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Coates' Canons NC Local Government Law

Types of Development Decisions

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Suppose you own a vacant lot in town and you want to build a small, six-unit apartment building on the site. What standards apply? Who decides and how much discretion do they have? Do the neighbors get to weigh in?

The short answer is *it depends*. The standards, the decision-maker's discretion, and the role of public input depend on whether the decision is administrative, quasi-judicial, or legislative. This blog provides an overview of the factors, procedures, and limitations for each type of land use decision.

Administrative Development Decisions

Administrative development decisions are the everyday decisions to enforce the development ordinances: zoning permits, notices of violation, interpretations of the ordinance, and similar ministerial decisions.

Administrative decisions are based on clear, objective criteria. As such, there is little room for judgment and discretion. The land use either is allowed on the property or it is a violation. The proposed development either meets the standards or not. Sometimes when we talk about zoning allowances, we refer to a use being "as of right" or "by right." In other words, that use is allowed on the property—the owner need only show that the development will meet the basic standards. This is an administrative decision. No discretionary approval is necessary.

There is no need or requirement for notice to the neighbors nor a hearing open to the public (though a local ordinance or property owner may choose to provide notice). In general, the notice and hearing occurred back when the applicable ordinance was first adopted.

When an administrative hearing is appealed, typically there is a level of review before it goes to court. When staff are the decision-makers for the decision, an appeal goes to the board of adjustment.

Most administrative decisions are made by staff. The planner approves the zoning permit. The zoning officer issues the notice of violation. The preservation planner issues the minor work permit. In some cases a board may decide an administrative decision. For example, the planning board or governing board may be the final decision-maker for a subdivision plat. Even then, if the standards are objective, the board must follow the normal rules for administrative decisions: If the applicant meets the standards, the applicant gets the permit.

Administrative decisions are efficient and predictable for the local government and the applicant. But, administrative decisions afford little flexibility for unique situations and little opportunity for neighbors to weigh in on the specific proposal. Thinking back to the six-unit apartment, the property might be zoned for residential uses including apartments. In other words, you can build apartments *by right*. You will need to obtain building permits and other standard building approvals based on objective and technical criteria, but there is no need to go before a board for a discretionary approval to build.

Quasi-Judicial Development Decisions

Quasi-judicial development decisions are the special requests when there is need for some adjustment to the rules (variances), resolutions of a dispute in interpretation (appeals of staff decisions), or specialized permit (special use permits and certificates of appropriateness).

These decisions are based on standards in the ordinance, but the standards inherently involve some judgment and discretion. A variance, for example, must be granted when the landowner provides evidence that strict enforcement of the ordinance would cause "unnecessary hardship." This is not an objective standard; the board cannot take out a tape measure to determine if the owner will endure unnecessary hardship. The board must weigh the evidence, resolve disputed facts, and use judgement and discretion to apply the ordinance standards to the particular situation.

In order to make a quasi-judicial decision, the board must hold an evidentiary hearing. As the names imply ("quasi-judicial" and "evidentiary"), this is a court-like matter. Witnesses are sworn in, testimony must be focused on relevant facts, and parties must have legal standing to make certain actions. Expert witnesses may be required for certain matters; the board may not rely on lay witness opinions for technical matters like traffic projections and property

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value impacts.

While there is some room for judgment and discretion, the board's discretion is limited. The board must base its decision on the evidence in the record and the standards as required in the ordinance. So, if an applicant has provided facts to show they meet the applicable standard and if the opponents have only provided general opinions and fears without factual support, then the board is obligated to approve the applicant's request.

A decision is quasi-judicial based on the type of standard, not based on who is making the decision. Quasi-judicial decisions may be assigned to several different boards. Boards of adjustment typically handle variances and appeals from staff decisions. Preservation commissions handle certificates of appropriateness. Special use permits may be assigned to a board of adjustment, planning board, or governing board. While governing boards may handle quasi-judicial decisions, the board must be careful to distinguish its political role in legislative hearings from its quasi-judicial role in evidentiary hearings. Appeals of quasi-judicial decisions go to superior court and the court reviews the case as if it were an appeals court—determining if the decision-making board followed the right procedures and had sufficient evidence for the decision below, but not opening a wholly new evidentiary hearing.

Quasi-judicial decision-making is a useful tool. It allows a local government to manage unique, difficult situations through variances, it allows the local government to ensure that changes in the historic district are compatible with the overarching design of the district, and it also allows the local government to set the standards so that particular uses may be reviewed to minimize impact and ensure harmony with the area. That said, the procedural formality can be challenging and frustrating for the applicant, the neighbors, and the board. The requirement that decisions must be based on evidence in the record insulates decisions, to an extent, from broader political concerns, and depending on the case and your perspective, that may be a benefit or detriment to the process.

So, what about the small apartment building? Suppose that the property is zoned for residential uses, but any density greater than one-unit requires a special use permit. In that case, you will need to apply for a special use permit. Commonly such a permit would require that, in addition to the basic zoning standards, the applicant must show that the project (i) is consistent with the comprehensive plan, (ii) is in harmony with the area, (iii) will not harm public health and safety, and (iv) will not harm neighboring property values. You will need to put together evidence to prove those points, including potentially hiring a traffic engineer, appraiser, and land use attorney. If you make a basic case of meeting the standards, then the burden shifts to any opponents. They must provide contrary factual evidence and/or expert opinion to rebut the applicant's case. If the opponents provide contrary evidence, then the board must weigh the evidence, resolve contested facts, and apply the standards. If the opponents merely show up with complaints while the applicant made their basic case, then the applicant is entitled to the special use permit.

Legislative Development Decisions

Legislative development decisions are the political decisions by the governing board to set or amend the development ordinances. Adopting a new unified development ordinance, rezoning a piece of property, adopting the comprehensive plan, amending the standards in the subdivision ordinance—each is a legislative decision. It is setting the broad policy for the community.

In advance of a legislative land use decision, the matter must be referred to the planning board for recommendation. The governing board must hold a legislative hearing and prior to that hearing there must be proper notice (published twice in the newspaper and, for rezoning matters, posted and mailed notice). Copyright © 2000 to Present School of Government at the University of North Carolina As part of an amendment to the zoning ordinance, the governing board to adopt a statement of plan consistency or reasonableness. The legislative hearing is, as the name suggests, a forum for hearing public opinion. Proponents and opponents of the legislative action may voice their support, concern, and opinions about the matter. Legislative hearings do not have the same level of procedural formality as a quasi-judicial evidentiary hearing.

When making a legislative decision the governing board enjoys broad discretion. These local elected leaders make the decision that they determine is in the best interest of the community based on the policies, the politics, and the community's priorities. A legislative decision is not bound to a factual record and established standards the way that a quasi-judicial decision is. But, to be clear, governing boards do not have complete discretion in legislative decision-

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making. Such land use decisions must be reasonable, grounded in land use considerations, and in keeping with the statutory purposes of development regulations. Land use decisions may not be arbitrary and capricious, may not go beyond the statutory authority of development regulations, and may not be determined based on traits of the involved parties (race, religion, ethnicity, etc.).

Conditional rezoning is a particular type of legislative decision-making. Conditional rezoning is a legislative action (like any rezoning) but it allows for the applicant and the local government to agree on site-specific conditions for the particular project. Conditional rezoning is a useful tool for approving large or complex developments that do not fit into the standard categories of the zoning ordinance. Conditional zoning also is a useful tool for addressing the unique impacts of a particular project.

Appeals of legislative decisions go to superior court. Opponents may challenge adherence to the procedural requirements—failure to provide proper notice, failure to seek planning board recommendation, or failure of the board to adopt a statement of plan consistency or reasonableness. Opponents also may challenge the substance or constitutionality of a legislative action, but given the broad discretion of local boards and the judicial deference to local legislators, substantive challenges are difficult.

Legislative decisions are the political process of setting the rules for how the community will grow and thrive. Legislative decision-making appropriately involves politics in the best sense of that term—we want our elected officials engaging with constituents, responding to concerns, and using their best judgment for what is in the best interest of the community. But, legislative decision-making can be messy and slow. There is little predictability. The voices of nearby neighbors or politically-connected constituents may hold more sway than the general public interest.

And, as for the six-unit apartment project? Suppose the property is currently zoned for one-unit residential (single family) and multi-unit residential is not allowed. You might seek a rezoning to the zoning district that allows for multi-unit residential or a rezoning to a conditional zoning district for this specific project. The governing board would have broad discretion to act or not. If the petition moved forward for consideration, you would have the opportunity to lobby the government officials for a favorable outcome—and any opponents would have the opportunity to lobby against it. The planning board would review and comment on the proposal. Through the legislative hearing neighbors could voice opinions and complaints without formal evidentiary procedures. The governing board would consider the comprehensive plan and reasonableness of the rezoning (and adopt a statement to that end), but the board would not be bound to take a certain action. Depending on the politics and the board’s determination of what is in the best interest of the community, you may get your rezoning or may not.

It Depends

The type of decision depends upon the nature of the standards. If the standards are objective, the decision is administrative. If the standards have some subjectivity, then the decision is quasi-judicial. If the decision is setting the standards (through ordinance amendment or rezoning), then it is legislative. Certain decisions may fall into a couple of categories. Subdivision plat approval typically is an administrative decision based on clear objective standards (lot size, open space allocation, technical road specifications, etc.). But, there is statutory authority to make subdivision decisions quasi-judicial. In addition to the clear, objective standards, an ordinance may require that the applicant meet certain standards requiring judgment and discretion similar to special use permits (Is it in harmony with the area? Will it harm neighboring property values?). If such additional standards apply to a subdivision plat, then the decision must follow the quasi-judicial standards.

Site plan approval, similarly, may have different aspects. A basic site plan may be reviewed with simple objective standards (land use, setback, parking allocation, etc.). But, a local ordinance may also require that a site plan is reviewed with additional standards requiring judgment and discretion (harmony, etc.). Additionally, development ordinances commonly require that a site plan be part of the review for a special use permit or conditional rezoning. In those cases, the site plan review is subject to the same level and type of review as the overall decision (quasi-judicial for special use permit and legislative for conditional rezoning).

The nature of the decision will depend upon the nature of the standards. The table below summarizes the types of decisions and related requirements. Also, find a pdf of the chart [here](#).

Type of Decision	Administrative	Quasi-Judicial	Legislative
Example	zoning permit, notice of violation	variance, special use permit, certificate of appropriateness	ordinance amendment, rezoning
Decision-maker	staff, typically	assigned board	governing board
Standards	objective	requires some judgment and discretion	based on what is in the public interest
Public Notice	none required, local option for notice of decision	mailed to neighbors and posted on the site	published in newspaper; if rezoning then also mailed to neighbors, and posted on the site
Hearing	none typically, but administrative hearing for certain decisions	evidentiary hearing	legislative hearing
Public Input	little or none for a particular decision; input up front to adopt the ordinance	limited to sworn, factual testimony at the hearing	broad public input

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Discretion	very little	decisions must be based on the applicable standards and evidence in broad discretion
Appeal	to the board of adjustment	the record to superior court

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