Coates' Canons Blog: The Who, What, and When of Appeals TO the Board of Adjustment

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Consider these three scenarios regarding potential appeals to the zoning board of adjustment.

1. *Scenario 1*. Marge Simpson has worked for decades to improve her neighborhood. Several years ago the town adopted a new plan that called for the neighborhood to retain its predominately residential character, but to add some appropriately sized retail and office uses. The zoning code was then amended to allow "neighborhood scale retail" as a permitted use along the major street that traverses the neighborhood. Marge just read in the paper that town staff had approved permits for a new national chain office supply store in the neighborhood, about ten blocks from her house. She is outraged, believing this in no way qualifies as a "neighborhood scale" business. The next day she files an appeal of the staff's interpretation of the ordinance. Can the board hear her appeal?
2. *Scenario 2*. Suppose Marge had learned of the store's plans when they first applied for a permit, prior to any staff action on the application and that she makes her complaint about the interpretation at that time. In this situation, suppose the staff studies the plan and the ordinance and is undecided about how the term "neighborhood scale retail" should be interpreted. Rather than decide what is clearly a political hot potato, the staff decides it would be best to take this to the board of adjustment and let the board make the call. Can the board hear the staff appeal?
3. *Scenario 3*. Suppose the national chain store got their certificate of zoning compliance and building permit from the staff with the matter never making the paper. A few weeks after getting the permit the site is cleared and graded, but no other site work is done. A couple of months later, as the utility lines are being installed on the site, the applicant posts a sign announcing this as the future site of the chain store. The next week a delegation from the neighborhood goes to the planning office and asks for details about what is being built. After seeing the site plan for the chain store, they appeal the zoning interpretation that allowed this as a permitted use. Can the board hear their appeal at this point in the development process?

The short answer is that only one of these appeals can be heard by the board of adjustment.

Standing: Who Can Appeal?

Scenario 1 raises the question of who can bring an appeal to the board of adjustment. A person with the legal right to initiate an appeal is said to have "standing" to initiate the appeal. A person with standing is entitled to be a "party" in the appeal.

Unlike a court proceeding, a quasi-judicial case coming to the board of adjustment does not have formal plaintiffs and defendants. The person who initiates the action (an applicant for a special or conditional use permit, a person appealing the zoning officer's determination or requesting a variance) is a "party" to the proceeding. To qualify to become a party, a person must be directly affected by the decision in a way different from the public at large.

A definition of standing has been written into the zoning statutes. G.S. 160A-393(d) defines who has standing to appeal a zoning decision to the courts. As of October 2013, G.S. 160A-388(b1)(1) applies this same definition to determine who has standing to make an appeal TO the board of adjustment (prior to the 2013 amendments to this statute, the standard was that "persons aggrieved" by the decision could appeal to the board).

Who qualifies for standing under this definition? The statute sets out four groups who qualify:

1. The owner of the property, someone with an option to purchase the property, and the applicant for a development approval.
2. Any other person who will suffer "special damages" as a result of the decision being appealed. A number of court cases have addressed what is necessary to establish "special damages." While physical proximity in and of itself

is not sufficient, that is an important factor. An allegation that the action would diminish the property value of the person is not necessary, but it is the "damage" that is most frequently alleged. The court in *Mangum v. Raleigh Board of Adjustment*, 362 N.C. 640, 669 S.E.2d 279 (2008), held that allegations of parking, stormwater runoff, and crime problems, as well as property value impacts, could establish "special damages."

3. An association of neighborhood property owners that would be affected, provided that at least one of the association members would have standing as an individual and that the association was not formed in response to the particular application being appealed.
4. The unit of local government that has made the decision being appealed.

Members of the general public are not "parties" for the purpose s of an appeal to the board of adjustment. A person who is interested in the matter but who does not have a personal stake in the outcome may attend and observe the hearing, but they have no legal right to initiate an appeal. [*Note: Also see Adam Lovelady's post regarding standing and quasi-judicial hearings* ***here****.*]

In our case, Marge has a great interest in community affairs. She has actively participated in developing the plan and the implementing ordinance amendments. But despite the depth of her commitment to neighborhood improvement, she can only initiate the appeal to the board of adjustment if she can establish "special damages" to her property that are distinct from the public at large. Since her property is ten blocks or so away, it is unlikely that she could credibly do so. She might approach a more nearby neighbor who would directly be affected by the traffic, noise, lights, and stormwater runoff from the proposed chain store and see if they would be interested in filing an appeal. But she cannot do it on her own. So in our first situation, the board would have to dismiss Marge's appeal for lack of **standing**.

Final, Binding Staff Decision: What Can Be Appealed?

An important role of the board of adjustment is hearing appeals of staff decisions. Appeals of decisions implementing zoning or unified development ordinances must go to the board of adjustment. Appeals from any other development regulation ordinance may also be assigned to the board of adjustment. G.S. 160A-388(b1). Significantly, however, G.S. 160A-388(a1) now codifies the existing rule from case law that staff "decisions" that can be appealed must be a "final and binding order, requirement, or determination." Some of the case law dealt with appeals to the board and others with defining a decision that creates vested rights, as both topics address the question of which staff decisions are final and binding.

In Scenario 2 the staff sought an advisory opinion from the board. Is this permissible? In short, no. Boards of adjustment do not have the jurisdiction to issue advisory decisions. A staff letter that offers a non-binding interpretation is not appealable to the board of adjustment. *In re Appeal of the Society for the Preservation of Historic Oakwood*, 153 N.C.App. 737, 571 S.E.2d 588 (2002). Neither is a staff assurance that a waiver to a regulatory requirement would be granted if requested. *Wilson v. Mebane Board of Adjustment*, 212 N.C.App. 176, 710 S.E.2d 403 (2011). The staff cannot send an interpretation question to the board prior to making a staff decision. *Tate v. Board of Adjustment*, 83 N.C.App. 512, 350 S.E.2d 873 (1986).

By contrast, a ruling from the staff that a particular height limit is met by an approved structure or a ruling that a specific use can be carried out on a specified site can be appealed. *Meir v. City of Charlotte*, 206 N.C. App. 471, 698 S.E.2d 704 (2010); *S.T. Wooten Corp. Board of Adjustment*, 210 N.C. App. 633, 711 S.E.2d 158 (2011). Sometimes there is a fine line between decisions that can be appealed and those that cannot. This is discussed in more detail in earlier posts **here** and **here**.

In Scenario 2, the staff wants to ask the board of adjustment for an interpretation of an ambiguous provision of the ordinance prior to ruling on that question. That would clearly be an advisory opinion and the board of adjustment simply has no jurisdiction to take it up. The staff can certainly discuss the potential interpretation informally with the planning board or even the governing board, but it cannot seek a formal opinion from the board of adjustment. So in our second situation, the board would have to dismiss the staff appeal for lack of jurisdiction.

Time Limit to Appeal: When Can an Appeal be Filed?

In Scenario 3 we see multiple steps in development approval and construction: issuance of a certificate of zoning compliance and building permit, site preparation, starting construction, and posting a sign. The question is when in this

process does the time for an appeal to the board of adjustment start to run?

When the staff makes a final, binding determination, notice of that decision is to be provided in writing to the owner of the affected property and to the person who requested the determination if that person was not the landowner. The decision can be delivered personally, by email, or by first-class mail. The owner and any other person with standing then have thirty days from receipt of the written decision to appeal to the board of adjustment (prior to the 2013 amendments to G.S. 160A-388, each local government set its own time limit for appeals). The appeal is filed with the city or county clerk. This aspect of the when the clock for an appeal starts to run is usually clear – when the applicant or owner receives the written notice of the decision.

This same thirty day period for filing appeals to the board of adjustment applies to anyone else with standing to make an appeal. G.S. 160A-388(b1)(3). Since only the landowner and person requesting the determination automatically get a personal notice of the decision, a question arises as to when this thirty-day period to appeal starts to run for other parties. The period to appeal for these persons begins to run when they have actual or constructive notice of the determination. Typical means by which constructive notice is provided to neighbors are initiation of site preparation, delivery of construction materials to the site, or other work that would clearly indicate that the requested determination had been made.

In Scenario 3, it is likely that the neighbors got no actual notice that the staff had determined the chain store was a “neighborhood scale retail” use allowed by the ordinance. This would not be unusual, as neither the applicant nor the city have any legal obligation to send routine building permit applications or decisions to the neighbors. Even the site clearing and grading would not have alerted the neighbors as to what was going up on the site. If it turns out the neighbors had no actual knowledge of the nature of the use that had been permitted prior to the developer posting the “future site” sign, that would likely be the constructive notice to the neighbors that would start the appeal clock running. So in the third scenario, if the neighbors appealed within thirty days of learning of the staff decision by seeing the sign, their appeal would be timely even though it came several months after the decision had actually been made.

Since the date of constructive notice is often ambiguous, the statutes now allow the owner or developer an option to provide certainty on this point. G.S. 160A-388(b1)(4) allows the landowner or applicant the option of prominently posting the affected site with a sign notifying neighbors that a zoning or subdivision decision has been made. Provided the sign remains up for at least ten days, the sign is deemed to be constructive notice of the decision as of the date it was initially posted. The owner posting the sign must verify the posting to the zoning official who made the determination. In situation three, if the owner had posted such a sign immediately upon receiving their zoning verification and building permit, that would have started the clock running and an appeal filed several months later would have to be dismissed for being untimely. Without that posting, the clock only starts to run when the neighbors know or should have known of the determination – in this instance that would likely not happen prior to posting the “future site” sign.

The lesson here is that while the board of adjustment can hear many appeals, the law does impose limits on its jurisdiction. It can only take up appeals filed by persons with standing, only final and binding staff decisions can be heard, and any appeal must be filed in a timely fashion.

Links

- canons.sog.unc.edu/can-neighbor-speak-can-neighbor-appeal-standing-quasi-judicial-hearings/
- www.youtube.com/watch?v=xhtzMwA5gJI
- canons.sog.unc.edu/?p=3928
- canons.sog.unc.edu/?p=4531