

Board of Adjustment

Legal Aspects

Judicial Review of Administrative Action

Both Procedural and substantive requirements are imposed on the Board by the courts.

Procedural Requirements

- a. The Board is required to conduct their meetings in such a way that interested parties have an opportunity to be heard and are otherwise fairly treated.
- b. The Board is required to make its findings of fact based upon evidence that is legally sufficient in terms of both quantity and quality.
- c. The Board must make a record of its proceedings that is adequate to allow a reviewing court to determine whether the other requirements have been complied with.

Substantive Requirement

The Board must find facts which lead reasonably to the conclusions they reach and that in making a final decision on the merits, the Board apply the correct principles of law.

Open Meeting Law

Meetings must be open to the public in accordance with the Open Meeting Law. No part of the meeting can be conducted in an executive session in order to weigh evidence before making a finding.

Notice

North Carolina law does not require a notice to the public or neighboring landowners. However, the Board's Rules of Procedure call for a newspaper notice to be published for two consecutive days at last five days prior to the meeting. This notice shall include all facts concerning the appeal and the time and place of the hearing. In addition, copies of the agenda are sent to the neighboring landowners.

Right To Present Evidence

A party to a Board of Adjustment hearing must be allowed to present evidence to meet his burden of proof and must also be permitted to present evidence by way of explanation or rebuttal. The Board is not required to listen to evidence that is incompetent, irrelevant, immaterial, or unduly repetitious.

Cross-examination

Cross-examination of adverse witnesses is a fundamental right in a hearing before the Board. If such a witness is not cross-examined by a participant, the Board has the duty to satisfy itself of the accuracy of testimony.

Voting

The enabling act for cities provides: The concurring vote of four-fifths of the members of the Board shall be necessary to reverse any order, requirement, decision, or determination of an administrative official charged with the enforcement of an ordinance adopted pursuant to this article, or to decide in favor of the applicant in any matter upon which it is required to pass under any ordinance, or to grant a variance from provisions of the ordinance.

An essential element of a fair hearing is that the decision be made by an impartial tribunal. A Board member may have to disqualify himself from participation if his vote is likely to be challenged on the basis of prejudice or conflict of interest. However, since a four-fifths vote is needed to approve an appeal, the disqualification of members often results in the inability to obtain the necessary four-fifths vote of the Board. To avoid this problem, members of the Board can be excused from voting only for the reasons set forth in the Rules of Procedure.

Rules of Evidence

1. The Board shall follow the rules of evidence as applied in the trial division of the General Court of Justice, except that when evidence is not reasonably available under rules to show relevant facts, they may be shown by the most reliable and substantial evidence available.
2. The Board may not rely on unsworn testimony with respect to crucial findings of fact.
3. The Board may not rely on hearsay evidence with respect to crucial findings of fact. The following items all constitute hearsay evidence:
 - a. A statement by the applicant that he consulted all of his neighbors, and that they favored his applications.
 - b. Letters by the applicant's neighbors stating they favor the proposed use; and
 - c. Sworn affidavits by the neighbors stating they favor the proposed use.
4. The Board is not to allow or rely on a witness's statements based on how he thinks, or feels, or believes, unless he is recognized as an expert by the Chairman. Only what is known as fact is to be submitted with respect to the finding of fact.

Record of The Board of Adjustment Hearings

The decisions of the Board are to be in writing. Because fact finding, the drawing of conclusions, and the interpretation of the Zoning Ordinance are important responsibilities of the Board, each decision shall be preceded by the Board's finding of fact, conclusions, and ordinance interpretations. The minutes are to carefully record all the procedural aspects of the meeting, such as number and names of Board members present, what witnesses were heard, whether they were sworn, whether parties were represented by counsel, whether cross-examination of witnesses was requested and allowed, and any other event at the hearing that had any impact on the outcome. Also, the vote of each member of the Board shall be recorded in the minutes.

Documentary and physical evidence of any kind admitted by the Board at the hearing are to be retained and made part of the permanent record of the case.

The record is to consist of three parts:

- a. The written discussion, findings of fact, and ordinance interpretation;

- b. The minutes, containing a summary of what happened at the hearing and what evidence was presented as well as a record of the vote; and
- c. A compilation of documentary and other physical evidence.

III. BIBLIOGRAPHY

1. Brough, Michael B. and Phillip P. Green, Jr., *The Zoning Board of Adjustment in North Carolina*, Institute of Government, University of North Carolina at Chapel Hill, Chapel Hill, North Carolina, 1978
2. North Carolina Municipal Zoning Enabling Act
3. The City of High Point Development Ordinance