest, and shall withdraw from any discussion, deliberation or decision regarding said matter. It shall be a violation of this policy for a County Official who has an Interest in some business before the County Commission to advocate, whether publicly or privately, that Interest to other County Officials.

**Section 5. Advisory Opinions**

When any County Official has a doubt as to the applicability of any provision of this policy to a particular situation involving that County Official, or as to the definition of terms used in this article, he/she may apply to the County Attorney for an advisory opinion. The County Official shall have the opportunity to present the County Official’s interpretation of the facts at issue and of the applicability of provisions of this policy before such advisory opinion is made.

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<sup>1</sup> In addition to this document, the Board’s Rules of Procedure deals with conflicts of interest in quasi-judicial hearings, including those not held before the Board of Commissioners.



**BYLAWS AND RULES OF PROCEDURE FOR THE  
HENDERSON COUNTY ZONING BOARD OF ADJUSTMENT  
2008 Edition**

- I. **CREATION.** The Henderson County Board of Commissioners created the Henderson County Zoning Board of Adjustment (hereinafter referred to as “ZBA”) as a board of adjustment and appellate body to review the Land Development Code in Henderson County. The ZBA was created in accordance with NCGS §§ and 153A-345. The powers and duties of the ZBA have also been described in Henderson County Code 200A-273. The Board of Commissioners subsequently appointed members to the board.
- II. **PURPOSE.** The purpose of the ZBA is to perform all duties of a county board of adjustment prescribed by law and to serve as the appellate body for specific ordinances as defined by local ordinance, specifically those delineated in Henderson County Code 200A-273.
- III. **ACCORDANCE WITH APPLICABLE LAW.** No part of these bylaws is intended to conflict or supersede state or local law. In any case of conflict, state law or local ordinance shall be binding.
- IV. **MEETINGS.**
- A. **Open-Meetings Law.** It is the public policy of North Carolina and Henderson County that the hearings, deliberations, and actions of this Board be conducted openly. Except as allowed by NCGS 143-318.11 each meeting of the Board shall be open to the public and any person is entitled to attend such a meeting. The public’s right to attend such meeting does not necessarily entitle the public to participate in the meeting.
- B. **Regular Meetings.** The Board shall hold regular meetings on the last Wednesday of each month at 4:00 p.m. in the Board of Commissioner’s Meeting Room located at 100 North King Street, Hendersonville, North Carolina. A schedule of the regular meetings of the Board shall be kept on file with the secretary of the Board and the Clerk to the Henderson County Board of Commissioners. The Board shall have the authority to change the schedule of regular meetings, and/or to change the date of a particular regularly scheduled meeting without the necessity of approval of the Board of Commissioners. If the Board changes the schedule or location of regular meetings, the secretary shall forward a copy of the new schedule to the Clerk to the Board of Commissioners at least seven (7) days prior to the first meeting held pursuant to the new schedule. If a particular regularly scheduled meeting date is changed, the secretary shall comply with the notice provisions of section D below, Special Meetings.
- C. **Public Input.** Public input at all Board meetings that are not quasi-judicial in nature may be limited to 3 minutes per speaker at the discretion of the Chairman.
- D. **Special Meetings.** The chair of the Board or the majority of the members of the Board may at any time call a special meeting of the Board by signing a notice stating the time and place of the meeting and the subjects to be considered. Such notice must be:
- i. Posted on the bulletin board in the front lobby of the Henderson County Courthouse,
  - ii. Posted on the bulletin board for the County Administration Building,
  - iii. Mailed or delivered to each newspaper, wire service, radio station and television station which has filed a written request for notice with the secretary,
  - iv. Mailed or delivered to any entity or person that has requested to be on the Board’s sunshine list as prescribed by law; and
  - v. Delivered to all members of the Board at least 48 hours before the meeting.
  - vi. Only the business that is specified in the notice of the meeting may be transacted during a special meeting.

- V. **MEMBERSHIP.** As described in Henderson County Code 200A-273, the Board shall have five regular members and five alternate members appointed by the Board of Commissioners. Members shall be citizens of Henderson County and shall serve without pay.
- A. Term. All members shall serve overlapping three-year terms.
- B. Alternate members. Alternate members shall serve in the absence of any regular member and while serving shall have and exercise all the powers and duties of a regular member of the Board. Alternate members may serve on individual matters based on a regular member's temporary disqualification. Alternate members shall be required to attend regular Board meetings on a rotating basis and may be requested to attend in the absence of a regular member. If all regular members are present, alternate members of the Board shall only be permitted to participate and vote on administrative matters regarding the workings of the ZBA; they shall not be permitted to vote or participate on cases before the Board except when needed to stand in the stead of a regular member.
- C. Vacancies. Any vacancy in the membership shall be filled for the unexpired term in the same manner of the initial appointments.
- D. Duties. Duties of the Board will be those duties as prescribed by Chapter 200A-273 of the Henderson County Code and as stated in Part 3 of Article 18 of Chapter 153A of the North Carolina General Statutes. In addition to those duties mentioned above, the Board shall also perform other duties as assigned by the Henderson County Board of Commissioners.
- VI. **OFFICERS**
- A. Required Officers
1. **PRESIDING OFFICER.** The presiding officer of each meeting of the Board shall be the chair of the Board. In situations where the chair is unavailable or unable to participate in the meeting or any particular matter before the Board, the vice-chair shall preside. In the event that neither the chair nor the vice-chair is available, the members of the Board, by affirmative vote of the majority, may appoint an acting chair who shall have all powers of the chair while acting as presiding officer.
  2. **SELECTION OF THE CHAIR AND VICE-CHAIR.** The chair shall be selected by majority vote of the Board unless the Board of Commissioners indicates to the Board that the Board of Commissioners will appoint said chair, in which case the appointment shall be made by the Board of Commissioners. The vice-chair shall be elected by a majority vote of the Board.
  3. **POWERS AND DUTIES OF THE CHAIR AND VICE-CHAIR.** The chair shall preside at all meetings of the Board but shall also have the right to engage in discussion and vote on any matter before the Board unless otherwise excused. The chair shall have the power to call a special meeting, rule on procedural matters during a meeting, call a brief recess of a meeting at any time, and adjourn a meeting in an emergency. At any other time, adjournment shall be by motion, duly approved. The vice-chair shall have all powers and perform all the duties of the chair in his or her absence.
  4. **DUTIES OF THE SECRETARY.** The staff person assigned to the Board shall serve as the secretary of the Board and shall perform the following:
    - i. The secretary shall insure that all meetings of the Board are properly noticed.
    - ii. The secretary shall maintain the sunshine list which is a list of those persons or entities that have filed a written request indicating a desire to receive notice of all special meetings of the Board.
    - iii. The secretary shall take and record the actions of the Board and draft minutes of the meetings accordingly. Minutes, draft orders, agenda items or other Board documents shall be made available to Board members one week prior to their next regularly scheduled meeting whenever reasonably possible. The secretary shall also forward a copy of the minutes as they are approved to the Clerk to the Board of Commissioners.

- iv. The secretary shall be responsible for maintaining an accurate list of members of the Board, submitting to the Clerk to the Henderson County Board of Commissioners a monthly attendance report for its members and notifying the Clerk to the Henderson County Board of Commissioners of any resignations of any of its members, or any other change in membership of the Board.
      - v. The secretary shall ensure all required documentation and evidence is kept as required by statute.
    - B. Schedule for Elections. Elections shall take place annually at the regularly scheduled meeting in January for Chair and Vice-Chair.
    - C. Attendance. All regular members of the board are expected to attend the regular and/or special meetings of the Board. Any member not able to attend must notify the zoning administrator or secretary in advance of the meeting so that alternate members may be contacted as appropriate. Any regular member who has three unexcused absences within a 12 month period or three unexcused absences to scheduled meetings by an alternate member within a 12 month period shall be reported to the Henderson County Board of Commissioners for possible replacement.
- VII. RULES OF CONDUCT. This Board shall follow these rules of procedure for the conduct of its meetings other than quasi-judicial proceedings:
  - A. The Chairperson will preside over the meetings and will be responsible for their conduct.
  - B. The Chair can make motions and vote on all matters.
  - C. The Chair can speak on any matter before the Board.
  - D. No motion needs to be seconded.
  - E. Informal discussion of any subject, without a motion being made, is allowed.
  - F. If a proposal is perfectly clear, a vote can be taken without a motion having been made.
  - G. After a general discussion has been held without a motion, action can be agreed upon by unanimous consent without taking a vote at all.
  - H. On important and or complex issues, a clearly stated motion should be made in order to assure that everyone understands what is being voted upon.
  - I. If desired, at the discretion of the Chair, the Board can revert to the more detailed and formal requirements of *Robert's Rules of Order* at any meeting by a vote of a simple majority of those in attendance.
- VIII. REPORTS.
  - A. Annual Report. The Board shall make a report to the Henderson County Board of Commissioners at least annually. This report must be submitted no later than July 1<sup>st</sup> of each year. The Board shall also make reports to the Board of Commissioners as needed or as requested.
  - B. Public Records Law. The Board shall abide by North Carolina's Public Records Law NCGS §§ Chapter 132
  - C. Public Records of Quasi-Judicial Proceedings. As per Henderson County 200A- 273, Zoning Board of Adjustment shall keep minutes of its proceedings, showing the vote of each member upon each question or, if absent or failing to vote, indicating that fact. Final disposition of *appeals* shall be by order indicating the reasons of the Zoning Board of Adjustment therefore, all of which shall be public records.
- IX. QUASI-JUDICIAL PROCEEDINGS. Such proceedings shall be ruled by North Carolina General Statute, case law, and the Henderson County Code and the Rules established by the Board of Commissioners.
  - A. Areas requiring quasi-judicial proceedings. The Board has the authority to determine the rights of a person or entity under certain County Ordinances. Such matters include but are not limited to hearings on appeals and reviews of any order, requirement, decision or determination made by a

- zoning administrator and/or watershed administrator and hearings on applications for permits or variances. Matters concerning such rights may only be determined by the Board after conducting a quasi-judicial proceeding.
- B. Purposes and Objectives. The purpose of these procedures is to provide an orderly method by which the Board can hear and decide all quasi-judicial proceedings. The Board's objectives when conducting such proceedings are (1) to conduct all proceedings in a fair and efficient manner, (2) to base all decisions on competent and relevant evidence, (3) to ensure that the applicable Ordinance is being enforced and administered in a fair and efficient manner, and, when applicable and allowed by Ordinance, (4) to provide the citizens of Henderson County an administrative avenue to contest and appeal decisions made pursuant to the Ordinance which adversely affected them.
- C. Notice. Notice shall be established by NCGS 143-318.12 and Henderson County 200A-338.
- D. Rules of Procedure. Each quasi-judicial proceeding must be conducted in substantial conformity with the following rules: Quasi Judicial Procedures described in Henderson County Code 200A-338 and the Henderson County Board of Commissioners procedures for quasi-judicial proceeding.
- E. Decisions. In accordance with Henderson County Code 200A-273 the concurring vote of 4/5 of the members of the Zoning Board of Adjustment shall be necessary to reverse any order, requirement or determination of the *Zoning Administrator*, or to decide in favor of the *applicant* on any matter upon which it is required to pass under this chapter, or to effect any variation of this chapter. On all *appeals*, applications and other matters brought before the Zoning Board of Adjustment, said Board shall inform those making *appeal* or application of its decisions and the reasons therefore. Such notification shall be in writing.
- F. Written Findings. Within 45 days of the conclusion of a quasi-judicial proceeding the Board must issue a written decision unless otherwise specified by state statute and Henderson County Ordinances. The written decision should contain critical findings of fact based on sworn testimony or other competent evidence, conclusions drawn by the board and a clear statement of the decision made by the Board. Such decisions may include conditions established by the Board.
- G. Minutes and Maintenance of Records. The secretary shall be responsible for maintaining all records associated with quasi-judicial proceedings, including but not limited to the application, notices of the meeting, the minutes and all documentary evidence presented during the proceedings. The minutes for quasi-judicial proceedings shall be taken in detail with detailed summaries of all evidence or testimony presented and statements made by members of the Board. The secretary may take the minutes as a verbatim transcript.
- H. Appeal. In accordance with NCGS 153A-345 each decision of the Board is subject to review by the superior court by proceedings in the nature of certiorari. Any petition for review by the superior court must be filed with the clerk of the superior court within 30 days after the decision of the Board is filed in such office as the ordinance specifies, or after a written copy thereof is delivered to every aggrieved party who has filed a written request for such copy with the secretary or chairman of the Board at the time of its hearing on the case, whichever is later.
- X. **DUTY TO VOTE.** It is the duty of each member, including the chairman, to vote unless otherwise excused. The Board may excuse members from voting on any matter involving their own financial interest or official conduct, when a member has indicated an inability to be impartial in any quasi-judicial matter before the Board, or when a member has not attended the quasi-judicial hearing(s) at which an appeal or application was presented. When excused from voting on a particular matter such member shall not participate in the discussion of the Board on such matter. Proxy voting is not permitted on any matter before the Board. Votes to abstain shall be counted as votes in the affirmative.
- XI. **NON-QUASI JUDICIAL ACTION BY THE BOARD.**
- A. Quorum. A four-fifths of the Board shall constitute a quorum for regular business. The number required for a quorum shall not be affected by vacancies. Alternate members shall serve in the stead of regular members for the purposes of quorum and in quasi-judicial actions. No action of the Board

- may be taken at any meeting where less than a quorum is present. Once a quorum has been established, it will not be defeated if members leave.
- B. Motions. Action of the Board may be taken upon a motion made by any member, including the chair. A motion shall be adopted if approved by the affirmative vote of a majority of the members present and not excused after full discussion of the motion by the members.
  - C. Minutes. Minutes shall be kept of all meetings of the Board. The secretary of the Board shall present such minutes to the Board for approval. Minutes of the meetings of the Board shall be public records. The secretary shall be responsible for sending a copy of all approved minutes to the Clerk to the Board of Commissioners.
  - D. Staff Support. County Staff shall be assigned to the ZBA, acting as the liaison between the ZBA, County Departments, and the Board of Commissioners and shall have the charge of correspondence, minutes, notifying members of meetings and other information.
- XII. AMENDMENTS. The board may amend these bylaws by a four-fifths vote of the Board at a regular meeting; provided however, that amendments shall not be voted on until such proposed amendments have been submitted in writing to the members of the Board at a regular meeting preceding the vote. Amendments to the bylaws shall not be effective until they are approved by the Henderson County Board of Commissioners.

## HYPOTHETICAL QUESTIONS

1. A contentious subject comes up before the Board and the issue is on the agenda for the following month's meeting. Members of the Board start sending emails with reports supporting or opposing various components of the issue along with their comments and opinions regarding the issue.
  - a. Is this an open meeting?
  - b. Is this a public record?
  - c. How should the situation be handled?
  
2. Do the following situations fall under the open meetings law? What if any problems could arise?
  - a. One member of the board holds a holiday party where a majority of the members attend in fellowship. Is this a public meeting?
  - b. A quorum of the board goes out to lunch together and starts talking about what they want on the next agenda. Is this permissible?
  - c. A quorum of the board goes out to dinner together and does not invite the other members and discuss an upcoming rezoning hearing.
  - d. One member of the board is very interested in a particular issue coming before the board and wants it decided a certain way. He speaks to each board member individually to persuade them to his side and to see how they plan to vote?
  
3. A reporter asks the Planning Department for a list of all the projects approved by Planning Board in the last year, any conditions, and the votes. Can he get this information? In what format?
  
4. A person requests to listen to the audio recording of the last Zoning Board of Adjustment meeting but says they can only do it at 7pm at night or on the weekend. What is the person entitled to and how do you handle this situation?
  
5. A project is presented before a Committee for approval. If the project is approved, it will bring in a lot of money to the area but there are environmentally sensitive aspects of the project that some are opposed to.
  - a. One member requests to be recused because the developer and some of the people opposing the project are members of his congregation. Is this a permissible reason for recusal?
  - b. Same as above but the member asks to recuse themselves because the member would be a sub-contractor on the project if it was approved as proposed.
  
6. There is a particularly contentious issue so that there are many people present for public comment and the room exceeds capacity for fire code.
  - a. Can you remove people until the population in the room is below the fire code capacity?
  - b. Can you ask anyone who is not planning to speak to go to an overflow room where the meeting will be broadcast?
  - c. Can you ask anyone who does not live in the County to leave the meeting?
  - d. Can you limit the time for public comment?
  - e. Can you limit the time for public comment of individuals who do not reside in the County?
  - f. Can you limit public comment to individuals who had a specific interest in the issue (i.e. those who would have "standing")?

7. Buffy Summers, an employee of the Henderson County Zoning Department, is unable to come to the ZBOA to present her staff report because she is sick. The Board has her staff report in support of the conditional use permit but it is not admitted into evidence. When it is his turn, Applicant Luke James stands up and says he has nothing to say.
  - a. Can the Board hear the matter without Buffy there?
  - b. Who has the burden to prove the elements of the Ordinance?
  - c. What is in the record for the case?
  - d. What should the decision of the Board be based on?
8. A hearing is held on variance request V-09-23 where Lily Builder has requested a variance request to build part of his business in a setback in Edneyville. In doing so he will cut down lots of trees. Anna Sunshine, fervent environmentalist and resident of Asheville, asks the Board if she can become a party to the hearing. How should the Board decide and why? Would it make a difference if Ms. Sunshine lived in Etowah?
9. The Board makes finding of fact and conclusions of law regarding approval for a variance. The Board makes the condition that the Etowah Applicant must donate money to the Hendersonville Search and Rescue. Can the Board do this? Why or why not?
10. Willow Rosenberg comes to the Board requesting a 10 foot variance in the side-yard setback. All of her neighbors have a 10 foot variance in the side-yard setback. There are no parties opposing the action and in fact some of her neighbors come to support the variance. How should the Board rule? How should the conclusions of law be structured?
11. The Board signs a permit for a variance which states the following:

#### FINDINGS OF FACT

1. Applicant owned property in Etowah that was about an acre in size.
2. The subject property is in a residential district.
3. Applicant applied for a 15 foot variance.
4. Testimony was heard by Board from Staff and from the Applicant. No evidence was entered into the record.

#### CONCLUSIONS OF LAW

1. The Board finds there are practical difficulties or unnecessary hardships preventing a reasonable use because of unique circumstances related to the land that weren't the applicant's fault.
2. The variance is in harmony with the spirit and intent of the law according to the Ordinance.
3. It will protect the public safety and welfare because there were no opposing parties and it the variance won't harm the neighbors.
4. Substantial justice is done because it seems unfair the applicant can't have the variance to do what they want with their property.

#### CONDITIONS

5. Applicant must provide an 8 foot fence along the side yard.
6. Applicant must maintain landscaping in the backyard in compliance with the Chapel Fox Subdivision Restrictive Covenants.

## APPROVED 8 FOOT VARIANCE FOR APPLICANT

- a. How likely is the court to uphold this order if challenged?
  - b. What are the problems with the findings of fact?
  - c. What are the problems with the conclusions of law?
  - d. What are the problems with the conditions?
12. A major developer applies for a variance for a multifamily structure (in a zoning district where this is permitted). 300 hundred residents of Henderson County come out to oppose the structure because the structure is being built to provide housing for low-income residents and the opponents fear that having low-income residents will lower housing values and increase crime. The Applicant has substantial, competent and material evidence for each element of the variance and evidence to rebut the opponent's claim regarding housing values and crime.
- a. 150 of the 300 opponents want to become parties- how do you decide who gets to be a party?
  - b. 25 people become parties. When they begin testifying it is clear they are all saying the same exact thing. What can the Board do?
  - c. When the Applicant is presenting his evidence, the audience starts shouting and hissing. How can the Board handle this problem?
  - d. How does the Board weigh the evidence presented by the Applicant and by opposing parties?
  - e. What should the Board look at in making its decision?