

Board of Adjustment Training for the Town of Shallotte

February 11, 2025

CAPE FEAR COUNCIL OF GOVERNMENTS
WES MACLEOD, AICP, ASLA



Legal Context

- Local governments are creatures of the state and have no inherent powers.
- In “home rule” states, local governments have broad authority - state legislatures have delegated any powers that do not conflict with the state or federal constitution.
- In “Dillon’s Rule” states, local governments only have those powers expressly granted to them by their legislatures.

Types of Land Use Decisions

Legislative – Policy decisions including adoption, amendment, or repeal of regulations.

Examples: zoning text amendment, rezoning (map amendment) and also annexation, budget. Final decisions reserved for the governing board (board of aldermen, council).

Advisory – Not final decisions, therefore, less regulated. Typically a function of the planning board and/or staff. Examples: recommendations on plans, text and map amendments, etc.

Administrative – Routine activities typically handled by professional staff, but sometimes by planning board or governing board. Examples: issuing permits, approving plans or plats, enforcement, application of non-discretionary standards.

Quasi-judicial – Formal actions where the decision makers apply discretion in applying existing policies to individual or special cases. Quasi-judicial (i.e. court-like) decisions use evidentiary hearings to gather facts and evidence and have very specific requirements.

Examples: special/conditional use permits, variances, and appeals. Decisions can be made by the governing board, planning board, or board of adjustment.

N.C.G.S. §160D-302 – Board of Adjustment

- Authorizes establishment of a board of adjustment
- 5 members minimum appointed to 3-year terms.
- Alternates may be appointed.
- Quasi-judicial procedures required.
- May allow for the Planning Board to function as the BOA

Town of Shallotte Board of Adjustment (BOA) Duties - § 3-18

- Hear appeals.
- Authorize variances.
- ***§ 160D-403 (b) specifically defines and establishes procedure for staff “determinations” of development regulation provisions. Appeals of such determinations may be brought to the BOA.***

Appeals (1)

- Appeals of advisory opinions are not allowed. A case must be the appeal of an actual official staff determination or action.
- The standard is not what the ordinance should say, but what the governing board intended. Board members must not substitute their judgment for that of the governing board.
- An appeal must be brought by a party with standing (i.e. hold a property interest that is specially affected by the decision) within 30-days of notice of decision.

Appeals (2)

- Appeal must be heard in a reasonable time and notice is required.
- Official whose decision appealed must provide relevant documents to the board and the appellant must be present at the hearing.
- Board may reverse or affirm, in whole or in part, appealed decision.
- Parties may agree to mediation or other alternate resolution.

Standing - § 160D-1402(c)

Any person who has standing or the Town may appeal a decision to the board of adjustment.

1. The owner of the property, someone with an option to purchase or lease the property, and the applicant for a development approval.
2. Any other person who will suffer “special damages” as a result of the decision being appealed. This may include parking, stormwater runoff, and crime problems, or property value impacts. Proximity alone not enough to prove such.
3. An association of neighborhood property owners that would be affected, provided that at least one of the association members would have standing as an individual and that the association was not formed in response to the particular application being appealed.
4. The unit of local government that has made the decision being appealed.

Variances: § 160D-705 (d)

Gives board permission to modify any provision of the ordinance to prevent unnecessary hardships where:

1. Unnecessary hardship would result from the strict application of the regulation. It is not necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property.
2. The hardship results from conditions that are peculiar to the property, such as location, size, or topography. ***Hardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the neighborhood or the general public, may not be the basis for granting a variance.*** A variance may be granted when necessary and appropriate to make a reasonable accommodation under the Federal Fair Housing Act for a person with a disability.

Variations: § 160D-705 (d)

Gives board permission to modify any provision of the ordinance to prevent unnecessary hardships where:

3. The hardship did not result from actions taken by the applicant or the property owner. The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance is not a self-created hardship.
 4. The requested variance is consistent with the spirit, purpose, and intent of the regulation, such that public safety is secured and substantial justice is achieved.
- No change in permitted uses and appropriate conditions may be included.***
 - Recommend the board vote on each of the four provisions.***

Quasi-Judicial Procedures: § 160D-406

Quorum – Depends on local ordinance, simple majority or 4/5ths.

Voting – Requires 4/5ths (0.8) majority to grant variance, simple majority to issue CUP/SUP, or affirm/deny an appeal. Vacant seats and disqualified members are not considered members for determining majority where qualified alternates not available.

Hearing – Evidentiary hearing to gather facts, not public opinion. A detailed record of the hearing is required, including detailed minutes or, preferably, verbatim transcripts or recordings. Hearing for each case must be opened and closed.

Quasi-Judicial Procedures: § 160D-406

Witnesses – Evidence must be presented under oath and cross-examination must be allowed. BOA chair may subpoena witnesses. The chair or clerk to board may administer oaths.

Findings – Written findings of fact are required. Where there is conflicting evidence, the Board must specify what it determines to be the facts that are the basis for the decision.

Quasi-Judicial Procedures : § 160D-406

Conflict of Interest – The NC Constitution gives parties to QJ decisions the right to an impartial decision maker, so conflicts of interest must be avoided.

Open meetings – All meetings and all deliberations must be open to the public, but deliberations and decision may be separate from hearing.

Quasi-Judicial Procedures: § 160D-406

Evidence – Evidence must be **substantial, competent, and material** and must be entered into the record and kept on file. Hearsay and non-expert testimony cannot be the basis for a decision or for establishing a fact. Board members ***may not gather evidence outside of the hearing*** and ex-parte communication is not allowed. Only evidence presented at the hearing and subject to cross-examination should be considered.

Competent Evidence § 160D-1402(j)(3)

The term "competent evidence" shall not include the opinion testimony of lay witnesses as to any of the following:

- a. The use of property in a particular way affects the value of other property.
- b. The increase in vehicular traffic resulting from a proposed development poses a danger to the public safety.
- c. Matters about which only expert testimony would generally be admissible under the rules of evidence.

Conflict of Interest: § 160D-109(d)

Members are disqualified from participating, not just from voting, in the following situations:

- Fixed opinion prior to hearing
- Undisclosed ex-parte communication (discussion regarding case)
- Close family, business, or other relationship with an affected person
 - ***A "close familial relationship" means a spouse, parent, child, brother, sister, grandparent, or grandchild. The term includes the step, half, and in-law relationships.***
- Financial interest in outcome

If objection is raised and member refuses to recuse, rest of board votes on recusal.

Sample Findings of Fact

- Section 12-5(a) of the Zoning Ordinance required a 15' side yard setback in the R-10 zoning district when the structure was constructed.
- The applicant constructed the accessory structure in the summer of 2013 without a permit and in violation of the side yard setback required at the time of construction.
- The proposed development project is expected to generate an average of 35 weekday P.M. peak hour vehicles according to the ITE Parking Generation manual 4th Ed.

Sample Conclusions of Law

- The applicant's hardship is self-imposed because he/she knew or should have known that a permit was required prior to construction.
- The hardship is not the result of site characteristics but is common to all commercial property in the neighborhood.
- The zoning administrator denied the permit appropriately because the proposed building should be classified as a primary structure, not an accessory structure.

Sample Hearing Process/Sequence

1. Chair opens hearing and announces case.
2. Witnesses are sworn in.
3. Staff gives summary overview the case.
4. Appellant (or attorney) presents case, documents, evidence, witnesses. BOA may ask questions. Chair allows cross-examination.
5. Objectors present case, documents, evidence, witnesses. BOA may ask questions. Chair allows cross-examination.

Sample Hearing Process/Sequence

6. Applicant's rebuttal.
7. Objector's rebuttal.
8. Chair summarizes evidence and excludes hearsay, opinion. BOA may add/clarify.
9. All parties may offer objections, corrections, additions to Chair's summary of evidence.
10. Deliberation and determination of facts and conclusions.
11. Motion and vote. Hearing closed.

Questions?



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