

Coates' Canons:
[NC Local Government Law](#)

- [About this Blog](#)
- [About the Authors](#)

Building the Record for a Quasi-Judicial Decision

About the author

Adam Lovelady



[View Other Posts](#)

This entry was posted on April 3rd, 2015 and is filed under [Land Use & Code Enforcement](#), [Quasi-Judicial Decisions](#).



“Every quasi-judicial decision shall be based upon competent, material, and substantial evidence *in the record*” (NCGS [160A-388\(e2\)](#)). Without such evidence, the decision is arbitrary and an abuse of the discretion vested in the board ([Godfrey v. Zoning Board of Adjustment](#), 317 N.C. 51 (1986)). So what is the record? What evidence goes in that record? And how is the evidence obtained? This blog explores those and other questions.

Evidentiary Hearings, Generally

For a typical quasi-judicial decision—a special or conditional use permit or a variance—the decision-making board is acting like a trial court. The board holds an evidentiary hearing to accept and review documents and testimony. The board is determining the facts and ruling on the law. The board is answering the broad question: Does the evidence show that the applicant meets the standards for the variance or permit? Through the evidentiary hearing, the board builds the record upon which the decision is based. And, if the decision is appealed, the superior court will base its review upon that record.

According to NCGS [160A-393](#), the record created by the evidentiary hearing “shall consist of all documents and exhibits submitted to the decision-making board . . . together with the minutes of the meeting or meetings at which the decision being appealed was considered.” This may include the application; the staff report; photographs, plans, and diagrams; studies and reports prepared by the applicant; exhibits presented by opposing parties; and all of the testimony at the evidentiary hearing. In other words, the record includes all of the materials and input that is presented to the board.

The evidentiary hearing may be taped (audio and/or video), but there is no requirement for taping. If a tape is made and the quasi-judicial decision is appealed to superior court, then any party may request that a tape be included in the record. Additionally, a party may request that a transcript be included in the record on appeal. The requesting party bears the cost of producing the transcript (NCGS [160A-393\(i\)](#)).

What if the tape messes up? In [Fehrenbacher v. City of Durham](#), __ N.C. App. __, COA14-712 (February 3, 2015), the city taping equipment malfunctioned and failed to record the first hour of testimony. The court noted that affidavits from the neighbors covered the substance of the missing testimony, and moreover, the statutory requirement states that tapes may be requested “if such a recording was made.” In this case, a recording was not made for a portion, and there is no obligation to create a recording.

Distinguishing Evidence within the Record

We need to make a clear distinction, here. The record of a quasi-judicial decision is composed of various pieces of evidence. Some of that evidence in the record is good: the application, factual testimony from opposing parties, expert opinion testimony. Some of that evidence in the record is incompetent, immaterial, and insubstantial. This may include unqualified speculative opinion, a petition from neighbors, hearsay evidence, or irrelevant facts, for example. For this discussion, I will call that insufficient evidence. In other blogs, my colleagues David Owens and Rich Ducker have written about distinguishing good evidence from insufficient evidence and the details of [sworn testimony](#), [opinion evidence](#), [expert evidence](#), and [ex parte evidence](#).

Legally, the board must base its decision on competent, material, and substantial evidence in the record—good evidence. But, in practice and as a result of the process, the record may include incompetent, immaterial, or insubstantial evidence. So what do we do with all of the insufficient evidence? Do we strike it from the record?

No. Insufficient evidence may remain in the record, but may not be the basis of the quasi-judicial decision. Quasi-judicial boards must adhere to the procedural requirements of constitutional due process, but boards are not required to follow the strict rules of evidence that apply in a courtroom. Some informality is allowed for the quasi-judicial board. As such, courts allow that the inclusion of some insufficient evidence as part of the record is not a due process violation.

“The question is whether there is substantial evidence in *the whole record* to support the findings and conclusions.” Where the court has determined that the record includes competent, material, and substantial evidence to support the Board’s decision, the admission of other arguably incompetent evidence does not infringe upon the parties’ due process rights ([Dobo v. Zoning Bd. of Adjustment of City of Wilmington](#), 149 N.C. App. 701, 709-10, 562 S.E.2d 108, 114 (2002)[rev’d on other ground](#), 356 N.C. 656, 576 S.E.2d 324 (2003)).

To be clear the board cannot base its decision upon insufficient evidence in the record. Where an applicant presents evidence to show he meets the standards for a special use permit, the burden shifts to opponents to produce evidence to the contrary. If neighbors produce nothing more than unrelated comments and speculative opinions (insufficient evidence), then the board does not have sufficient evidence to deny the permit. The board must approve the permit. ([Blair Investments, LLC v. Roanoke Rapids City Council](#), 752 S.E.2d 524 (N.C. Ct. App. 2013)).

Getting the Evidence

Application and Evidentiary Hearing. Generally, the evidence creating the record is provided by the parties, either in advance of the hearing (with the application) or as part of the evidentiary hearing. Indeed, the burden typically is on the applicant to present the evidence that they meet the applicable standards.

Administrative Record. In addition to the typical evidentiary hearings described above, the board of adjustment is tasked with handling appeals from decisions made by zoning administrators and historic preservation commissions. David Owens has written about these types of [appeals](#) to the board of adjustment. When that happens, the case comes to the board of adjustment with a record.

Consider an appeal of an administrative decision such as issuing a notice of violation or making a formal interpretation of the ordinance. When an administrative decision is appealed, the zoning administrator who made the decision “shall transmit to the board all documents and exhibits constituting the record.” The zoning administrator also must provide the record to the appealing party and owner of the property (NCGS [160A-388\(b1\)](#)).

Preservation Commission Record. When a decision from the historic preservation commission is appealed to the board of adjustment, the preservation commission should transmit to the board of adjustment the record of its decision, including all documents, exhibits, and minutes. Tapes and transcripts, if any, may be included.

For these appeals from the preservation commission, the board of adjustment is acting as an appeals court. The technical scope of review is outlined at NC General Statute [160A-393\(k\)](#). In sum, the board reviews the record to determine whether there is sufficient evidence to support the decision made by the preservation commission, and to determine whether the actions taken were authorized and appropriate under the law. The board of adjustment may hear legal arguments from the parties, but the board does not take new factual evidence or testimony.

Subpoena. In some cases, though, the quasi-judicial board may need to compel production of evidence. Under NC General Statute [160A-388\(g\)](#) boards of adjustment and other boards making quasi-judicial decisions are authorized to subpoena witnesses and compel the production of evidence. A party to the case may request that the chair of the board subpoena a witness or compel evidence. The chair makes the decision about issuing subpoenas; that decision may be appealed to the full board. If a party fails to comply, the board or the party requesting may seek an order requiring compliance from the General Court of Justice.

Appeals to Court—Supplementing the Record

When a decision from a quasi-judicial board is appealed to superior court, the reviewing court is acting like an appeals court. Generally, the court must base its decision on the record that was before the decision-making board.

But, for certain topics, the court may supplement the record. The reviewing court may “allow the record to be supplemented with affidavits, testimony of witnesses, or documentary or other evidence if, and to the extent that, the record is not adequate to allow an appropriate determination” of specific legal standards:

- legal standing
- conflicts of interest
- actions that are unconstitutional or in excess of the board’s statutory authority

Additionally, under NC General Statute [160A-393\(i\)](#), the court may direct that matters be deleted from or added to the record ([Fehrenbacher](#), ___ N.C. App. ___, COA14-712 (February 3, 2015)).

Conclusion

As stated in the statutes and case law, “[e]very quasi-judicial decision shall be based upon competent, material, and substantial evidence in the record.” The record is all of the materials and input that is presented to the board, including the application, exhibits, testimony, and related materials. The record for a quasi-judicial decision may include some insufficient evidence, but the board may not base its decision on it. If necessary, the quasi-judicial board may subpoena witnesses and compel production of evidence for the record. In the case of appeals to the board of adjustment, the case comes with its own record.

Quasi-Judicial Decisions

Board Workshops
Spring 2015



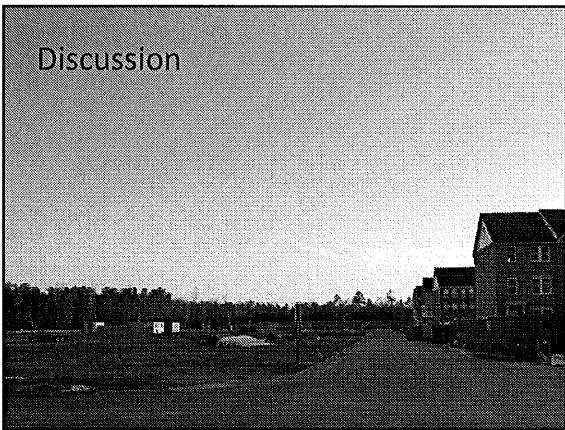
www.sog.unc.edu

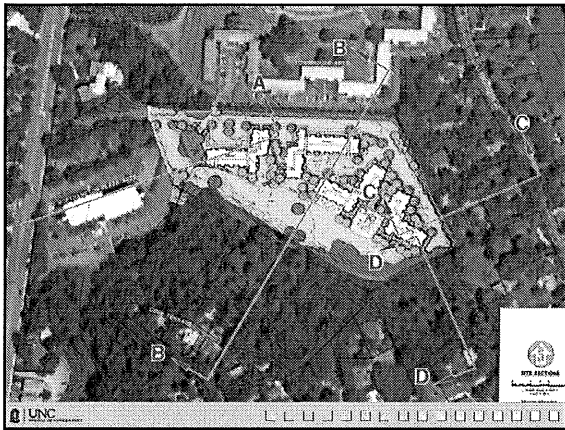
1. Types of Decisions
2. Before the Hearing
3. Conducting the Hearing
4. Making the Decision



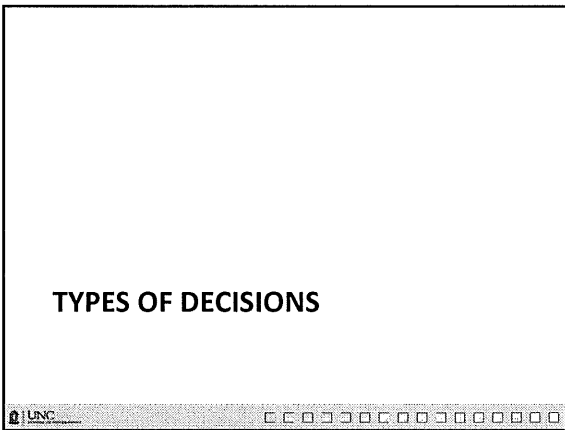
www.sog.unc.edu

Discussion





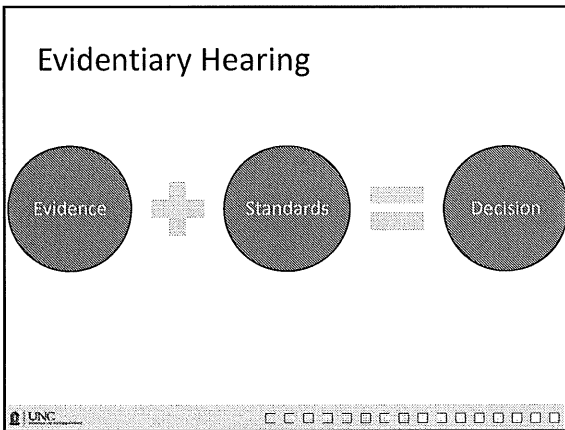




Legislative	Quasi-Judicial	Administrative

Quasi-Judicial Decisions

- Special Use Permit or Conditional Use Permit
- Variance
- Certificate of Appropriateness
- Appeal of Administrative Decision



Decision	Standard
Special Use Permit/ Conditional Use Permit	Ordinance standard (commonly property values, plan conformity, harmony with area, etc.)
Variance	Statutory standard for hardship
Certificate of Appropriateness	Congruous with the character of the district or landmark
Appeal of Administrative Decision	Ordinance Interpretative Guidance

The board . . .


<p>Must</p> <ul style="list-style-type: none"> • Apply the established standards • Decide whether the particular application meets the standards 	<p>Must not</p> <ul style="list-style-type: none"> • Set new policy • Gauge public opinion • Decide based on personal preference
---	--

Due Process Rights

- Notice
- Clear Standards
- Opportunity to be Heard
- Impartial Decision-maker
- Right to Appeal


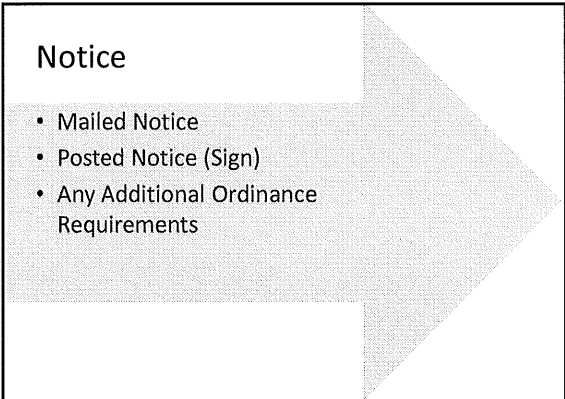
Notice
Bias
Ex Parte Communications
Conflicts

BEFORE THE HEARING




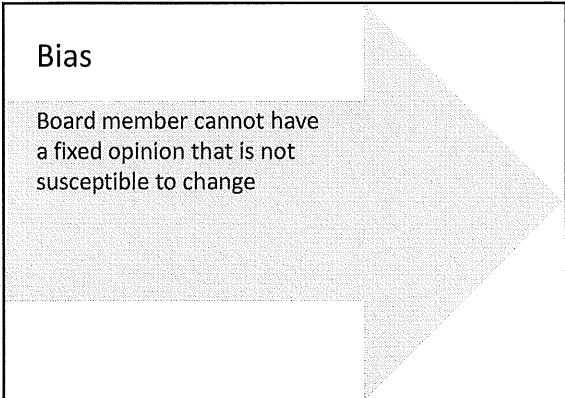
Notice

- Mailed Notice
- Posted Notice (Sign)
- Any Additional Ordinance Requirements



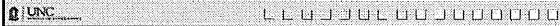
Bias

Board member cannot have a fixed opinion that is not susceptible to change



Ex Parte Communication

- Contacts with a party outside of the hearing
- Should be avoided
- Must be disclosed

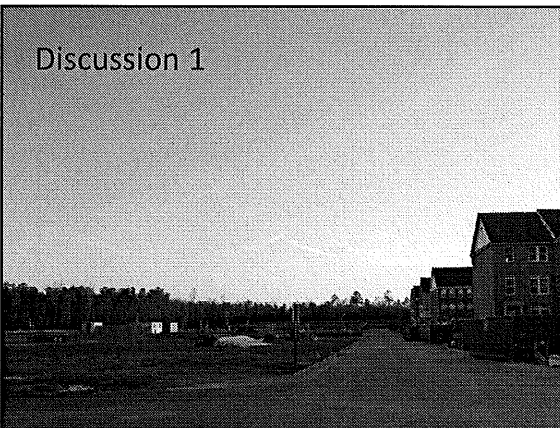


Conflicts of Interest

- a close familial, business, or other associational relationship with an affected person
- a financial interest in the outcome of the matter

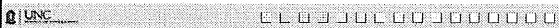


Discussion 1



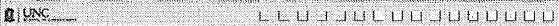
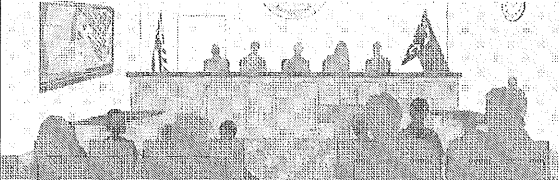
Roles
Opening
Creating the Record
Testimony
Opinion Evidence

CONDUCTING THE HEARING



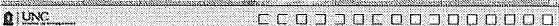
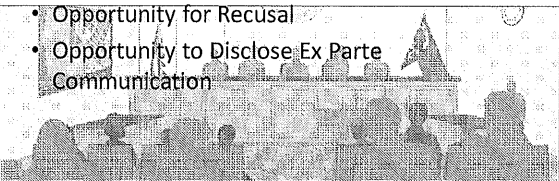
Roles

- Board Chair
- Board Members
- Staff
- Parties
- Attorneys



Opening

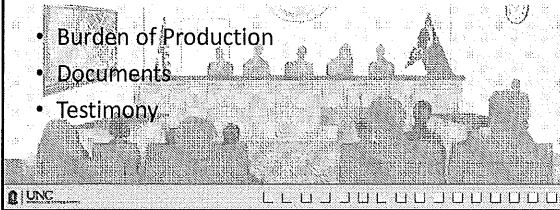
- (Swearing In Witnesses)
- Description of the Hearing
- Description of the Standards
- Opportunity for Recusal
- Opportunity to Disclose Ex Parte Communication



Creating the Record

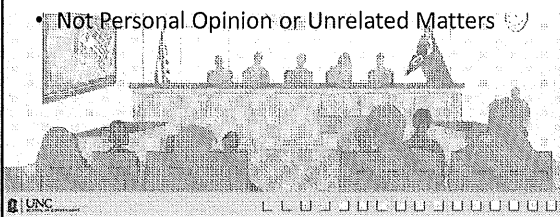
"Every quasi-judicial decision shall be based upon competent, material, and substantial evidence in the record."

- Burden of Production
- Documents
- Testimony



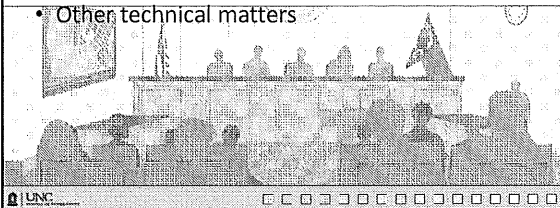
Testimony

- Sworn Witnesses
- Factual Testimony
- Related to the Standards
- Not Personal Opinion or Unrelated Matters

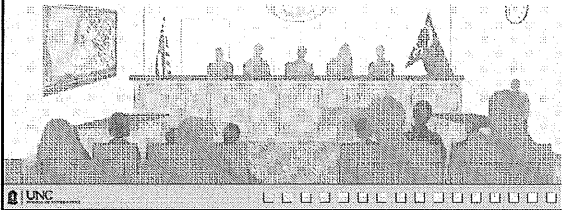


Opinion Evidence

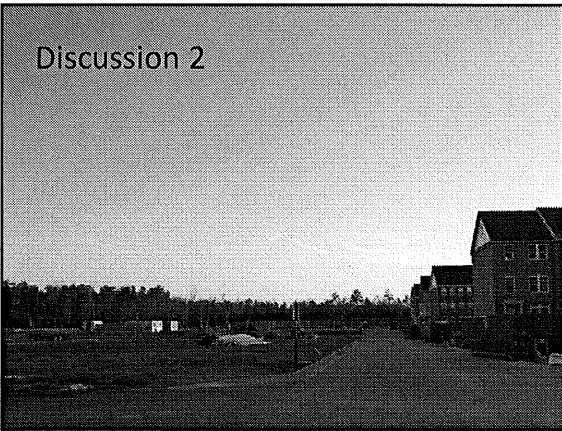
- Expert Witnesses
 - Property Values
 - Projected Traffic Impacts
- Other technical matters



Closing the Hearing

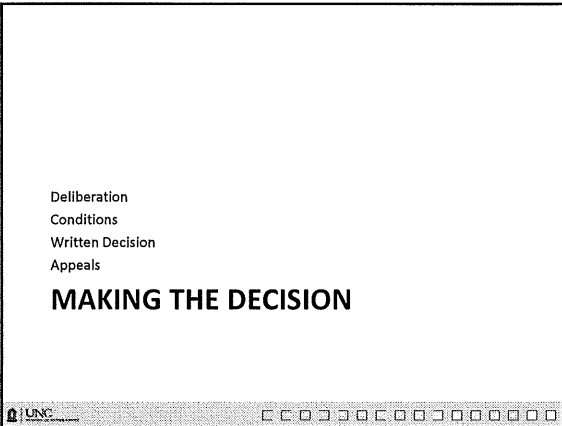


Discussion 2



- Deliberation
- Conditions
- Written Decision
- Appeals

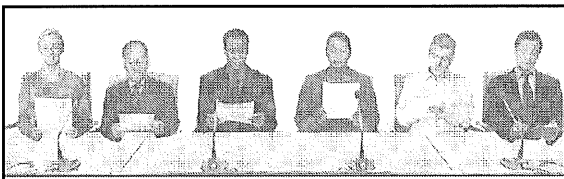
MAKING THE DECISION






Deliberate in Open Session

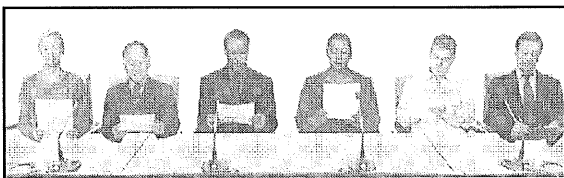





Determine Facts

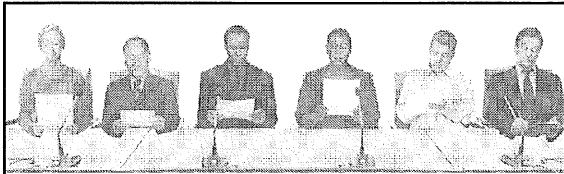
- Does the project injure property values?
- Is the hardship peculiar to this property?





Apply Standards

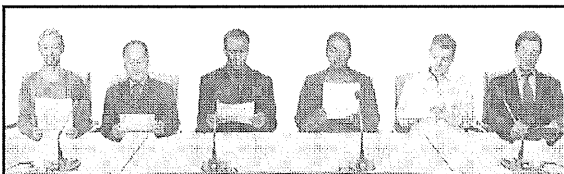




Conditions

- Related to the standards
- May bring a development into compliance (that would have been denied otherwise)

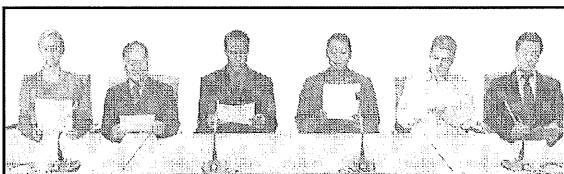




Motion

- Approve, approve with conditions, or deny
- Reasoning related to the standards

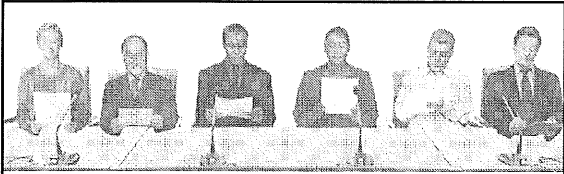




Voting

- Simple majority, generally
- 4/5 majority for a variance

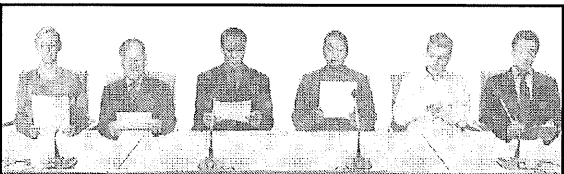




Written Decision

- May prepare draft decision prior to hearing
- Final decision document prepared after the meeting (may be by staff or attorney)
- Accurately reflect action and reasoning of the board
- Signed by chair or authorized member
- Need more than meeting minutes

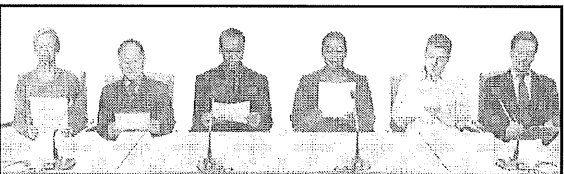




Notice of Decision

- Email, first class mail, or personal delivery
- Staff certifies delivery for the record (i.e., clerk affidavit)

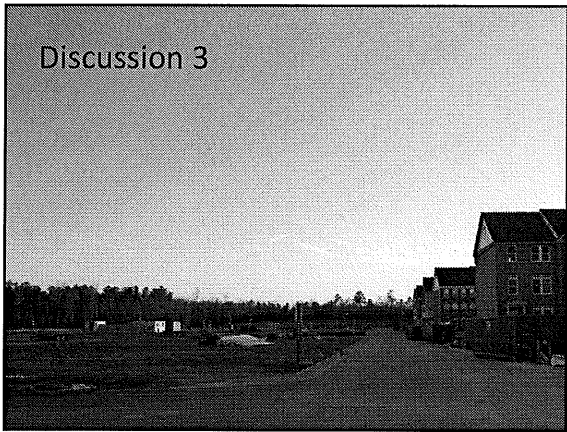




Appeals

- 30 days from effective date
- To Superior Court
- On the record






Discussion 3

Questions

Adam Lovelady	David Owens
adamlovelady@sog.unc.edu	owens@sog.unc.edu
919-962-6712	919-966-4208

 www.sog.unc.edu
