

2012 Annual City and County Clerks' Academy & Institute

Advanced Workshop on Quasi-Judicial Hearings: There's
Nothing Quite Like Them

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I. Types of Land Use Regulatory Decisions

Decisions can be grouped into four categories: legislative, quasi-judicial, advisory, and administrative. Often the body charged with making the decision varies according to the type of decision involved. Governing boards usually make legislative decisions but can also make quasi-judicial decisions. Planning boards usually make advisory decisions but can also make quasi-judicial decisions. However, more important than which *board* is making the decision, the rules that must be followed change depending on the *type* of decision involved, and these rules apply no matter which board is making the decision. Therefore knowing the type of decision is vital to determining what decision-making process should be used.

Legislative decisions affect the entire community by setting general policies applicable through the zoning or other ordinance. They include decisions to adopt, amend, or repeal the ordinance. The zoning map is a part of the zoning ordinance, so amending the map to rezone even an individual parcel is considered a legislative decision. Because legislative decisions have such an important impact on landowners, neighbors, and the public, state law mandates broad public notice and hearing requirements for these decisions. Broad public discussion and careful deliberation are encouraged and substantial discretion on these decisions is allowed. These decisions are generally made by the local government body, which "legislates" or sets policy.

Quasi-judicial decisions involve the application of ordinance policies to individual situations. Examples include variances, special and conditional use permits (even if issued by the governing board), appeals, and interpretations. These decisions involve two key elements—the finding of facts regarding the specific proposal and the exercise of judgment and discretion in applying predetermined policies to the situation. Since quasi-judicial decisions do not involve setting new policies, the broad public notice requirements that exist for legislative decisions do not apply. However, the courts have imposed fairly strict procedural requirements on these decisions in order to protect the legal rights of the parties involved. Quasi-judicial decisions are most often assigned to boards of adjustment, appointed by the governing board. But these decisions can also be assigned to the planning board or to the governing board itself.

Advisory decisions are made by bodies that may recommend decisions on a matter but have no final decision-making authority over it. The most common example is the advice on rezoning petitions given by planning boards to the city council or board of county commissioners. There are few rules set by state law or by the courts on how advisory decisions are made.

Administrative decisions are typically made by professional staff in various government departments. Such decisions cover the day-to-day non-discretionary matters related to the implementation of an ordinance, including issuing basic permits, interpreting the ordinance, and enforcing it. Examples include issuing a certificate of zoning compliance for a permitted use or a notice of violation. These decisions may be appealed to the board of adjustment.

Some Key Differences Between Legislative and Quasi-judicial Decisions

	Legislative	Quasi-judicial
Decision-maker	Only governing board can decide (others may advise)	Can be board of adjustment, planning board, or governing board
Notice of hearing	Newspaper, mailed notice to owners and neighbors, posted notice required; actual notice for third party rezoning	Only notice to parties required unless ordinance mandates otherwise
Type of hearing	Legislative	Evidentiary
Speakers at hearings	Can reasonably limit number of speakers, time for speakers	Witnesses are presenting testimony, can limit to relevant evidence that is not repetitious
Evidence	None required; members free to discuss issue outside of hearing	Must have substantial, competent, material evidence in record; witnesses under oath, subject to cross-examination; no ex parte communication allowed
Findings	None required (statement on rationale and plan consistency required for zoning amendments)	Written findings of fact required
Voting	Simple majority, but 3/4 required if protest petition filed on municipal rezoning	4/5 to decide in favor of applicant, but if special/conditional use permit is issued by governing board or planning board, only a simple majority required
Standard for decision	Establishes standards	Can only apply standards previously set in ordinance
Conditions	Not allowed, except with conditional zoning districts	Allowed if based on standard in ordinance
Time to initiate judicial review	Two months for rezoning; one year for other amendments, running from acquiring standing, with three year maximum	30 days from mailing and filing written decision
Conflict of interest	Requires direct, substantial, and readily identifiable financial interest to disqualify	Any financial interest, personal bias, or undisclosed ex parte communication disqualifies; impartiality required
Creation of vested right	None	Yes, if substantial expenditures are made in reliance on it

TYPICAL ALLOCATION OF LOCAL GOVERNMENT PLANNING FUNCTIONS

<u>Agency</u>	<u>Primary role</u>	<u>Other possibilities</u>
GOVERNING BOARD: (city council, county board of commissioners)	Legislative decisions: adopts ordinances, amendments, policy statements, budgets; approves acquisitions; makes appointments to other bodies	May also serve as planning board; may approve plats and special use permits
PLANNING BOARD: (planning board; planning commission; planning committee of governing board)	Advisory decisions: sponsors planning studies; recommends policies, advises governing board; coordinates public participation; must recommend initial zoning ordinance	May also serve as board of adjustment; may approve or review plats
BOARD OF ADJUSTMENT:	Quasi-judicial decisions: hears zoning appeals, variances, special and conditional use permits	
STAFF: (Planning department, inspections department, community development department)	Administrative decisions: issues permits, conducts technical studies, initiates enforcement; advises manager	

BUT: Rules for process depend on type of decision, not identity of board

II. Quasi-Judicial Hearings

Preliminary Matters

Notice of hearings. A local government must give due *notice* of its quasi-judicial hearings to all parties to the case. Individual mailed notice is the usual method of doing this. The zoning statutes impose no special published notice requirements for quasi-judicial decisions (unlike proposed zoning amendments). If a zoning ordinance itself requires additional notice, such as publication in the newspaper or a sign on the site, that additional notice is mandatory. The open meetings law also has requirements for meeting notices. Once a hearing has been opened, it may be *continued* to a later date if that is necessary to receive additional evidence. Additional notice of the continued hearing is not required by law, but many boards provide it.

Open meetings law. Boards of adjustment are subject to the state open meetings law [G.S. 143-318.9 to 143-318.18]. All meetings of a majority of the board, or any committees of the board, for the purpose of conducting business must be open to the public. Closed sessions may be held only for narrow purposes set forth by statute (e.g., receiving legal advice regarding pending litigation). A board may not retire to a private session to deliberate a case. Public notice must be provided for all meetings (regular schedule filed with clerk, special meetings notice posted and mailed to media).

Liability. Members of boards making quasi-judicial decisions are “public officers” and, as such, have limited exposure to personal liability as a result of board actions. Members do have exposure to liability for intentional torts (such as assaulting someone during a board meeting) and for willful misconduct (such as intentionally denying a permit that should have been issued because of a personal vendetta against the applicant). Good faith mistakes or errors in judgment do not expose members to personal liability.

Collecting Evidence

Subpoenas. Boards conducting these hearings have the authority to issue subpoenas to compel testimony or production of evidence deemed necessary to determine the matter.

Burden. The person requesting a variance or special/conditional use permit has the burden of producing sufficient evidence for the board to conclude the standards have been met. If insufficient evidence is presented, the application must be denied (or the board can continue the hearing to a later date to receive additional evidence). Once sufficient evidence is presented that the standards are met, the applicant is entitled to a permit. If conflicting evidence is presented, the board must determine which facts it believes are correct.

Oaths. Those offering testimony are usually put under oath. This reminds witnesses of the seriousness of the matter and the necessity of presenting factual information, not opinions or speculation. All of the witnesses may be sworn in at one time at the beginning of the hearing or each witness may be sworn in as they begin to testify. While oaths may be waived if *all* of the parties agree, most local governments routinely swear in all witnesses, including the staff members and attorneys who are making presentations. If a witness has religious objections to taking an oath, they may affirm rather than swear an oath. The oath is generally administered by the chair of the board receiving the testimony (it may also be administered by the city or county clerk or by any notary public).

Cross-examination. Parties have the right to cross-examine witnesses. The board can establish reasonable procedures for this, such as allowing questions to be posed only by a single representative of a party. Board members are also free to pose questions to anyone presenting evidence.

Hearsay. Hearsay evidence (a statement about the facts made by someone who is not present and available for cross-examination) is generally not allowed. If that is the best evidence available the board can receive it, but the board may well decide to limit the weight or credibility it gives such evidence.

Opinions. Opinion evidence generally should be offered only by a properly qualified expert witness. The statutes specifically prohibit use of opinion testimony by nonexperts on how a project would affect property values, how traffic would affect public safety, and any other matter for which only expert testimony would be permitted in court.

False testimony. A person who deliberately gives false testimony under oath in a zoning hearing is subject to criminal charges for perjury.

Outside evidence. Persons affected by a decision have the legal right to hear all of the information presented to board members, to know all of the “facts” being considered by the board. Therefore members of the decision-making body are not allowed to discuss the case or gather evidence outside of the hearing (what the courts term *ex parte* communication). Only facts presented to the full board at the hearing may be considered. It is permissible for board members to view the site in question before the hearing, but they should not talk about the case with the applicant, neighbors, or staff outside of the hearing. If a member has special knowledge about a site or case, the member should disclose that at the hearing.

Time limits. While unduly repetitious or irrelevant testimony can be barred, an arbitrary time limit on the hearing cannot be used. It would not be appropriate, for example, to limit each side in a variance proceeding to ten minutes to present their case. It is acceptable to allow only a single witness representing a group with similar concerns.

Exhibits. Witnesses may present documents, photos, maps, or other exhibits. Once presented for consideration by the board, exhibits are evidence in the hearing and become part of the record (and must be retained by the board). Each exhibit should be clearly labeled and numbered as it is received into evidence.

The application for the permit and any correspondence submitted as part of the application file should also be entered into the hearing record and may be considered by the board. Most application forms are designed to solicit sufficient information for a decision. It is a good practice to have a person familiar with the information in the application (usually the applicant or an agent of the applicant) available to answer any questions the board may have about the written submissions.

Quality of evidence. There must be "substantial, competent, and material evidence" to support each critical factual determination. Key points need to be substantiated by the factual evidence in the hearing record; the findings cannot be based on conjecture or assumptions. For example, for the board to find that neighboring property values would be significantly reduced by a proposed project, there must be some testimony in the record to support that finding, such as testimony from a Realtor about the impacts of a similar project elsewhere in town or presentation of facts that would allow a reasonable person to conclude property values would go down. Where conflicting evidence is presented, the board has the responsibility of deciding how much weight to accord each piece of evidence.

Record. Complete records must be kept of the hearings. Detailed minutes must be kept noting the identity of witnesses and giving a complete summary of their testimony. Any exhibits presented should be retained by the board and become a part of the file on that case. Though not legally required to do so, most boards make audiotapes of the hearings in case a transcript is needed if the case is appealed to the courts.

Some Problems for Discussion: Hearing Procedures

1. A special use permit application is scheduled to come before your board next week. Are any of the following contacts improper?
 - a. The applicant is a casual acquaintance of a board member. She sees the member at a social gathering and tells her a little bit about her case.
 - b. The applicant's attorney calls a board member the week before the hearing and gives him "strictly factual" background information about the case.
 - c. A board member stops by town hall the day before the hearing to get a quick briefing on the cases that are coming up from the staff.
 - d. A board member drives by the site the morning of the hearing to get a first hand view of the property.
 - e. A board member drives by the site and stop to get a closer look. A neighbor comes over and talks about conditions at the site.
2. Your board is considering a variance petition. A representative of the neighbors appears at the hearing and presents a petition signed by 50 neighbors opposing the variance. Can the board consider the petition?
3. A special use permit for a group home is before your board. A long-term resident lives next door testifies that she firmly believes the project would adversely affect her property value. Can the board consider her opinion?

Summarizing Evidence and Findings

Findings. Written findings of fact are required. The board must specify what it determines the facts to be and must document the basis for the decision. Simply repeating the standards for the ordinance and noting each is met is generally not sufficient, especially where there is conflicting evidence. It is useful for the staff and board to have a clear and common set of terminology relative to “standards,” “findings,” “findings of fact,” “decisions,” and “orders.” An example of the findings for a simple variance decision is attached at the end of these materials.

Some Practical Issues Relative to Findings of Fact

1. What format is used for the written findings of fact?
 - Separate document
 - Part of minutes
2. Who prepares the proposed findings?
 - Zoning staff
 - Applicant
 - BOA’s attorney
 - BOA members
 - Clerk to board
3. When are draft findings prepared?
 - Prior to the hearing
 - At the conclusion of the hearing
 - After the hearing
4. When are the findings approved by the Board?
 - At the conclusion of the hearing
 - When the chair signs after the meeting
 - When the board approves its minutes at a subsequent meeting

Voting on a Decision

Quorum and voting. The general rule is that a majority of the board is a quorum. While the state statutes do not set a special *quorum* for boards of adjustment, some ordinances specify a higher four-fifths requirement for this board. Most decisions of the board of adjustment require a *four-fifths majority*—such as granting a variance, a special or conditional use permit, or overruling a determination of the zoning administrator. Members who are recused due to a conflict of interest are not considered when computing the required majority. A few local governments have local legislation that changes the required majority.

Precedents. Prior decisions are not legally binding on a board. Each case must be decided on its own individual merits. Subtle differences in individual facts and situations can lead to differing results. However, a board should be aware of previous decisions and, as a general rule, similar cases should usually produce similar results. If a board reaches a different result for a very similar fact situation, the board's written decision must clearly explain why there was a different conclusion.

Rehearings. As a general rule, a board may not hear a quasi-judicial case a second time. The applicant and other affected parties must present their evidence at the initial hearing. Appeals of the initial decision may be made to the courts, not back to the board. If there is a substantially different application, or there has been a significant change of conditions on the site or in the ordinance, a new hearing may be held. Some boards allow a case to be *withdrawn* without a formal decision anytime up to a vote; others do not allow withdrawal after the hearing begins and some limit withdrawal after publication of notice of the hearing.

Conflicts of interest. The Constitution and the statutes give parties to a quasi-judicial decision a legal right to an *impartial decision maker*. Thus boards must avoid conflicts of interest. In addition to financial impact, bias (defined as a predetermined opinion that is not susceptible to change), undisclosed ex parte communications about the case, and close family or business ties also disqualify members from participating. Nonparticipation includes the discussion as well as voting.

Participation in continued hearing. If a hearing is continued or conducted over several days, a member may miss part of the hearing, but be present when a vote is called. The courts allow a member who was not physically present for the presentation of all evidence to vote, but only if the member had full access to the record of evidence presented in the member's absence (such as an opportunity to read the minutes, see the exhibits, or listen to a tape). This is also allowed for a new member appointed after some of the evidence was presented. Some jurisdictions have local legislation or rules of procedure that disqualify a member who did not actually hear all of the evidence from voting on that case.

Voting Calculations

1. You have a five-member board of adjustment. One member is absent and no alternate is present. A motion to grant a variance is adopted by a 3-1 vote. Does the petitioner get the variance?

2. You have a five-member board of adjustment. A motion is made to deny a variance. That motion passes by a 3-2 vote. Is the variance denied?

3. You have a ten-member board with no alternates. Two members have been recused from consideration of a variance due to a conflict of interest. A motion to grant a variance is adopted by a 7-1 vote. Does the petitioner get the variance?

Some Problems for Discussion: Conflicts

A special use permit comes before your town board. Is it permissible for a board member to participate in the board's decision in the following instances?

- a. The board member is a Realtor who has listed the property for sale and this permit would likely double the asking price of the property.

- b. The applicant is the board member's father-in-law.

- c. The applicant is the board member's church.

- d. In a case where a board member has a conflict of interest, can the member abstain from voting but participate in the debate and discussion prior to the vote being called?

Judicial Appeals of Quasi-judicial Decisions

Quasi-judicial decisions can be appealed to *superior court* (not to the governing board). Appeals must be made within 30 days of mailing a written decision to the parties (and anyone who requested a written decision at the hearing) and filing of the written decision with the board's clerk, whichever is later (the time is not measured from the date of decision).

Court review is based on entirely on the record developed at the board's hearing. The superior court does not take any new testimony or review any new evidence. An inadequate record will usually result in a remand to the board for a new hearing.

There are limited *grounds* for judicial reversal of a board's decision: Errors in law; procedures mandated by statute or ordinance were not followed; due process requirements for the hearing were not met; there is inadequate competent, substantial, material evidence in the whole record to support decision; or there was an arbitrary and capricious decision.

Sample Findings of Fact for a Simple Variance

Findings of Fact

1. Mary Smith is the owner of a parcel located at 575 E. Front St. in Mayberry, N.C. and has owned this parcel since September 1977.
2. The lot at 575 E. Front St. has the following dimensions: 150 feet frontage on E. Front St. and a depth of 250 feet, as is shown on Attachment 1, the applicant's site plan.
3. The lot at 575 E. Front St. is currently vacant.
4. The lot at 575 E. Front St. is currently zoned R-1, which is a single family residential zoning district with required side yard setbacks of fifteen feet. The lot has been zoned R-1 since the adoption of the Mayberry zoning ordinance in 1981.
5. There are wetlands along the east and rear portions of the lot, extending some 60 feet from the east property line. The wetlands are accurately depicted on Attachment 1.
6. On June 1, 2012, Mary Smith applied for a certificate of zoning compliance and building permit for a single-family residence at 575 E. Front St.
7. On June 7, 2012 Bernard Simmons, town zoning inspector, denied the permit application of Mary Smith on the basis that the proposed structure would violate the side yard setbacks on the west side of the property.
8. On June 15, 2012 Mary Smith submitted a complete petition for a variance of five feet from the side yard setback requirement in order to locate a residence as depicted in Attachment 2, Smith petition for a variance.
9. On July 16, 2012, the Mayberry Board of Adjustment conducted a duly advertised and noticed hearing on the Smith variance petition.
10. State and federal permit requirements prevent location of any residential structure on or over the wetlands depicted in Attachment 1.
11. There is insufficient space on the lot to construct a residence of the size required by restrictive covenants and in a manner compatible with the surrounding property while avoiding the wetland area and meeting the side yard setback.
12. If no residence can be constructed on the lot, there is no other practical use of the lot that has reasonable value.
13. Construction of a residence ten feet from the west side property line will not have a negative impact on the adjoining property.
14. Construction of a residence ten feet from the west property line will not impair emergency vehicle access, create a fire hazard, or otherwise be contrary to public health and safety.

Conclusion and Findings

1. Based on the application, the evidence submitted, and the above findings of fact, the board of adjustment by unanimous vote of 5-0 on July 16, 2012 concludes that Mary Smith meets each of the four standards set forth for a variance in Section 10.4 of the Mayberry Zoning Ordinance.

2. Mary Smith is hereby granted a variance to construct a residence to be located ten feet from the west property line of her lot at 575 E. Front St., Mayberry, N.C.

3. This variance is conditioned upon a requirement that the ten feet between the residence depicted on Attachment 2 and the west property line be maintained as an undisturbed vegetated buffer.

Board Chair

I certify that the above decision was filed with the clerk to the board of adjustment on _____, 2012 and mailed to the petitioner and each person making a written request for a copy of the decision at the hearing. The mailed copies were deposited in the U.S. Mail with postage affixed, addressed to the attached list of recipients, on _____, 2012.

Clerk to the Board of Adjustment