Advisory Board Review of Quasi-judicial Decisions

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Acme Development Co. is proposing to build a 200-unit apartment project on a vacant lot. Under the city's zoning ordinance, this use of the site is allowed only if a special use permit is secured. The ordinance standards for the special use permit set out a variety of technical requirements and require the applicant to show the proposed use will be harmonious with the surrounding neighborhood and that it will not have significant adverse impacts on neighboring property values. Under the ordinance, the decision on this application will be made by the city council following a formal evidentiary hearing.

This will be a controversial project. The applicant has hired capable consultants who are sure all of the city standards can be met. On the other hand, residents of the neighboring single-family neighborhood have already raised concerns about traffic, congestion, noise, storm water runoff, and other negative impacts of the character of their neighborhood.

Before the city council takes up Acme's special use permit application, should it be sent to the planning board for review and comment?

No statutory mandate

The North Carolina statutes do not mandate a particular answer to this question.

If a rezoning was required for the proposed use, that would have to be referred to the planning board. The planning board must be given at least 30 days within which to comment on whether a rezoning would be consistent with adopted plans. The planning board may add any other comments it deems appropriate. The rationale for this mandated advisory review is that with a zoning map or text amendment the governing board is making a legislative decision and a more informed and thoughtful policy choice will be made if they have the considered advice of the planning board.

When a quasi-judicial decision is being made, as with the special use permit application in our case, the decision-making board is not making a policy choice. It is determining whether a particular application meets the standards already set out in the ordinance. A hearing is required as part of the decision-making process, but the sole purpose of the hearing is to gather evidence as to whether the standards are met, not to secure opinions or advice as to what would be in the best public interest. See this **post** for more on the differences between legislative and quasi-judicial decision-making.

So there is no requirement in the statutes for a quasi-judicial decision to be referred to an advisory board for review and comment. Nor is there a prohibition on referral.

Why is it done?

Under North Carolina zoning statutes, decisions on special use permits are quasi-judicial and can be assigned by the zoning ordinance to the governing board, planning board, or the board of adjustment. A 2005 SOG survey indicated 69% of jurisdictions have ordinances that assign these decisions to the governing board, 53% to the board of adjustment, and 4% to the planning board. The numbers add up to more than 100% because some jurisdictions send some special use

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permits to the governing board and others to the board of adjustment. Click **here** for that study. So it is the city council, the county board of commissioners, or the board of adjustment making almost all of these decisions.

Somewhat surprisingly, a great many jurisdictions add a role for the planning board. 67% of the jurisdictions reported they send special use permit applications to the planning board for an advisory review.

Why are ordinances structured this way? Some of it may simply be confusion in drafting – conflating the process for reviewing a special use permit application with the process for a rezoning. After all, if the city council decides rezoning petitions and has to send those to the planning board, why not just do the same for special use permit applications decided by the city council? While that might explain how some jurisdictions initially put an advisory review for special use permits in their ordinance, it does not explain why so many jurisdictions continue to do this.

The rationale for advisory reviews that I hear most often is that it gives the applicants and neighbors an informal chance to present their cases and get feedback, as well as providing a chance for all involved to get a better sense of the issues that will be contentious when the case gets to the decision-making board. This allows for consideration of actions to address concerns that are raised, such as conditions that might be appropriate or potential modification of the application. In short, the advisory review can serve as dress rehearsal for the more formal evidentiary hearing and provides a chance to work out points of contention before the case gets to the city council or county board of commissioners. While this adds an extra step to the review process, many jurisdictions have concluded the benefits secured outweigh the burdens this imposes on the applicant, the neighbors, and the staff.

How this can be a legal problem?

All of this sounds well and good, but it is not without some potentially significant legal risks.

It is perfectly appropriate (as well as legally required) to have an advisory review of legislative decisions and policy choices that go to the city council or county board of commissioners. Special use permits, however, are not legislative decisions. The question before the decision-making board is not what the policies should be, not whether the project is popular with the public, and not even whether the planning board thinks it is a good project or not. The only question before the decision-making board is whether there is sufficient evidence in the record to establish that this particular application does or does not meet the standards already in the ordinance. See this **post** from Adam Lovelady on building a proper record for quasi-judicial decisions.

Furthermore, constitutional due process considerations and the zoning statutes require that the decision be made solely on the basis of competent, substantial, and material evidence that is properly presented to the decision-making board. This generally requires the evidence be presented at the decision-making board's evidentiary hearing by witnesses under oath and subject to cross-examination. Hearsay testimony, opinion evidence from non-expert witnesses, and evidence not presented at the hearing may not be considered. See this **post** for more on limits to use of evidence gathered outside the hearing.

This raises serious questions about the use the decision-making board can make of an advisory comment from the planning board. What if the planning board comment is based on evidence that was not presented formally to the governing board? Unless the evidence presented to the planning board is also presented at the evidentiary hearing, it cannot be used in making a decision. Is the planning board comment "evidence" that can be considered to resolve contested facts? Almost certainly not. Can the recommendation in and of itself be used to conclude the ordinance standards have been met? Highly unlikely.

What to do?

Given these limitations on the use of advisory comments for a quasi-judicial matter, some jurisdictions have simply eliminated this step altogether. If a planning board comment has such limited use, why put everyone to the time, trouble, and expense to go through the planning board prior to going to the decision-making board? In these jurisdictions the responsibility to hold an evidentiary hearing and make a decision on a special use permit is assigned to a single board and there are no advisory reviews. This is the safest course of action from a legal perspective and is quicker and simpler for applicants and neighbors concerned about the application.