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The Chair's Comments

Fresh Thoughts on an Old Lesson

Preaching to the choir is supposed to be easy. I'm not sure that's so. The choir has seen a lot of preachers. It ought to be a tough audience. How do you make them shout hosanna when they've heard it all before?

Talking to administrative lawyers about licensing boards may be preaching to the choir, but here it goes.

STEVEN M. SHABER

Thought 1. I have not been in front of every board, but every board I have been in front of is a bit different from every other. If you are about to go before a board that is new to you, it's worth it to learn what you can about it and its members. Read the newsletter, visit the Web site, read about it in the newspapers, and talk to other lawyers who have practiced before it.

Thought 2. Boards change. Members leave, and new ones come. Public perceptions affect board action. So the board you were in front of a year ago is not the board you are going before next week. See Thought 1.

Thought 3. Board members come and go, but the board's staff is (just about) forever. Getting at cross-purposes with the staff is dumber than getting at cross-purposes with the chair of your firm's compensation committee.

Thought 4. For you and your client, the board's attorney is the most important staff member. This is the person you understand. This is the one who understands you, your professional needs and anxieties. This is the person who can speak these sweet words

See **COMMENTS** *page 2*

Quasi-Judicial Proceedings Before Local Governments

By Ben Kuhn

Editor's Note: This article is part of a Young Lawyers Division initiative to provide practical, practice-specific assistance to new lawyers and to promote section involvement among young lawyers. Such articles will be published this year in nearly all of the NCBA's section newsletters.

This article has been adapted from a more in-depth discussion and analysis of quasi-judicial zoning decisions prepared by attorneys with Holt York McDarris & High, LLP.

A quasi-judicial proceeding before a local board of adjustment or town council involves the application of public policy to individual situations in a court-like setting. A quasi-judicial proceeding before a town board or council is at odds with the process and procedures that an uninitiated attorney might expect when representing a client before a local government. In truth, it is somewhat odd and peculiar to find oneself in a judicial/court-like proceeding in a town hall before decision-makers that often have no legal training or background. Nevertheless, the process is very important and exists mainly for the benefit of the person seeking approval of a variance or other conditional or special use permit (i.e., often your client). For these reasons, a short "primer" on the issues one may face in such a proceeding is in order.

Quasi-Judicial Decision-Making Process

Quasi-judicial decision-makers hold hearings, apply the rules of evidence, investigate facts or ascertain the existence of facts, and draw legal conclusions from these facts. Quasi-judicial decisions thus involve two key elements: 1) the finding of facts regarding the specific proposal and 2) the use of judgment and discretion to analyze those facts as applied to predetermined ordinance standards.

Courts impose fairly strict procedural requirements on quasi-judicial decision-makers in order to protect the legal rights of the parties involved. Although quasi-judicial decisions are most often assigned to boards of adjustment, these requirements apply to all local government boards that make quasi-judicial decisions, including city councils or boards of county commissioners. These due process requirements demand an impartial decision-maker and require that a quasi-judicial decision, in contrast to zoning decisions, be based solely on legitimately acquired, presented, and considered evidence.

The quasi-judicial process requires an evidentiary hearing with witnesses testifying under oath and subject to cross-examination. Evidence must be relevant to the issue before the quasi-judicial body. Decisions must be reduced to writing with findings of fact based on substantial, competent, and material evidence appearing in the record of the hearing. A quasi-judicial decision is not subject to a

See **PROCEEDINGS** *page 2*

Inside this Issue:

ADMINISTRATIVE LAWYER

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COMMENTS *from page 1*

to you: "I'll recommend that to my client."

Thought 5. Find yourself a favorite expert for each board, one who will consult with you on a regular basis, someone who will take your call on Saturday. Someone who will take a few minutes to point you in the right direction and not send you a bill.

Thought 6. But do not make one expert your only expert. Try to have several available to you. Your former clients can be very helpful, even if they cannot testify. Former board members are great help.

Thought 7. Load your work on the front end of the case. If you prepare yourself and your client as if for hearing, you may be win without a hearing. Starting fast and avoiding a hearing always beats starting slow and winning at hearing.

Thought 8. Prepare your client for what's coming. Professionals often—surprisingly often—misunderstand licensure hearings. The archetypal clients are the Pedant, the Penitent, the Pug, and the Fool. The first wants to lecture the Board and its staff about the fine points of the profession, as if he or she were defending a dissertation. The second cannot confess fast enough, as if confession were always good for more than the soul. The third just wants to fight. The fourth cannot imagine that this is serious and will not take time to deal with it. As to each, your job is the same. Help the client spot the issues, understand the issues, and resolve the issues efficiently.

Thought 9. Remember the collateral consequences. Try to avoid admitting guilt or liability. Don't undermine your client's malpractice insurance coverage; even if the insurer may decline coverage, it most likely will have to defend unless your client has made the defense impossible. Remember a reprimand can affect your client's ability to get future business. These are issues you can handle effectively, lawyer to lawyer, with the board's counsel. See Thought 4.

Thought 10. Licensing board matters are like airplane landings. Any matter your client can walk away from is a good one. ■

PROCEEDINGS *from page 1*

protest petition or supermajority vote requirement if conducted by the city council or a county commission. A quasi-judicial decision by a board of adjustment does require a super-majority vote (normally four out of five votes), however. Further, all ex parte communications are prohibited in order to satisfy the due process requirement that quasi-judicial decision-makers are impartial.

Types of Quasi-Judicial Decisions

1. Special Use Permits. A special use permit is an exception permitted by a zoning ordinance once specific conditions are met upon the presentation of substantial, competent and material evidence. Special use permits may be issued by the governing body or by its appointed board of adjustment. A board does not have unlimited discretion and is required to apply the standards that are set forth in the zoning ordinance.

The applicant must present evidence to show that the standards in the ordinance have been met. It is not the planning staff's responsibility to produce evidence or information to meet the standards. Once such evidence is presented in the record, the applicant is prima facia entitled to the permit. The burden of proof then shifts to persons opposing the permit to produce evidence that demonstrates how the proposed special use fails to meet the existing standards for the type of land use at the particular location. Between two opposing parties, a board must decide who presented the more persuasive substantial, competent and material evidence. The board must then determine whether to grant the requested permit/variance, grant the permit/variance with conditions, or deny the requested permit or variance. When contradictory evidence is presented, the board must make written findings and apply the appropriate standards when reaching a legal conclusion.

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2. Variances. Variances allow adjustments of the rules to fit individual, unanticipated situations that a zoning ordinance did not comprehend. A variance is an authorization to do something contrary to the express terms of the zoning ordinance (such as building a structure inside a required setback area). If a request for a variance is approved, it gives permission to the property owner to use the property in a manner forbidden by the explicit requirements of the zoning ordinance. The standards for obtaining a variance are therefore narrowly tailored, since this is one of the most powerful tools available to boards of adjustment and are subject to abuse if not carefully administered.

Variances cannot, however, be used as a substitute for amending the zoning ordinance. A board of adjustment may issue a variance from any local regulation or provision relating to the use, construction, or alteration of buildings or structures, or the use of land only upon making findings based on record evidence that:

a. Practical difficulties or undue hardships would result if the strict terms of the zoning ordinance were followed. Tests used to determine whether "undue hardship" or practical difficulties justify granting a requested variance include:

- Whether there is no reasonable use of the property without a variance;
- Whether hardship results from application of the express terms of the zoning ordinance;
- Whether hardship is suffered by the property owner;
- Whether the hardship is or is not self-created; and
- Whether the hardship is peculiar to the property.

b. The variance is in accord with the spirit, intent, and purpose of the zoning ordinance. This means:

- No "use variances" should be allowed; and
- Non-conformities should not extend beyond what the ordinance allows.

c. Issuance of the variance will secure the public safety and welfare. The applicant should show that the variance is consistent with the overall public welfare and that it does not create a nuisance or violate any other law.

d. Substantial justice is done by issuance of the variance.

The landmark case in North Carolina concerning the limitations placed on a board of adjustment's power to grant zoning variances is **Lee v. Board of Adjustment of City of Rocky Mount.**[1] In **Lee,** the board of adjustment granted a variance that permitted a grocery store/service station to be built on property zoned for residential purposes. The North Carolina Supreme Court reversed the lower court's affirmation of the variance grant. In doing so, the Court stated that a board of adjustment's power to vary a zoning ordinance is "limited to such variations and modifications as are in harmony with the general purpose and intent of the ordinance and do no violence to its spirit." The **Lee** court stressed that the enabling statute greatly limits the power of the board of adjustment, holding that the board of adjustment is not a law-making body. The action of the board of adjustment in **Lee** was an attempt to amend the zoning ordinance to permit a use in a residential zone that was otherwise not permitted under the express terms of the zoning ordinance, which the board had no legal authority to do.

3. Administrative Appeals and Boundary Disputes. Zoning ordinances also allow citizens to appeal administrative zoning decisions, usually to the board of adjustment. Administrative appeals apply only to local government staff decisions or interpretations such as a zoning administrator or building inspector. If a party is dissatisfied with the decision of another citizen board, he or she cannot appeal the decision to that jurisdiction's board of adjustment unless the zoning ordinance specifically authorizes it. Such board or commission will normally set forth separate procedures for appeals from their decisions. In general, only formal staff decisions or rulings may be appealed to the board of adjustment.

North Carolina enabling statutes also specifically grant the board of adjustment the authority to interpret zoning maps and pass upon disputed questions of lot lines or district boundary lines. When the board of adjustment is deciding an appeal, it has the same power and authority as the official from whom the appeal is taken. A subsequent court review is based entirely on the record developed at the board's hearing. An inadequate record will usually result in a remand to the board for a new hearing or to consider additional evidence.

Appealing Quasi-Judicial Decisions

Appeals of quasi-judicial decisions go directly to the Superior Court in the county where the decision was made.[2] The appeals are taken in the nature of certiorari. An appeal to Superior Court must be filed within 30 days of when the board's decision is filed with the city or county or when notice of the final decision is delivered to the party who filed a written request for such copy with the secretary or chairman of the board at the time of the hearing, whichever is later. The Superior Court will not conduct a new hearing. Instead, it sits as an appellate court and reaches its decision based on the record from the quasi-judicial body. Judicial review of a quasi-judicial decision is limited to: 1) reviewing the record for errors in law; 2) ensuring that procedures specified in both statute and ordinance are used; 3) ensuring that due process rights are protected, including the right to offer evidence, cross-examine witnesses and inspect documents; 4) ensuring that decisions are supported by competent material and substantial evidence in the whole record; 5) ensuring that decisions are not arbitrary and capricious, and; 6) ensuring that the decision-makers are impartial, unbiased and not predisposed.

Further, only a person who is directly affected by the decision can appeal to Superior Court. For example, in a special use case, to establish that one is "aggrieved," a person appealing must allege "special damages distinct from the rest of the community." In **Sarda v. City/County of Durham Board of Adjustment,**[3] the petitioner's failure to allege "special damages" resulted in the dismissal of the petition for writ of certiorari. The petitioners' mere allegation in **Sarda** that they owned land in the immediate vicinity of the property subject to the special use permit request was insufficient to confer standing.

Conclusion

For a more detailed and thorough analysis of quasi-judicial proceedings one should consult the Institute of Government's "Introduction to Zoning" by David W. Owens, as well as the N.C. Bar Foundation's CLE manuscript titled "Quasi-Judicial Proceedings" dated Nov. 16, 2001.

Endnotes

1. 226 N.C. 107, 37 S.E.2d 128 (1946).
2. *See* N.C.G.S. §§153A-345(e), 160A-388(e).
3. 156 N.C. App. 213, 575 S.E.2d 829 (2003).

KUHN PRACTICES WITH HOLT YORK MCDARRIS & HIGH, LLP, IN RALEIGH.

The Basics of "Other" Administrative Hearings

By Reed Fountain

Editor's Note: This article is part of a Young Lawyers Division initiative to provide practical, practice-specific assistance to new lawyers and to promote section involvement among young lawyers. Such articles will be published this year in nearly all of the NCBA's section newsletters.

Introduction

Chapter 150B of the North Carolina General Statutes, (known as the Administrative Procedure Act) governs the procedures to employ in administrative law settings including rulemaking (Article 2A), administrative hearings before the Office of Administrative Hearings (Article 3), "other administrative hearings" (Article 3A), and judicial review of administrative hearings (Article 4). This article focuses on "other administrative hearings," which practitioners commonly refer to as Article 3A hearings.

Determining Whether Your Case Falls Under Other Administrative Hearings

For the practitioner new to administrative law, the starting point is determining whether the hearing will take place before the administrative board or agency, or take place before the Office of Administrative Hearings. Often the answer is not readily apparent. The practitioner should look to N.C.G.S. Section 150B-38 for guidance when faced with that question. "Other administrative hearings" include occupational licensing agencies (such as the Medical Board, State Board of Examiners of Plumbing, Heating and Fire Sprinkler Contractors, the Real Estate Commission etc.), the State Banking Commission, the Department of Insurance, and others. N.C.G.S. Section 150B-38(a). Such cases typically arise from illegal activity by a licensee that triggers a disciplinary proceeding or from the denial of a license or permission to take an exam to an applicant for reasons such as issues of character, experience or education.

Prehearing Procedure

Prior to taking action, the agency is required to provide an "opportunity for hearing without undue delay" and provide notice at least 15 days prior to the hearing. See N.C.G.S. Section 150B-38(b). The notice must contain a statement of the date, time, place and nature of the hearing, and include a reference to the statutes and rules involved, and a short, plain statement of the facts alleged. Some agencies calculate the notice to provide no more than 15 days notice and deny continuance requests. Some boards provide a less formal conference that precedes the Article 3A hearing. Counsel is recommended for any type of conference

The practitioner may wish to confirm proper service was made. The notice must be served personally, by certified mail, or, in the event that notice cannot be given personally or by certified mail, by publication. N.C.G.S. Section 150B-38(c). A party who has been served with a Notice of Hearing is allowed but not required to file a written response that must be mailed to all of the parties at least 10 days prior to hearing. N.C.G.S. Section 150B-38(d). If intervention and joinder are issues of interest, motions can be made under N.C.G.S. Section 150B-38 and addressed to the attention of the presiding officer. However, intervention is rare and the parties are typically the board staff and the licensee or applicant, and not the complainant.

Having confirmed that the agency in question falls under Article 3A, and dealt with the need for any responsive motions, the next step a practitioner should take is to locate the rules adopted by that agency which will govern the conduct of the hearing. These rules are required by N.C.G.S. Section 150B-38(h). These rules are often available online, either on the Web site maintained by the Office of Administrative Hearings or directly on the agency's Web site. The Web sites of most, if not all, Article 3A agencies may be located through the official Web site of the state of North Carolina, *www.ncgov.com.* These rules and the particular agency's governing statute need to be reviewed for both procedural matters and substantive issues such as definitions, lists of prohibited acts and other requirements which may be at issue during the hearing. Some boards have detailed statutes with rules, while the reverse is true for others.

The Discovery Process

All hearings conducted under Article 3A are open to the public. Given the typically short period of notice prior to hearing, attorneys often find themselves scrambling to prepare, in contrast with the more extended periods for discovery allowed in Superior Court. A practitioner who finds him or herself in the situation of having to prepare on short notice, should place a call to the attorney for the agency in question as soon as is practicable. It is the writer's experience that those attorneys are often a valuable resource and are willing to share the procedures and customs of the particular agency. In addition, many counsel are willing to provide necessary information via informal discovery that may enable one to get up-to-speed more quickly. Opposing counsel are also often the starting point for discussing any possible continuance. In addition to informal discovery options, the Administrative Procedure Act provides for more formal discovery under N.C.G.S. Section 150B-39, which allows for the taking of depositions, the subpoena of records and the service of interrogatories and requests for production of documents. If the discovery request deals with an identifiable agency record involving a material fact in the contested case, then the agency is required to "promptly provide the record" to the requesting party (N.C.G.S. Section 150B-39(b). The reality is that informal discovery is the prevalent method in Article 3A proceedings because of the short time before hearing.

Other Pretrial Matters

Many agencies encourage settlement discussions. Each agency handles negotiations differently and an understanding of the agency's methods of settlement is essential. Opposing counsel is often a primary resource for outlining possible settlement mechanisms that may include consent orders containing suspended sanctions, referrals to substance abuse programs, requirements of additional education or resolution of consumer concerns.

If one desires to subpoena witnesses or documents to the hearing, one should request that the presiding officer issue subpoenas in the name of the agency pursuant to N.C.G.S. Section 150B-40. If third parties refuse to honor the subpoenas, the presiding officer has the authority to initiate Show Cause proceedings to the Superior Court in the applicable county. With regards to the issuance of subpoenas, the practitioner should carefully review N.C.G.S. Section 150B-39(c), that incorporates Rule 45 of the Rules of Civil Procedure and addresses

efforts to quash subpoenas and witness fees.

Certain agencies use informal hearings/settlement conferences at the front end of the process, prior to the issuance of a Notice of Hearing for an official board action. The North Carolina Board of Dental Examiners, the North Carolina Medical Board and various contractor boards use settlement conferences in some form. The use of the word "conference" can be deceptive. In such cases, it is advisable for the respondent to obtain representation at the earliest possible moment to assist in preparation for and attendance at those settlement conferences/informal inquiries. A failure to adequately prepare for these informal conferences can be a lost valuable opportunity.

Under N.C.G.S. Section 150B-40, the presiding officer may also direct the parties to confer to conduct a prehearing conference to consider simplification of the issues. Such conferences often involve the exchange of exhibits and witness lists. The presiding officer may also set deadlines for the filing of any briefs or motions prior to the hearing under N.C.G.S. Section 150B-40(c).

The Hearing

If efforts at settling the matter have failed, the next step is the hearing itself. Formal hearings under Article 3A are governed by N.C.G.S. Section 150B-40 which seeks to ensure a fair and impartial hearing. The agency and all parties must be given an opportunity to present evidence, examine witnesses, submit evidence and present arguments. A failure to attend a hearing despite proper service, subjects a party to a hearing being conducted in their absence. N.C.G.S. Section 150B-40(a). The hearings are conducted before a majority of the agency. N.C.G.S. Section 150B-40(b).

It is advisable to attempt to learn the identity of the members who will be sitting on the hearing panel prior to hearing. This enables counsel to ensure bias is avoided. If personal bias or prejudgment of a particular member is at issue, it is appropriate to file with the presiding agency member a motion with supporting affidavits to disqualify the particular member. For a thorough discussion of concerns regarding bias of members, see **Farber v. N.C. Psychology Board,** 153 N.C. App. 1, 569 S.E.2d 287 (2002), cert. denied, 356 N.C. 612, 574 S.E.2d 287 (2002). When evaluating concerns of bias or prejudgment, be sure to review the prohibitions on review of materials or discussions with possible witnesses by panel members prior to the hearing. N.C.G.S. Section 150B-40(d)

Among the powers given to the presiding officer regarding the conduct of the hearing is the ability to administer oaths, to allow the taking of testimony by deposition, and to rule on prehearing motions. N.C.G.S. Section 150B-40(c). An agency may elect to refer a matter to the Office of Administrative Hearings rather than hearing the matter itself pursuant N.C.G.S. Section 150B-40(e). Such referrals are not frequently utilized.

During the hearing, the Rules of Evidence, as applied in the trial division of the General Court of Justice, are to be followed and irrelevant, immaterial and unduly repetitious evidence is to be excluded. N.C.G.S. Section 150B-41(a). However, when evidence is not otherwise reasonably available, a party may utilize "the most reliable and substantial evidence available." N.C.G.S. Section 150B-41(a). Objections to evidence at the hearing are preserved for appeal without the need to make actual objections during the hearing. N.C.G.S. Section 150B-41(a). A record of the hearing, including testimony and documentary evidence, must be maintained by the agency and will become the basis for any necessary appeal. N.C.G.S. Section 150B-41(b). (See also, N.C.G.S. Section 150B-42 regarding the official record.) In many administrative hearings, the parties will stipulate that testimony may be received by affidavit, signed letters of support, or similar documents to avoid inconveniencing witnesses and to allow for a more efficient hearing. If counsel intends to rely on such documents, it is advisable to secure agreement with agency counsel prior to the hearing that there will be no objection to the offer of such evidence.

Stipulated facts are permissible under N.C.G.S. Section 150B-41(c). In addition, official notice may be taken as to facts within the "specialized knowledge of the agency," and an agency may use its "experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it." N.C.G.S. Section 150B-41(d). For a discussion of the types of specialized knowledge which an agency may possess, see **Watkins v. N.C. State Board of Dental Examiners,** 358 N.C. 190, 593 S.E.2d 764 (2004), and **Leahy v. North Carolina Board of Nursing,** 346 N.C. 775, 488 S.E.2d 245 (1997)

Following the conclusion of the hearing, the agency is required to make a written decision under N.C.G.S. Section 150B-42. The decision must include findings of fact and conclusions of law. The findings of fact must be based on matters either in evidence or officially noticed. The decision is to be based upon consideration of the record as a whole and be supported by "substantial evidence admissible under N.C.G.S. Section 150B-41." A copy of the order must be served upon each party, either personally or by certified mail, and shall be furnished to any party's attorney of record. N.C.G.S. Section 150B-42(a).

Prior to the end of the hearing, it is often possible to obtain from either the panel or opposing counsel a likely timetable for the issuance of the decision. Certain agencies issue rulings immediately after briefly conferring with one another following the close of all evidence and others issue the decisions days or weeks later. The effective date of the order may be different than the date it is signed. If a party is dissatisfied with the results of the hearing, he or she should consider the rights arising under the judicial review provisions of Article 4 of the Administrative Procedure Act, as well as motions to reconsider. Note reconsideration is sometimes a possibility when counsel is not contacted until after the hearing. The agency is not requested to produce a transcript except in conjunction with the Record on Appeal, a fact that impacts strategic decisions after a hearing.

Conclusion

Practicing in the area of administrative law in the context of Article 3A agencies can be an exciting and rewarding area of practice. The practitioner often has the opportunity to make a real difference in representing his client's interests and bringing out facts in evidence which might otherwise go unnoticed by the agency in question. In addition, there is often an informal, collegial aspect to this practice area as contrasted with the more formal Superior Court proceedings. While all of the above can be rewarding, there are pitfalls awaiting the practitioner who fails to stay abreast of the applicable rules and statutes of each agency and fails to recognize that each agency under Article 3A has different attitudes, expectations and procedural nuances. To effectively represent a client in this arena, one must be willing to do the necessary homework and to proceed quickly with preparation once the matter has come into the office. ■

FOUNTAIN PRACTICES WITH YOUNG MOORE AND HENDERSON, P.A., IN RALEIGH.

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Background

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