

CONDUCTING QUASI-JUDICIAL HEARINGS ON LAND USE MATTERS

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1

Outline

- Planning Board as LPA
- The Difference Between Legislative and Quasi-Judicial Hearings and Decisions
- Relationship Between Comp Plan and LUDC
- Characteristics of Quasi-Judicial Decisions
- *Ex Parte* Communications and Quasi-Judicial Bias
- Findings of Fact
- Best Practices

2

Planning Board as LPA

- LPA – Local Planning Agency
- Fla. Stat. § 163.3174
- Responsible to conduct comprehensive planning program, including:
 - ✓ preparing plan or plan amendment after hearings to be held after public notice
 - ✓ making recommendations to the Town Council regarding adoption or amendment of the plan
 - ✓ monitoring/overseeing effectiveness of plan (EAR process)
 - ✓ reviewing LUDCs for consistency
 - ✓ other tasks as assigned by Town Council

3

Setting Policy = Legislative

- Adopting or amending the Comprehensive Plan
- Includes large and small-scale plan amendments
- Adopting or amending Land Use Development Code (LUDC)
- All legislative (also known as quasi-legislative) decisions in land-use practice involve setting policy

4

Legislative Hearing Process

- Broad notice (i.e. posted agenda, newspaper publication)
- Wide-ranging public hearing, including consideration of pure preferences and opinions, conjecture and assumptions
- Presentation of evidence: anything relevant
- Substantial discretion: Board as policy-makers
- Can take a public or private position ahead of the hearing - *Izaak Walton League of America v. Monroe County*, 448 So.2d 1170 (Fla. 3rd DCA 1984).

5

Fairly Debatable Standard of Review

- There must be a reasonable basis to support the action.
- Very deferential standard.
- Akin to a bar debate.
- **The Court:**
 - may not second guess the wisdom of the local government's action; and
 - must affirm if there is any reasonable basis for the decision and that there are no constitutional violations.

6

Applying Code and Comp Plan = Quasi-Judicial

- Application of the Code and/or the Comp Plan to specific properties
- Cannot create new policies to govern the decision (legislative process)
- Site-specific application of Land Development Regulations (Examples: rezonings, site plans, conditional uses, variances, administrative adjustments, plats, special exceptions, licenses, permits)
- **Key elements:**
 - finding of facts regarding the specific proposal
 - exercise of judgment and discretion in applying adopted policies to the specific situation

7

Quasi-Judicial Hearing Process

- Notice to owner and affected persons
- Sworn testimony – swear or affirm (all at once, or one at a time)
- Parties (City applicant, affected persons) have the right to call and examine witnesses, introduce exhibits, cross-examine opposing witnesses on any relevant matter, and rebut evidence
- Applicant and affected parties entitled to more than the 3 minute rule because their rights are uniquely affected
- Board acting as judges

8

Hearing Process Continued...

- Where evidence conflicts, the Board has the responsibility of deciding how much weight to accord each piece of evidence.
- Continued hearings: must be present for all or must review the complete record of portions missed.
- Record-keeping is important – keeping all things exhibits and things handed up to the Clerk or shown to the Board.
- Review is on the record. No ability to create additional evidence after decision is made.
- Board should give due consideration to the professional judgement of your zoning and planning staff, considering their training and experience. But the question of what the Code means is a question of law for which the Board must make its own decision, as the creator of the law.

9

Affected Parties? Objectors With Standing to Sue

- A person who has a **legally recognizable interest** which is or will be affected by the action of the zoning authority in question has standing.
- **May be shared in common with other members of the community** (an entire neighborhood), but not every resident and property owner of a municipality can, as a general rule, claim such an interest.
- **Must be a definite interest exceeding the general interest** in community good shared in common with all citizens.
- **Relevant factors:**
 - proximity of property to the property to be zoned or rezoned,
 - character of the neighborhood, including the existence of common restrictive covenants and set-back requirements
 - type of change proposed
 - entitlement to receive notice under the zoning ordinance is a factor, but is **not** controlling.

10

Burden of Proof for Quasi-Judicial Matters

- The burden is on the applicant for a rezoning, special exception, conditional use permit, variance, site plan approval, etc. to demonstrate the application complies with the requirements of the applicable ordinance and that the use sought is consistent with the applicable comprehensive plan.
- The burden then shifts to the government to present **competent substantial evidence** that the application does not meet applicable criteria under the code and that maintaining the status quo on the property **accomplishes a legitimate public purpose, and is not arbitrary, discriminatory, or unreasonable.**
- Quasi-judicial decisions generally are based on their facts and do not set precedents.

11

Variances – Applicability

- A variance may be granted by the board of adjustment to deviate from the terms of the Land Development Code.
- A variance shall not be granted to permit or expand a use not permitted generally or by special exception in the applicable zoning classification.
- A variance may be granted only if the applicant meets **all** of the criteria listed in subsection 44-177.
- No nonconforming use of neighboring land, structures, or buildings in the same zoning classification and no permitted use of lands, structures or buildings in other zoning classifications shall be considered grounds for the authorization of a variance.
- Inconveniences or financial burdens that can be resolved by means other than a variance shall not constitute evidence of unnecessary and undue hardship and shall not alone be considered grounds to justify granting a variance.
- State and/or federal laws or requirements may not be varied by the town.

12

Variance Applicant Must Prove:

- That the variance is in fact, a variance as set forth within this article and within the province of the board of adjustment upon the opinion of the town attorney.
- That special conditions and circumstances exist which are peculiar to the land, structure, or building involved, and which are not applicable to other lands, structures or buildings in the same zoning district.
- That the special conditions and circumstances do not result from the actions of the applicant.
- That granting the variance requested will not confer on the applicant any special privilege that is denied by this article to other lands, buildings, or structures in the same zoning district.

13

Variance Standards – cont'd.

- That literal interpretation of the provisions of this article would deprive the applicant of rights commonly enjoyed by other properties in the same zoning district under the terms of this article and would work unnecessary and undue hardship on the applicant.
- That the variance granted is the minimum variance that will make possible the reasonable use of the land, building, or structure.
- That the granting of the variance will be in harmony with the general intent and purpose of the chapter, and that such variance will not be detrimental to the public welfare.

14

Competent Substantial Evidence

- ✓ Evidence a reasonable mind would accept as adequate to support a conclusion
- ✓ Substantial Competent Evidence from lay witnesses/residents must be "fact based"
- ✓ Subjective preferences ("love it"/"hate it") are not fact based and do not constitute Substantial Competent Evidence
- ✓ Conjecture or assumptions are irrelevant to the issues

15

Competent Substantial Evidence

• Example: Harm to Property Values

- Is there testimony from an appraiser about the impacts of a similar project?
- Is the similar project truly similar?
- Does the evidence in the record reflect reduced values, or are you just relying on personal knowledge?
- Don't just tell, **SHOW**. What may be obvious to local citizens will not be known by a reviewing court unless its in the record.
- Property owners testifying from personal knowledge of appraisals, sales prices or cancelled contracts resulting from similar development or from the pending application should be supported with the documents themselves.

16

Findings of Fact

- The Fla. Supreme Court ruled that local government "will NOT be required to make findings of fact" to support its decision on an application for rezoning.
- However, written findings of fact are a good idea in case of appeal to support the local government's quasi-judicial decisions because they:
 - Are essential to effective strict judicial scrutiny of quasi-judicial decisions.
 - Greatly reduce the possibility of arbitrary or politically-motivated rezoning decisions, thereby providing protection for property rights.
 - Ensure mindfulness of consistency with Comp Plan requirement; if local government makes written findings of fact to support their consistency determinations, local government officials will focus more closely on the relationship between proposed rezoning and goals, objectives and policies of the Comp Plan.

17

Ex-Parte Communications

- An ex parte communication occurs when a party to a case, or someone involved with a party, talks or writes to or otherwise communicates directly with a Board member about the issues in the case **without the other parties' knowledge**.
- Example: A Board member meets with the applicant or an opponent without the public present.
- **Attributes of ex-parte communications on local quasi-judicial matters:**
 - Occurs outside the official hearing
 - Usually one-sided (opposition or support)
 - Does not allow the other side an opportunity to respond
 - Can be in any form – written, verbal, electronic, etc.

18

Town should adopt disclosure resolution or ordinance

- Under F.S. § 286.0115, ex-parte communications are **not presumed prejudicial if disclosure is made** at the beginning of the public meeting pursuant to a locally adopted ordinance or resolution.
- Must disclose the following information for the record:
 - The subject matter of the communication and the identity of the person, group or entity with whom the communication took place
 - Written communications should be submitted into the record
 - Disclose the existence and nature of any investigations, site visits and expert opinions received

19

Bias in Quasi-Judicial Hearings

- Bias (a **predetermined opinion that is not susceptible to change**), undisclosed ex parte communications, and close family or business ties can **disqualify Board members from participating or voting** as a matter of due process – even if there is no statutory conflict of interest
- Those participating in quasi-judicial proceedings have a right to expect **impartial decision-making on the basis of the evidence presented**. Decision-makers should **not take a position** on a quasi-judicial application until each party (City applicant, affected person) has made its presentation at the hearing. Doing so deprives a party of its constitutionally protected right to a fair hearing.
- Board members should **not** actively involve themselves in efforts to support proponents or opponents of a quasi- judicial land development action. To do so could subject the City and the individual Board member to a lawsuit.

20

Voting Conflict of Interest Statute Allows Abstention for Quasi-Judicial Bias

- Section 286.012, Fla. Stat. **Voting requirement at meetings of governmental bodies.**—A member of a ... municipal governmental ... commission... who is present at a meeting of any such body at which an official decision... is to be taken or adopted **may not abstain from voting** in regard to any such decision...; and a vote shall be recorded or counted for each such member present, **unless**, with respect to any such member, there is, or appears to be, a possible **conflict of interest** If there is, or appears to be, a possible conflict, . . . the member shall comply with the disclosure requirements of s. 112.3143.... **If the official decision, ruling, or act occurs in the context of a quasi-judicial proceeding, a member may abstain from voting on such matter if the abstention is to assure a fair proceeding free from potential bias or prejudice.**

21

QJ Hearing Standard of Review

- Narrow and limited review by certiorari on three issues:
 - Whether procedural due process was accorded;
 - Whether the essential requirements of the law were observed; and
 - Whether the decision was supported by competent substantial evidence
- Petitions for writ of certiorari must be filed within 30 days of rendition of the development order to be reviewed.
- Denials must cite to the legal authority for the decision.

22

Best Practices for Quasi-Judicial Decisions


- **BE AN OBJECTIVE DECISION-MAKER**
 - Do not prejudge the case - avoid making up your mind beforehand.
 - Provide objective decisions based on all the facts and evidence presented.
 - Follow your community's plan and the local zoning codes, and local land development codes.
 - Base decision on the information available to you at the meeting, including the staff report, the site visit, relevant information presented at the meeting, and public comment.
- **MAKE THE BEST DECISION POSSIBLE BASED ON ALL OF THE INFORMATION PRESENTED TO YOU**

23

More Best Practices

- **BE AN EFFECTIVE BOARD MEMBER**
 - Prepare well for the meetings
 - Keep the meeting tempo the same at the beginning and end
 - Seek to understand each other's positions and opinions
 - Be civil to each other so the public will be civil to you
 - Have a bias for action
 - Explain your rationale, but don't lecture
 - Make your final action clear to the public


24



More Best Practices

- **MAKE SOUND DECISIONS & DEFENSIBLE MOTIONS**
 - Ask applicant if he/she agrees. If not, why not? Verify understanding and assumptions before voting. Allow rebuttal as needed.
 - Restate and discuss criteria to support the motion.
 - Follow competent substantial evidence, not the Roar of the Crowd
 - Repeat the "gift wrapped" motion provided by staff if you agree
 - Motions different than staff-recommended motion
 - Develop defensible public record based on evidence in the record
 - May not be arbitrary
 - Denials must provide a reason, in writing, to the applicant


25



Even More Best Practices

- Adding Conditions of Approval?
 - Make sure they do not overlap or conflict with the staff-recommended conditions
 - Should relate to the criteria for approval
 - Rational nexus test
 - Rough proportionality test
 - Section 70.45, Fla. Stat., exposure for unlawful exaction

26



QUESTIONS?

27
