

Quasi-Judicial Hearing Procedures

Housekeeping

- Bylaws/Rules of Procedure – sample is on DCA website from “The Zoning Board of Adjustment in NC,” 1984, Institute of Government book (from now on referred to as “IOG book.”)

It is highly recommended that all boards have rules of procedure. Good things to cover are:

- Officers and their duties
- Rules of conduct
- When meetings are held
- Cancellation of meetings
- What is a quorum, and what happens when an absence means it will take a unanimous vote in order for an applicant to receive a favorable finding.
- What constitutes a conflict of interest, and what is the procedure for dealing with a member who someone believes has a conflict and doesn't recuse him/herself, or when someone says they have a conflict and the other members don't agree
- Procedure for filing appeals from decisions of Zoning Administrator
- Rehearings
- When can an application be withdrawn—up until hearing begins, up until vote taken? (this point is not covered in sample rules on website)
- What happens if a member misses a meeting where a case is heard, and is continued—can the member participate in the discussion and vote at the meeting when the case is decided? (this point not covered in sample rules)
- Time frame for decisions, and how they are presented to applicant and interested parties; where to find the record of cases
- Expiration of permits
- Amendments to by-laws

- Quorums

- Statutes do not set a special quorum for BOA. To adopt rules of procedure, establish meeting schedules etc., a simple majority is generally established.
- When the board hears a case, the quorum should be set so it is at least as high as 4/5 of the membership so action can take place. However, boards could consider establishing a quorum equal to the entire membership of the board that applies when the board hears a case, so a unanimous vote is not needed in order to find in favor of the applicant.

- Zoning Ordinance

Should be familiar with what local ordinance says regarding procedural matters for BOA, and what isn't covered there should be in rules of procedure that are adopted separately.

➤ Hearing Notice to the Parties (refer to p. 17 of handouts for more information)

Critical to give notice; if notice not given, Board has no power to act and any decisions it makes are void.

- Statutes do not lay out special published notice requirements, unlike zoning amendments; just say “due notice” to “the parties.”
- Four kinds of notice: published in newspaper, signs posted in affected neighborhood, written notice and oral notice.
 - Who is a “party?” Enabling acts provide that “any person aggrieved” by the decision of the zoning enforcement officer may appeal to the BOA, Courts have interpreted a “party” to include the person who filed the appeal; owner of property in question (if not appellant); others who have a direct interest in the property such as lessees; person who has an option or contract to purchase the property; adjacent property owners; others who can demonstrate they would be adversely affected directly by the decision; and the Zoning Administrator.
 - To avoid legal complications, Board should give the parties direct notice in a manner that can be proven in court, such as certified mail, return receipt requested.
 - Local ordinance could require mailed notice, specifying the distance within which neighboring properties are entitled to notice, and the records (usually tax listings) to be checked for names and addresses of property owners.
 - Institute of Government recommends two forms of notice—could be notice published in newspaper (helpful in court cases—can easily prove it was given) and written notice to parties/affected property owners. Posting a sign on the property is more effective in actually letting people know about the case.
 - Most important point is that if you have notice requirements spelled out in your rules of procedure or local ordinance, then you must follow them or any decision can be challenged procedurally.
 - Once a hearing has been opened it may be continued to a later date if it is necessary; additional notice is not required so long as it is continued during the meeting itself to a certain date, time, and location; however, many boards provide for additional notice.

➤ Extra-Territorial Jurisdiction (ETJ) members

- G.S. 160A-362 requires cities/towns to give representation to residents of ETJ on its Planning Board and BOA, based on the population of the ETJ and what proportion it makes up of the entire planning area. County Board of Commissioners responsible for appointing representatives. ETJ should also be represented by alternates.
- It’s a good idea to check the population of the ETJ and the proportion it makes up of the planning area after every Census so the number of members is correct.

- Statutes allow but do not require municipality to specify that ETJ members are to have equal rights and privileges; in other words, they may vote on all matters whether they are in ETJ or not. If not specified in ordinance, then they may participate only on ETJ matters.
 - Membership of BOA expands when ETJ members join w/ regular membership to conduct a hearing—if regular membership is five, and ETJ members are not allowed to participate in all hearings and there are two ETJ members, then the membership of the board expands to seven when a case comes up that involves the ETJ.
 - If there are too few qualified residents of ETJ to meet required membership, County Commissioners may make up deficiency by appointing other residents of the county living outside of the ETJ.
- Alternate members
 - It is highly recommended that the governing boards appoint alternates to BOA. Conflicts of interest are bound to arise, people take vacations or become sick, and it makes life a whole lot easier if there are alternates who can fill in.
 - If a city/town has ETJ, then from a legal standpoint it should have alternate members who are inside the town limits as well as members in the ETJ; “inside” alternate members should replace “inside” regular members and vice versa.
 - It is a good idea to encourage alternates to attend meetings for a while so they become familiar with the meeting format and procedures.
- Open Meetings Law (G.S. 143-318.9 through -318.18)
 - All meetings for the purpose of conducting business must be open to the public. A BOA may not retire to deliberate a case in private. Closed session may be held only for seven narrow purposes set forth by statutes, such as receiving legal advice regarding pending litigation. Public notice must be provided for all meetings: regular schedule filed with Clerk, special meetings notice posted and mailed to the media.

Conflicts of interest

- Constitution gives parties legal right to an impartial decision-maker
 - BOA members **must** avoid conflicts of interest
 - Legislation passed in 2005 session codified existing case law, so members must not participate in or vote on any matter where they have:
 - A fixed opinion on the case prior to the hearing that is not subject to change (also called bias);

- Undisclosed ex parte communications (this subject covered in greater depth later in presentation);
- Close family, business or associational ties with an affected person;
- A financial interest in the outcome of the case.
- BOA may also vote to exclude a member participating in a hearing if the member him/herself does not do so and the Board members perceive a conflict.
- Must also avoid perception of conflict. Even if in your mind there is no conflict, it is always best to disclose a family or business tie and seek input of board members before case begins.
- This law exists not because BOA members are assumed to be bad people, but because the legislature wants to protect public confidence in the process. You don't want to give opposition reasonable grounds to wonder if the decision was made not on the merits of the case but rather on who was asking.
- However, don't become tempted to ask to be excused just to avoid a politically unpopular decision by raising a conflict of interest issue when there really isn't one. Some boards have the rule that if the member is not excused by the board but still withdraws, then it is counted as a yes vote.
- If a member is not participating in a hearing, the member should leave the room (not just where the Board is sitting) and not be present at all during the deliberation; this is to avoid the situation where a member might be accused of making gestures to indicate approval or disapproval of something being said.

Scenario #1

You are a member of the BOA and you realize an upcoming case involves property owned by the church you used to attend up until three months ago. *What should you do?*

- What if the case involves property owned by a distant cousin?
- What if the case involves a business owned by your deceased wife's brother?

See p. 25 of handout packet for more examples of conflict of interest

Meeting format

- Getting the room ready
 - Have table large enough to accommodate Board members; maps of city or county; map showing zoning districts; identify property in question on map; make sure recording equipment is ready, and projector if needed; if

blackboard, then chalk and erasers. Have room large enough for crowd expected, with public address system if very large.

- Gives people confidence in the system when things look organized and all is ready ahead of time

➤ Swearing in/administering oaths

- Those offering testimony should be put under oath (or affirm). This reminds witnesses of the seriousness of the matter and the necessity of presenting factual information, not opinions or speculation.
 - Only sworn testimony can/should be used in making a decision. State Supreme Court has required that the Board base its decisions only on testimony given under oath (affirm counts)
 - Everyone can be sworn at the beginning of a meeting, or it can be done individually.
 - While oaths may be waived if all parties agree, it is a much better practice to administer oaths.
 - Board chair or person acting in his absence may administer oaths.

The more controversial the case, the more important it is to have a hearing that adheres closely to the rules.

➤ Using scripts, handouts and forms--there is a sample script on DCA website

- It would be a good idea for the staff or board chair to have a script that they read before each meeting to explain that this is a quasi-judicial hearing and by law it must adhere to certain procedures, explain how the meeting will work and to serve as a reminder that there are standards BOA must follow, namely:
 - Chair can announce that the State Supreme Court has required that the Board base its decisions only on testimony given under oath (affirm counts) and then ask everyone who expects to testify at the hearing to come forward and be sworn/affirm.
 - If anyone refuses to be sworn (or affirm), then chair should inform them that their statements must not be treated as evidence on which to base a decision, but merely as arguments.
 - Please limit testimony to facts relevant to the standards for the decision, what you know personally; no opinions;
 - Here is how the voting works—4/5 required to find in favor of the applicant
 - For a conditional/special use permit, could say the policy has already been established that allows this use to be established if certain conditions are met
- A script can help citizens understand the process.
 - Forms can help board members remember all the steps and procedures they must follow, and provide an outline to use to work through decisions.

Collecting evidence (Refer to p. 18 of handout packet for more information)

- Board member packets
 - Packets can be mailed out to board members before the meeting, or handed out at the meeting. If mailed out ahead of time, then the applicant and all other parties should receive one at the same time as the members. Could also use local government website to post agenda, staff reports, etc.
 - All items are public record and anyone is entitled to see the application, staff report, exhibits or anything else.

- Ex parte communication is not permitted
 - Defined as communication outside the presence of the other party; this means that all discussion regarding the case should take place at the meeting so everyone hears what is being said at the same time and has the opportunity to respond or counter testimony immediately.
 - This includes conversations between board members and staff, attorneys, among board members themselves, neighbors at the site or someone a member bumps into at a social gathering, grocery store, or church.
 - It is up to the board member to end discussions about a case outside the meeting; you can be polite but you have to be firm if someone is persistent.
 - Member needs to say at the beginning of the hearing if someone approached him/her about the case and wanted to give an opinion, even if member tells the person it can't be discussed at that time.
 - Refer to p. 20 of the handout packet for some examples of contact before a meeting; answers are given to these examples plus others in handout at the back of packet.
 - If a member has special knowledge about a site or case, it should be disclosed at the beginning of the hearing.

- Site visits
 - It's a good idea to go look at the site—can't bring it to the meeting. State what you observed at the hearing; this puts evidence in the record, and gives the applicant and any other party the opportunity to clarify and rebut what the board member says.
 - Don't go as a group unless it's part of the meeting.
 - A member does not have the automatic legal right to go onto the property, although it is a good practice to have a place on the application that clearly indicates whether it is permissible for board members to go on the property to take a look, or the applicant could state any times that are better than others to visit the site. Otherwise, stay on the sidewalk or street.
 - If a neighbor comes over and wants to talk, remember that you must not engage in ex parte communications; you can be polite, but you must be firm. You also need to state at the hearing that you saw/talked to the neighbor.

➤ Standing

- This refers to who has the right to participate in the hearing and contest the issuance of a permit (this also implies right to cross-examine); also goes back to comments about who is a “party” to a proceeding. “Standing” also relates to who can contest the outcome of the decision in court.
- Anyone has standing who will suffer some “special damage” not common to all other persons (who may oppose a permit). A diminution in property values would constitute such special damage, so a neighbor could have standing. Legislation from the 2009 session, S.L.2009-421 (S 44), creates G.S. 160A-393; it clarifies who has standing (look in handout packet for this new statutory language).
 - Not all residents in the community automatically have standing just because they happen to be residents. If someone lives across town and wishes to participate, then they need to say how case will affect them directly and the BOA can decide if they may participate in the hearing. If someone wanders in by chance, for example, and decides to attend the hearing because it looks interesting and wants to “weigh in” simply because they have an opinion, they are not legally entitled to give testimony and cross-examine witnesses because they don’t have standing.
 - One opportunity to make this determination is when the person comes forward to speak; when they state their name and address, it is permissible to ask them their interest in being a witness.
 - G.S. 160A-393 specifies three categories of entities with standing to bring these judicial appeals:
 - ✓ Those who applied for approval or who have a property interest in the project or property, including: the applicant; and all persons with a legally defined interest in the property, including not only ownership interest but also leasehold, option to purchase the property, or an interest created by an easement, restriction, or covenant
 - ✓ Local government whose board made the decision being appealed
 - ✓ Other persons who will suffer “special damages” as a result of the decision. Both individuals (such as a neighbor who contends the decision will adversely affect the value of his or her property) and qualifying associations are included.

The compromise worked out during the debate over the bill allows some, but not all, groups to have standing. Neighborhood associations and associations organized to protect and foster the interests of the neighborhood or local area are granted standing, provided at least one of the members of the association would have individual standing and the association was not created in response to the particular development that is the subject of the appeal.

- The issue of standing is more likely to be an issue in a variance hearing than for a conditional use permit, because a variance is probably going to directly affect only the immediate neighbors. In a conditional use permit, impacts are more likely to affect a broader land area.
- Cross-examination of witnesses can be done by anyone who has standing, not just BOA members.

➤ Witnesses

- Anyone who intends to present testimony at a hearing should be treated as a witness, including local government staff if they are defending an ordinance interpretation, stating what they perceive to be the facts of the case, or making a recommendation concerning the outcome of the case.
- A party can testify and then call other witnesses who are not parties to testify
- Parties may be represented by counsel or a spokesperson.
- All witnesses should be sworn at the beginning of the case by the board chair or acting chair.
- 2005 changes in legislation now authorize city/town and county boards of adjustment to issue subpoenas in order to compel attendance of witnesses and the production of important documents.
- BOA can call its own witnesses.

Scenario #2

There are seven members on your Board, and a case comes up that is located on a remote gravel road known to be difficult to drive. The applicant offers to drive the Board to the members to the property in her SUV in two groups so there won't be a quorum in her vehicle. *Is this OK?*

- What if the applicant offers to include the head of the citizens group opposed to the project on each trip?
- What if it's a county-owned vehicle and it's driven by the planner?

➤ Type of Evidence

- State Supreme Court held Board's findings must be "supported by competent, material, and substantial evidence" (wording from 1963 court case *Jarrell v. Board of Adjustment* and continued in others: 1980 case, *Coastal Ready-Mix Concrete Co., Inc. v. Board of Commissioners of the Town of Nags Head*.) What is meant by "competent" -- generally understood to mean legally admissible in a court of law; in BOA's case, admissible before a local board.
- Key points need to be substantiated by the factual evidence in the hearing record; findings cannot be based on conjecture or assumptions.
- Need to have testimony in the record that supports a finding, for example, that a certain type of project may lower property values, beyond a neighbor saying

“everybody knows...” Even someone with credentials, for example, a licensed Realtor, may not simply make a statement and have it count as evidence without providing facts to support the argument.

- G.S. 160A-393 also addresses the use of hearsay evidence and opinion testimony by lay witnesses. Several specific instances of opinion testimony by nonexpert witnesses are explicitly deemed not to be competent evidence. These include testimony about how the proposed use would affect neighboring property values, whether vehicular traffic would pose a danger to public safety, and any other matter upon which only expert testimony would generally be admissible under the rules of evidence. 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. (David Owens blog <http://sogweb.sog.unc.edu/blogs/localgovt/?p=1160>)
 - A North Carolina court case in 2000 rejected the statements of a real estate agent in a conditional use permit hearing that property values would go down, saying the agent did not present “any factual data or background, such as certified appraisals or market studies, supporting [his] naked opinions” (*Sun Suites Holdings v. Board of Alderman of Garner*). In other words, unless the real estate agent produces appraisals or market studies as part of his/her expert testimony, the Board should not consider this testimony as evidence.
 - It is possible for BOA to admit whatever evidence is offered, unless it feels that it is not only irrelevant, immaterial or repetitious but also calculated to inflame the situation, unfairly affect the decision, or is unduly delaying the proceeding.
 - IOG book states that BOA doesn’t need to worry so much about what evidence is actually accepted by the Board; what really matters is what evidence is used to reach a decision.
 - Where conflicting evidence is presented, the board has the responsibility of deciding how much weight to accord each piece of evidence (this also relates to who has the “burden of proof” discussed later).
- Hearsay (including submission of written statements)
- Means a statement not made at the hearing that the proponent seeks to have admitted as evidence.
 - Why is excluding hearsay testimony important? Person/expert needs to be present so questions can be asked about the particulars of their statements. For example, imagine someone at a conditional use permit hearing quoting from a study on the Internet that said asphalt plants increase asthma rates. To truly use this study as evidence, the author needs to be present to talk about how the study was done and to interpret the results. The author would also be available to answer questions from the opposition, to determine how the situations in the

study relate to the specific circumstances at this site for example, and if they are truly comparable.

- Person needs to be present at meeting and sworn in order to have testimony included and used as a finding.
- According to staff at Institute of Government, hearsay is admissible, but it cannot be the sole basis for a crucial finding of fact/contested finding.
- Law regards hearsay evidence as inherently unreliable.
- Petitions, even if notarized, are not valid evidence that can be considered in making a finding because they represent people's opinions.

➤ Time limits for speakers

- Time limits that are common at Planning Board or governing board meetings cannot be used. It is not fair to require that the applicant or an opposing neighbor limit their statements to three minutes, for example.
- It is possible to limit unduly repetitious or irrelevant testimony,

Scenario #3

You are a newly-appointed BOA member and there is a controversial conditional use permit coming before the BOA in a couple of weeks. You see one of your neighbors in the grocery store and she says she has a lot of concerns about the permit. You talk for a few minutes while she outlines her objections and then a few days later she comes by your house with a petition against the project and asks you to sign it. *What should you do?*

➤ Cross-examination

- It is part of a quasi-judicial hearing for parties to cross-examine witnesses. The board can establish reasonable procedures for this, such as allowing questions to be posed only by a single representative of a party. Board members are also free to pose questions to anyone presenting evidence.
 - If no one is at the meeting who opposes the application, then BOA should try to act in that capacity and ask questions so all points are considered.

➤ Burden of proof

- The person requesting a variance, special/conditional use permit, or is appealing a ruling of the Zoning Administrator has the burden of producing sufficient evidence for the board to conclude the standards have been met.
 - Courts do not give clear guidance on what points must be proved. Until then, general principle is that applicants should be required to bear burden of producing evidence and the burden of persuasion with respect to all ordinance requirements and conditions that are specific enough so applicant can reasonably be expected to understand what evidence must be presented to make a case.

- Ordinance itself can state specifically who has burden of producing evidence with respect to various requirements and conditions.
 - If insufficient evidence is presented, the application must be denied. The board can also continue the hearing to a later date to receive additional evidence.
 - Once sufficient evidence is presented that the standards are met, the applicant is entitled to a permit or variance.
 - If conflicting evidence is presented, the board must determine which facts it believes are correct.
- Exhibits
- The application for the permit and any correspondence should be entered into the hearing record as an exhibit. Might need to require a map as part of the application.
 - Witnesses may present documents, photos, maps or other exhibits, but once they are presented they become part of the record and must be retained by the board.
 - If someone points to a particular feature on a particular picture, make sure picture is numbered and feature is identified on the picture so a trial court will be able to quickly find the same piece of evidence.
 - Make sure exhibits are identified in the minutes.
 - It is a good idea to keep exhibits even past the time for an appeal; they may be important when the project is constructed, for example, to show the location and dimensions of a buffer.

Decision-Making

- Facts
- It is the responsibility of the BOA to investigate the facts of a situation and decide whether they come within the provisions of the ordinance it is enforcing.
 - Decisions of boards must be “supported by competent, material and substantial evidence in the whole record” (*Ready-Mix Concrete v. BCC Nags Head*, 1980) or in other words, be based on facts, not opinions.
 - Board reads the ordinance, determines which findings must be made, examines the factual evidence before it, and then decides whether this evidence enables it to make the required findings.
 - Continuum between fact and conclusion: it is straightforward to say (and determine) what the size of a lot is. However, whether a certain use, if located on that lot, would be detrimental to the public health and safety is a conclusion BOA must reach after they have exercised their collective judgment.
- Findings of fact/Conclusions of law

- Written findings of fact are required. The board must specify what it determines the facts to be and must document the basis for its decision.
 - Think of the findings as *footprints in logic* to help describe how the board arrived at its decision.
 - Findings of fact should be designed to summarize the evidence, allowing legal conclusions to be reached about how ordinance standards apply.
 - Simply repeating the standards for the ordinance and noting each one is met is not enough, especially when there is conflicting evidence or when the permit is denied.
 - For example, in a special use permit case, typically the ordinance requires two kinds of findings: some that are general and must be made in every case involving a special use permit, and some that apply only to the specific kind of use for which an application has been submitted.

Board needs to do two things:

- Determine the facts/findings (at some point this must be written down.) It would be a good idea at the end of all the testimony for the Chair to summarize the points and ask, “Have I misstated anything? Do the other Board members, applicant, neighbors, staff agree?”
- Draw conclusions: in other words, determine how the facts fit the standards that must be followed.

- What is a finding of fact, and what is a conclusion of law?
 - Finding of fact: “The applicant installed the swimming pool and deck in May of 2007 without a permit and located it closer than 10 feet to the property line, thereby violating the side-yard setback regulation in effect at that time.”
 - Conclusion of Law: “Any hardship suffered by the applicant by the application of the ordinance is self-imposed because the applicant knew or should have known that the applicable setback regulations prohibited him from locating the deck within the required setback.”

- Who prepares findings of fact? (Refer to p. 21-23 of the handout packet for more information, sample findings)
 - Applicants can submit proposed set of findings they hope will be accepted, staff can submit proposed set; can also be done by BOA attorney, BOA members or clerk to board.
 - Findings can be part of the minutes, or a separate document. If they are done quickly, it robs those involved of the time to reflect.
 - The findings of fact can also be done after the day of the hearing/vote. The Board can delegate to the chair the power to approve the findings after the meeting date, or they can be done by the board at the next meeting.

- When do you make a decision?

Assuming you are ready to make a decision at that particular meeting, you have two options.

- You can hear all the cases scheduled for that meeting and then start the deliberations; IOG book recommends this procedure because “it demonstrates clearly to the parties that their time for talking has ended and they are not to interfere with the board’s deliberations.” Compares to a jury withdrawing to their room to deliberate; the book acknowledges this cannot be done in a BOA meeting.

However, you should not close the hearing in case the board needs to ask for additional evidence on a particular point. Could say “This ends the portion of the hearing for public comment” without actually closing the hearing.

Disadvantage is that you may forget some of the discussion or points that were made; also the parties will have to wait until the end of the meeting before they learn the outcome.

- You can begin the deliberations immediately after the evidence is presented and all parties have cross-examined witnesses. Again, you should not close the hearing.
- Although the board cannot ask the public as a whole to leave the room, individuals who “willfully interrupt” etc. may be ordered to leave the meeting (failure to comply is punishable by imprisonment and/or a fine).

➤ Decisions

- Several court cases, when taken together, lead to this conclusion: When BOA grants a variance or conditional/special use permit, not necessary to go into a lot of detail; but when board denies the request, the reasons for denial should be as specific as possible.
 - In other words, if a request for a variance or conditional/special use permit is turned down, BOA needs to tell applicant (and a reviewing court) exactly why it acted as it did.
- Helpful to use forms so no necessary steps are overlooked. Forms in IOG BOA book are now in electronic format and can be found at our website: <http://www.ncommerce.com/en/CommunityServices/CommunityPlanningAssistance/CommunityPlanningProgram/WesternRegionalOffice/BOATraining.htm>

➤ Discussion of motions

- Four-fifths vote in favor of applicant required
 - Motion can be made either to grant or refuse the relief asked by the applicant.
 - Refer to page 24 of handout packet for some examples of the way motions can be made and how the votes are calculated to determine whether the applicant’s petition is successful.

- Easy way to calculate whether applicant is successful in the petition is that there must be four-fifths vote in favor of applicant.
 - Staff may provide “suggested motions” as part of the staff report/memorandum.
- Precedents
- Prior decisions are not legally binding on a BOA; each case must be decided on its own merits. Slight differences in individual facts and situations can lead to differing results. A board should be aware of previous decisions and as a general rule, similar cases should usually produce similar results. More info on p. 24 of handouts
 - If board reaches a different result for a very similar fact situation, then the written decision must clearly explain why there was a different conclusion. Remember due process—don’t want it to look like the decision was made based on who was doing the asking.
- Participation in continued hearings
- If a hearing is continued or conducted over several days, a member may miss part of the hearing but be present and participate when the vote is held.
 - The courts have ruled that a member who was not physically present for the presentation of all evidence may vote, but only if the member has had full access to the record of evidence presented in the member’s absence—review minutes, see exhibits, listen to a tape.
 - Also have ruled new members may vote even if they were appointed after some of the evidence was presented (*Brannock v. Board of Adjustment*, 260 N.C. 426, 132 S.E. 2d 758, 1963). However, this should be addressed in the rules of procedure so there is no confusion at the meeting whether a Board member is allowed to participate and vote.
- After the meeting
- Complete “Findings of Fact”
 - Possible for findings to be done and approved at BOA meeting, but they can be done later as well
 - Can delegate to Chair to prepare findings
 - Or staff or Chair can prepare after meeting and then bring back to full Board at next meeting for a vote
 - this is recommended if there is a high probability the decision could be appealed—and in this case, it would be a good idea to have the local government’s attorney present at the meeting to help with the findings so they are as defensible as possible

- Prepare “Order”
 - Concise summary statement of what action was taken by BOA and why; official decision of BOA
 - Also relates to judicial appeal—Statutes specify (for municipalities 160A-388(e2); for counties 153A-345(e2)) that petition for review shall be filed within 30 days after decision of board is filed in office specified by ordinance, or after a written copy is delivered to every aggrieved party who has requested it, whichever is later. Should also notify appellant.
 - Sample forms are in IOG book; summarizes findings of fact and conclusions that explain why Board acted as it did in this particular case
 - Can wait to do Order until next BOA meeting, take vote of full Board (again, good idea if it looks like decision will be appealed to Superior Court)
 - If applicant in a hurry, and case was non-controversial, BOA could authorize issuing building permit before Order and letter are finalized
 - Written decision can be prepared for acknowledgement by property owner so it can be recorded in Register of Deeds’ office when required by zoning ordinance (especially for major projects)

- Write letter to applicant, aggrieved parties
 - Statutes require decision to be delivered by personal service or registered or certified mail, return receipt requested.
 - Basically transmits Order—in simple cases, could combine letter and Order
 - Form letter in IOG book

Scenario #4

Bed and breakfasts are not allowed in the R-1 district of the zoning ordinance. A large house in the district was on the market for a while and was finally purchased a few months ago. The new property owner comes before the Board and asks for a variance to convert it to a B&B. She says she didn’t realize how deteriorated it was when she bought it, has spent a lot of money fixing it up, and now doesn’t have enough money left to make the monthly mortgage payments. She says she contacted the realtor who sold the house to her to get his advice because he served on the Board of Adjustment for several years, and she says he advised her to ask for a variance. She produces six letters from the surrounding neighbors, all notarized, saying they have no objection to it being converted to a B&B. She also says she won’t put up a sign, and won’t have any parking in the front of the house. *What should happen next?*

- What if the Board of Adjustment granted a variance for a B&B (also zoned R-1) a few houses down on the same block three years ago—has a precedent been set?

- Would it make any difference if the property were adjacent to the R-2 zone, where B&Bs are allowed?

Scenario #5

You are the Chair of the BOA. At the hearing for a controversial conditional use permit, the representative of a citizens' group opposed to the project presents a petition signed by 50 people and asks that it be entered into the record as evidence. ***What should you do?***

- Would it make any difference if the signatures were notarized?
- At the same meeting, a representative of the local Merchants' Association presents a petition in favor of the project, signed by all members of their Board and 60 general members. ***What should you do?***

Building a record

- Complete records must be kept of the hearings.
 - This is vital because if the case is appealed to Superior Court, all the necessary information to affirm or reverse the BOA must be in the record. The Superior Court acts in the capacity of an appellate court—it takes no additional evidence, but must make its decision strictly on the basis of the record submitted.

See p. 30 of handout packet for more information on judicial appeals

- Detailed minutes are necessary that record all the procedural aspects of the meeting
 - A narrative summary of what was said is adequate for the minutes.
- Although it is not a legal requirement, most board make audiotapes of the hearings in case a transcript is needed if the case is appealed to the courts; a recording is useful if a questions should arise about the accuracy of the minutes.

The record should:

- summarize the *facts presented in evidence* and should include any other facts known to the Board members concerning the case;
- have the names of Board members present
- what witnesses were heard, whether they were sworn
- the summary of their testimony
- whether the parties were represented by counsel
- whether cross-examination of witnesses was requested and allowed, and any other event at the hearing that had any effect on the outcome
- state the *findings of fact* that forms the basis of the board's decision;
- include the *decision* of the board plus a record, by name, of each member's vote.
 - Each case should be given a number.

- If you use any of the suggested forms, they should become part of the record.
- Any exhibits presented should be retained by the board and become a part of the file on that case.
- If appealed to court, what will be examined is whether the conclusion reached is supported by the evidence; was the evidence competent, material, and substantial—not so much whether the Board reached the “right” decision. In other words, they are not “second guessing” the decision itself, but determining whether a reasonable person hearing the same evidence might reach the same decision.

Superior Court must be able to answer the following questions by looking only at the record:

- What sort of action was requested of the Board (appeal from decision of zoning administrator, variance, or conditional use permit)?
- What sections of the ordinance are relevant?
- What procedures were followed at the hearing?
- What evidence was presented or considered at the hearing?
- How did the Board interpret specific provisions of the ordinance or other matters of law?
- What was the Board’s final decision, and on what findings of fact or conclusions did that decision rest?