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Appeals of Administrative Development Decisions

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Seemingly clear, objective development regulations may be the subject of debate and interpretation. Is that new business unlawful? Was the notice of violation correctly issued? Does the proposed development meet the applicable standards? Did the administrator correctly interpret the regulation? Each of these scenarios may raise disputes.

To resolve such disputes, appeals of administrative development decisions are assigned to the local board of adjustment. State law sets forth the procedures and standards for those appeals. This blog outlines those rules.

Principles and Purposes

No development regulation can address every possible scenario. Properties are unique, landowners are creative, and land uses evolve. Not only that, but no ordinance is perfect. Inevitably there are ambiguities, contradictions, and gaps. Public officials are called to apply these imperfect regulations to an array of scenarios and the correct application is not always clear. Sometimes reasonable people may disagree about the proper interpretation of an ordinance. Sometimes the public official did not have access to complete information at the time of determining the violation. In such cases, an appeal can help resolve the disagreement.

Whatôs more, these imperfect regulations affect rights and liberties. Business owners and religious groups, homeowners and residents, farmers and developersð they all have a deep interest in the productive use of their own land, protection of their investments, minimizing of nuisances, and ensuring equal treatment under the law. These rights are enshrined in the US Constitution through the Fifth Amendment protection against deprivation of property rights without due process of law. Appeals to the board of adjustment are grounded in that Constitutional assurance of due process and practical reality that ordinances are not always clear.

An appeal is not the right process for everything, however. If an owner wants a waiver of a requirement because the strict application of the rules will cause hardship, that owner should seek a variance, not an appeal. And, if a citizen is simply looking for a change to the rules, that requires an ordinance amendment, not an appeal.

With those principles in mind, letôs turn to the details for appeals of administrative development decisions.

Zoning and More

The provisions for administration of development regulationsð including administrative decisions and appealsð are outlined in Article 4 of Chapter 160D. G.S. 160D-405 states that for local development regulations, appeals of administrative decisions made by staff *shall* be made to the board of adjustment. So, administrative decisions for zoning, subdivision, and other development regulations are appealed to the local board of adjustment. The statute does allow that such appeals may be assigned to other boards if authorized by statute or local ordinance. So, for example, an appeal of a minor work permit in a historic district might be assigned to the local preservation commission rather than the board of adjustment. If the ordinance assigns any appeals of administrative decisions to another board, that board must follow quasi-judicial procedures just the same as the board of adjustment (G.S. 160D-405(a)).

Certain development regulations have separate appeals procedures. Minimum housing codes, authorized in Article 12 of Chapter 160D, must follow specified procedures for notice, administrative hearings, and final orders. Moreover, G.S. 160D-1208 outlines the authority and procedures for appeals of minimum housing decisions to the housing appeals board. Similarly, the appeals procedures for local stormwater regulations and erosion and sedimentation control regulations are outlined in separate statutes. For those topicsð minimum housing codes, stormwater, and erosion and sedimentation controlð appeals of administrative decisions do not go to the board of adjustment unless explicitly stated in the local ordinance (G.S. 160D-405(a)).

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The Decision

"Determination"

In order for an administrative decision to be appealed, the public official must have made an official determinationð a written, final, and binding order, requirement, or determination (160D-405(d) & -102(10)).

Examples of final, binding determinations include a formal notice of violation, a zoning compliance permit, a formal ordinance interpretation, and other final, written decisions. A formal determination that a particular activity is permitted in a zoning district is an appealable determination (*S.T. Wooten Corp. Board of Adjustment*, 210 N.C. App. 633, 711 S.E.2d 158 (2011)). Additionally, a written determination that the owner has complied with applicable height limits is appealable (*Meir v. City of Charlotte*, 206 N.C. App. 471, 698 S.E.2d 704 (2010)).

Some staff actions are not formal determinations so they are not subject to appeal to the board of adjustment. If a written statement affects no rights and is merely advisory in nature, it is unlikely to be appealable. A letter that merely states the basic zoning district of a property is not a binding decision; it is merely a recitation of the current rules. A written statement about how the ordinance *might* be interpreted in the future is not an appealable decision (*In re Appeal of the Society for the Preservation of Historic Oakwood*, 153 N.C. App. 737, 571 S.E.2d 588 (2002)). A written communication that amounts to nothing more than a recommendation at a preliminary stage of the permit review process is not a final, binding decision (*Ashe Cty. v. Ashe Cty. Plan. Bd.*, 376 N.C. 1, 852 S.E.2d 69 (2020); *Wilson v. Mebane Board of Adjustment*, 212 N.C. App. 176, 710 S.E.2d 403 (2011)). Inaction by staff is not a decision that can be appealed, but a party may seek a court order to require staff action that is not discretionary.

The administrator cannot defer a question to the board prior to making a staff decision. When a decision is assigned to staff, the administrator must make the decision and then allow the appeal to the board of adjustment. (*Tate v. Board of Adjustment*, 83 N.C. App. 512, 350 S.E.2d 873 (1986)).

Notice of the Decision

Pursuant to G.S. 160D-403, the local government official who made the decision must provide written notice of the decision to the property owner and the requesting party, if different from the owner. This written notice may be provided by personal delivery, email, or first-class mail. The timing of notice is important, as that starts the clock running for the time of appeal.

A property owner or developer who wants to start the clock for neighbor appeals can establish constructive notice for the neighbors by posting a sign on the property in question pursuant to G.S. 160D-403(b). The sign must clearly state ñZoning Decisionò or ñSubdivision Decisionò in letters at least six inches high and provide a way to contact an official about the decision. The sign must be posted for at least ten days, and the person posting the sign must provide verification of such posting to the official who made the decision. An ordinance may require such posted notice of decisions, but if not specified in the ordinance, it is an option for the property owner. Note that this sign to establish constructive notice is separate from the routine notice required in advance of any quasi-judicial hearing, including an appeal of a staff decision.

Filing an Appeal

Deadline for Appeal

Parties have thirty days from notice of the decision to appeal (160D-405(d)). For a party receiving written notice from staff, the thirty-day period begins with receipt of the notice. Notice sent by email or hand delivery is presumed received on the date it is sent or delivered. With regard to mailed notice, it is presumed to be received on the third business day following deposit of the notice for mailing. For other parties, the thirty-day period begins with any noticeð actual or constructiveð of the decision. That notice could be a letter from the property owner, a posted sign as discussed above, the beginning of construction on the site, or some other means of learning about the decision. If a party fails to appeal within thirty days, the board of adjustment cannot hear the appeal.

Standing to Appeal

State law allows an appeal of administrative decision by a person with legal standing. As outlined at G.S. 160D-1402(c), that includes an individual with an ownership interest in the subject property, the applicant for a permit or recipient of a notice of violation (if different from the owner), the local government, any person who will suffer special damages from the decision, and certain associations that have members who will suffer special damages.

For some of these parties, standing is clear. The applicant, the owner, and the local government are easily identified as parties with standing to appeal. Determining whether a neighbor will suffer special damages requires more, as discussed in this blog on standing in quasi-judicial hearings. In short, the courts look at factors such as proximity, property value impacts, and additional adverse impacts (noise, pollution, traffic, etc.) to determine special damages. The application form for an appeal may request information to confirm legal standing, and at the hearing, the question of standing is a threshold matter for the board to determine. If the person filing the appeal lacks standing, the board lacks authority to hear the appeal.

Notice of Appeal

A person seeking to appeal an administrative decision must file a notice of appeal with the local government clerk or other official as designated by the local government ordinance. The notice of appeal must state the grounds for appeal. Local governments commonly have a form or application for appeals of administrative decisions. Once a complete application is filed properly, staff is obligated to put the request on the agenda for the board; staff cannot make decisions on legal questions, such as standing (*Morningstar Marinas/Eaton Ferry, LLC v. Warren Cty.*, 368 N.C. 360, 360, 777 S.E.2d 733, 734 (2015)).

Stays of Enforcement and Permitting

For an appeal of an enforcement action, the appeal stays enforcement. Civil penalties and other enforcement actions are paused for the duration of the appeal. However, if the enforcement official certifies that ña stay would cause imminent peril to life or property or, because the violation is transitory in nature, a stay would seriously interfere with enforcement of the development regulation,ò then enforcement is only stayed by a restraining order (G.S. 160D-405(f)).

For an appeal of an approved development permit, the appeal ñdoes not stay the further review of an application for development approvals to use the property.ò But, the person appealing the permit or the local government may request that the board of adjustment stay any final decision on the development approval applications, including building permits (G.S. 160D-405(f)).

Quasi-Judicial Procedures

An appeal of an administrative development decision must follow quasi-judicial procedures, as outlined at G.S. 160D-406. Among other things, notice must be mailed and posted on the property; witnesses must provide sworn testimony and factual evidence; and the board must base its decision upon competent, substantial, relevant evidence in the record. Politics and personal preference are not legitimate bases for the decision.

Administrator Compiles the Record

In advance of the hearing the official who made the decision being appealed must compile the record upon which he or she based the decision, including all applicable documents and exhibits. The administrator must provide that record to the board and a copy of the record to the individual appealing the decision and the property owner, if different.

Administrator Appears as a Witness

As required by G.S. 160D-406(e), the public official who made the decision being appealed ñshall be present at the evidentiary hearing as a witness.ò If the individual who made the decision is no longer employed by the local government, then the individual currently occupying that position must appear as a witness.

This role of appearing as a witness is different from the staff role in other types of quasi-judicial decisions. In a variance case or special use permit case a staff person may serve as a clerk and/or witness providing support and analysis for the board, but in appeals of staff decisions the staff person acts as a party defending an interpretation of the ordinance. This leads to heightened concerns of *ex parte* communications between the board and the staff person. Local government staff often interact with board members outside of meetings. In the case of a staff person as party, they should be careful not to discuss the substance of the appeal with board members outside of the hearing

This dynamic of *staff-person-as-party* also may complicate the role of the local government attorney who is called in to advise the board and the staff member who is appearing before the board. For this reason, some local governments assign separate attorneys, one for staff and one for the board, for appeals of staff decisions.

Additional Evidence

In some cases, the party making the appeal, or that partyôs attorney, may submit in advance a written analysis (essentially a legal brief) for board consideration. If so, copies should be provided to the board and the parties just as the rest of the record is provided.

The extent to which new evidence is needed or appropriate depends on the case. In some cases, the parties may agree to the basic facts (proposed building, applicable section of the ordinance, etc.) but disagree on the legal question of how to interpret the ordinance correctly (for example, does the proposed building qualify as a single-family home?).

In other cases, the board may need to supplement the record with additional facts in order to make the decision. In an appeal of a notice of violation, for example, the parties may dispute whether and when a certain land use occurred on the property. The property owner may have documents or testimony that challenges the record provided by staff. The evidentiary hearing may elicit additional evidence for the record, and the board must resolve contested facts in its decision.

The chair of the board of adjustment is authorized to issue subpoenas to compel the production of evidence. A party may make a written request to the chairperson explaining why a subpoena is necessary to compel certain witnesses or evidence, and the chairperson shall issue the subpoena if he or she determines it to be relevant, reasonable in nature and scope, and not oppressive (160D-406(g)).

Legal Interpretations

Commonly a dispute over an administrative decision is a dispute over interpretation. For more guidance on interpretation, take a look at this blog on Interpreting the Zoning Ordinance.

Decision and Appeal

The board of adjustment must decide an appeal within a reasonable time. As with any quasi-judicial decision, the boardôs decision must be based on competent, material, and substantial evidence in the record. The board must determine any contested facts and apply relevant legal standards. The board has all of the powers of the official who made the decisionð they board steps into the shoes of the administrative staff, so to speak. The board may affirm the staff decision, reverse the staff decision, or modify the staff decision, and the board may ñmake any order, requirement, decision, or determination that ought to be made.ò

Appeals of administrative decisions are decided by a simple majority vote. The decision ñshall be reduced to writing, reflect the boardôs determination of contested facts and their application to the applicable standards, and be approved by the board and signed by the chair or other duly authorized member of the board.ò The decision of the board of adjustment may be appealed to the superior court in the nature of certiorari pursuant to G.S. 160D-1402.

Alternatives to the Board of Adjustment

Instead of taking an appeal to the board of adjustment, the parties to an appeal may agree to mediation or other alternative dispute resolution. The ordinance may set standards and procedures to facilitate this process.

When the basis of the appeal is a challenge of the enforceability, validity of the regulation itself, or the whether the regulation in unconstitutional, is beyond the statutory authority of the local government, or is an unconstitutional regulatory taking, a person with standing may opt to bypass the board of adjustment and take those legal challenges straight to superior court.