

**CITY OF NORTHWEST
SPECIAL COUNCIL MEETING
TUESDAY, APRIL 20, 2021
5:30 PM**

ASSEMBLY

The Northwest City Council held a special meeting on Tuesday, April 20, 2021 at 5:30 PM at 4889 Vernon Road, Northwest NC.

Present were: Mayor James Knox; Councilwoman Sheila Grady and Councilmen: Charles Carroll, Aaron Perkins, Haywood Miller, and Michael Troy.

Also present was: Donna Strickland, City Clerk

CALL TO ORDER & INVOCATION

Mayor James Knox called the meeting to order at 5:30 PM
Councilman Haywood Miller gave the invocation.

BOARD OF ADJUSTMENT TRAINING

Mayor Knox requested that everyone state their name and position.

James Knox, Mayor
Donna Strickland, City Clerk
Sheila Grady, Councilwoman
Charles Carroll, Councilman
Haywood Miller, Councilman
Michael Troy, Councilman
Aaron Perkins, Councilman
Allen Serkin, Cape Fear Council of Governments
Justin Brantley, Brunswick County Planner
Brandon Hackney, Brunswick County Planner
Helen Buch, Brunswick County Zoning Administrator

Mayor Knox asked Mr. Serkin to proceed with the training.

The Board of Adjustment Training Power Point Slides will be in Exhibit Book V.

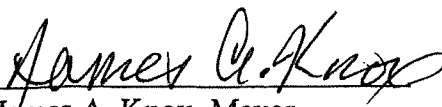
Helen Bunch stated that the County has Board of Adjustment Hearings the 2nd Thursday of each month at 6:00 PM and everyone is welcome to attend and observe.

Mr. Serkin stated that anyone wishing to speak must be sworn in at a Board of Adjustment hearing. He also stated that the Oath can be given by the Mayor or the City Clerk.

Mayor Knox asked how is a subpoena issued and what happens if a person is subpoenaed, and they do not show? Mr. Serkin stated that these are question the City Attorney should answer.

ADJOURNMENT

It was the **CONSENSUS** of Council to adjourn the meeting at 6:49 PM.


James A. Knox, Mayor


Donna Strickland, City Clerk/Finance Officer

Board of Adjustment Training for the City of Northwest

April 20, 2021

CAPE FEAR COUNCIL OF GOVERNMENTS
ALLEN SERKIN, AICP, CZO



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Outline

- Legal Context and Types of Decisions
- Board of Adjustment Basics
- Appeals, Variances, Special Use Permits
- Quasi-judicial Procedures, Standing, Evidence, Conflict of Interest
- Examples

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Legal Context

- Local governments are creatures of the state and have no inherent powers.
- In "home rule" states, local governments have broad authority - state legislatures have delegated any powers that do not conflict with the state or federal constitution.
- In "Dillon's Rule" states, local governments only have those powers expressly granted to them by their legislatures.

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Legal Context

- NC is not a "home rule" state; however, the General Assembly has delegated a significant authority to local governments, including:
- Powers expressly granted (N.C.G.S.):
 - Powers fairly implied in or incident to those expressly granted; and
 - Powers essential to the declared objectives and purposes of the local government.

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Types of Land Use Decisions

Legislative – Policy decisions including adoption, amendment, or repeal of regulations.
Examples: zoning text amendment, rezoning (map amendment) and also annexation, budget. Final decisions reserved for the governing board (board of aldermen, council).

Advisory – Not final decisions, therefore, less regulated. Typically a function of the planning board and/or staff. **Examples:** recommendations on plans, text and map amendments, etc.

Administrative – Routine activities typically handled by professional staff, but sometimes by planning board or governing board. **Examples:** issuing permits, approving plans or plats, enforcement, application of non-discretionary standards.

Quasi-judicial – Formal actions where the decision makers apply discretion in applying existing policies to individual or special cases. Quasi-judicial (i.e. court-like) decisions use evidentiary hearings to gather facts and evidence and have very specific requirements. **Examples:** special use permits, variances, and appeals. Decisions can be made by the governing board, planning board, or board of adjustment.

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N.C.G.S. §160D-302 – Board of Adjustment

- Authorizes establishment of a board of adjustment
- 5 members minimum appointed to 3-year terms.
- Alternates may be appointed.
- Quasi-judicial procedures required.
- Planning Board or Governing Board may be designated to perform any of the BOA duties.

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Northwest Board of Adjustment Duties

- Hear appeals of administrative decisions (§ 160D-405)
- Authorize variances § 160D-705(d)
- Issue special use permits § 160D-705(c)
- Determine vested rights (for site plan requiring special use permit)

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Questions?



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Appeals

- Appeals of advisory opinions are not allowed. A case must be the appeal of an actual official staff determination or action.
- When interpreting an ordinance, the Board of Adjustment must determine the intent of the governing board.
- An appeal must be brought by a party with standing within 30-days of notice of decision.

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Sample Hearing Process/Sequence

1. Chair opens hearing and announces case.
2. Witnesses are sworn in.
3. Staff gives summary overview the case.
4. Appellant (or attorney) presents case, documents, evidence, witnesses. BOA may ask questions. Chair allows cross-examination.
5. Objectors present case, documents, evidence, witnesses. BOA may ask questions. Chair allows cross-examination.

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Sample Hearing Process/Sequence

6. Applicant's rebuttal.
7. Objector's rebuttal.
8. Chair summarizes evidence and excludes hearsay, opinion. BOA may add/clarify.
9. All parties may offer objections, corrections, additions to Chair's summary of evidence.
10. Deliberation and determination of facts and conclusions.
 - 1.1. Motion and vote. Hearing closed.

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Appeals

- Appeal must be heard in a reasonable time and notice is required.
- Official whose decision appealed must provide relevant documents to the board and the appellant must be present at the hearing.
- Board may reverse or affirm, in whole or in part, appealed decision.
- Parties may agree to mediation or other alternate resolution.

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Variances: § 160D-705 (d)

Gives board permission to modify any provision of the ordinance to prevent unnecessary hardships where:

1. Unnecessary hardship would result from the strict application of the regulation. It is not necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property.
2. The hardship results from conditions that are peculiar to the property, such as location, size, or topography. *Hardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the neighborhood or the general public, may not be the basis for granting a variance.* A variance may be granted when necessary and appropriate to make a reasonable accommodation under the Federal Fair Housing Act for a person with a disability.

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Variances: § 160D-705 (d)

Gives board permission to modify any provision of the ordinance to prevent unnecessary hardships where:

- 3. The hardship did not result from actions taken by the applicant or the property owner: The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance is not a self-created hardship.
- 4. The requested variance is consistent with the spirit, purpose, and intent of the regulation, such that public safety is secured and substantial justice is achieved.

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Findings of Fact/Conclusions of Law Considerations

- Must be in writing
- Must be signed by the Chair or other authorized member.
- Must explain the logic behind the decision.
- Who will prepare them? – Typically staff/attorney.
- When will they be prepared? – Typically within a few days of hearing.
- When are they approved? – Typically upon chair signature.

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Variances

- No change in permitted uses.
- Appropriate conditions may be included.
- Recommend the board vote on each of the four provisions.

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Testimony/Evidence Considerations

- How should non-expert testimony be handled?
 - Must be ruled on by the chair, typically can be heard but cannot be basis of decision.
- How should standing be determined?
 - Must be ruled on by the chair/board – not staff.
- Time limits generally not permitted.

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Sample Findings of Fact

- Section 12-5(a) of the Zoning Ordinance required a 15' side yard setback in the R-10 zoning district when the structure was constructed.
- The applicant constructed the accessory structure in the summer of 2013 without a permit and in violation of the side yard setback required at the time of construction.
- The proposed development project is expected to generate an average of 35 weekday P.M. peak hour vehicles according to the ITE Parking Generation manual 4th Ed.

Special Use Permits

- The special use permit allows a certain activity provided for in the ordinance to be established at a proposed location within a zoning district if the applicant can demonstrate that certain ordinance requirements are met.
- In other words, the use is not permitted by right.
- Evidentiary hearing required. Notice to neighbors provided for the hearing.
- Not a public hearing to hear the opinions of public at large – decisions must be factual testimony.

Sample Conclusions of Law

- The applicant's hardship is self-imposed because he/she knew or should have known that a permit was required prior to construction.
- The hardship is not the result of site characteristics but is common to all commercial property in the neighborhood.
- The zoning administrator denied the permit appropriately because the proposed building should be classified as a primary structure, not an accessory structure.

Special Use Permits

- Decision must be based on the standards in the ordinance.
- The burden of proof is on the applicant to show that the standards have been satisfied.
- If sufficient evidence is presented to show that the standards have been met, the board must approve the permit. If contradictory evidence is presented, the board must find that the standards are met or the permit must be denied.

Standards for Review: UDO §3.5.9

The Board must find that the proposed use, with any imposed conditions, is:

1. In harmony with the area and not substantially injurious to the value of properties in the general vicinity;
2. In conformance with all special requirements applicable to the use;
3. Will not adversely affect the health or safety of the public; and
4. Will adequately address the review factors below.

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Conflict of Interest: § 160D-109(d)

Members are disqualified from participating, not just from voting, in the following situations:

- Fixed opinion prior to hearing
 - Undisclosed ex-parte communication (discussion regarding case)
 - Close family, business, or other relationship with an affected person
 - A "close familial relationship" means a spouse, parent, child, brother, sister, grandparent, or grandchild. The term includes the step, half, and in-law relationships.
 - Financial interest in outcome
- If objection is raised and member refuses to recuse, rest of board votes on recusal.

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Special Use Review Factors

1. Circulation (easements, rights-of-way, access points, connections, traffic flow)
2. Parking and Loading (including driveways)
3. Service Entrances and Areas (refuse areas, service vehicle access)
4. Lighting (glare, traffic safety, economic effect compatibility with area)
5. Signs (location, height, size, design)
6. Utilities (location and availability)
7. Open Spaces (required yards, open spaces, preservation of natural features)
8. Environmental Protection (tree cover, floodplains, stream buffers, wetlands, steep slopes, water quality)

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Parties and Witnesses

- Parties with standing have rights to present evidence, cross-examine, inspect documents, object to testimony and evidence, and offer explanations or rebuttal.
- An attorney may represent a party and act on the party's behalf.
- Based on an ethics opinion from NC State Bar, non-lawyers may not provide legal advocacy on behalf of a party.
- Architects, engineers, surveyors and other land use professionals can participate as witnesses and provide evidence in support of their clients – but they cannot cross examine, make legal arguments, or examine evidence.

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Standing - § 160D-1402(c)

1. The owner of the property, someone with an option to purchase or lease the property, and the applicant for a development approval.
2. Any other person who will suffer "special damages" as a result of the decision being appealed. This may include parking, stormwater runoff, and crime problems, or property value impacts. Proximity alone not enough to prove such.
3. An association of neighborhood property owners that would be affected, provided that at least one of the association members would have standing as an individual and that the association was not formed in response to the particular application being appealed.
4. The unit of local government that has made the decision being appealed.

§ 160D-406. Quasi-judicial procedure. (d) The applicant, the local government, and any person who would have standing to appeal the decision under G.S. 160D-1402(c) shall have the right to participate as a party at the evidentiary hearing.

Competent Evidence § 160D-1402(j)(3)

The term "competent evidence" shall not include the opinion testimony of lay witnesses as to any of the following:

- a. The use of property in a particular way affects the value of other property.
- b. The increase in vehicular traffic resulting from a proposed development poses a danger to the public safety.
- c. Matters about which only expert testimony would generally be admissible under the rules of evidence.

Note: Trial court "rules of evidence" not required.

Special Use Review Factors

9. Screening, Buffering, and Landscaping (to protect adjoining property)
10. Effect on Adjoining Property (including noise and odor)
11. Compatibility (appropriate use in relationship to neighboring properties)
12. Impacts on Military Installations (consider base commander's comments)

Special Use Conditions: UDO §4.05(c)(7)

- Reasonable and appropriate conditions and safeguards may be imposed upon these permits.
- Conditions run with the land and must be consented to in writing.
- Conditions may be imposed which require that one or more things be done before the use requested can be initiated. For example, that a solid board fence be erected around the site to a height of six (6) feet before the use requested is initiated.
- Conditions of a continuing nature may be imposed. For example, exterior loud speakers shall not be used between the hours of 10:00 p.m. and 9:00 a.m.

Quasi-Judicial Procedures: § 160D-406

Quorum – Depends on local ordinance, simple majority or 4/5ths.

Voting – Requires 4/5ths (0.8) majority to grant variance, simple majority to issue CUP/SUP, or affirm/deny an appeal. Vacant seats and disqualified members are not considered members for determining majority where qualified alternates not available.

Hearing – Evidentiary hearing to gather facts, not public opinion. A detailed record of the hearing is required, including detailed minutes or, preferably, verbatim transcripts or recordings. Hearing for each case must be opened and closed.

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Quasi-Judicial Procedures : § 160D-406

Conflict of Interest – The NC Constitution gives parties to QJ decisions the right to an impartial decision maker, so conflicts of interest must be avoided.

Open meetings – All meetings and all deliberations must be open to the public, but deliberations and decision may be separate from hearing.

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Quasi-Judicial Procedures: § 160D-406

Witnesses – Evidence must be presented under oath and cross-examination must be allowed. BOA chair may subpoena witnesses. The chair or clerk to board may administer oaths.

Findings – Written findings of fact are required. Where there is conflicting evidence, the Board must specify what it determines to be the facts that are the basis for the decision.

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Quasi-Judicial Procedures: § 160D-406

Evidence – Evidence must be **substantial, competent, and material** and must be entered into the record and kept on file. Hearsay and non-expert testimony cannot be the basis for a decision or for establishing a fact. Board members **may not gather evidence outside of the hearing** and ex-parte communication is not allowed. Only evidence presented at the hearing and subject to cross-examination should be considered.

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