Coates' Canons Blog: Do You Have to Swear to Tell the Truth to the Board of Adjustment?

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Hector Peabody is fuming. Several months ago one of his neighbors called town hall and complained that he was running an illegal kennel in his backyard. Sure, he raised plot hounds, kept them in a pen out back and the dogs barked from time to time. Even though he occasionally sold some of the hounds, Hector considered this a hobby. But his neighbor, Mr. Sherman, had called town hall and complained. After inspecting his pens and asking him about his dogs, the town cited Mr. Peabody for a zoning violation. So here he was sitting through a lengthy zoning board of adjustment hearing on his appeal. Now his disgruntled neighbor was going on and on about how many dogs were there, how they howled all night long, and such.

Mr. Peabody finally had enough. He stands up and addresses the board. “Mr. Chairman, I’m sorry to interrupt, but this is just malarkey. Sherman and I had a falling out years ago and he brought this ridiculous complaint just to harass me. I can put up with that. But now he’s lying about my dogs and that’s too much. What he just said is plain wrong. I want you to put this kid under oath or make him sit down and be quiet.”

Apart from the lack of good order and decorum, does Mr. Peabody have a point? Does the neighbor need to sworn in to tell the board what he has seen going on in his neighbor’s back yard?

When the board of adjustment hears an appeal, it is acting in a quasi-judicial capacity. The same is true when it hears a variance or when the town council evaluates an application for a special or conditional use permit. For these quasi-judicial matters, the board must conduct an evidentiary hearing to gather evidence as to the facts of the case. The rules for these hearings are designed to be sure that the ultimate decision is based on good quality, reliable evidence in the record in order to protect the due process rights of the persons affected by the decision.

Sworn testimony is one of the important rules for conducting a valid quasi-judicial hearing. Placing a witness under oath reminds that person that this is a serious matter and they have an obligation speak accurately and truthfully, without speculation or exaggeration. It is a Class 1 misdemeanor for a person to testify falsely under oath in an evidentiary hearing on a quasi-judicial land use regulatory matter. G.S. 160A-388(g) and 153A-345(g); [G.S. 160A-388(f) as of Oct. 1, 2013]. The use of sworn testimony distinguishes these evidentiary hearings from the more familiar and less formal public hearing on a legislative rezoning or other ordinance amendment. In the legislative public hearing a person speaking is free to express their opinion as to the wisdom or desirability of an action, while in an evidentiary hearings the person speaking is a witness testifying as to the facts of the case. The legislative hearing is an opportunity for members of the public to speak their minds and give their opinions. The quasi-judicial hearing is about obtaining and evaluating the evidence necessary for making a fair and legally supportable decision.

Who should be sworn in?

Generally, all persons presenting evidence to a board making a quasi-judicial decision should be under oath. Jarrell v. Board of Adjustment, 258 N.C. 476, 128 S.E.2d 879 (1963). This includes the applicant, neighbors, governmental staff members, and any other person who may be presenting information to the board, such as a surveyor, engineer, or real estate agent.

An oath of office is not a substitute for an oath for testimonial purposes. A zoning administrator or board member may have taken an oath to faithfully execute the duties of their office, but they must take a separate oath for the presentation of evidence.

The same is true for an attorney who is testifying. An attorney for a party sometimes directly presents facts and information to the board (as opposed to simply questioning witnesses and making arguments to the board). The State

Bar's rules of professional conduct limit the role of the lawyer as a witness. Although an attorney should generally not appear as a witness in a case that he or she is trying, testimony is not absolutely prohibited. Robinhood Trails Neighbors v. Winston-Salem Board of Adjustment, 44 N.C. App. 539, 261 S.E.2d 520, review denied, 299 N.C. 737, 267 S.E.2d 663 (1980). If an attorney does testify as to the facts in a case, the attorney should be sworn as a witness.

Who administers the oath?

The chair of the board (and any member serving as the chair) is authorized to administer the oath in quasi-judicial proceedings. G.S. 153A-345(f); 160A-388(f). Any notary public can also administer this oath. G.S. 10B-14(a)(2). As of October 1, 2013, the statutes also allow the clerk to the board receiving the testimony to administer the oath. S.L. 2013-126.

Each witness may be sworn at the time of testifying. An alternative frequently used is to swear in all of the witnesses who intend to testify at the beginning of the hearing. If a witness was sworn at the beginning of the hearing, the chair should at the outset of that witnesses' testimony confirm that fact and remind the person that they are testifying under oath.

Form of the oath

The form that is usually used is the same as for civil cases. G.S. 11-11. A standard practice is to have the person administering the oath do so as follows: "Do you swear [or affirm] that the evidence you shall give to the board in this action shall be the truth, the whole truth, and nothing but the truth, so help you God?"

Persons with religious objections may affirm rather than swear an oath.

Can the oath be waived?

If all the parties agree or fail to object, the right to have witnesses under oath may be waived. In Craver v. Board of Adjustment, 267 N.C. 40, 147 S.E.2d 599 (1966), the court noted that witnesses should be sworn, but that when the applicant was present at the quasi-judicial hearing, his own testimony was not sworn, and a full and open discussion ensued, the unsuccessful applicant cannot then object that the witnesses were not sworn. The court has similarly held that when a petitioner appears at a quasi-judicial hearing accompanied by counsel, offers unsworn testimony, and does not object to unsworn testimony (or seek to cross-examine the witness or to offer rebuttal evidence), the petitioner cannot object to such on judicial review. Howard v. City of Kinston, 148 N.C. App. 238, 244, 558 S.E.2d 221, 226 (2002). G.S. 160A-393(k)(3) codifies this by providing that "competent evidence" for a quasi-judicial matter includes evidence admitted without objection, provided it appears to be sufficiently trustworthy.

Even if the right to have sworn testimony is waived, the board must still have competent, material, and substantial evidence in the record as a foundation for its findings on any contested facts. Thus the standard practice of most boards conducting quasi-judicial hearings is to place all persons offering testimony under oath.

Administration of oaths to all witnesses testifying in an evidentiary land use hearing serves an important function. It is more than just a time consuming formality. Most evidentiary hearings are conducted with a degree of informality. It is not the same as appearing in a courtroom before a judge in robes. But the board is charged with fairly, accurately, and impartially determining the facts of the case. The decisions substantially affect the rights of the applicant and neighbors. The oath firmly reminds participants of the solemn obligation to tell the truth, the whole truth, and nothing but the truth.