Coates' Canons Blog: Administrative Modifications in Subdivision and Zoning Ordinances

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In an effort to be business-friendly and to avoid a bunch of extra hearings, city council wants to allow the subdivision review officer to vary the subdivision standards when there is good reason to do so. But, the statutes say that a variance from the ordinance must be granted by the board of adjustment and only after a quasi-judicial hearing. Can city council authorize administrative modifications to the ordinance? This blog explores that question in light of a recent court decision regarding subdivision plat approval.

Distinguishing Quasi-Judicial and Administrative

From the start we must distinguish between two different types of decisions: administrative decisions and quasi-judicial decisions. I have written previously about this distinction for subdivision plat approvals.

Administrative decisions are decisions based on clear, objective standards in the ordinance (standards like "a setback of 10 feet," "¼ acre minimum lot size," and "industrial uses prohibited"). Administrative decisions are routine and nondiscretionary. There is no need for a hearing. Administrative decisions may be made by a staff person, an appointed board, or an elected board.

Quasi-judicial decisions are based on subjective standards in the ordinance (standards like "the development is in harmony with the area," "the building is congruous with the character of the district," and "there is an unnecessary hardship"). Quasi-judicial decisions apply a subjective standard to a certain set of facts. The decision-maker must "exercise discretion of a judicial nature." As such, quasi-judicial decisions require an evidentiary hearing and they must be made by an appointed or elected board, not an individual staff person.

Variances

Under General Statute 160A-388(d), "[w]hen unnecessary hardships would result from carrying out the strict letter of a zoning ordinance, the board of adjustment shall vary any of the provisions of the ordinance." The statute then goes on to outline a subjective standard for "unnecessary hardship" (discussed in more detail here). By the nature of the standard, variance decisions are quasi-judicial. If other ordinances regulating land use or development (such as a subdivision ordinance) provide for variances, they must follow the standards and provisions outlined at 160A-388(d).

Butterworth Case

In the case of Butterworth v. City of Asheville, __ N.C. App. __, COA15-919 (May 17, 2016), the city code called for the planning commission to make preliminary plat decisions as an administrative (or ministerial) act. But the code also allowed modifications under certain circumstances. A developer applied for a subdivision plat approval. City street standards required a forty-five foot rights-of-way, but the developer sought approval for streets with only twenty-five foot rights-of-way. The technical review committee reviewed and recommended approval of the preliminary plat with the modification for narrower streets. The planning commission held a public meeting, heard a presentation from the city's urban planner giving the recommendation of the technical review committee, and allowed public comment from concerned citizens including the neighbors. The planning commission approved the preliminary plat with the street modification. As stated in the court decision, the commission believed that it was acting in a ministerial capacity, believing that it had to approve the plat with modification since the city staff had reviewed and recommended approval.

Neighbors challenged the decision, arguing that the planning commission should have followed quasi-judicial procedures because the decision was quasi-judicial, not ministerial, in nature. The code allowed for street modification in cases of "physical hardship." Physical hardship was defined as "those cases where because of the topography of the tract to be subdivided, the condition or nature of adjoining areas, or the existence of other unusual physical characteristics, strict compliance with the provisions of [the] chapter would cause unusual and unnecessary hardship on the subdivision of the property by [the] property owner or developer."

The court reiterated that such a standard—determining if a hardship is "unusual and unnecessary"—requires the exercise of judgment and discretion, and thus is quasi-judicial in nature. The planning commission failed to follow the necessary fair trail procedures for a quasi-judicial decision.

Administrative Modifications

So what about administrative modifications? The court did not strike down administrative modification. The court found that the particular standard in the Asheville code was quasi-judicial. The court, though, emphasized that ordinances may have administrative modifications as long as those modifications "involve[] the application of specific, neutral, and objective criteria as set out in the municipality's governing code."

The court offered a clarifying footnote: "Our holding is not to be construed to deem all allowances of modifications, variances, or special uses, whether under Asheville's Code or any other local land use regulation, as quasi-judicial decisions." The court went on to identify acceptable administrative modifications in the Asheville code that include specific, neutral, and objective criteria "such as the limitation of a deviation not in excess of 'up to ten percent or 24 inches . . . from the approved setback,' or a reduction of no more than '25 percent in the number of parking spaces required[.]'"

Take Away

So where does this leave us? The zoning ordinance must—and other development ordinances may—provide for variances granted by the board of adjustment. But, variances require a quasi-judicial hearing and the applicant must meet a high statutory standard for hardship.

A development ordinance may also allow for administrative modifications. The administrator must not have unbridled discretion of a modification; the ordinance must include specific, neutral, and objective criteria for the modification. In order to be clear about the distinction, it is helpful to call an administrative modification something other than a "variance." Reserve the term "variance" for those quasi-judicial decisions (variances) governed by 160A-388.

Need more? If you are interested in subdivision approvals, including quasi-judicial standards and administrative modifications, check out our upcoming half-day Subdivision Workshops (multiple locations in Oct/Nov) and multi-day Subdivision Practice (Chapel Hill in January).

Links

- canons.sog.unc.edu/subdivision-plat-approval-what-type-of-decision-is-it/
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-388.html
- canons.sog.unc.edu/variance-standards-what-is-hardship-and-when-is-it-unnecessary/
- appellate.nccourts.org/opinions/?c=2&pdf=33898
- www.sog.unc.edu/courses/2016-regional-board-workshops-planning-and-development-regulation#!/
- www.sog.unc.edu/courses/subdivision-practice