Coates' Canons Blog: Can the neighbor speak? Can the neighbor appeal? Standing and quasi-judicial hearings

By Adam Lovelady

Article: https://canons.sog.unc.edu/can-neighbor-speak-can-neighbor-appeal-standing-quasi-judicial-hearings/

This entry was posted on September 27, 2016 and is filed under Land Use & Code Enforcement, Quasi-Judicial Decisions, Zoning

A local development board is set to hold a quasi-judicial hearing for a development permit. The neighbor across the street from the proposed project is set to oppose it. She wants to voice her concerns in the quasi-judicial hearing—and appeal to court if necessary. Does the neighbor have a right to participate in the hearing? What about a right to appeal the decision? This blog considers those questions in light of North Carolina caselaw including a recent decision from the state Court of Appeals.

The situation described above is the situation that played out in a dispute over a contemporary house in a Raleigh historic district, the case of *Cherry v. Wiesner* (781 S.E.2d 871 (N.C. Ct. App. 2016), review denied, No. 103P16, 2016 WL 4468152 (N.C. Aug. 18, 2016)). A property owner applied to build a contemporary home in a historic district. After the preservation commission granted the certificate of appropriateness, the neighbor across the street appealed the decision to the board of adjustment. The board of adjustment reversed the decision of the preservation commission. The property owner and the city appealed to superior court claiming, among other things, that the neighbor lacked standing to appeal. The superior court agreed that the neighbor lacked standing and affirmed the approval from the preservation commission. Subsequently the N.C. Court of Appeals upheld the superior court decision, and the N.C. Supreme Court denied a request for review.

The *Cherry* case garnered national media coverage focused on the appropriateness of contemporary design and the possibility of enforcement against a nearly-finished house (including Vanity Fair and The New York Times). In the end, though, the court decision did not address substantive questions of congruity or evidence. Rather, the court decision centered on the question of standing: Does the neighbor have a legal right to appeal the decision? The Court of Appeals ruled that in this case the neighbor did not. The neighbor had the opportunity to present information to show standing, but failed to do so.

The holding and additional commentary from the court raise questions for quasi-judicial hearings generally. The discussion below seeks to address several overlapping issues of standing: distinguishing between *participation* and *standing*; determining when a standing determination is needed; when does a party make their case for standing and who decides the issue; and what evidence is needed to show special damages and establish standing.

Note that this discussion is focused on standing in quasi-judicial zoning decisions and appeals from various land use decisions. Participation in public hearings for legislative zoning decisions such as amending the ordinance or rezoning property is a separate discussion. My colleague David Owens has discussed aspects of participation in legislative zoning decisions here.

Participation

It is necessary to separate two related but separate issues: the ability of an individual to participate in a quasi-judicial hearing and the rights of an individual to act as a party with legal standing.

Many different individuals participate in a hearing without standing. Consider a quasi-judicial evidentiary hearing for a conditional use permit. Planning staff introduces the application and provides staff analysis of the project. The staff-person does not have legal standing, but provides important evidence and analysis for the board. The applicant may call a variety of witnesses or experts to testify on their behalf. These individuals do not have individual standing, but provide testimony and argument on behalf of the applicant who clearly does have standing.

Many boards allow interested individuals to provide sworn testimony even though they have not established legal standing. The board is ***not required*** to hear from those individuals without standing, but the board ***may allow*** such individuals to provide competent, relevant, and substantial evidence on the matter. Indeed, a board seeking to make the best decision may welcome additional testimony. Preservation commissions even have statutory authority to seek outside experts (NCGS 160A-400.9(d)). David Owens previously blogged about who gets to speak at a quasi-judicial hearing.

Standing

In contrast to participation, relatively few individuals have legal standing in the quasi-judicial decision. A party with standing is an aggrieved party that would suffer special damages from the outcome of the matter. They are distinct from the general public and enjoy certain due process rights that must be protected.

General Statute 160A-393 outlines the rights and procedures for appealing a quasi-judicial decision. It sets forth the following persons that have standing to appeal. This guidance is also instructive for determining standing in the initial quasi-judicial hearing.

- A person with a legal interest in the subject property (this might include ownership; lease interest; an option or contract to purchase the property; or an interest created by an easement, restriction, or covenant)
- The applicant before the decision-making board
- The city or county when the governing board believes the decision was made in error
- A person who will suffer special damages as a result of the decision
- An association organized to promote the interests of a particular area (such as a homeowners association or community association) so long as at least one member would have standing as an individual and the association was not created in response to the development at issue

When does standing matter?

A party must have due process rights in the proceeding to take certain actions. So, standing matters when an individual wants to assert one of those legal rights. Otherwise the proceedings could infringe on the constitutional due process rights of the individuals who do have standing in the matter.

An individual must have standing to:

- Appeal a staff decision to the board of adjustment
- Appeal a preservation commission decision to the board of adjustment
- Act as a party in the quasi-judicial hearing, including to
    - cross-examine witnesses
    - object to evidence
    - offer rebuttal
    - challenge the impartiality of a decision-maker
- Appeal a quasi-judicial decision to superior court
- Intervene in an appeal to superior court

Does an individual have to establish standing in order to participate as a witness? As discussed above, the board may allow individuals to participate (and many boards do), but those individuals do not have a right to participate. Indeed, a board could limit participation to only those individuals with standing. Regardless, mere participation in the hearing does not establish formal legal standing in the hearing.

When is standing determined? And by whom?

As for timing, standing should be addressed in advance of the action the individual is seeking. Oftentimes the question of standing is simple: The individual has standing as the property owner or applicant. Other times standing is not straightforward and the individual must offer evidence to prove standing. An application for an appeal to the board of adjustment should require a statement and substantiation of standing. The board, then, may hear additional evidence and rule upon standing at the start of the hearing. During a quasi-judicial hearing, if a participating individual attempts to act as a party (examples listed above), the board may request evidence for and rule upon standing before the individual asserts those rights.

Standing is a legal question to be determined by the board. Local government staff cannot decide questions of standing (*Morningstar Marinas/Eaton Ferry, LLC v. Warren Cty.*, 368 N.C. 360 (2015)). If a board does not rule formally on the question of standing but allows an individual to proceed as a party, it has implicitly ruled that the party has standing, as found in the *Cherry* decision.

If standing is an issue on appeal to superior court, the court "may, in its discretion, allow the record to be supplemented . . . " (NCGS 160A-393). The court is not required to allow a party to supplement the record, but the court may. In *Cherry*, for example, the neighbor argued that she did not have an opportunity to allege standing before the board of adjustment, and she sought to supplement the record to support her claim of standing. The court found that the neighbor had opportunity to allege standing in her application to appeal before the board of adjustment. The application form provided ample notice and explanation of the requirements for alleging standing. The superior court was not required to permit supplemental evidence, and there was no evidence of abuse of discretion.

Proving special damages

In *Cherry*, the initial application asked the neighbor to explain how she was an aggrieved party. The neighbor stated that she was a resident adjacent to the subject property, that the proposed house was incongruous with the neighborhood, and that the house would harm neighborhood value. The court ruled that the evidence was insufficient to establish standing: "[T]hese allegations do not demonstrate special damages distinct to respondent, other than the view from her front porch; rather, respondent alleges a generalized damage to the overall neighborhood."

So then, what is sufficient to establish standing? North Carolina caselaw has not established a clear rule for this. Rather, each case is a fact specific inquiry based on a set of factors including proximity, property value, and other adverse impacts. The central question is this: Has the party who claims standing shown that their damages are distinct from those damages to the public at large?

Proximity is a factor in standing, but not determinative. As noted in the case *Mangum v. Raleigh Bd. of Adjustment* (362 N.C. 640, 644 (2008)), while proximity "in and of itself, is insufficient to grant standing, it does bear some weight on the issue of whether the complaining party has suffered or will suffer special damages distinct from those damages to the public at large."

In *Cherry* the neighbor challenging the certificate of appropriateness lived directly across the street. Such proximity was insufficient to convince the court of standing in this dispute over historic district character and congruity of new structures. This case raises a vexing question, beyond the scope or space of this blog, about standing and preservation regulations. If a regulation is rooted in and justified by aesthetics, does not the visual impact of a new project on a neighbor count as an adverse impact sufficient to establish standing?

Property value is a factor in standing, but not determinative. As noted by the *Cherry* court, "[u]sually, special damages include economic damages such as a decrease in property value and other direct adverse effects on the property . . . ." But, NC courts have found standing without an allegation of diminution in property value. In the *Mangum* case the neighbors did not directly allege loss of property value but the court still found standing. (The dissent cited prior caselaw as it argued that evidence of diminution in property value is necessary to allege standing.)

Even with an allegation of diminution in property value, that may be insufficient to establish standing. In the *Cherry* case, the court did not allow additional affidavits for the neighbor's standing argument. The Court of Appeals noted that even if it

had allowed the affidavit from an appraiser predicting loss of vales, that affidavit was insufficient without identifying some secondary impacts such as traffic, noise, light, odors, runoff, or other potential damages generated by the use of the subject property.

Additional adverse impactsneed to be shown by the party alleging standing. As noted in *Lloyd v. Town of Chapel Hill* (127 N.C. App. 347 (1997)), in order to establish standing the individual must do more than state that they live in the vicinity of the subject property and allege that the project will harm property values. The party must allege some secondary impacts. These impacts may be key factors in property value loss. The essential element is a credible allegation of harm to the use and enjoyment of a particular property.

In *Mangum*, neighbors challenging a permit for an adult business alleged adverse impacts on their property, including problems related to parking, safety, security, stormwater runoff, littering, and noise. The court accepted those impacts as sufficient to establish standing, even without directly alleging property value damage.

In *Bailey & Associates, Inc. v. Wilmington Bd. of Adjustment* (202 N.C. App. 177 (2010)), neighbors sought to intervene at superior court challenging a property owner's right to develop without adhering to conservation performance standards. Following the reasoning of the *Mangum* decision, the court found that the neighbors had standing based on a combination of proximity and potential injury. The intervenors owned property contiguous to the subject property or in the immediate vicinity; intervenors accessed their property by one road, the same road accessing the subject property; and the proposed increase in density on the subject property would significantly increase traffic, light pollution, noise and other related pollution that would all lead to a pecuniary loss in the value.

Conclusion

A quasi-judicial board may allow an individual to participate as a witness in an evidentiary hearing, and commonly boards do, but the board is not required to allow an individual without standing to participate. If an individual wants to take certain actions and act as a party in the matter, then that individual must establish formal legal standing. For some individuals—such as the property owner or the applicant—standing is straightforward. For other individuals, they must establish standing by showing that they would suffer special damages from the proposed project. Proximity, property value, and other adverse impacts are each factors to determine standing, but none are determinative

Links

- appellate.nccourts.org/opinions/?c=2&pdf=33184
- www.vanityfair.com/culture/2014/04/oakwood-teardown-historic-district
- www.nytimes.com/2014/07/13/opinion/sunday/is-an-ugly-house-grounds-to-sue.html?_r=0
- canons.sog.unc.edu/can-time-limits-be-imposed-on-speakers-at-a-zoning-hearing/
- www.ncleg.net/EnactedLegislation/Statutes/PDF/BySection/Chapter_160A/GS_160A-400.9.pdf
- canons.sog.unc.edu/can-i-be-heard-who-gets-to-speak-at-a-hearing-on-a-quasi-judiciial-matter/
- www.ncleg.net/EnactedLegislation/Statutes/PDF/BySection/Chapter_160A/GS_160A-393.pdf
- appellate.nccourts.org/opinions/?c=1&pdf=33676
- appellate.nccourts.org/opinions/?c=1&pdf=755
- appellate.nccourts.org/opinions/?c=2&pdf=5138