



Town of Indian Trail
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PLANNING DEPARTMENT

Zoning Staff Report

Case: Training on NC Open Meetings Law		
Reference Name(s)	Discussion Item on NC Board of Adjustment Rules and Procedures – as presented by Centralina Council of Governments (COG) in Monroe, NC on March 18, 2010	
Applicant	Town of Indian Trail	
Submittal Date	May 27, 2010	
Location	N/A	
Tax Map Number	N/A	
Recommendations & Comments	Planning Staff	Discussion/Training Session

Executive Summary:

This is a summary of a training session held by the Centralina Council of Governments (COG) in Monroe, NC on March 18, 2010 to cover Board of Adjustment rules and procedures in the State of North Carolina. This session will also cover recent changes in NC law as it pertains to Boards of Adjustment and their operation as a quasi-judicial body.

Analysis:

Introduction

With the Board of Adjustment in North Carolina, there are several issues of discussion when it comes to how such a Board operates and conducts business as a quasi-judicial body, as follows:

1. Who conducts quasi-judicial hearings?
2. What is a variance, and how does it differ from that of a “use” variance?
3. What are variance findings?
4. What is the SUP and its process (special use permit)?
5. What is an appeal?
6. What is a BOA interpretation?
7. How are quasi-judicial hearings advertised?

8. What are BOA rules of procedure?
9. How are quasi-judicial hearings held and conducted?
10. What is involved with conflicts of interest?
11. What is considered evidence?
12. How do cross examinations and subpoenas work?
13. What are the roles of staff attorneys?
14. How does NC's Open Meetings Law play into this?

1. Quasi-Judicial Procedures Generally

A quasi-judicial hearing, by definition, is a body that exercises power or functions similar to that of a court or judge in terms of procedure (partly borrowed from dictionary.com). This means that any decisions made by the Board of Adjustment, which is a quasi-judicial body under North Carolina (NC) law, are subject to appellate review by the local Superior Court. Everything conducted with these quasi-judicial procedures must follow the rules of evidence, court-like procedures, and must strictly observe the formalities of such processes.

Typically, there are several types of hearings that a Board of Adjustment may hear as quasi-judicial, and they include the following:

- Variances;
- Appeals;
- Interpretations; and
- Discretionary decisions based on findings (from a Town's zoning, UDO, and/or subdivision ordinances).

In terms of who hears a quasi-judicial procedure, the Board of Adjustment falls under this requirement. Upon adoption of the Indian Trail Unified Development (UDO) in December 2008, only the Board of Adjustment hears quasi-judicial cases within the Town.

2. Variances

Variances, by their very nature, are rare in terms of their usage and application. For instance, if a property owner wishes to develop their property, and they cannot do so because of a requirement in the Indian Trail UDO (i.e., a setback requirement), then a variance **may** be possible. However, the story is not that simple. In order to have a proper variance request, an applicant must prove that the limitation on their property under the UDO is specific to them, and must be "unique" to that property owner (no else must have a similar situation in the Town). Furthermore, such a requirement must also present a "unique hardship" to the property owner's use of their land.

That said, we must now distinguish between a variance (like the process described above) to that of a "use" variance. "Use" variances in North Carolina are **illegal**. These types of variances involve a situation where someone is claiming that they cannot utilize their property for a particular use, and only because that the property owner cannot have the proposed use on the property. You cannot do this under State law, and the Town should not allow these types of variances to be even filed and/or accepted at all. This is because

a “use variance” is a rezoning request, and as such, rezoning are handled by the Planning Board and Town Council, and cannot be conditioned in any way.

For a proper variance request, an applicant may also have “fair and reasonable” conditions placed on them. In addition, such conditions placed on the variance request must be mutually agreed upon by the applicant and the Town. It must finally be stated that a variance request is solely the applicant’s request, and no one else’s request.

3. Findings for a Variance

Based on rulings from North Carolina courts, the following findings are needed, at a bare minimum, for a variance:

- There has to be a showing of practical difficulties or an unnecessary hardship present;
- By granting the variance, there has to be a showing that the spirit of the ordinance is indeed preserved by doing so;
- The public safety and welfare is secured by granting the variance; and
- There has to be substantial justice served with respect to the variance request’s treatment.

In the UDO, variances require that six findings be found for a variance as follows (see UDO Chapter 380 for reference):

- If the applicant strictly complies with the provisions of the UDO, he/she cannot make any reasonable use of their property;
- The hardship of which the applicant complains is one suffered by the applicant rather than by neighbors or the general public;
- The hardship relates to the applicant’s land, rather than personal circumstances;
- The hardship is unique, or nearly so, rather than one shared by many surrounding properties;
- The hardship is not the result of the applicant’s own actions; and
- The variance will neither result in the extension of a nonconforming situation in violation of DIVISION 1400, Nonconformities, nor authorize the initiation of a nonconforming use of land.

Note – In order to be certain of proper review, please make sure that, as a matter of practice, every Board member votes on every finding stated above, regardless if one member says “no” or not. This way, if there is an appeal of the decision, then a court can review the record and see how each finding was decided.

4. SUP’s (Special Use Permits)

As an overview, the special use permit (SUP) essentially serves to allow a property owner to develop a certain specified use on that property. In addition, such uses subject to the SUP process must be spelled in the UDO Table of Permissible Uses, along with being subject to the Board’s approval. The Board can also attach fair and reasonable conditions to such a permit, which are mutually agreed to by the property owner and the Town.

Another thing to understand with SUP's (or any case brought to the Board, for that matter) is that this is the applicant's case, and no else's case. Since the applicant is the one bringing the issue, they must make the case through the required findings that the Board has to make. For example, with the SUP, applicants have to complete a Statement of Justification relating to the four required findings of the SUP, and they should follow that Statement when offering testimony and evidence to the Board at the public hearing.

For the SUP, an applicant submits a complete application with the following:

- Completed Town SUP application;
- Statement of Appraisal (appraiser's report explaining if any adjoining/abutting properties will be substantially injured by the proposed SUP use);
- Statement of Justification (allows the applicant to explain for themselves why the required four findings for an SUP can be made to the Board);
- At least 8 Copies of the SUP Concept Plan (showing the proposed use);
- Letter of Intent by the applicant to explain the proposed use;
- Notarized Signatures of Applicant and Property Owner (if one and the same, that's OK); and
- Fees associated with the review (\$300 processing + \$2.50 per each adjoining property owner).

The SUP application, once complete, is then reviewed first by staff at a regular TRC (Technical Review Committee) meeting, where all Town planners meet to discuss the SUP. Once done, staff comments are generated to the applicant dealing with any issues related to the UDO that need to be addressed prior to the applicant going before the Board. Once all staff comments are addressed, then the applicant will be ready to take the case before the Board for consideration. It should be noted, however, that the applicant does have the right to bring the case to the Board at any time, regardless of staff's recommendation to the Board on the project.

For the SUP process before the Board, there are certain key factors that must be considered:

- The proposed use under the SUP process must be referenced as being allowed by SUP in the UDO;
- The SUP process is entirely quasi-judicial in nature;
- The entire SUP process is subject to final decision by the Board of Adjustment; and
- Fair and reasonable conditions may be attached to the SUP, and must be mutually agreed to between the applicant and the Board.

Under UDO Chapter 360, the following three criteria must be met in order for the SUP request to be considered by the Board:

- The SUP must be within its jurisdiction (the Board's), as indicated in the UDO Table of Permissible Uses as being allowed by SUP;
- The SUP application must be complete; and
- The SUP is found to comply with all of the requirements and regulations of the UDO.

NOTE – All of the above must be found by each Board member as being true before an SUP can be considered for issuance.

In addition, the Board must also make the following four findings to find for the SUP to be approved:

- The proposed development will not materially endanger the public health or safety;
- The proposed development will not substantially injure the value of adjoining or abutting property;
- The proposed development will be in harmony with the area in which it is to be located; and
- The proposed development will be in general conformity with the Town of Indian Trail Comprehensive Plan or other adopted plans.

Quick Note on the Old CUP Process: It should be noted here that since the UDO was established by the Town in December 2008, the process of the conditional use permit (CUP) has been eliminated and changed to that of conditional zoning (CZ), where the process is just a one-step legislative process in nature, and goes to the Planning Board and Town Council for approval.

5. Appeals

Whenever the Zoning Administrator for the Town (i.e., Planning Director) makes a determination on a particular planning issue (i.e., disapproval decision, etc.), then an applicant has 30 days from the decision's date to appeal that decision to the Board of Adjustment. It is very important, especially as staff, to inform an applicant that they have the right to appeal any determination made by the Town, and to tell them when they can do so. The Board of Adjustment is also the only body that can hear such appeals; the governing body (i.e., Town Council) cannot overturn any Zoning Administrator's determinations.

At the appeal phase, the Board of Adjustment does have the authority to reverse or affirm, in whole or in part, the decision of the Zoning Administrator. The Board collects all relevant evidence, facts, and testimony on the issue, and then renders a decision based solely on what has been offered at the hearing. If the applicant would like to appeal any decision of the Board, they have 30 days to appeal the Board's decision to the local Superior Court. The Superior Court, on timely appeal, would look at the record of the Board's hearing to determine if there were any errors made in terms of the Board's decision, as it does for any appeal of any Board of Adjustment decision.

6. Board of Adjustment Interpretations

For interpretations, the process for an applicant to file for this is much the same as filing an appeal of the Zoning Administrator's determination. However, such interpretations are generally limited. For example, an applicant can ask the Board to consider a question dealing with an interpretation of a zoning boundary's correct position, especially where current GIS maps and old tax maps may not necessarily match. This is more along the

lines of what an interpretation by the Board, as opposed to an appeal of a Zoning Administrator's determination.

One thing to keep in mind, especially in terms of the Town's UDO, is to encourage the Zoning Administrator(s) of the Town to be proactive and remedy any errors that may exist in the UDO. In addition, staff should also be proactive, mainly by educating the public as to various permit processes, such as the SUP, appeals, and other related processes through checklists and user-friendly guides.

Another thing to understand is that this is the applicant's case, and no else's case. Since the applicant is the one bringing the issue, they must make the case through the required findings that the Board has to make. For example, with the SUP, applicants have to complete a Statement of Justification relating to the four required findings of the SUP, and they should follow that Statement when offering testimony and evidence to the Board at the public hearing.

7. Board of Adjustment Rules of Procedure

Every Board of Adjustment should have established rules of procedure handy with them at all times – for **all** hearings. They need to address the following items, along with other matters of procedure:

- When officer elections occur, and what each officer's role is;
- When regular meetings are held, and how special meetings occur;
- How and when alternate Board members are used;
- Who makes motions, how votes are taken, and who can vote;
- What happens if quorum is lost midway during the hearing; and
- How cross-examinations are handled.

In addition, rules of procedure should formally adopted and reviewed annually, and should be gone over with any new Board members as often as possible. This way, the Board ensures itself of continuity of procedure from one Board to the next.

Also, the Board should make sure of the following:

- Make sure that nothing in the rules of procedure conflicts with the Town's UDO, or the NC General Statutes;
- If the UDO already addresses an issue relevant to the Board's operation, then do not put this into the rules of procedure;
- Make sure to actually hand out the rules of procedure and explain what they mean to all Board members;
- Staff needs to make sure that the rules of procedure are present at all Board hearings; and
- Finally, make sure to follow everything in the UDO and in the rules of procedure when conducting a meeting.

8. Advertising Board of Adjustment Hearings

In terms of advertising, the UDO spells out how Board hearings are supposed to be advertised. Here is a quick rundown:

- **Newspaper Notice:** Any notice of the Board’s hearing shall be placed into a newspaper of general circulation (i.e., the Enquirer Journal) no sooner than 25 days before a public hearing, and no later than 10 days before such hearing. In addition, such a notice shall run at least two consecutive weeks before a public hearing.
- **Mail Notice:** Generally, all adjacent property owners to an applicant must be sent first-class mailed notices of the Board’ hearing at least 10 days prior to the hearing itself. All adjacent property owners are noticed, and must be given an opportunity to come to the hearing and be present.
- **Posting a Property Notice:** In addition to the above, the Town places a sign indicating the date, time, and place of the Board’s hearing on the applicant’s property for all to see at least 10 days prior to the hearing. This usually takes the form of a sign notice, provided by the Town.

This is all done to ensure transparency and easy access of a case’s information to the general public.

9. Quasi-Judicial Operations and Procedures Generally

In terms of conducting a quasi-judicial hearing, there are some items of importance that the Board should consider as part of their processes:

- Any application brought to the Board must be complete before that case can be processed and heard by the Board.
- Make sure that there is a deadline for an applicant to properly submit their application for consideration.
- Any public hearing heard by the Board must be properly advertised.
- In terms of giving evidence, people can do so, provided that they are sworn in or affirmed to do so before giving that evidence to the Board for a case.
- The sole purpose of a public hearing is to gather evidence, not to gauge the popularity of a particular project.
- On any public hearing, the Board should ask questions whenever something doesn’t appear to make any sense, or is not easily understood.
- The Board must make findings that support their decision.
- There must be a written record of the public hearing, and it should include written findings, along with the facts that support them.
- In the order sent to the applicant stating the actions of the Board, the applicant must always be notified of their ability to appeal the Board’s decision to the Superior Court within 30 days.

In addition, the Board’s Chair should state before starting a public hearing how the case will be handled (i.e., taking evidence, no unsolicited remarks during the hearing, 4/5’s vote requirement needed in favor of the applicant to approve a project, etc.). Also, the Chair should describe, as best as possible, the overall groundwork for the hearing itself (how things will generally proceed, what is expected, etc.).

For conducting a public hearing, the following should be done by the Board:

- The public hearing is opened by the Chair, and hearing procedures are explained by the Chair to the Board and everyone in attendance.
- The Chair should ask if any Board member has a conflict of interest or any “relevant evidence or ex parte conversation” that needs to be shared in advance of hearing testimony and/or evidence.
- All persons (including staff) who will be providing evidence and testimony must be sworn in/affirmed before doing so at the hearing.
- Staff should give a general overview of the case.
- There should be a sign-up sheet for persons wishing to present evidence at the hearing.
- Following staff, the applicant (or agent, attorney, etc.) will have the opportunity to present their case in full.
- Others who are sworn in can also speak, following the applicant’s presentation. The sign-up sheet is encouraged to keep things in order for all speakers present.
- Persons who are sworn in can be cross-examined by persons with standing in the case (i.e., adjacent property owners).
- Hearsay should not be relied upon for a case’s disposition, and must be limited strictly to the evidence presented at the hearing.
- Following the above, once all questions/clarifications by the Board members for the respective parties are fully concluded on the case, then the Chair will close the public hearing (or period of public discussion), where no additional evidence or testimony can be offered after this takes place and only clarifications can be offered from that point forward.
- The Board then deliberates and decides on the case at hand, based entirely on substantial, competent and material evidence presented at the hearing, with no hearsay allowed.
- Mutually agreeable conditions can be placed on any case’s potential approval (applicant and Board must agree). Any condition offered by the Board for an approval must be related to the findings of fact, along with being land use related in nature.

In terms of facilitating process, the Board should attach the conditions of approval to any motion of approval for the case. If the Board decides to place a condition that the applicant does not request, then the Board must allow the applicant to offer comments on the condition(s) offered (again, must be mutually agreed upon). Also, when the Board member makes a motion to approve a finding of fact, each Board member must cite the evidence presented at the hearing that gives justification for their motion being made.

10. Conflicts of Interest

On occasion, the Board, whenever having a public hearing, may run across a possible conflict of interest situation. Such situations are not to be taken lightly. This is where a Board member’s duty to act in the public interest clashes with that member’s inclination to advance their own personal interest. This can be a variety of issues, from financial conflicts to personal biases, and includes associations with those affected by a decision.

In North Carolina, a Board member must recuse themselves from a particular case if one of the following occurs:

- If a Board member has a fixed opinion on the matter at hand;
- If a Board member engages in an ex parte conversation outside of the hearing at hand;
- If a Board member has close familial, business, or other associational relationship with the applicant; or
- If a Board member has a financial interest in the outcome of a case.

In addition, the Board’s Chair should state right at the opening of a public hearing if any Board member has reason to believe that there is a conflict of interest of any member, based on the above four standards in North Carolina. If so, then the member must recuse themselves from the case’s hearing.

Quick Note on Time Limits for Speakers – An applicant should always have as much time as they need to make their case to the Board (depending on the case at hand). Reasonable time must also be given to other persons giving evidence, as well. Furthermore, there is no need to hear the same evidence over and over again. If it looks like a lengthy meeting (w/lots of people), then try to make sure that equal time is given to those in favor and those who are opposed.

11. What is (and is not) Evidence?

For the collection of evidence at a public hearing, the Board needs to make sure that a complete record of the hearing is maintained at all times. This record should include the application, supporting materials, all evidence, and minutes of the hearing itself. If they like, the Board can also make sure that the hearing is taped as well. In addition, make sure that nothing related to a case is destroyed in any way, especially to allow for an applicant to appeal the decision (please retain all information related to a case for longer than this, if possible). Under a recently passed Session Law of the NC General Assembly (S.L. 2009-421), all records and materials of a public hearing shall be made available, upon a Court’s request, if the case is appealed (including audio and video tapes, if done).

The same Session Law (S.L. 2009-0421) also provides for the following to be done:

- The Session Law applies to all quasi-judicial decisions made in North Carolina following January 1, 2010.
- No lay witness testimony can be offered on the following:
 - Use of property that would affect property values (property owners directly adjacent to a particular project can be considered “experts” on the subject, based on State case law).
 - Increase in vehicular traffic that would pose a danger to public safety.
 - Matters which only expert testimony would generally be relied upon.
- The Board has an obligation to let persons know if what they are saying is perceived as hearsay evidence.

For example, hearsay includes petitions signed by 100 people, “seeing something with your own eyes,” speaking for other people not in attendance, strictly saying an opinion (i.e., alleging someone is lying or simply stating an opinion), and more emotion-based arguments (i.e., “there goes the neighborhood’s property values” types of arguments).

None of this is ever allowed, unless it can be substantiated by competent and material evidence.

12. Handling Cross-Examinations and Subpoenas

Cross-examination is allowed, especially for and/or towards persons that have standing to do so. This includes, but is not excluded to, any person who has given sworn testimony. Anyone doing so may be subject to this by the opposing party or by a person having standing do so. This can happen at any time during the hearing. The Board's rules of procedure, if it does not contain this, should contain the process on how cross-examinations are to be properly conducted.

In addition, the Board has the ability and power to subpoena witnesses to appear before the Board at a public hearing to give testimony and evidence on a case.

13. Making Decisions and Voting

The Board should consider the following, after receiving all of the testimony and evidence during a public hearing, the following questions:

- What were the facts heard during the case?
- How do these facts relate to each of the required findings?
- Is there enough factual evidence to support each required finding?
- If so, should the application be approved "as is," or should "fair and reasonable" conditions be attached along with any approval?

In making decisions, all quasi-judicial decisions do require a 4/5's vote in favor of the applicant (including the required findings of fact). For governing boards, like the Town Council and/or Planning Board, a simple majority will suffice. The Board must calculate their decision based on the number of persons eligible to vote (excluding vacancies and recusals, if no alternates are present, but not absences). In addition, each finding for a variance or SUP must be voted on individually, and should all be stated, for the record.

For voting and the role of alternates, if we have a 5 member Board, and no alternates, then 4 of the 5 are required to vote on the case at hand, if all 5 are there to hear the case. If 4 members are present and eligible to vote, with 1 member being absent, then all 4 are still required to vote on the issue because absences do not count. If we have 4 members present, and 1 member has to be recused, then all 4 are needed to pass anything (4/5's requirement to vote – 3/4's present is not enough). Finally, if 4 members are appointed, and the 5th position is not filled, then all 4 are still needed to vote. If there is an absence, recusal, and/or a vacancy, and there are 4 members present, then the vote for any decision will need to unanimous for any Board decision to pass.

For alternates, the Chair should know which alternate or alternates are able to serve at a public hearing. This is not up to the alternate to decide whether or not to serve at a public hearing; it is the Chair's decision, specific to that public hearing. Finally, make sure that the Board knows what to do if there is a recusal situation, what rights a recused person has, and how the recusal process is spelled out.

14. The Role of the Staff Attorney

The Board does not need a staff attorney present (it is not required), but it is a good idea to have one there, just in case. The attorney for the Board of Adjustment represents the Board of Adjustment only, in all matters before the Board. Some communities use a separate attorney for staff, and one for the Board. The attorney present should make sure that the rules of procedure, the UDO, NC case law, and NC General Statutes are followed during the course of a public hearing. The attorney cannot advise the Board on how to vote at all.

15. NC Open Meetings Law

All quasi-judicial hearings are subject to the NC Open Meetings Law. An official meeting occurs whenever a majority of Board members meet, either in person or by some electronic means) to conduct a hearing, deliberate, take action, or even to otherwise transact public business. If there is a new public hearing, then a minimum of 48 hour notice must be given and provided to the general public.

16. Additional Notes

Here are some additional general pointers:

- Please listen to all of the evidence being presented for reasonableness and whether or not something makes sense.
- Ask questions, especially if something does not make any sense, and take nothing at face value.
- Make findings based only on the evidence presented.
- Make decisions based only on the findings.
- Give it your best shot...planning is not an “exact” science.

Please make sure that the Board does not do the following:

- Have an undisclosed conflict of interest.
- Have an undisclosed ex parte communication.
- Come off as being judgmental and don't come into the case with your mind already made up.
- Rely on hearsay.
- Listen to someone ad nauseam (refer to rules of procedure on how to deal with this).
- Be overly strict or lax in terms of procedures (strike the appropriate balance in meetings).

Conclusion:

Staff would like to thank the Board of Adjustment for their time and attention regarding this presentation. Staff would also like to thank Centralina COG, most notably Bill Duston, for allowing the Town to attend the March 18, 2010 session on quasi-judicial hearings in North Carolina. If you have any additional questions on this material, please feel free to contact our office at (704) 821-5401. Thank you for your time and attention.

Staff Contact

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Attachments

Attachment One – Copy of Quasi-Judicial Presentation by Centralina Council of Governments (COG) on 03/18/2010 in Monroe, NC
Attachment Two – Amended Board of Adjustment Rules of Procedure (proposed version only – 05/27/2010)

BOA TRAINING ATTACHMENT ONE

BOA TRAINING ATTACHMENT TWO