Coates' Canons Blog: Is the Mayor Doing Her Job or Improperly Receiving Evidence?

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Mayor Juanita Beasley was stuck in the checkout lane at the supermarket. She was wondering why she always managed to pick the slowest line when she felt a tap on her shoulder.

She turned to find her old high school friend Clara Edwards smiling and leaning in. After a quick exchange of pleasantries, Clara says, "Juanita, you know that store they're talking about putting in across the street from me on Raleigh St.? The one that's up before the town council next week. A couple of folks from the neighborhood are getting together at my house Sunday afternoon to talk about it and it would be so nice if you could stop by and join us. We'd sure like to share our thoughts and see what you can do to help us."

"Well, Clara, I'd be delighted to stop by. You know I always have time for you. And what good's a mayor who doesn't take time to find out what on her constituents' minds? What time should I come by?"

Juanita knew exactly what project Clara was talking about. After a couple of quiet years, development was beginning to stir in Maycomb. The town had received a special use permit application for a new 24-hour drug store on Raleigh St. The hearing on the permit was coming before the town council next week. Juanita was more than a little familiar with the site proposed for the store. Although she now lived on the other side of town, she had grown up just a couple of blocks away from the proposed site and had seen firsthand how that neighborhood had changed over the years.

A couple of folks had already called Juanita to raise concerns about the traffic and noise the new store would bring to the old neighborhood. While Juanita was generally inclined to vote for a project that would bring jobs to town, she was concerned that this site might have some real problems. She had driven by the site just yesterday to take a look at how traffic moved during the evening rush and had made a mental note to drop by the planning office to chat with the staff about what conditions could be added to prevent this store from making things worse.

In all of this is Juanita being a good public servant, dutifully checking into the matter and meeting with folks to help get a good resolution of a community controversy? Or do we have a problem brewing?

While Mayor Beasley has been diligent and responsible so far, she may be about to cross the line between being a responsive and responsible official and violating the legal rights of a permit applicant.

Many critical land use regulatory decisions are made by citizen boards—city councils, county boards of commissioners, planning boards, and boards of adjustment. There are different legal rules for the process that must be followed that depend on the type of decision being made. For some decisions, such as the policy choice of whether or not to approve a requested rezoning, the process is designed to assure broad and open public discussion with the decision-making board. But for other types of decisions, those termed "quasi-judicial," the law's emphasis is on assuring a fair decision-making process for those most directly affected. Quasi-judicial decisions involve two critical elements—determining contested facts and applying standards that require application of some judgment. With quasi-judicial decisions—special and conditional use permits, variances, and appeals—there is not a policy choice being made. Rather these decisions must apply the policies already in the ordinance. The purpose of a public hearing for a quasi-judicial decision is not to gather public opinion about whether the proposal would be good for the community. The purpose of the hearing in a quasi-judicial matter is to gather quality evidence in a fair manner to determine the facts of the case. So what is lawful and perfectly appropriate in a rezoning hearing may be unlawful and inappropriate in a special use permit hearing.

And therein lies our potential problem. While some degree of informality is permissible even in a quasi-judicial matter,

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applicants and those neighbors who may be substantially affected have a constitutionally protected right to a fair hearing. In a case involving a decision by the town council on a special use permit for a gas station in downtown Chapel Hill, Justice Susie Sharp set forth specific due process requirements for a quasi-judicial land use regulatory decisions. She noted, “Notwithstanding the latitude allowed municipal boards, . . . a zoning board of adjustment, or a board of aldermen conducting a quasi-judicial hearing, can dispense with no essential element of a fair trial.” Humble Oil & Refining Co. v. Board of Aldermen, 284 N.C. 458, 470, 202 S.E.2d 129, 137 (1974).

The court held that one of the “essential elements” of a fair trial is that each party have an opportunity to review all of the evidence being considered and have the chance to rebut that evidence. All of the decision-makers must see the same evidence and have a chance to assess the credibility of the witnesses, as well as the opportunity to ask questions of the witnesses. Thus the courts have long concluded that board members must not gather evidence outside of the hearing, a limitation on what the courts refer to as “ex parte” contact. Undisclosed ex parte communications can evidence impermissible bias or rise to a level of unfairness that will lead to judicial invalidation of the decision. Crump v. Board of Education, 326 N.C. 603, 392 S.E.2d 579 (1990). In addition to constitutional due process considerations, the zoning statutes also provide that members of boards exercising quasi-judicial functions must not participate in or vote on any quasi-judicial matter if they have a fixed opinion prior to hearing the matter that is not susceptible to change or have undisclosed ex parte communications. G.S. 160A-388(e1) and 153A-345(e1). Many local land use ordinances also specifically prohibit ex parte communications with decision-makers on quasi-judicial matters.

Our situation poses at least four potential dimensions of ex parte evidence. Mayor Beasley may be establishing facts outside of the hearing through: (1) her prior personal knowledge of the site; (2) her site visit to inspect traffic conditions; (3) phone calls and a potential meeting with neighbors to discuss the case; and (4) a potential visit with staff prior to the hearing to discuss potential permit conditions. Which of these pose a problem with the limits on ex parte evidence? Let’s take a quick look at each.

Prior personal knowledge

Board members hearing quasi-judicial matters are members of the community in which these land use cases arise. They may well have personal knowledge about the site or a personal acquaintance with the parties. The courts have applied a rule of reason to ex parte communication in quasi-judicial proceedings. If a board member has prior or specialized knowledge about a case, it is entirely proper to consider that knowledge. But it is essential that knowledge be disclosed to the rest of the board and the parties during the hearing. Humble Oil & Refining Co. v. Board of Aldermen, 284 N.C. 458, 468, 202 S.E.2d 129, 136 (1974).

So in our case it is entirely appropriate for Mayor Beasley to consider what she already knows about the history of the site and the neighborhood. But she should be careful to lay that out at the hearing for the benefit of other council members, the applicant, and the neighbors. That way if anyone disagrees with her views of the facts or wants to offer rebuttals, they can do so.

Site visit

As with personal knowledge of the facts, the courts have long held that site visits by board members are permissible. Photographs, surveys, and even video tapes of the site may be submitted as exhibits, but often there is often no substitute for getting a look at the site and the conditions that exist there.

If board members do make a site visit, they should during the course of the hearing note that they have done so and summarize any pertinent facts they discern from the visit. Again, this allows all parties to know the evidence being considered and gives them an opportunity to present rebuttal information. Members should refrain from discussing the facts of the case with the applicant, neighbors, or staff during a site visit. Those comments are best made at the hearing for the benefit of all involved.

Meetings with neighbors (or applicant)

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It is not uncommon for a board member to have had casual conversations about the case prior to the hearing with staff, the applicant, or the neighbors. As long as those are relatively brief and are fully disclosed at the hearing, there is no legal problem.

That said, board members must avoid any extensive discussion about the facts of a case outside the hearing. The applicant has a legal right to know what the neighbors are saying about the case and have a chance to rebut factual assertions. Even if the conversations are innocent and well intentioned, the applicant has no way of knowing what is being said. Public confidence in the integrity of the decision depends on all of the evidence being presented openly and transparent to everyone affected. Evidence needs to be gathered at the hearing, not through the **grapevine**. So discussions with the neighbors (and with the applicant) outside the hearing must be minimized. Even disclosure may not cure extensive contact with a party about the case prior to the hearing.

So Mayor Beasley should politely tell folks who call her about the case that she appreciates their concerns, encourage them to come to the hearing and speak on the case, but let them know that she is not at liberty to hear about the case outside of the hearing. She could do the same at a brief drop-in with neighbors, but it would probably best to avoid attending meetings about the case with the neighbors or the applicant prior to the hearing.

Meetings with staff

The same rule applies, and for the same reasons, to a board member’s discussions outside the hearing with the board’s staff. Both the applicants and the neighbors have a right to see and hear all of the evidence being presented. It is acceptable to speak with staff about the ordinance and its requirements prior to a hearing, but those discussions should not include the facts of a pending case.

It would certainly be appropriate for Mayor Beasley to ask staff these questions at the hearing. It is acceptable for her to send staff a memo prior to the hearing alerting them to information she would like to see presented at the hearing. It is also appropriate for staff to prepare reports and recommendations to be presented to the board, provided that information is presented to all board members and to all parties (and the staff member should be available at the hearing to present the report and respond to queries). But a board member must be careful not to express an opinion about the ultimate outcome of the case or even the need for a particular condition prior to hearing the evidence at the hearing.

All of these rules may seem unduly formal and constraining. But the permit decision will have a significant impact on the applicant and the neighbors. Both have rights to a fair hearing. Board members making quasi-judicial decisions have a responsibility to observe and protect those rights. A fair hearing requires that all board members and the parties see the same evidence and have a fair chance to rebut and challenge that evidence. Avoiding undue receipt of information outside the hearing is therefore an essential duty for boards making quasi-judicial decisions.

Links

- www.youtube.com/watch?v=Y7dGdrP3pms

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