

***QUASI JUDICIAL PROCEEDING
TRAINING MATERIALS***

CREATED BY SARAH GRACE ZAMBON
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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



Charles Russell Burrell
County Attorney
rburrell@hendersoncountync.org
Susan L. Fosmire
Assistant County Attorney
sfosmire@hendersoncountync.org
Sarah G. Zambon
Deputy County Attorney
szambon@hendersoncountync.org
Rebekah R. Price
Associate County Attorney
bprice@hendersoncountync.org

Margaret Street
Administrative Assistant
mstreet@hendersoncountync.org

Kathryn Finotti
Paralegal
kfinotti@hendersoncountync.org

Jacqueline Justus
Paralegal
jjustus@hendersoncountync.org

Tracy Osteen
Office Assistant
tosteen@hendersoncountync.org

1 Historic Courthouse Square
Suite 5

or

1200 Spartanburg Highway
Suite 400

**Hendersonville
North Carolina 28792**

Telephone:
(828) 697-4719 (King St.)
(828) 694-6490 (Spartanburg Hwy)

Facsimile:
(828) 697-4536

Website:
www.hendersoncountync.org

Confidential Memorandum

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.

**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 1st 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?

I.

What is a Quasi-Judicial Proceeding?

**David W. Owens
School of Government
The University of North Carolina at Chapel Hill
Chapel Hill, NC**

What is a Quasi-Judicial Proceeding?

David W. Owens
School of Government
The University of North Carolina at Chapel Hill
Chapel Hill, N.C.

From DAVID OWENS, LAND USE LAW IN NORTH CAROLINA 137-38 (2d ed., 2011):

Land use regulatory adjudications are classified as quasi-judicial¹ when they involve the application of legislatively determined policies to individual situations. There are two key factors that trigger the quasi-judicial classification: the finding of facts regarding the specific proposal and the exercise of discretion in applying pre-determined policies to the situation.²

¹. Literally, “as if” it is a judicial determination. These are administrative decisions that are similar to but not the same as judicial decisions. “A term applied to the action, discretion, etc., of public administrative officers or bodies, who are required to investigate facts, or ascertain the existence of facts, hold hearings, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature.” BLACK’S LAW DICTIONARY 1121 (5th ed. 1979).

². *Cnty. of Lancaster v. Mecklenburg Cnty.*, 334 N.C. 496, 502, 434 S.E.2d 604, 612 (1993).

In one of the state’s first zoning cases the court noted:

It is evident, we think, that the Board of Adjustment is clothed, if not with judicial, at least with quasi-judicial power, being its duty to investigate facts, and from its investigation to draw conclusions as a basis of official action and to exercise discretion of a judicial nature. These are not mere ministerial duties. . . .

[T]he exercise of judgment or discretion may be regarded as the usual test by which to determine whether an act is ministerial or judicial.

Harden v. City of Raleigh, 192 N.C. 395, 397, 135 S.E. 151, 152 (1926). *See also Stephenson v. Town of Garner*, 136 N.C. App. 444, 524 S.E.2d 608, *review denied*, 352 N.C. 156 (2000) (decisions on conditional use permits are not ministerial as they involve substantial discretion, so board making the decision has legislative immunity).

The finding of facts and the application of general rules to specific individuals are typical considerations in classification of a decision as quasi-judicial. Justice Holmes noted, “A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power.” *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 226 (1908). Most states apply similar principles in making legislative-quasi-judicial distinctions. *See, e.g., Idaho Historic Pres. Council*,

In the zoning context quasi-judicial decisions include variances, special and conditional use permits, and appeals of administrative determinations. Other decisions involving land use–related decisions have also been characterized as quasi-judicial, including site plan approval,³ an order to demolish a dilapidated structure,⁴ and subdivision plat approvals if the subdivision ordinance includes discretionary standards.⁵

The General Assembly codified these rules in 2009.⁶ G.S. 160A-393 was added to the

Inc. v. City Council, 134 Idaho 651, 654, 8 P.3d 646, 649 (2000) (certificate of appropriateness under historic preservation ordinance is quasi-judicial); Thompson v. Amis, 208 Kan. 658, 662–63, 493 P.2d 1259, 1262–63 (1972) (appeal of suspended employee with civil service protection is quasi-judicial).

³. Knight v. Town of Knightdale, 164 N.C. App. 766, 596 S.E.2d 881 (2004). The standards for approval included consideration of adverse effects expected from the development, considering a list of enumerated potential impacts.

⁴. Coffey v. Town of Waynesville, 143 N.C. App. 624, 547 S.E.2d 132 (2001) (city council is acting in quasi-judicial capacity when hearing appeal of a demolition order for a dilapidated structure pursuant to G.S. 160A-426). *See also* Carolina Holdings, Inc. v. Hous. Appeals Bd., 149 N.C. App. 579, 561 S.E.2d 541, *review denied*, 356 N.C. 298, 570 S.E.2d 499 (2002).

⁵. William Brewster Co., Inc. v. Town of Huntersville, 161 N.C. App. 132, 588 S.E.2d 16 (2003). The subdivision ordinance required proposed subdivisions to be consistent with the most recently adopted public plans and policies for the area and to “protect and enhance the stability, environment, health and character of neighboring areas.” The court invalidated denial because there was no competent, substantial, material evidence in the record to support a finding that either standard was not met. *See also* Guilford Fin. Servs., LLC v. City of Brevard, 356 N.C. 655, 576 S.E.2d 325 (2003), *per curiam*, *adopting dissent in* 150 N.C. App. 1, 563 S.E.2d 27 (2002). In the court of appeals decision, both the majority and dissent held that the decision on a subdivision plat approval is quasi-judicial if the ordinance includes discretionary standards for the decision.

⁶. S.L. 2009-421. It is unlikely that this statute in and of itself affects appeals of local government decisions made under ordinances that are not development regulations (those adopted under Article 19 of Chapter 160A of the North Carolina General Statutes (hereinafter G.S.) for cities and Article 18 of Chapter 153A for counties). G.S. 160A-393(a) states that the law is applicable to appeals of quasi-judicial decisions when the appeal is in “the nature of certiorari as required by this *Article*.” Several other factors support that interpretation. First, the law is codified within the city and county zoning enabling statutes and expressly applies to appeals of all quasi-judicial zoning decisions. The statute specifically mentions variances, special and conditional use permits, appeals of administrative determinations regarding the zoning ordinance (all of which have long been codified in the statutory section on boards of adjustment), and site plan approvals that include discretionary standards. Second, the law added specific reference to appeals of several non-zoning decisions and inclusion of these specific additions implies that others are excluded. It added G.S. 160A-377 and 153A-336 to apply this framework to appeals of any city and county quasi-judicial decisions made under land subdivision ordinances if those ordinances include standards that involve judgment and discretion (which is relatively rare). Inclusion of these specific provisions regarding subdivision regulations, which are within the development regulation Articles,

statutes to provide detailed procedures for judicial review of quasi-judicial zoning decisions. G.S. 160A-393(b) defines quasi-judicial decisions as those “involving the finding of facts regarding a specific application of an ordinance and the exercise of discretion when applying the standards of the ordinance.” This provision notes that variances, special and conditional use permits, and appeals of administrative determinations fall into this category. It also notes that decisions that are usually administrative or ministerial (site plans specifically) become quasi-judicial if the standards for decision require a discretionary decision. G.S. 160A-377(c) and 153A-336(c) apply the same rule in the context of subdivision plat reviews.

The categorization of a decision as quasi-judicial is a question of law, ultimately determined by the courts. Thus the way a decision is labeled in an ordinance is not necessarily dispositive of the question of which legal category a decision falls into. For example, the city of Burlington labeled a decision on permission for siting manufactured home parks as an overlay zoning district, the application of which is normally a legislative rezoning decision. However, the ordinance provided that the overlay district was permitted by right in certain zoning districts provided specified standards were met. The court determined this was more the application of policy applying predetermined standards than the creation of new policy; so even though a rezoning is generally a legislative decision, the court determined in this situation that it was really a quasi-judicial determination.⁷ On borderline calls, however, the court

raises a substantial question as to the applicability of the law to the other non-zoning and non-subdivision Parts of these Articles, such as appeals of unsafe building orders under G.S. 160A-430 and 153A-370 or housing code enforcement orders under G.S. 160A-443, especially since those statutes have detailed, specific procedures set forth for appeals that were not amended by this law. The law also expressly covered appeals of several specific other non-zoning decisions. It added a provision to the airport zoning act (G.S. 63-34) to include judicial review of some decisions under those ordinances. It added a provision to G.S. 162A-93(b) to apply this framework to judicial review of appeals of city decisions to extend water or sewer to certain areas with county water and sewer districts. There are ordinances adopted under other statutory authorizations that are quasi-judicial in nature. For example, there may be standards that involve discretion included within ordinances adopted under the general police powers (such as a junk car ordinance adopted pursuant to G.S. 153A-132.2 that requires findings about the negative aesthetic impacts outweighing the burdens placed on the owner). None of those are expressly covered by this law. The language of this law, its placement in the statutes, and the inclusion of several other non-zoning decisions that are expressly brought within the law all strongly imply that the procedural provisions set by this law do not apply to those decisions that are not expressly referenced.

⁷. The ordinance provided that the manufactured housing overlay district (MHOD) must have either (1) a minimum of eight existing contiguous lots with a minimum of 65,000 sq. ft. or (2) a single contiguous area of 95,000 sq. ft. The MHOD could be applied in three of the city’s eight residential districts. Manufactured, modular, and site-built houses were permitted uses once the overlay designation was made. The ordinance further provided that the district was to be designated by the city council and was “permitted by right” in the three specified districts (the list of permitted uses for each of

gives some deference to the ordinance's categorization of the decision.⁸

these zoning districts listed MHODs among permitted uses). Further, the ordinance had a separate basic mobile home district.

This ordinance provision was before the court of appeals three times. In *Northfield Development Co., Inc. v. City of Burlington*, 136 N.C. App. 272, 523 S.E.2d 743, *aff'd per curiam*, 352 N.C. 671, 535 S.E.2d 32 (2000), the court held that while amendment of the text of the ordinance to create the overlay district was a legislative zoning decision, any subsequent decision on whether to apply the district to a particular area was "a quasi-judicial decision because it required application of the MHOD standards set out in the City's zoning ordinance to individual situations. The decision to approve or reject MHOD petitions is most analogous to the decision to grant or deny variances or special use permits." *Id.* at 282, 523 S.E.2d at 750. When this same ordinance provision was before the court a second time, the court noted that while the council retained some discretion in making the overlay designation, bounded discretion is a part of quasi-judicial decision making and does not convert the decision to a legislative characterization. *Devaney v. City of Burlington*, 143 N.C. App. 334, 338, 545 S.E.2d 763, 766, *review denied*, 353 N.C. 724, 550 S.E.2d 772 (2001). The city continued to argue that a legislative rather than quasi-judicial procedure was appropriate for MHOD decisions, a position the court rejected a third time when the *Northfield* matter returned to the court. *Northfield Dev. Co., Inc. v. City of Burlington*, No. COA01-1043, 2002 WL 1419623 (N.C. Ct. App. July 2, 2002) (unpublished).

⁸. *Cnty. of Lancaster v. Mecklenburg Cnty.*, 334 N.C. 496, 510, 434 S.E.2d 604, 614 (1993).

What is a Quasi-Judicial Proceeding?

David W. Owens

April 12, 2013

ZPLU Annual Meeting



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Categorization of Decisions

Legislative

Quasi-Judicial

Administrative/Ministerial

Advisory



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Elements for Quasi-Judicial

1. Ascertain facts
AND
2. Apply pre-determined standards
involving judgment and discretion

Foundation

Constitutional due process basis

*County of Lancaster v. Mecklenburg
County* (1993)

Codified at G.S. 160A-393 (2009)

Examples

Always Quasi-judicial

- Variances
- Special and conditional use permits
- Appeals
- Demolition order

Examples

Sometimes quasi-judicial,
depending on standards for
approval:

- Site plans
- Subdivision plats (rarely)

Query

What about a “permitted use, subject to conditions” ?

Implications

Due process demands set by courts

May vary depending on particular type
of decision

For zoning –

*Humble Oil and Refining Co. v. Town
of Chapel Hill (1974)*