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## Coates' Canons Blog: Can We Continue this Zoning Hearing?

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The county board of commissioners is holding a public hearing on a controversial rezoning. The hearing has been going on for an hour and there are many interested citizens waiting to speak. The board chair knows the agenda for the meeting following the hearing is packed with a number of other important items that will generate a good deal of board discussion. She thinks it might be prudent to call a halt to the rezoning hearing this evening and continue with additional citizen comments at the board's next meeting. Can the board do that? If so, would the county have to go to the expense of additional mailed and published notice of the continued hearing?

The city council is conducting a hearing on a special use permit application. One of the witnesses the applicant planned to have testify is unable to attend the hearing. The applicant appears and asks that the hearing be continued to the next meeting so that the witness can attend. Is the council required to extend the hearing? Or suppose neighbors opposed to a special use permit application present some interesting, relevant testimony about potential negative impacts of the project. One of the council members suggests it would be useful to have staff investigate that question and report back at the next meeting. Can the hearing be continued to allow that? Or to make matters even more complicated, suppose the council has closed the hearing on a special use permit application and in the midst of council deliberations a member suggests reopening the hearing to get more evidence on a question that arose during the deliberations. Can that be done?

In many instances the board making a zoning decision conducts a hearing, discusses the matter, and then votes on it in the same meeting. But it is also not uncommon that the board wants to consider continuing a zoning hearing. This can generally be done, but the board must be careful how it is done.

As with most zoning questions, it is important to distinguish legislative and quasi-judicial zoning decisions. Both require hearings and allow them to be continued, but different factors to be considered in the process.

### Legislative decisions

When a city council is considering adopting, amending, or repealing a zoning ordinance, state statutes require a properly advertised public hearing. G.S. 160A-364, 153A-323. For a rezoning, in addition to two notices published in the newspaper, a notice of the hearing must be mailed to the owners of the affected and adjacent properties and posted on the site. G.S. 160A-384, 153A-343. In addition to the cost of providing notice, the landowner and neighbors have often expended considerable time and effort to attend the hearing and present their views for the consideration of the governing board. For those reasons, many boards attempt to hear all comments at the advertised hearing.

Sometimes there are clearly more comments to be presented than the board has time to hear. In other instances some information the landowner or neighbors want to present is not available at the time set for the hearing. Or board members may request more information on a particular point. In these instances the board is not required to continue the hearing, but may do so at its discretion. State statutes allow city and county governing boards to continue a legislative hearing without further advertisement, provided the time and place of the additional hearing is announced at the initial hearing. G.S. 160A-81, 153A-52. The open meetings statute further provides that no additional notice is required if a duly advertised official meeting (which would include a zoning hearing) is recessed and the time and place of the recessed meeting is announced during the initial meeting. G.S. 143-318.12(b)(1). Additional notices can be made if the board thinks that would be useful, but it is not legally required. It is very important to note, however, that if the time and place of the continued hearing are not announced before the initial hearing is closed, all of the required notices will have to be made for the second hearing.

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Also, if the board wants to consider taking an action that is substantially different from the proposed action that was originally advertised, a new hearing with new notices is required. *Heaton v. City of Charlotte*, 277 N.C. 506 (1971). This is discussed in more detail in a **previous post**.

So in our example, the board can certainly entertain a motion to continue the rezoning hearing to a specified future date and place. As long as the board adopts that motion before closing the initial hearing, no additional hearing notice is required provided that the board will still be considering the same or a substantially similar action.

### **Quasi-judicial decisions**

The question of extending or continuing the evidentiary hearing required for a quasi-judicial zoning decision (a special or conditional use permit or a variance) is essentially similar, but without the detailed statutory guidance provided for legislative decisions. There are, however, some constitutional factors that must be considered with these decisions.

An initial consideration is that the applicant for approval of a quasi-judicial action has the legal burden to present sufficient evidence at the hearing to allow the board to make the evidentiary findings needed to approve the application. If the applicant fails to do so, the board can deny the application without extending the hearing. If a continuance is requested, the board has the discretion to do so and usually will if there is a good cause presented to do so. For example, if the applicant is ill or a key witness is unavailable, the board should upon a timely request continue the hearing. If on the other hand the applicant or an opponent is simply not prepared at the scheduled hearing, the board may allow additional time but is certainly not required to do so.

As with legislative matters, if a decision to extend or continue the hearing is made prior to the close of the initial hearing and the time and place of the additional hearing is announced, no additional notice is required. G.S. 143-318.12(b)(1). Once the hearing is closed, however, the affected parties have a constitutionally protected due process right to have a decision made solely on the basis of evidence properly in the record. The board is not allowed to take any new evidence between closing the hearing and making its decision. *Ballas v. Town of Weaverville*, 121 N.C. App. 346 (1996). The board can continue or postpone its deliberations and vote until a future meeting. *Tate Terrace Realty Investors, Inc. v. Currituck County*, 127 N.C. App. 212 (1997). Deliberation about the evidence and potential conditions to be imposed is allowed subsequent to the closing of the hearing, but not receipt of additional evidence. *In re Application of Raynor*, 94 N.C. App. 173 (1989). If during deliberations the need for additional evidence arises, the board must afford all affected parties with reasonable notice that the hearing will be reopened. If this occurs five minutes after closing the hearing and all the parties and witnesses are still present, the hearing could be reopened immediately. However, if any party has departed or the decision to reopen the hearing to receive additional evidence occurs at a future meeting, notice of the new hearing must be provided in the same manner as the initial hearing.

Once a decision is made on a quasi-judicial matter, it is very difficult to reopen the matter to get additional evidence or to reconsider the matter. The courts long ago held that a board may not rehear a previously decided quasi-judicial matter. *Little v. City of Raleigh*, 195 N.C. 793, 795 (1928). The recourse for a disappointed party is not to ask for a new hearing before the board, but to make a timely appeal to superior court.

So how does this apply to our special use permit example above? If a key witness is absent, the board may continue the hearing until the witness can appear, but is not required to do so. If a question arises during the hearing that board would like to direct the staff to investigate, the hearing can certainly be continued to allow that evidence to be gathered and presented at an announced future time and place for reconvening the hearing. But once the hearing is closed, the board must be extremely careful to protect the due process rights of all affected persons to hear and rebut all evidence to be considered by the board. Protecting those rights may well often require new notice of a reopened hearing. Also, once a quasi-judicial decision has been made, it is generally too late to request the hearing be reopened.



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