



Coates' Canons Blog: Can the Opinions of Neighbors be Considered in a Zoning Hearing?

By David Owens

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A national retailer plans to locate a new big box store on a large vacant lot adjacent to an existing single-family neighborhood. The town council is holding a hearing on a special use permit application for project. The zoning ordinance requires that the project not have a significant adverse impact on public safety and not have a significant adverse impact on neighboring property values. A large group of the neighbors appear at the hearing to vigorously oppose the application. A spokesperson for the neighbors testifies that she firmly believes that traffic generated by the project would pose a substantial danger to the neighborhood children as they walk, bike, and play on adjacent streets. Another neighbor who is a real estate agent testifies that everyone knows the value of their houses will go down if this project is approved. He presents a petition signed by 80 nearby property owners who agree with this contention. Can the council base a permit decision on either's testimony? New legislation clarifies the use of lay-person testimony in these situations.

Most development regulations in North Carolina require special or conditional use permits for some kinds of development. The ordinance specifies the standards that must be met for those permits. The board deciding the permit (whether it is the governing board, board of adjustment, or the planning board) holds a formal evidentiary hearing to gather evidence as to whether the standards are met. Witnesses appear under oath and subject to cross-examination to present testimony. It is very common that the standards for these permits require that the project not harm public health and safety and that they not harm neighboring property values. So what evidence may be considered in making these determinations?

Much of the evidence presented at these hearings is non-controversial. The applicant often has retained experts to conduct analysis, write reports, and testify at the hearing. For example, traffic engineers may present a detailed traffic impact analysis. A professional real estate appraiser may testify as to the results of a study on property value impacts. Reports from state or local government staff on existing and projected traffic counts may be presented. Occasionally the opponents to a project will also retain experts to present alternative views of the impacts of the project. In all of these situations members of the decision-making board are free to question the witnesses about their assumptions, methodology, or the data relied upon. If the expert opinions vary, the board must weigh the credibility of each and make a judgment as to where the board concludes the facts lie. But, assuming the experts are properly qualified, there is no question that the evidence they present is admissible and can be fully considered by the board.

But in many cases evidence on these issues is offered by lay persons. The applicant may directly speak on behalf of the project, or have a presentation made by a contractor, surveyor, or other agent. Often the neighbors speak about their concerns. They have not hired professional experts, but are speaking for themselves and basing their testimony on personal observations and opinions. To what extent can their testimony on technical issues like traffic safety and property value impacts be considered?

If the testimony is on *facts* within the personal knowledge of the witness, the testimony can be fully considered by the council. A neighbor can testify about the number of children she has seen biking on the street, about accidents she has observed, about the level of traffic she has seen. A neighbor can testify that he moved away from a commercial area and would not buy a house near a big box retail site. The decision-making board can take these facts into consideration in making its determination of the facts.

But offering *opinions* or conclusions about the implications of those facts is another matter altogether. The general rule is that the council 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 that is offered. 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.

So, in the examples at the top of this post, the testimony of the two neighbors can be received, but the opinions and conclusions offered cannot be the basis of a conclusion by the council unless the neighbors have been properly qualified as expert witnesses and have clearly laid out the factual basis for their opinions.

One last important point. 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.

Links

- www.ncleg.net/Sessions/2009/Bills/Senate/PDF/S44v7.pdf