

GUILFORD COUNTY BOARD OF ADJUSTMENT MAY 6, 2014

The Guilford County Board of Adjustment met in regular session on May 6, 2014 in the Blue Room of the Old Guilford County Courthouse, Greensboro, North Carolina.

MEMBERS PRESENT: Ditra Miller, Chair; Robert Lawler, Jr.; Willie Johnson; Larry Standley; Patrick Woods; and Randall Crum.

STAFF PRESENT: Tiffany Burch, Planning Department, and J. Leslie Bell, Guilford County Planning Director.

Vice-Chair Lawler welcomed everyone to the meeting.

Roll Call of attendees was taken.

Mr. Bell introduced the newest addition to the Planning staff, Dervin Spell. Mr. Spell described his past experience as a Planner.

Chair Miller joined the meeting at 6:07 p.m.

TRAINING SESSION ON QUASI-JUDICIAL HEARINGS:

Mr. Bell introduced Mark Payne, County Attorney, who provided a training session for Commissioners on quasi-judicial hearings. He distributed information on the presentation to members for their review.

Mr. Payne stated that the Guilford County Board of Adjustment serves as a quasi-judicial Board sharing many of the functions of a judge. The authority of the Board of Adjustment is established by North Carolina General Statute 153A-345; however, the County can assign additional duties. The Board of Adjustment is often the default appeals body for the County.

At least five members are established by statute for three-year terms. Mr. Payne explained that although terms are established for three years, members do not have a vested interest in serving out the term. The Board of Commissioners can remove a member and appoint someone else to serve in the three-year term. According to a recent change in the statute, while a majority vote will suffice for other decisions, there must be a super-majority vote for variance decisions.

Mr. Payne provided an overview of the powers and duties of the Board of Adjustment. The Board hears and decides appeals on final actions made by an administrative official charged with enforcement of the Guilford County Development Ordinance such as appeals from the

Historic Preservation Commission, Zoning regulations and violations, and variance requests. The Board may be called upon to create an interpretation of the Development Ordinance.

In regard to variances, the Board may be asked to allow exceptions to dimensional regulations where strict enforcement would allow practical difficulties or unnecessary hardship. By granting the variance, the intent of the policies of the Board of Commissioners will be observed and substantial justice done. Findings of fact must be made not only to create a record of the decision that was made but also to document the reason for the decision.

Mr. Payne explained that the Board may hear appeals from agency decisions with the exception of decisions made by the Board of Commissioners. When an agency's decision is appealed the Board must determine if there is a legal basis for the decision and if there is competent, material and substantial support for the decision. The Board should not substitute its judgment for the agency.

The Board also hears requests on matters of interpretation of the Development Ordinance. That standard of review is *de novo* meaning that the matter is looked at from scratch. The Board will only be asked to interpret the Ordinance if there is an interpretation issue that is having a direct and material impact on an applicant. Mr. Payne stated that case law for appeals to the Board of Adjustment says the determination of the Board of Adjustment as to what an Ordinance means should be given deference by the courts. The court will look to the Board of Adjustment's interpretation of a Development Ordinance when it has to look at that same ordinance provision. The Board of Adjustment can hear petitions for interpretations of zoning map lines. Strict standards are set and deference is given to the County's interpretation of the zoning map lines.

Mr. Payne described the Board's function as a quasi-judicial body. He stressed the importance of making sure that due process has been served. Notice must be given to everyone impacted by the decision to provide an opportunity for individuals to come and present their full case. They must be given a reasonable opportunity to be heard. The Board can issue subpoenas and orders to enforce their decisions.

The role of the Board in a Public Hearing is to decide the case, to provide due process, and to build a record. Having a thorough record of the case is important so that someone who does not have the Board's context of the matter can understand the decision that was made.

Mr. Payne gave an overview of procedure during a Board of Adjustment meeting. All witnesses must be sworn in as part of due process to show that substantive evidence will be given. County staff should then introduce the case. Sometimes there might be a complicated matter that requires an opening argument or an opening argument may be allowed to make the groundwork of the case known. Opening arguments are optional and often are not necessary. The Chairman leads the meeting. If the Chairman makes a decision that members feel may not be correct, they can vote to take a different action.

During the presentation of the appellant's case, Board members and individuals from the other side can ask questions. The other side may be represented by staff or an opposing party seeking an interpretation.

Responding to a question from Mr. Lawler, Mr. Payne clarified that the opponents to a variance can ask questions directly to the applicant. He suggested that opponents ask their questions through the Board to create a smoother atmosphere. The Chairman should control the questions and direct them in some way.

There must be an opportunity for presentation of the case, questions, and redirection as many times as necessary until every fact and question of the case is laid out. Cross-examination occurs only as long as there is new and relevant information. The County's case is then presented followed by optional closing arguments and deliberation. It is possible to deliberate in closed session but it is not recommended as issues may be created relative to due process.

Mr. Johnson asked if the Board acts as a mediator if both sides are represented by attorneys. Mr. Payne indicated that the Board is not a mediator; it is a quasi judicial Board and as a body they must act like a judge.

When all presentations have been made the Board will make its decision based on information before them. The decision of the Board will be followed up by a written decision to the appellant from staff. The Board can choose to continue a case when more information is needed to make a decision.

It was noted that staff should also be sworn as to their testimony. The procedural order is not important as long as all required criteria are met. Attorneys do not have to be sworn in as long as they are making legal arguments. If they are giving facts, then they must be sworn in.

Mr. Payne commented on laymen who present arguments to the Board acting in the capacity of a lawyer. In this situation the Board can ask the individual if he is presenting facts on behalf of the applicant. If he replies in the affirmative, the applicant should state that they agree with the comments that were made.

Mr. Johnson left the meeting at 6:45 p.m.

Mr. Payne presented an overview of due process. He pointed out the importance of the appellant's notice of appeal rights from the Board's decision. In addition, they must know that when they receive the first decision, they have the right to appeal to the Board of Adjustment. There must be a realistic opportunity for appeal. Notice should be given for the Public Hearing that is open to everyone to attend even if business is not being conducted. Due process is served through sworn evidence and the opportunity to have a meaningful cross-examination of the evidence as presented. Other components of due process are notice of decision and findings and the opportunity for appeal from the Board's decision.

Mr. Standley asked for clarification on undue prejudice. Mr. Payne explained that undue prejudice is when evidence is presented that does more harm than the value it is being

presented for. He said that relevancy comes up more often than undue prejudice when the speaker must be redirected back to the relevant issue.

Any documents that the Board comes into contact with, along with all documents presented in the Public Hearing, become part of the public record.

Mr. Payne addressed the issue of introducing a petition into the record. The petition is considered hearsay as it is a statement made outside of the hearing for the purpose of proving a fact that is relevant to the hearing. A letter that is hearsay must be examined for credibility. The letter may be entered into the record if sufficient credibility is established. If there is an issue of credibility, further examination must be made to determine if it is trustworthy enough to be considered relevant.

Relative to staff reports, Mr. Payne indicated that it is very important to date the report on the day it is read to create a more reliable record.

Mr. Woods left the meeting at 6:55 p.m.

Mr. Payne commented on ex parte communication. He stressed that outside of the proceedings members must decline to talk to anyone regarding a future case.

Mr. Standley asked if the power to issue orders was in the statutes. Mr. Payne replied in the affirmative and added that case law states the Board of Adjustment has some of the rights as a judge.

Mr. Crum asked how far the Board can go to question the applicant for a response or should the decision be based only on what was given. Mr. Payne stated the case must be based on what was presented but the Board can ask questions trying to make it as open-ended as possible.

Mr. Payne addressed the issue of setting a precedent when making a decision. He said that although patterns may be seen, every case is unique. In dealing with land, case law says that land is unique and precedent is discounted in a lot of instances. He was less worried about setting precedent than being comfortable with the decision being made as shown by the accompanying record.

The Board thanked Mr. Payne for his presentation.

ADDITIONAL BUSINESS:

Mr. Bell updated members on a case that was recently heard by the Board. Staff worked with the applicant and the accessory building will be moved. The applicant went to the Environmental Review Board last week and a building permit was pulled. They will have to make some modifications to the building because it is located in a flood zone.

ADJOURNMENT:

There being no further business before the Board, the meeting adjourned at 7:07 p.m.

Respectfully submitted,

Ditra Miller, Chairman

Tiffany Burch, Board Secretary