

TOWN OF WAYNESVILLE Zoning Board of Adjustment

9 South Main Street
Waynesville, NC 28786
Phone (828) 456-8647 • Fax (828) 452-1492
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Stephanie Strickland
Henry Kidder
Jack Suddath
Neil Ensley
David Felmet
Charles John Gisler

Development Services
Director
Elizabeth Teague

TOWN OF WAYNESVILLE ZONING BOARD OF ADJUSTMENT REGULAR MEETING

**Town Hall – 9 South Main Street, Waynesville, NC 28786
Tuesday, September 4, 2018, 5:30 PM**

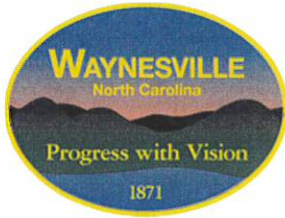
A. CALL TO ORDER:

1. Welcome/Announcements
2. Adoption of Minutes from the April 3, 2018 Meeting

B. BUSINESS ITEMS:

1. Introduction of New Members
2. Election of Officers
3. General information and overview for the year ahead.

C. ADJOURN



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Development Services
Director
Elizabeth Teague

Stephanie Strickland
Henry Kidder
Joshua Morgan
Neal Ensley (Chairman)
David Felmet (Vice Chairman)
Charles John Gisler

Regular Meeting

Town Hall, 9 South Main Street, Waynesville, NC 28786
Monday, April 3rd 2018, 5:30 pm

The WAYNESVILLE ZONING BOARD OF ADJUSTMENT held a regular meeting on April 3rd, 2018 at 5:30 pm in the board room of the Town Hall, 9 South Main Street, Waynesville, NC.

A. CALL TO ORDER:

1. Welcome/Calendar/Announcements

Mr. Neal Ensley, Chairman, welcomed everyone and called the meeting to order at 5:32 pm.

The following members were present:

Neal Ensley, Chairman
David Felmet, Vice Chairman
John Gisler
Henry Kidder

The following members were absent:

Stephanie Strickland
Joshua Morgan

The following staff members were present:

Elizabeth Teague, Development Services Director

2. Adoption of Minutes from the March 7, 2018 Meeting

Board Member David Felmet made a motion, seconded by Board Member Henry Kidder, to approve the minutes of the March 7, 2018 meeting as presented. The motion passed unanimously.

B. BUSINESS ITEMS:

1. Development Director Elizabeth Teague informed the Board that the Town had hired Stewart Engineering to begin working on the Comprehensive Plan Update. The Consultants are working with a Steering Committee appointed by the Board of Aldermen and are focusing on data collection in this first phase of the project. They will be sending out a survey which Ms. Teague encouraged board members to participate in.
2. Development Director Elizabeth Teague informed Board of Training opportunity with the Institute of Government. Henry Kidder is planning on attending.
3. Ms. Teague shared that Board member John Gisler has resigned from the Board in order to relocate to Florida. Alternate Joshua Morgan will become a regular member and the Town will be advertising for new alternates in June. She stated that she has appreciated working with Mr. Gisler and valued his insight. Other Board members also expressed their appreciation to Mr. Gisler.

C. ADJOURN

With no further business, Board Member Dave Felmet made a motion, seconded by Board Member Henry Kidder to adjourn at 5:50 pm. The motion carried unanimously.

Neal Ensley, Chairman

Elizabeth Teague, Planning Director

Town of Waynesville Code of Ordinances: 14.4 – Board of Adjustment.

14.4.1 Powers and Duties.

The Board of Adjustment of Waynesville shall have the following powers and duties to be carried out in accordance with the terms of this ordinance:

- A. To hear and decide appeals from any order, requirement, permit, decision or determination issued by an administrative officer of the town in enforcing any provision of the Town of Waynesville Minimum Housing Codes.
- B. LDS Decisions: The Board of Adjustment shall render final decisions regarding the following permits types (see also [Chapter 15](#)):
 - 1. Appeal of any Administrative decisions (15.6-7, 15.8.1, 15.9.1,3, 15.12)
 - 2. Appeals of Planning Board Decision regarding Subdivision (Major) - Preliminary Plats (15.11.1)
 - 3. Appeals of Historic Preservation Commission Decision regarding Certificate of Appropriateness (Major) (15.11.3)
 - 4. Variances (15.13)
- C. The Board of Adjustment shall also have any additional powers and duties as may be set forth for in other laws and regulations or at the direction of the Board of Alderman.

14.4.2 Membership and Quorum.

- A. The Waynesville Board of Adjustment shall consist of the number of members referenced and indicated in the most current version of the Town of Waynesville Boards and Commissions Manual which may from time to time be updated or amended. A quorum of four-fifths (4/5) of the membership shall be necessary to transact business.
- B. The Board shall not pass upon any question relating to an appeal from a decision, order, requirement or determination of town officials or an application for a variance or conditional use permit when there are less than four-fifths (4/5) of the board members with jurisdictional authority present.
- C. The Waynesville Board of Aldermen shall appoint members from within the Town limits and, if the Town is exercising Extraterritorial Jurisdiction, one (1) or more members shall be appointed by the Haywood County Commissioners as set forth in G.S. 160A-362 to provide for proportional representation of residents within the Extraterritorial Jurisdiction. As vacancies occur the Administrator shall advise the appropriate governing board to make appointments or reappointments as necessary to maintain this proportional representation based on best available estimates of current population of the Town and the Extraterritorial Jurisdiction. The representatives of the Extraterritorial Jurisdiction shall have equal rights, privileges and duties with the other members of the Board of Adjustment.
- D. All members shall serve three (3) year terms and may succeed themselves.
- E. Officers shall be elected in accordance with the adopted rules of procedure.
- F. Meetings shall be held on the date and time as referenced in the Town of Waynesville Boards and Commission Manual and may from time to time be updated or amended.

15.5 - General Requirements for Quasi-Judicial Hearings and Decisions.

A quasi-judicial decision is a process that involves the finding of facts regarding a specific application of an ordinance and the exercise of discretion when applying the standards of the ordinance. Quasi-judicial decisions include decisions involving variances, special use permits, and appeals of administrative determinations. In accordance with G.S. 160A-393, decisions on the approval of site plans and subdivisions and are quasi-judicial in nature if the ordinance authorizes a decision-making board to approve or deny the application based not only upon whether the application complies with the specific requirements set forth in the ordinance, but also on whether the application complies with one or more generally stated standards requiring a discretionary decision on the findings of fact to be made by the decision-making board. As a result the following standard procedures shall be incorporated as appropriate.

15.5.1 Standards for Conduct of Quasi-judicial Hearings.

- A. **Contact with Decision-Making Board Members:** Contact with any members of a decision-making board prior to the public hearing by any individual regarding the matter is prohibited.
- B. **All Participants to be Sworn In:** All participants in the public hearing shall be duly sworn in prior to the submission of any testimony by the Chair or Clerk to the Board/Commission.
- C. **Competent Evidence Required:** All decisions shall be based on competent evidence entered in as part of the record. The term "competent evidence," as used in this subsection, shall not preclude reliance by the decision-making board on evidence that would not be admissible under the rules of evidence as applied in the trial division of the General Court of Justice if (i) the evidence was admitted without objection, or (ii) the evidence appears to be sufficiently trustworthy and was admitted under such circumstances that it was reasonable for the decision-making board to rely upon it. The term "competent evidence," as used in this subsection, shall not be deemed to include the opinion testimony of lay witnesses as to any of the following:
 - 1. The use of property in a particular way would affect the value of other property.
 - 2. The increase in vehicular traffic resulting from a proposed development would pose a danger to the public safety.
 - 3. Matters about which only expert testimony would generally be admissible under the rules of evidence.
- D. **Cross-Examination Permitted:** The cross-examination of witnesses submitting testimony shall be permitted upon request.

15.5.2 Standards for Decisions.

Each decision-making board under the provisions of this section shall ensure that the rights of petitioners have not been prejudiced because the decision-making body's findings, inferences, conclusions, or decisions were:

- A. In violation of constitutional provisions, including those protecting procedural due process rights.
- B. In excess of the statutory authority conferred upon the city or the authority conferred upon the decision-making board by ordinance.
- C. Inconsistent with applicable procedures specified by statute or ordinance.
- D. Affected by other error of law.
- E. Unsupported by substantial competent evidence in view of the entire record.

- F. Arbitrary or capricious.

15.5.3 Record of Decision.

- A. The following shall become part of the official record of decision:
- Documents and exhibits submitted to the decision-making board.
 - Meeting minutes.
- B. **Transcript of Audio/Video of Meetings:** Any party may request, at their expense, a transcript of the proceedings from any recorded audio/video.
- C. The Board shall determine contested facts and make its decision within a reasonable time. Every quasi-judicial decision shall be based on competent, material, and substantial evidence in the record. Each quasi-judicial decision shall be reduced to writing and reflect the board's determination of contested facts and their application to the applicable standards. The written decision shall be signed by the Chair or other duly authorized member of the Board. A quasi-judicial decision is effective upon filing the written decision with the Clerk to the Board. The decision of the Board shall be delivered by personal delivery, electronic mail, or by first-class mail to the applicant, property owner, and to any person who has submitted a written request for a copy, prior to the date the decision become effective. The Administrator shall certify that proper notice has been made.
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Notes:

1. The ZBA of Waynesville has 5 members, plus 1 alternate, therefore 4 members must be present for the Board to make decisions.
2. Decisions require a **finding of facts**, based on “**competent, material and substantial evidence.**”

The general rule is (Boards) can only rely on opinions offered by qualified experts and even then a proper foundation must be established for the testimony. For example, a real estate expert testifying about property value impacts needs to carefully lay out the comparable sales considered and other facts supporting the analysis leading to the opinion on property value impacts. . . . The testimony of a lay witness offering only opinions or conclusions is characterized by the courts as “speculative assertions,” “mere expression of opinion,” or “generalized fears” — not the substantial evidence needed by the decision-making board to reach its conclusions.

Legislation adopted in 2009 confirms this distinction about the testimony of lay witnesses. S.L. 2009-421 created G.S. 160A-393(k)(3) to expressly address the opinion testimony of lay witnesses in quasi-judicial land use hearings, such as those for special and conditional use permits and variances. This law, effective January 1, 2010, provides that lay opinions may not be used to establish impacts on property value or the impacts of vehicular traffic on public safety.

The answer to this question is altogether different when the governing board is considering a legislative matter, such as a proposed rezoning. In those hearings, public opinion is vitally important and can be fully considered. It is only in a quasi-judicial setting, where quality evidence is required to support findings of fact, that the opinion testimony of lay witnesses may not be considered.

3. What is Arbitrary or Capricious?

Arbitrary: a decision based on random choice or personal whim. "Willful and unreasoning action, without consideration and regard for facts and circumstances presented . . . bad faith or failure to exercise honest judgment."

Capricious: subject to whim; impulsive and unpredictable.

Arbitrary and Capricious: "A willful and unreasonable action without consideration or in disregard of facts or law or without determining principle."

- *Black's Law Dictionary*

4. Standing: Who Can 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.

- *Coates Canons, David Owens*