SMITH ANDERSON Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P.
Client Alert

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Land Use and Zoning

Implementing the New Quasi-Judicial Hearing Requirements

Assessing the Impact One Year Later

As many developers and land owners are aware, the General Assembly enacted new statutory provisions[i] effective January 1, 2010 that clarified important issues related to land use hearings before local government boards. The General Assembly identified the decisions by local governments that require quasi-judicial hearings and addressed the conduct of quasi-judicial hearings and how appeals of those decisions can be taken. Unlike a legislative determination in which the governing board has broad discretion in making its decision, quasi-judicial decisions must be based on competent sworn testimony.

The statutes clarify that decisions by local government boards involving factual determinations and the exercise of discretion in applying standards in an ordinance are quasi-judicial decisions that require quasi-judicial hearings. Those decisions include variances, special and conditional use permits, and appeals of administrative determinations. Site plan approvals that require application of subjective standards are also quasi-judicial, while site plan approvals based on objective criteria are not. These clarifications have forced some local governments to treat decisions as quasi-judicial that they formerly treated as legislative.

The statutes also specify the procedures that quasi-judicial hearings must employ. Prior to the new legislation, most local governments agreed that quasi-judicial hearings are more formal and require constitutional protections such as notice and the right to cross-examine witnesses. However, application of those requirements varied and was subject to local practice. The new statutes now force local governments to apply specific procedures when holding a quasi-judicial hearing.

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The provisions of the statutes that deal with "competent evidence" have led to significant changes in hearing procedures and in how developers and landowners must approach a quasi-judicial hearing. The statutes specify that quasi-judicial decisions must be based on "competent evidence." Prior to the enactment of the statutes, local governments often allowed parties opposing an applicant to testify to almost anything remotely relevant to the application. Local government boards now may rely only on evidence that would be admissible under the North Carolina Rules of Evidence or is supported by circumstances that make the evidence reliable. In practice, this has curtailed the use of hearsay in quasi-judicial hearings (that is, testimony regarding what someone else told the witness or information that he does not know of his own personal knowledge), including the use of letters (even when notarized, since the writer cannot be cross-examined) or information from a source such as the internet.

The statues now specifically state that testimony regarding the following is not competent evidence unless given by a qualified expert: 1) the impact of a proposed land use on the value of nearby property; 2) danger to public safety resulting from increases in traffic; and 3) other matters that require special training or expertise. Thus, unless they are experts, opponents can no longer testify to the reduction in value of their property, the danger of increased traffic, or, for example, the amount of noise that will be generated – they must hire licensed appraisers, traffic engineers, and acoustical engineers to offer such testimony. Accordingly, one of the biggest practical changes seen in hearings under the statutes is the need to object to and move to exclude incompetent evidence. Governing boards often need to be reminded that opponents can no longer present improper lay opinion testimony, hearsay, and other incompetent evidence.

These requirements have led to much more "court like" proceedings for many land use approvals. The new requirements also make it even more important to ensure that the record of the proceeding (the testimony and other evidence) is sufficient to support the applicant's case should an appeal be necessary. This includes ensuring that sufficient competent evidence is provided on all relevant criteria, recording objections to incompetent evidence, and, when warranted, hiring a court reporter to prepare a transcript for use on appeal. The North Carolina courts have held that where an applicant has proved its case with competent material evidence and there is no competent evidence supporting a denial, the applicant is entitled to the requested approval as a matter of law. In such a circumstance, a judicial appeal should result in reversal of a denial by a local board.

A recent hearing reflected several steps now routinely taken by Smith Anderson lawyers in representing clients in quasi-judicial proceedings. Those steps included providing the town attorney a memorandum in advance of the hearing summarizing the rules now applicable to quasi-judicial hearings and the admissibility of evidence, successfully objecting to incompetent evidence at the hearing, ensuring that the applicant provided

competent evidence for all necessary elements under the ordinance, and retaining a court reporter whose presence at the hearing insured the availability of a transcript and demonstrated to the town board a willingness to appeal an adverse ruling. The client's permit was approved notwithstanding significant opposition.

By clarification of the rules applicable to quasi-judicial hearings, the new statutes have strengthened the ability of developers and landowners to win approvals. Success, however, requires adequate preparation, the presentation of competent evidence on all relevant criteria, and insistence that the board conducting the hearing and making the decision adhere to the new statutory mandates.

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[i] North Carolina General Statutes §§ 160A-393 and 153A-349.

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