
Coates' Canons Blog: BOA Changes Are Coming

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Many folks have never heard of zoning board of adjustment, but this is a critically important piece of the local development regulation machinery. Every year these boards hear and decide hundreds of appeals of the interpretation of ordinances made by staff administrators – such as whether an alleged violation is really a violation or whether a proposed land use or project design really meets the ordinance requirements. This board has the power to issue authorization to landowners to develop in ways contrary to the letter of the law – the variance power. Many of these boards make final decisions on special or conditional use permit applications. Boards of adjustment (often referred to as the BOA) may not get the public attention that comes along with a high-profile rezoning debate before the city council, but their work has a significant practical impact on landowners, developers, neighbors, and anyone else concerned about how land development regulations are applied.

The statute creating boards of adjustment and setting their authority was first adopted in North Carolina in 1923. Over the decades the statute has been frequently adjusted – some 17 times by my quick count. The result was a nearly century old statute with its original language largely intact, supplemented with dozens of uncoordinated individual legislative tweaks added over the decades.

Come October, however, we will have a modernized board of adjustment statute. The new law does not drastically alter the fundamental aspects of the prior law. Rather it focuses on providing greater clarity, creating standardized procedures for key actions, and generally providing more certainty and predictability about the processes used by boards of adjustment. This post reviews how that came about and summarizes the changes it will make in the law.

H.B. 276, AN ACT TO CLARIFY AND MODERNIZE STATUTES REGARDING ZONING BOARDS OF ADJUSTMENT, was co-sponsored by Rep. Skip Stam (R-Wake) and Rep. George Graham (D-Lenoir). In what is likely a first for a bill addressing zoning reform – a contentious topic that often leaves builders, neighborhood advocates, and local governments at odds – the bill moved through the entire legislative process without a single dissenting vote. It received unanimous support from the House Government Committee, the full House of Representatives (a 119-0 vote), the Senate Commerce Committee, and the full Senate (a 47-0 vote). It has been ratified and only awaits the Governor's signature to become law. Assuming the Governor signs off, it will become effective on October 1, 2013. [*Update*: The bill is now law: S.L. 2013-126.]

How does a bill on such a contentious topic, a bill that makes substantive adjustments to a well-established and heavily used law, get through the legislature so smoothly? While many factors go into such a result, two warrant particular note here – the process that was followed and the substantive reforms incorporated.

Development of the BOA Reform Proposal

The bill originated as a proposal from the North Carolina Bar Association, specifically the Bar's Zoning, Planning, and Land Use Section. Working through several committees of attorneys with decades of experience representing developers, local governments, and neighbors on zoning issues, bill drafts were crafted in the summer and fall of 2012. What began as a modest effort to fix a few glaring practical shortcomings in the statute gradually expanded to a line by line review aimed at a complete modernization of the statute.

An early decision to make the reform effort as open, transparent, and inclusive as possible played an important role in the bill's legislative success. Bill drafts were distributed to successively broader groups – the full membership of the Zoning, Planning, and Land Use Section of the Bar Association, the Bar's Government Law Section membership, and all city and county attorneys. Drafts were sent to key interest groups, including the North Carolina Homebuilders Association, the North Carolina Chapter of the American Planning Association, the North Carolina Association of Zoning Officials, the

League of Municipalities, the Association of County Commissioners, and various industry groups. At each step a detailed, footnoted explanation of each proposed edit to the statute was provided, along with a request for comments and suggestions. Every comment received was thoughtfully considered and many additional refinements to the statute were identified and incorporated into the bill through this consultative process. Not every suggestion was accepted. Some provisions were retained that did not have the unanimous support of all interest groups. But a good faith effort was made to consult with everyone who would be affected, to fully explain the purposes of each edit, to incorporate as many constructive suggestions as possible, and to have a thoughtful rationale for addressing each comment received. The result was a bill crafted by talented lawyers with decades of practical experience, vetted by affected parties, and inclusive of ideas for improvements suggested from all corners.

This nonpartisan, inclusive approach carried over to the General Assembly. The two principal bill sponsors, Reps. Stam and Graham, are respectively a member of the Republican leadership with extensive municipal land use law experience and a Democrat who had served as a county commissioner for twenty years. Sen. Tamara Barringer (R-Wake), another lawyer knowledgeable in these issues, managed the bill in the Senate. The fact that all affected parties had been consulted, that they understood what was being proposed and why, and that their concerns had been discussed and largely addressed was a critical factor in the eventual unanimous support for the bill in the legislature.

What the Bill Changes

Once the bill becomes law, the School of Government will post a detailed description and checklist for changes that will need to be made to zoning ordinances to bring them into conformance with the law. What follows are the highlights of the bill.

The Bar Association committee made an early decision that was critical to the bill's success in the legislature – the proposal would only include “good government” reforms for which broad consensus support could be reached. Suggestions were incorporated to improve the clarity, accessibility, organization, and practical application of the law. Suggestions designed primarily to improve the chances of success for a particular interest group were not included, the committee concluding that those amendments should be proposed as separate bills directly by the interests involved.

Amendments to the board of adjustment statute made by this bill can be placed into three groups of changes.

The first is a set of numerous stylistic and organizational changes to clarify the statute. The bill modernizes the language in the statute. Outdated, awkward, and confusing language and syntax are removed. Gender neutral language is used throughout. Related provisions are consolidated into coherent sections and section headings are provided for readability. The separate section on boards of adjustment in the county statutes is replaced with a single section applicable to both cities and counties, removing current and future city-county differences.

The second group of changes is largely technical in nature, but should simplify operations for boards of adjustment. For example, clerks to the board are authorized to administer oaths to witnesses, the process for requesting and objecting to subpoenas is clarified, the provisions on judicial review updated to incorporate recent legislation on judicial appeals, and case law regarding the necessity to follow quasi-judicial procedures is codified.

The third group of changes incorporates a variety of consensus modernizations and uniformity provisions. A uniform notice requirement for hearings on quasi-judicial matters is added (a mailing to the owner of the affected property and adjacent owners plus posting on site). Appeals to the board must be filed within 30 days of notice of a final, binding administrative decision. When the zoning administrator makes a determination affecting a property, the land owner is given the option of posting notice of the determination on the site to provide constructive notice to those who may wish to appeal that determination to the board of adjustment. Zoning officials whose determinations are appealed are required to appear as witnesses at the appeal hearing. Alternative dispute resolution for appeals is authorized. Variances and appeals to the BOA are authorized, but not required, for land development regulations other than zoning ordinances. The four-fifths majority vote is retained for variances, but only a simple majority is required for ordinance interpretations and for special and conditional use permits (a change made decades ago for governing board and planning board decisions on SUP and CUP decisions). The standard for variances is further defined, deleting the “practical difficulty” language, defining what constitutes “unnecessary hardship,” and continuing the prohibition on use variances. This is potentially one of the more significant substantive changes and will be discussed further in future posts. Board decisions must be made in a reasonable time, reduced to writing, reflect the board's determination of contested facts, and be signed by the board



chair. A clearer effective date for decisions is defined.

Taken together, these amendments do not drastically alter the fundamental nature of the board of adjustment, its duties, or its mandated procedures. The rewritten statute does provide greater clarity and mandates more uniform procedures around the state. To date most observers consider this to be helpful for those regulated by zoning, neighbors affected by the decisions, and the administrators and board members charged with administration of the ordinances. Time and experience with the new BOA statute will tell if that indeed proves to be the case.

Links

- www.ncleg.net/Sessions/2013/Bills/House/PDF/H276v5.pdf
- www.ncleg.net/Sessions/2013/Bills/House/PDF/H276v6.pdf