

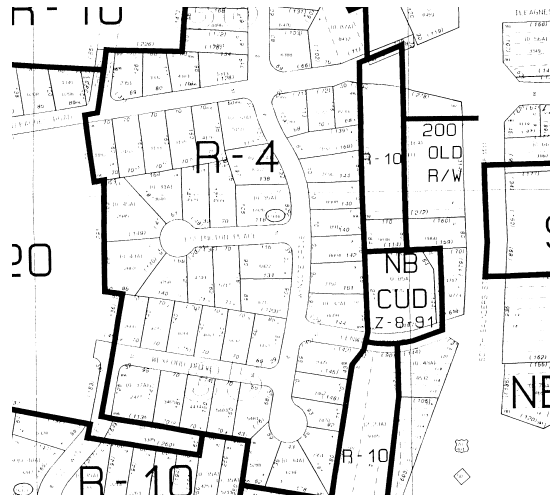


Module 4. Zoning

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This module has 5 parts:

- **Why zoning? What is this tool intended to accomplish? Constitutional limits.**
- **Some General Considerations—Basic structure of zoning ordinances, types of decisions and zoning strategies.**
- **Legislative Zoning Decisions**
- **Quasi-judicial Zoning Decisions**
- **Other Zoning Issues—Vested rights, nonconformities, special requirements for particular land uses.**



Why Zoning?

- **When people live close...**

Early American leaders envisioned a nation of farmer-citizens who worked their land and came together only rarely to transact the business of democracy. Jefferson and others saw America as an agrarian landscape where a homesteader could establish an independent life on the land, relegating the role of governance to a few, simple laws managed by a small circle of respected citizens.

As more and more of us flocked to this new land and as the economy changed from agricultural to industrial, we became more a nation of communities, of towns and cities, than a nation of farms. This industrial revolution brought large factories, often built within neighborhoods where workers could have easy access to jobs. As people crowded together in increasing densities in cities, the Jeffersonian concept of independent self-determination on one's own land became tempered by our very proximity to one another. This resulted in the actions of some property owners having have negative effects on others nearby.

Early in this century civic leaders began to explore ways to manage these conflicts in a fair way that respected both the rights of individual property owners and the rights of others in the community. Zoning has become common throughout this country as a means of balancing these sometimes conflicting interests. By simply separating land uses into compatible groups and establishing physical areas of a community for these uses to be considered acceptable, the conflicts inherent in unfettered land use decision-making were reduced. Contemporary communities use a more sophisticated and complex application of zoning as a means to ensure that a high quality of life is maintained for their citizens.

• Purposes of Zoning

- *Implement community goals as described in the Comprehensive Plan*
- *Protect property rights against negative spin-offs of neighboring land use.*
- *Make land use patterns predictable*
- *Ensure cost-effective public services to citizens and minimize public expenditures*
- *Establish economic development areas for job growth*
- *Protect against negative environmental impacts*
- *Set minimum aesthetic and functional standards for development*

• Going overboard

In an attempt to protect against negative effects of each others use of property, it is easy to use zoning to go a bit off the deep end in establishing strict separation of uses and actually prevent good things from happening. This tool must be artistically wielded. Used too strictly, a community will become bland and tedious. Used too loosely, a community can tend toward the chaotic and disorganized. It is an ever-adjusting means to achieve an end. Always keep in mind what the underlying purpose of the tool is...follow the community's land use or comprehensive plan.

• Constitutional limits.

There are constitutional limits to zoning authority. Failure to observe these limits can lead to invalidation of the ordinance and monetary damages to those harmed. There are several specific provisions critical for land use regulation:

- **Due process**—*requires legitimate objectives, appropriate means, and fair procedures;*
- **Equal protection**—*distinctions are permissible, but must treat similarly situated persons and situations similarly;*
- **Takings**—*do not have to allow most profitable use, but must leave some practical use/reasonable value;*
- **Others**—*freedom of speech, religion, assembly, association, movement, privacy can all come into play in certain circumstances.*

Some General Considerations

• Structure of Zoning Ordinances

Text and map.

Text:

- *defines the various zoning districts,*
- *describes the rules that apply to development,*
- *establishes the administrative structure for implementing zoning and amending the map.*

Map:

- *applies the districts to the zoned area. The map is a part of the ordinance and is physically specific .*

Districts

A key aspect of zoning is that different rules for development apply to different zoning districts. There are no state standards on the number or type of zoning districts allowed. Each local government can craft a unique set of districts tailored to their local needs. Because each community tends to do this in a different way, with different descriptive terms (R-30 in one jurisdiction may mean 30,000 square foot lots minimum, while R-30 in another jurisdiction may mean 30 units per acre are allowed), no unified standard for zoning districts across multiple jurisdictions is likely to occur. Within each district, no matter what it may be called, there must be uniformity of application (all development is treated alike). If this does not occur, the zoning ordinance may be challenged in court as being arbitrary.

Use regulation

Most ordinances concentrate heavily on defining the land uses that are allowed (permitted uses) and not allowed (prohibited uses) in each district. This is usually done in a text format, but more ordinances are experimenting with charts and schedules that allow a user of the ordinance to more easily understand what is permitted or prohibited in each zoning district.

Design standards.

In addition to regulating the use of land, zoning ordinances often contain the following:

- *allowable residential densities*
- *setbacks for buildings*
- *maximum building sizes*
- *landscaping standards*
- *buffering rules between incompatible land uses*
- *off-street parking requirements*
- *on-premise sign standards*
- *standards for "special" uses such as apartment complexes and shopping centers*

• Various zoning approaches.

Cumulative districts. This is an approach where the zoning of more intensive districts also allows all of the uses permitted in less intensive districts. An example would be a business district that automatically allows all uses permitted in a residential district.

Special purpose districts. This is an approach where only a narrow range of permitted uses is allowed, such as zoning an industrial park area so that only specific types of industries are allowed there.

Performance standards. With performance standards, zoning sets standards rather than focusing on uses, such as a provision that allows any commercial or industrial use of a parcel so long as it does not generate more than a specified amount of traffic or noise.

Overlay and floating districts. Overlay zones are special districts that create special requirements that are in addition to the underlying zoning requirements, such as a highway corridor overlay district that imposes special landscaping requirements along a major entryway to town; floating districts are those that are defined in the ordinance but not applied to property unless the owner requests it, such as manufactured home park district.

Planned unit development (PUD's). These are special districts that can be applied to a large parcel, usually with a mix of land uses being developed according to an overall plan. An example would be a large site with some office uses, a shopping area, some multi-family housing, and some single family housing, all being developed under a pre-approved overall development scheme.

Special and conditional use districts (SUD's and CUD's). These are zoning districts with no permitted uses at all; all development is subject to acquiring a special or conditional use permit. These can only be established at the land owner's request.

• Types of Decisions

There are four types of planning decisions that are used to apply or enforce zoning regulations, each with a different process and set of rules. It is critical that a board member know at all times which type of decision they are making so you will know which rules apply. The four types of decisions are:

- *Legislative* These include final, binding decisions on general policies that apply throughout a community. Examples include adoption, amendment, or repeal of land use regulations, adoption of the budget, and so forth. These are almost always assigned to the governing board.
- *Advisory* These include recommendations on plans, policies, ordinance changes, and the like. A key difference between these and legislative decisions are that these are not final decisions, but are recommendations only. They are often handled less formally and have fewer state rules about how they are made.
- *Quasi-judicial* These are formal decisions that determine the rights of individuals affected by government policies. They include variances, special and conditional use permits, and appeals of administrative decisions. They do not involve setting new policies, but the application of previously adopted policies to the parties involved. These involve fact-finding and the application of some discretion. The zoning board of adjustment makes most of these decisions, but planning boards and governing board may also be assigned quasi-judicial decisions.
- *Administrative* These are the routine, day-to-day decisions, such as making individual permit and enforcement decisions. They are usually handled by the professional staff.

SOME KEY DIFFERENCES BETWEEN LEGISLATIVE AND QUASI-JUDICIAL ZONING DECISIONS

	<u>Legislative</u>	<u>Quasi-judicial</u>
Decision-maker	Only governing board can decide (others may advise)	Can be board of adjustment, planning board, or governing board
Notice of hearing	Newspaper and mailed notice to owners and neighbors required	Only notice to parties involved required unless ordinance mandates otherwise
Type of hearing	Legislative	Evidentiary
Speakers at hearings	Can reasonably limit number of speakers, time for speakers	Witnesses are presenting testimony, can limit to relevant evidence that is not repetitious
Evidence	None required; members free to discuss issue outside of hearing	Must have substantial, competent, material evidence in record; witnesses under oath, subject to cross examination; no ex parte communication allowed
Findings	None required	Written findings of fact required
Voting	Simple majority, (but in cities, 3/4 required if protest petition filed on rezoning)	4/5 to decide in favor of applicant, but if special/conditional use permit is issued by governing board, only a simple majority required
Standard for decision	Creates standard	Can only apply standards previously set out in ordinance
Conditions	Not allowed	Allowed if based on standard in ordinance
Time to initiate judicial review	Two months to file challenge	30 days to file challenge
Conflict of interest	Requires direct financial interest to disqualify	Any financial interest or personal bias disqualifies
Creation of vested right	None	Yes, if substantial expenditures are made in reliance on it

Legislative Zoning Decisions

• Zoning Ordinance Amendments

Process

Who can initiate? Any citizen can request that property be rezoned. There is no requirement that all petitions go through the full public hearing process. Local governments can screen requests, such as sending to hearing only those petitions approved by the planning board or made by the owner.

Process for consideration. Each local government can set its own process for review of proposed amendments. State law requires counties to submit amendments to the planning board for review (and most cities do this by choice) and requires the governing board to hold a public hearing before acting.

Limits on reconsideration. Many local ordinances provide that once a decision is made on a rezoning proposal, no other zoning petitions affecting that property can be considered for a specified time (often six months or a year).

Public notice. State law mandates specific notice of the public hearing:

- (1) Newspaper -- An advertisement for the hearing must be published twice, in separate weeks, with the first notice at least 10 but not more than 25 days prior to the hearing*
- (2) Mail -- First class mailed notice must also be sent to the affected and abutting properties.*
- (3) Special rules for larger rezonings (more than 50 owners/properties)--In this instance, the local government has the option of substituting four weekly half page newspaper ads for the mailed notice. If used, a sign on the hearing must be posted on site and a mailing made to non-resident owners.*
- (4) Hearing -- The hearing on rezonings is legislative. Speakers need not be under oath and they can express opinions about the wisdom of the proposed action.*

Protest petitions. State law mandates these for cities. A qualified petition triggers a requirement that any rezoning be adopted by a 3/4 vote of the governing board.

- (1) Form and timing of petition--The ordinance can require the petition be on a special form. The petition must be turned in two working days prior to the hearing.*
- (2) Qualifying area--The petition must be signed by the owners of 20% of the land being rezoned or 20% of a 100 feet wide strip on either side, the rear, or across the street from the rezoned area.*

Findings. Unlike quasi-judicial decisions, no written findings of fact are required for zoning ordinance amendments.

Quasi-judicial Zoning Decisions

• Rules for Quasi-judicial Decisions

Special rules.

The constitution and state statutes mandate special procedures be followed for all decisions where there is fact-finding and the application of discretionary standards. This includes appeals, variances, special use permits, and conditional use permits. While these decisions are typically made by boards of adjustment, they may also be assigned to the planning board or governing board. These special rules apply to whoever decides: planning board, board of adjustment or governing board.

Quorum and voting.

The statutes do not set a special quorum for boards of adjustment. Some ordinances specify a majority of board, others use a higher four-fifths requirement. Many decisions of the board require a *four-fifths majority*, such as granting a variance, a special or conditional use permit, or overruling a determination of the zoning administrator. A few local governments have local legislation that change the required majority.

Hearings.

An evidentiary hearing is required for each decision. The purpose of the hearing is to establish the facts, not to gather opinions about the desirability or popularity of the project. Witnesses present testimony under oath, cross-examination must be allowed, board members are not allowed to gather evidence outside of the hearing, and written findings of fact are required.

Notice of hearings.

A local government must give due notice of its hearings to all parties to the case. Individual mail notice is the usual method of doing this. The zoning statutes impose no special published notice requirements for quasi-judicial decisions (unlike proposed zoning amendments). If a zoning ordinance itself requires additional notice, such as publication in the newspaper or a sign on the site, that additional notice is mandatory. The open meetings law also has requirements for meeting notices that apply to boards making these decisions.

Witnesses.

Persons presenting testimony to the board are subject to several requirements. Everyone presenting evidence should do so under oath. Oaths may be waived, but it is best to use oaths or affirmations for everyone. This applies to anyone offering evidence, including staff and attorneys. *Cross-examination* of witnesses must be allowed. Municipal boards have authority to issue subpoenas.

Evidence.

Quality evidence must be in the hearing record to support all of a board's key conclusions. The legal standard is that *substantial, competent, material evidence* is required to be in the record for each key fact. While strict legal rules of evidence do not apply, they are a general guideline for boards. Hearsay and non-expert opinion should be avoided. Determining how much *weight* should be given to the evidence that is offered is a key job of the board (how persuasive and how reliable is the evidence offered).. No *ex parte* communication should be allowed. Only evidence in the record at the hearing may be considered. Site visits prior to the hearing are permissible, but care should be taken to avoid conversation with applicant/neighbors and any critical information obtained on site must be disclosed at the hearing. Persons have the right to present and inspect documents and records. The board must maintain a *detailed record* of its hearing. Keep all exhibits and prepare either detailed minutes or a verbatim transcript.

Findings.

Written findings of fact are required. The board must specify what it determines the facts to be and must document the basis for the decision. Simply repeating the standards for the ordinance and noting each is met is generally not sufficient, especially where there is conflicting evidence. It is useful for the staff and board to have a clear and common set of terminology relative to standards, findings, findings of fact, decisions, and orders.

Some Practical Issues Relative to Findings of Fact

When a board is required to make findings, there are several practical issues relating to how this is done that should be considered. Among these are:

1. What format will be used for the written findings of fact?

- Separate document
- Part of minutes

2. Who will prepare the proposed findings?

- Zoning staff
- Applicant
- Board's attorney
- Board members
- Clerk to board

3. When will the draft findings be prepared?

- Prior to the hearing
- At the conclusion of the hearing
- After the hearing

4. When are the findings approved by the Board?

- At the conclusion of the hearing
- When the chair signs after the meeting
- When the board approves its minutes at a subsequent meeting

Conflicts of interest.

The Constitution gives parties to a quasi-judicial decision a legal right to an impartial decision maker. Thus boards must avoid conflicts of interest. North Carolina courts have held that a direct and substantial financial impacts disqualifies a member from participating. In addition to financial impact, bias (defined as a predetermined opinion that is not susceptible to change) and close family or business ties also disqualify members from participating. Non participation includes the discussion as well as voting.

Open meetings law.

All of the government boards involved with planning and land use regulation are subject to the state open meetings law [G.S. 143-318.9 to 143-318.18]. All meetings of a majority of the board, or any committees of the board, for the purpose of conducting business must be open to the public. Closed sessions may be held only for seven narrow purposes set forth by statute (e.g., receiving legal advice regarding pending litigation). A board may not retire to a private session to deliberate a case. Public notice must be provided for all meetings (regular schedule filed with clerk, special meetings notice posted and mailed to media).

*****FOR MORE INFORMATION ON CONFLICTS OF INTEREST AND OPEN MEETINGS, SEE MODULE 1, WORKING TOGETHER*****

• Special and Conditional Use Permits / Special Exceptions

Standards.

A board must apply the standards that are already in the zoning ordinance. The board does not have unlimited discretion. These cases are not the appropriate place to make policy; rather the board is applying previously set policies to an individual case. The standards can be general (e.g., the activity not have a significant adverse effect on neighboring property values and the activity be compatible with the surrounding neighborhood), specific (e.g., the use be located on a lot of at least 40,000 sq. ft.), or a combination of general and specific standards.

Burden of proof.

The burden of proof in these cases is allocated as follows: The applicant must present evidence that standards in ordinance are met. It is not the staff's responsibility to produce this basic information. Often application forms are required that will elicit most of this information. If the applicant presents sufficient evidence that the standards are met, the applicant is legally entitled to a permit. If contradictory evidence is presented; the board must make findings and then apply the standards.

Conditions

Individual conditions may be applied to quasi-judicial zoning decisions (but not to legislative zoning decisions). These conditions are fully enforceable. A board may only impose conditions related to the standards that are already in the ordinance.

• Appeals of Quasi-judicial Decisions

Quasi-judicial zoning decisions can be appealed to superior court (not to the governing board). Court review is based on entirely on the record developed at the board's hearing. An inadequate record will usually result in a remand to the board for a new hearing.

There are limited grounds for judicial reversal of a board's decision: Errors in law; procedures mandated by statute or ordinance were not followed; due process requirements for the hearing were not met; there is inadequate competent, substantial, material evidence in the whole record to support decision; or there was an arbitrary and capricious decision.

Sample Findings of Fact for a Simple Variance

1. Mary Smith is the owner of a parcel located at 575 E. Front St. in Owensboro, N.C.
2. The lot at 575 E. Front St. has the following dimensions: 150 feet frontage on E. Front St. and a depth of 250 feet, as is shown on Attachment 1, the applicant's site plan.
3. The lot at 575 E. Front St. is currently vacant.
4. The lot at 575 E. Front St. is currently zoned R-1, which is a single family residential zoning district with required side yard setbacks of fifteen feet.
5. There are wetlands along the east and rear portions of the lot, extending some 60 feet from the east property line. The wetlands are accurately depicted on Attachment 1.
6. On June 1, 1997, Mary Smith applied for a certificate of zoning compliance and building permit for a single family residence at 575 E. Front St.
7. On June 7, 1997 Bernard Simmons, town zoning inspector, denied the permit application of Mary Smith on the basis that the proposed structure would violate the side yard setbacks on the west side of the property.
8. On June 15, 1997 Mary Smith submitted a complete petition for a variance of five feet from the side yard setback requirement in order to locate a residence as depicted in Attachment 2, Smith petition for a variance.
9. On July 15, 1997, the Owensboro Board of Adjustment conducted a duly advertised and noticed hearing on the Smith petition.
10. State and federal permit requirements prevent location of any residential structure on or over the wetlands depicted in Attachment 1.
11. There is insufficient space on the lot to construct a residence of the size required by restrictive covenants and in a manner compatible with the surrounding property while avoiding the wetland area and meeting the side yard setback.
12. If no residence can be constructed on the lot, there is no other practical use of the lot that has reasonable value.
13. Construction of a residence ten feet from the west side property line will not have a negative impact on the adjoining property.
14. Construction of a residence ten feet from the west property line will not impair emergency vehicle access, create a fire hazard, or otherwise be contrary to public health and safety.

Other Zoning Issues

- **Vested rights.**

This is the legal right to continue or complete a use even if the regulations have changed. To qualify, the use must have been legal when started. There are three ways vested rights can be established in North Carolina:

- **Common law.** The owner must have made substantial expenditures in good faith reliance on a valid specific approval and suffer some harm if required to comply with the current standards.
- **Valid building permit.** The owner has a vested right only as long as the building permit remains valid and only for the work approved by the building permit. Building permits expire in six months if work is not commenced. They also expire if work is stopped for a twelve month period after it has started.
- **Site specific development plans.** This is a special provision mandated by state law that allows plans defined by each local ordinance to get a two year vested right. The plan must have been approved by the local government after a public hearing. Local governments have an option of allowing up to a five year vested right for more general phased development plans

- **Spot zoning**

Zoning a relatively small area differently from the surrounding area is illegal unless the government establishes a reasonable basis for the spot zone. Factors for determining reasonableness include:

- (1) *Size of area* - and its particular characteristics
- (2) *Relation to comprehensive plan*
- (3) *Degree of change in uses allowed*
- (4) *Relative harm and benefit* - to owner, neighbors, and the community

- **Contract zoning**

If there are mutual promises between the city and the applicant or if the governing board does not consider all permissible uses, this is illegal in North Carolina. Individual conditions on rezonings are unenforceable.

Conditional use districts are legal (see below). It is permissible to consider a rezoning to a new zoning district that has no permitted uses, only conditional or special use permits, and to concurrently consider a conditional or special use permit for an individual project.

- **Conditional Use District Zoning**

In many North Carolina communities, conditional use districts are a popular tool to tailor a zoning case to the specifics of a proposed use. Essentially there are no uses allowed "by right" in a conditional use zone. Each request to apply such a zone must be accompanied by a specific plan, for which a conditional use permit is issued. The planning board may recommend additional conditions on such a request. The role of the board is to evaluate the merits of the proposed development and either issue a conditional use or special use permit for the proposed use (or make a recommendation if such a permit is to be issued by the governing board), or not. The advantage of conditional use zoning is that it allows

an applicant to specifically address concerns that may arise in the consideration of the case. Because only one specific use or a set of specific uses in a specific configuration is allowed in these zones...the board and the adjacent property owners need not worry about a broad range of allowed uses as is typical in a general use zone.

- **Aesthetic standards / signs / historic preservation**

The U S Supreme Court has upheld the use of zoning to ensure that a community is beautiful as well as safe and efficient. Communities use zoning to set minimum standards for landscaping, to regulate signs, control billboards and limit the removal of existing vegetation in special areas. Amortization (see below) is a tool which has been used often in North Carolina to phase out non-conformities when a new zoning standard is established. Special districts (historic districts are one example) may be set up to preserve or enhance the character of a portion of a community. It is important in a special district that clearly-defined and well-researched standards are published to allow appointed design review boards to fairly manage the permitting process. Signs can be regulated either through zoning or with a separate sign ordinance. Zoning can have reasonable regulations on the time, place, and manner of speech (e.g., no billboards in residential areas) but great care is needed when regulating political speech. Federal highway law limits the ability to remove billboards on federally funded highways.

- **Nonconformities and amortization.**

These are land uses, lots, or structures that were legal when started, but which no longer conform to current ordinance requirements. Immediate compliance with new rules can be required if necessary to protect public health or safety. Most zoning ordinances allow them to be continued, but subject to restrictions set by the ordinance. The most common restrictions are that the nonconformity not be expanded or enlarged, it not be changed to another use, and that it not be reestablished if abandoned or discontinued. In North Carolina the courts have upheld the use of an *amortization* period to cause a zoning non-conformity to be phased out over time. Amortization is legal if a reasonable time is allowed.

- **Family and group care homes.**

If they have six or fewer handicapped persons, they must be treated the same as a single family residence. State law allows minimum separation requirements of up to one-half mile. G.S. 168-21, -22. Federal law prohibits discrimination against the handicapped and requires reasonable accommodation; there is uncertainty as to impact of federal law on zoning separation requirements and limits on number of persons in a dwelling.

- **Manufactured housing.**

Zoning can regulate the location, dimensions and appearance of manufactured housing communities, but can not completely prohibit them from a jurisdiction. Many ordinances distinguish "manufactured housing" (factory built using national HUD building code) from "modular housing" (factory built using N.C. Building Code).

- **Alcohol sale.**

State ABC permit preempts local zoning restrictions on the location and operation of facilities that have ABC permits. It is important therefore for the locality to comment on consistency with land use regulations during the ABC permitting process. Recent legislation has allowed communities more input in ABC Board deliberations when an adult establishment is the subject of the request.

- **Sexually oriented businesses.**

A local government can not totally prohibit a business that offers non-obscene but sexually explicit books, films, or dance. Obscenity can be prohibited. Regulations to prevent adverse secondary impacts are permitted. This can include minimum separation requirements, limits on advertising and noise, operational requirements (e.g., open booths, dancers separated from patrons, etc.), and licensing requirements for owners and employees.

- **Watershed areas.**

State law sets minimum standards for land use regulations covering water supply watersheds. Local governments with surface water supply watersheds located within their jurisdiction are required to adopt regulations to protect the quality of the water, even if it is not their water supply source.

- **Summary of this module...**

FOUR THINGS TO REMEMBER ABOUT ZONING PURPOSE AND STRUCTURE:

- (1) **Zoning is intended to protect property values, not limit them.** It's original intent was to protect property owners from the negative land use decisions made by their neighbors, and make the land use pattern of a community predictable. Zoning power is limited by the constitution to protect against the tyranny of the majority against the individual property owner.
- (2) **Zoning is a means to an end.** Zoning, when used too strictly, can make a community bland and sterile. When it is used too loosely, it can also lead to chaos and eroding land values. Zoning should always be related to community goals stated in a general plan.
- (3) **Zoning ordinances are made up of text and maps and define districts** within which rules are applied evenly for all properties in the district.
- (4) **There are many different zoning approaches.** Performance standards, special use districts, overlay zones, planned unit developments, etc. are all useful tools to tailor a zoning ordinance to specific community goals. Be creative.

FOUR THINGS TO REMEMBER ABOUT PUBLIC DECISION-MAKING AND OTHER ZONING ISSUES:

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- (1) **There are four types of public decisions.** Advisory decisions are made in support of a legislative function and also allow consideration of a broad range of data from many sources relatively informally. Administrative decisions are generally handled by a professional staff, and involve measuring a proposal against an objective standard. Legislative decisions (re-zoning requests) are more discretionary in nature but must be made by the governing board. Quasi-judicial decisions are formal proceedings involving the preparation of findings of fact, and require that decisions be based on specific criteria and on sworn evidence.
 - (2) **Applicants are entitled to an impartial decision-maker.** Meetings must be open to the public with reasonable notice. Decisions, particularly quasi-judicial decisions, must be made stating specific findings. Conflicts of interest should be stated up front, and decision-makers excused if the conflict calls into question the impartiality of the board member.
 - (3) **Spot zoning and contract zoning require special attention.** Spot zoning is illegal unless the government establishes that it is reasonable. Determining what is a "spot zone" is not easy, but is guided by the size of the area, the relation of the case to the general plan, the magnitude of the change and the relative harm or benefit to be derived by the applicant, neighbors and the community from the case. No zoning decision can be based on mutual promises between the property owner and the representatives of the community. However, conditional use zoning, where a special or conditional use permit specifying a developer-offered set of conditions that will be applied to a land use, is legal.
 - (4) **Non-conforming uses may be allowed to remain, or may be required to be phased out.** Generally, non-conformities when created by a change in zoning law are allowed to remain with some restrictions on their ability to expand. Occasionally it is in a community's best interest to phase out all non-conformities over a period of time. This is called "amortization" and has been declared legal by the Supreme Court as long as a reasonable time period is allowed.

Some Exercises:

1. A variance petition is scheduled to come before your board of adjustment next week. Are any of the following contacts improper?
 - a. The applicant is a casual acquaintance of yours. She sees you at a social gathering and tells you a little bit about her case.
 - b. The applicant's attorney calls you the week before the hearing and gives you "strictly factual" background information about the case.
 - c. You stop by town hall the day before the hearing to get a quick briefing on the cases that are coming up from the staff.
 - d. You drive by the site the morning of the hearing to get a first hand view of the property.
 - e. You drive by the site and stop to get a closer look. A neighbor comes over and talks to you about conditions at the site.
2. Your board is considering a variance petition. A representative of the neighbors appears at the hearing and presents you with a petition signed by 50 neighbors opposing the variance. Can you consider the petition?
3. Your board is considering a re-zoning request. At the hearing you become convinced that the proposed project would be harmful to the community and is a bad idea. A neighbor speaks at the hearing and states that the property will reduce his property values and endanger his children. However, the proposal seems to meet all of the goals in the Comprehensive Plan. Can the board properly recommend denial of the request?
4. Your zoning standards call for signs no greater than 100 square feet on properties abutting a major thoroughfare. A merchant has erected a sign 200 square feet in area, and decision has been made by the zoning inspector that the sign must be removed or reduced in size. The merchant is challenging the rule, stating that because the sign says "Republicans love Hamburgers" that it is protected political speech under the 1st amendment. No formal request has been received for a variance.
 - (a) Is the merchant or the zoning inspector correct?
 - (b) What role does the Planning Board have in this question?

Other related subjects:

Ask your professional staff provide you with more training on these issues:

- **"Performance" Zoning**
- **NC and US Legal Cases Regarding "Takings"**
- **Landscape and Sign Regulations**
- **Meeting Management and Public Hearings**
- **Unified Development Ordinances**
- **"Neo-Traditional" or "New Urbanism" Zoning Techniques**

Additional IOG Resources on North Carolina Zoning Law

Brough, Michael B. and Green, Philip P., Jr., **THE ZONING BOARD OF ADJUSTMENT IN NORTH CAROLINA** (Chapel Hill: Institute of Government, 2d ed. 1984) 128 pages, \$9.50. This is a basic text on the board of adjustment. It covers functions of the board, how it conducts meetings and makes decisions, and the types of findings required for various decisions. It includes suggested forms and rules of procedure.

Green, Philip P., Jr., **LEGAL RESPONSIBILITIES OF THE LOCAL ZONING ADMINISTRATOR IN NORTH CAROLINA** (Chapel Hill: Institute of Government, 2d ed., 1987) 124 pages, \$11.00. This is a basic text for zoning administrators. It includes coverage of the duties of a zoning officer, and discussion of record-keeping, permitting, inspection, and enforcement.

Owens, David W., **CONFLICTS OF INTEREST IN LAND-USE MANAGEMENT DECISIONS** (Chapel Hill: Institute of Government, 1990) 105 pages, \$10.00. This book covers potential conflicts of interest faced by members of citizen boards dealing with land use issues--governing boards, planning boards, and boards of adjustment. It includes discussion of bias, financial conflicts, and personal relationships with the parties. A model ordinance provision on conflict avoidance is included.

Owens, David W., **INTRODUCTION TO ZONING** (Chapel Hill: Institute of Government, 1995) 120 pages, \$15.00. This is an overview of zoning for citizen board members and the public. It includes discussion of zoning jurisdiction, rezoning, spot and contract zoning, special and conditional use permits, variances, vested rights, nonconformities, enforcement, and constitutional limitations on zoning.

Owens, David W., **LAND USE REGULATION OF RELIGIOUS USES** (Chapel Hill: Institute of Government, PLANNING AND ZONING BULLETIN No. 8, October 1997) 14 pages., \$_.00. A detailed review of the legal aspects of regulating the location and operation of religious land uses (such as places of worship, day care and schools, homeless shelters, and other uses operated by or for religious groups). It addresses Constitutional limitations on regulation imposed by the Free Exercise and Establishment Clauses and analyzes court cases interpreting those limits, including the Religious Freedom Restoration Act and the *Boerne* case.

Owens, David W., **LEGISLATIVE ZONING DECISIONS: LEGAL ASPECTS** (Chapel Hill: Institute of Government, 1993) 294 pages, \$18.00 paperback, \$21.00 hard cover. This is a detailed review of the law on adoption and amendment of zoning ordinances. It includes coverage of zoning hearings, notice, protest petitions, spot and contract zoning, vested rights, nonconformities, and constitutional limitations. It includes digests of all North Carolina appellate court decisions on zoning.

Owens, David W., **PLANNING LEGISLATION IN NORTH CAROLINA** (Chapel Hill: Institute of Government, 1996) 386 pages, \$30.00. This is the eighteenth edition of a compilation of North Carolina statutes on planning, land use regulation, building, and environmental protection. It includes annotations and cross-references.

Owens, David W., **REGULATING SEXUALLY ORIENTED BUSINESSES** (Chapel Hill: Institute of Government, SPECIAL SERIES No. 15, January 1997) 30 pages., \$15.00. This is a detailed review of the legal aspects of regulating the location and operation of sexually oriented businesses (such as topless bars, adult bookstores, and massage parlors). It includes discussion of what activity can be banned entirely and the legal foundation that must be established for restrictions.

Popular Government Articles

Ducker, Richard D., Using Impact Fees for Public Schools, SCHOOL LAW BULLETIN 1 (Spring, 1994)

Owens, David W., Amortization: An Old Land-Use Controversy Heats Up, 57 POPULAR GOV'T 20 (Fall 1991)

Owens, David W., Bias and Conflicts of Interest in Land-Use Management Decisions, 55 POPULAR GOV'T 29 (Winter 1990)

Owens, David W., Land Use and Development Moratoria, 56 POPULAR GOV'T 31 (Fall 1990)

Owens, David W., Zoning Hearings: Knowing Which Rules to Apply, 58 POPULAR GOV'T 26 (SPRING, 1993)

Note: Copies of any of the above additional resources may be obtained from the Publications Office, Institute of Government, CB #3330 Knapp Building, UNC-CH, Chapel Hill, N.C. 27599-3330. Phone: 919-966-4119. Fax: 919-962-2707.
