

Quasi-Judicial Development Decisions

for Boards of Adjustment
and Other Boards Making Planning and Zoning Decisions

Remote Workshop
October 2022



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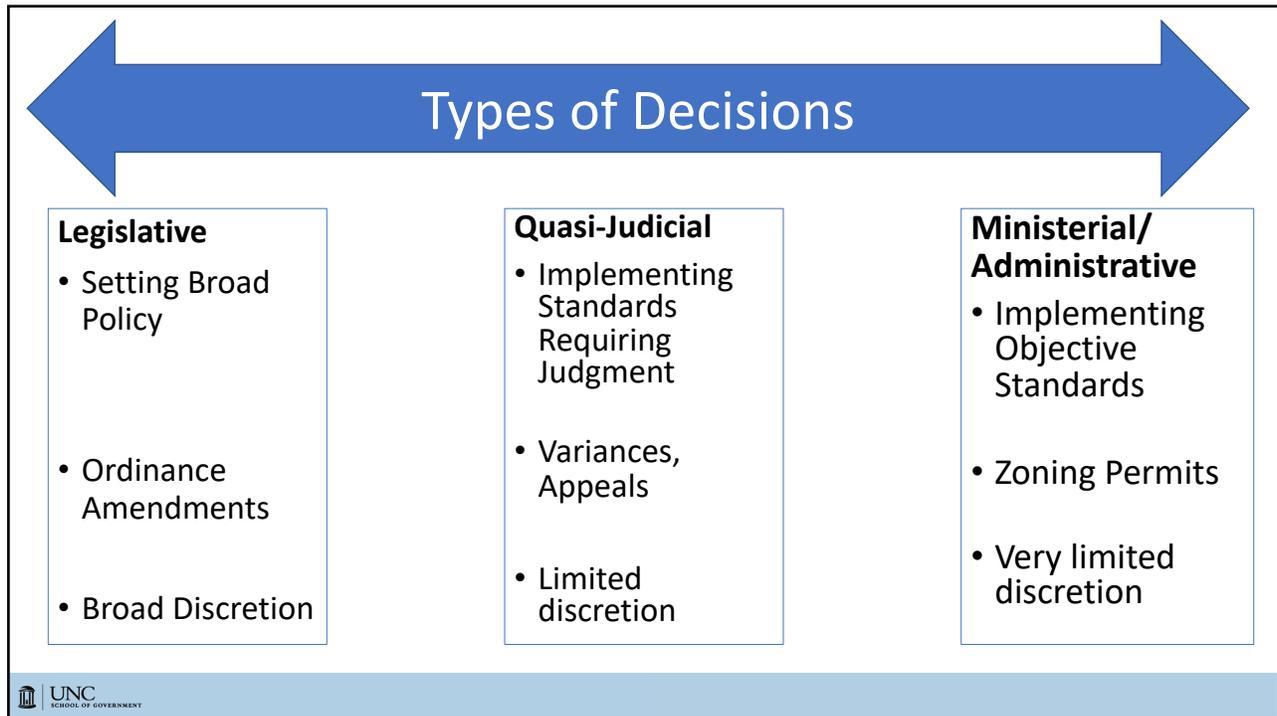
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What is Quasi-Judicial? Procedures Evidence Decision



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Quasi-Judicial Decision

Process of adjudicating how the general law applies to a particular situation based on an evidentiary record – G.S. 160D-406

Two key responsibilities:

- 1) Determine contested facts
- 2) Apply standards that require judgment and discretion

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The board of adjustment acts *kind of* like a court...

Quasi-Judicial Decision

What it is not

Opportunity to decide what standards should be applied
Must apply only the standards already in ordinance

Based on public opinion

Must be based on competent, substantial, material evidence properly in the record

Variance

(set by statute)

1. Unnecessary hardship would result from the strict application of the ordinance.
2. The hardship results from conditions that are peculiar to the property, such as location, size, or topography.
3. The hardship did not result from actions taken by the applicant or the property owner.
4. The requested variance is consistent with the spirit, purpose, and intent of the ordinance, such that public safety is secured, and substantial justice is achieved.

Special Use Permit

(set by ordinance)

1. Does not materially endanger the public health or safety;
2. Meets all required conditions and specifications;
3. Would not substantially injure the value of adjoining property or be a public necessity, and
4. Will be in harmony with the area in which it is located and be in general conformity with the comprehensive plan.

Certificate of Appropriateness

- Not incongruous with the special character of the landmark or district, as identified in:
 - The report describing the significance of the buildings, structures, features, sites or surroundings
 - The principles and guidelines for new construction, alterations, additions, moving and demolition.

Appeals of Staff Decisions

- Based on the facts and the law, what is the correct application of the ordinance to this case?

Due Process

- Clear guiding standards
- Notice
- Opportunity to be heard
- Impartial decision-makers
- Decision based on the evidentiary record
- Right to appeal

What is Quasi-Judicial? Procedures Evidence Decision



Steps in the Process

1. Notice of Hearing
2. Hearing Preliminaries (including recusal of members with conflicts)
3. Evidentiary Hearing (including swearing in of witnesses)
4. Voting and Final Decision
5. Appeals

Statutory reference: G.S. 160D-406

Notice

- Mailed Notice
- Posted Notice (Sign)
- Any Additional Ordinance Requirements

Bias

Board member cannot participate if member has a fixed opinion that is not susceptible to change

Conflicts of Interest

- A board member must recuse himself or herself if:
 1. [*Financial*] The outcome would have a direct, substantial, and readily identifiable financial impact
 2. [*Relationship*] The board member has a close family, business, or associational relationship with an affected person
 3. [*Neutrality*]: The board member has undisclosed ex parte communications or is biased

Ex Parte Communication

- Contacts with a party outside of the hearing
- Should be avoided
- Must be disclosed

Evidentiary Hearing: Common Order

- Opening
- Introduction of the case (staff or chair)
- Applicant presents
- Other parties present
- Non-party witnesses present
- Rebuttal from applicant and other parties
- Deliberation
- Decision

Open Meetings and Public Records

Public Meeting

- Anytime a majority of the board gathers, in person or electronically, to conduct public business
- Open to the public; standard notice requirements
- Full and accurate minutes
- Limited allowance for closed session
- At social occasions avoid discussion of public business

Public Records

- Any record made or received in the transaction of public business
- Letter, email, photographs
- Subject to disclosure

Discussion 1 – Who Can Participate?

The board of adjustment is considering a variance request for a major development downtown. Any recusals?

- 1) Board member **Russell** went to high school with the applicant. His brother-in-law is a business partner with the applicant.
- 2) Board member **Sara** currently serves on the Board of Adjustment and is campaigning for a seat on Town Council. Last week during a campaign event Sara proclaimed “There’s just too much development. I’m gonna shut it ALL down. Especially that monstrosity proposed for downtown.”
- 3) Board member **Tameka** didn’t do a thing. She heard those lawyers from the School of Government talk about bias and ex parte communications so she did not visit the site, nor did she review the application materials or staff report. She arrived with a clear mind and a clean conscience.

What is Quasi-Judicial? Procedures Evidence Decision



Building the Record

“Every quasi-judicial decision shall be based upon **competent, material,** and **substantial** evidence in the record.”

- Trustworthy and reliable
- Related to the standards
- Sufficient to support a conclusion

Initial Evidence

- Application
- Staff Analysis
- Site Visits

Presentation of Evidence

Anyone may be allowed to present relevant evidence, but only parties may cross-examine, object, make legal arguments, or act as a party

Rules are different from court rules of evidence



Witness Testimony

Should be:

- Sworn or affirmed
- Factual
- Focused on standards and land use impacts
- Supported by first-hand knowledge or by documentary evidence

Should not be:

- Unsworn
- Personal opinion
- Focused on owner or residents
- Supported by
 - Mere speculation
 - Vague assertions
 - Unsubstantiated fears

Expert Opinion

Expert witness is required to rely on opinion testimony regarding:

- 1) Property Values
- 2) Projected Traffic Impacts
- 3) Other technical matters

Expert must have proper foundation for any opinion offered – appropriate study required

Documentary Evidence

- Written materials can be submitted and distributed prior to hearing (application, staff reports, documents)
- Documents (including photos, maps, studies, letters, etc.) submitted become part of record
- Clearly label each
- All objections made at hearing

Outside Evidence

Generally, all evidence must be presented at hearing

Ex parte evidence – site visits permissible, but must avoid discussing substance and must disclose site visit at hearing, along with any key information observed

Hearsay Testimony – can accept, but cannot use as basis for key findings

Application – Can accept and use documents that are part of application

“In quasi-judicial proceedings, no board or council member should appear to be an advocate for nor adopt an adversarial position to a party, bring in extraneous or incompetent evidence, or rely upon ex parte communications when making their decision.”

PHG Asheville, LLC v. City of Asheville

Discussion 2 – Is it good evidence?

- A. A petition signed by 25 neighbors opposing the project and outlining the ways in which it is out-of-character for the neighborhood.
- B. A sworn statement from the minister at Joe Developer’s church stating that Joe is an upstanding member of the community and volunteers at the homeless shelter.
- C. Testimony from a neighbor and salon owner that the apartments will injure her property value.
- D. A letter from Joe Developer’s traffic engineer about why, in her professional opinion, any traffic impacts will be reasonably accommodated by the proposed street improvements.

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Deliberation

- In open session
- Focused on the applicable standards
- Based on the evidence in the record

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Burden

- Generally, applicant bears the burden to produce sufficient evidence to show standards are met
- Burden shifts to opponents if applicant provides sufficient evidence to support his or her case



Determine Contested Facts

For example...

- (For a variance) What makes the situation peculiar to the site?
- (For a certificate of appropriateness) What about the property is in keeping with the character of the district?



Apply the Standards

For example . . .

- (For a variance) Given the facts, is there unnecessary hardship?
- (For appeal of staff determination) Given the facts, was the administrative decision correct?



Motion(s)

- Findings of Fact (sometimes separate)
- Approve, approve with conditions, or deny
- Include reasoning based on the evidence and standards



Voting

- Simple majority for appeals and most other matters
- 4/5 majority for a variance
- Absent members still count toward number of members “of the board”
- Exclude vacant seats and those with conflict of interest



Written Decision

- May prepare draft prior to hearing
- Final document may be prepared after the meeting (usually by staff or attorney)
- Must accurately reflect action and reasoning of the board
- Approved by board
- Signed by chair or authorized member



Notice and Delivery of Decision

- Email, first class mail, or personal delivery
- Staff certifies delivery for the record (i.e., clerk affidavit)
- Decision is effective when filed with clerk



Appeals

- 30 days from later of effective date or date of decision
- To Superior Court
- On the record

The Record

- Application and supporting materials
- Record of the hearing itself
 - Detailed minutes or transcript required
 - Audio or video tape advisable, not required
 - If verbatim transcript requested, cost can be assigned to party requesting it
- Any other documents submitted

