Meeting Agenda & Instructions for Remote Zoom Participation

Spencer Historic Preservation Commission
Regular Meeting Agenda
Monday, April 15, 2024, 7:00 P.M.

- Call the Meeting to Order .... Leslie Ann Talbott, Chair
- Introduction & Pledge of Allegiance.. Volunteer from the Board
- Formal Roll Call.. Leslie Ann Talbott, Chair
    - [Determination of a Quorum (**3** Regular Business)]
- Approval of Agenda
    - Adoption of Agenda for April 15, 2024, Regular Meeting.

New Business:

1. **<u>CERTIFICATE OF APPROPRIATENESS (COA) APPLICATION:</u>**

   COA-24-004– 709 4th Street – John & Anne Haddock (Owner/Applicant)
   Rowan County Parcel ID: 033 143
   <u>Proposed Project:</u>

   - Construction of new roof dormer on right-side roof slope to match previously-approved new roof dormer on left-side roof slope. Specifically, the proposed dormer features a gabled roof, horizontal clapboard siding, and a window substantially matching the existing windows on the house.

2. **Quasi-Judicial Training (Steve Blount)**
3. **Board to Receive an Update on 500 South Carolina Avenue (Notice of Violation)**
4. **Board to Receive an Update on 607 3rd Street (Notice of Violation)**

- **Public Comment**
- **Comments from Staff**
- **Comments from Board Members**
- **Announcements**
    - Next meeting is Monday, May 20, 2024, 7:00 P.M. (Regular Meeting)
- **Adjourn**

INSTRUCTIONS FOR ZOOM PARTICIPATION:

All interested persons are invited to participate in the public hearing at Town Hall. If you have any questions about participating in this meeting, please contact Kyle Harris, Town Planner, at (704) 633-2231 ext. 20 or kharris@spencernc.gov. Additional information will also be posted on the Town's website (www.spencernc.gov).

To review Spencer's Historic District Standards and to find more information about the local historic district review and permitting process, please visit the Town's website or contact the Town Planner.

Zoom Participation:

Remote Meetings: If you choose to participate in the meeting remotely by Zoom, please use the link below. If you choose to participate remotely, you are advised to contact the Town Planner prior to the meeting:
Join Zoom Meeting:

https://us02web.zoom.us/j/87232609059?pwd=QjIyL1dma0hMSFVMMnpnYWdVMmZ3UT09

Or call 301 715 8592
Meeting ID: 872 3260 9059, Passcode: 226177
One tap mobile
+13017158592,,87232609059#,,,,*226177#

Rowan's Original Gateway.

Planning & Zoning Administration:
Certificate of Appropriateness (COA) Staff Report

HEARING DATE:	April 15, 2024
SUBJECT:	Certificate of Appropriateness (COA) Staff Report
CASE PLANNER:	Kyle Harris, Town Planner
CASE:	COA-24-004
APPLICANT:	John Haddock (Owner/Applicant)
ADDRESS:	709 4th Street (Spencer Local Historic District)
PARCEL ID:	033 143
PROJECT TYPE:	*Installation of Roof Dormer*
EXISTING LAND USE:	Historic Residential
EXISTING ZONING:	RMST (Residential Main Street Transition) | Corporate Limits
REPORT PREPARED BY:	Kyle Harris, Town Planner

Per Town Code Sec. 32.43, no exterior portion of any building or other structure located in Spencer's Historic District shall be erected, altered, restored, moved, or demolished until after an application for a Certificate of Appropriateness (COA) has been submitted to and approved by the Historic Preservation Commission.

Applicant Proposal:

CERTIFICATE OF APPROPRIATENESS (COA) APPLICATION:

COA-24-004– 709 4th Street – John & Anne Haddock (Owner/Applicant)
Rowan County Parcel ID: 033 143

Proposed Project:

- Construction of new roof dormer on right-side roof slope to match previously-approved new roof dormer on left-side roof slope. Specifically, the proposed dormer features a gabled roof, horizontal clapboard siding, and a window substantially matching the existing windows on the house.

Exhibits:

A. Staff Photographs
B. Previously-Approved COA Permit # COA-23-011 (709 4th Street)

Note:

- In considering this case, the HPC should avoid any unnecessary discussion of Fire Code requirements, which are outside your scope of authority and consideration.

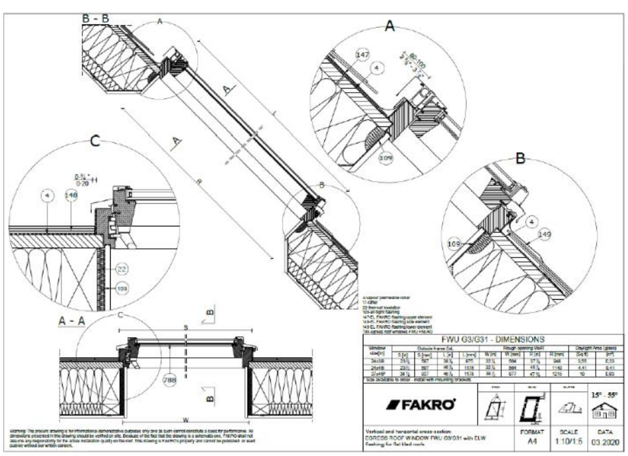
Staff Discussion:

The commentary below represents the staff's opinion and is offered to provide the Commission with some general guidance and points for discussion. The HPC is not bound by this opinion.

Background:

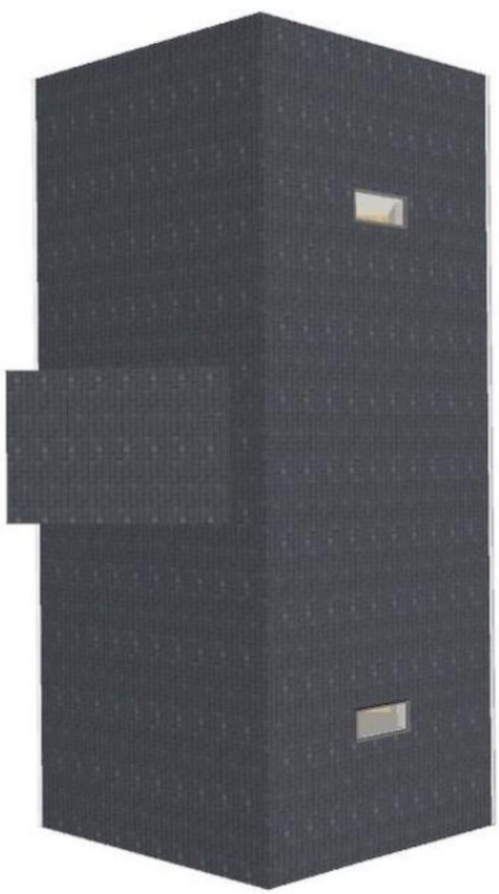
- On September 18, 2023, the HPC approved a Certificate of Appropriateness (COA) permit # COA-23-011 for a project at the subject property. The approved Scope of Work follows:
    - Skylights: Installation of two (2) flush-mounted egress skylights to the right-side roof slope.
    - Dormer: Construction of new roof dormer on left-side roof slope.
- A copy of the previously-approved permit is attached (Exhibit B).
- In approving the above COA, the HPC determined that:
    - The proposed skylights are not highly visible from the street (Standard 2.5.12). Additionally, because they are flush-mounted with the roof, they are inconspicuous, and the overall visual impact is minimal. Therefore, the skylights will not compromise the overall roof design or the character of the district (Standard 2.5.11).
    - The proposed dormer (approved with certain conditions) will be compatible with the existing home. The new work is differentiated and discernible form the original while maintaining compatibility in terms of architectural style, massing, form, scale, height, orientation, roof form, fenestration, materials, etc. (Standard 3.2.1).
- In approving the proposed dormer, the HPC stipulated the following design conditions:
    - Condition # 1: The new roof dormer addition shall feature a gabled roof to maintain compatibility with the existing historic home, which is a front-gabled bungalow and does not feature shed roof forms (Standard 3.2.1, 3.2.7, & 3.1.7). According to Standard 3.1.7, the style of the dormer should relate to the style of the house. The gable, eaves, soffit, and other roof trim elements of the new dormer should substantially match the appearance of the existing side gable eaves, soffit, and other roof trim elements (Standard 3.1.5); and
    - Condition # 2: The new roof dormer addition shall feature horizontal clapboard siding that matches the existing clapboard siding on the house in terms of width of boards, profile, color, texture, and overall appearance (Standard 3.2.1 & 3.1.6). The siding material must be installed in a traditional manner that includes the installation of corner boards, architectural trim around windows, etc. (Standard 3.1.6).
    - Condition # 3: The new roof dormer addition shall feature windows that match the existing windows on the house in terms of placement, configuration, size, material, detail, and overall appearance (Standard 3.2.3 & 3.1.3). This includes matching articulation of trim and detailing around the window and all parts of the window including headers, framing, casing, muntins, sills, sashes, etc. (Standard 3.1.3); and

- Additionally, the HPC placed certain conditions on the approved skylights:
  - o <u>Condition # 4</u>: The skylights shall be designed to substantially match the overall roof color; and
  - o <u>Condition # 5</u>: The skylight shall be installed such that the roof shingles shall be installed abutting the skylight frame to minimize any uncovered framing structure; and
- The approved skylights and roof dormer are depicted below:



Updated Proposal:

- The applicant requests a COA permit to modify the previously-approved project as follows:
  - Construction of new roof dormer on right-side roof slope to match previously-approved new roof dormer on left-side roof slope. Specifically, the proposed dormer features a gabled roof, horizontal clapboard siding, and a window substantially matching the existing windows on the house.
- The revised proposal would involve "substituting" the previously-approved right-side skylights with a second roof dormer to match the previously-approved dormer on the left-side. See below:

Previously-Approved COA:	Proposed Modified Plan:
	

- Therefore, the final proposed plan would include zero (0) skylights and two (2) roof dormers – one on either side elevation of the house.

Staff Analysis:

- In evaluating this proposal, the HPC should consider the following questions:
    - Does the proposed right-side dormer compromise the historic roof design or damage the character of the district? (Standard 2.5.11).
    - Is the proposed right-side dormer located in a manner that is inconspicuous and minimally visible from the street? (Standard 3.2.5).
- Note: In approving a permit for two (2) skylights on the right-side roof slope in September, the HPC determined in its Findings of Fact that the “right-side roof slope…is a less visible elevation and is not highly visible from the street”.
- Therefore, if the HPC previously-approved a matching dormer on a more visible building elevation (the left elevation is more visible from the street), then it would logically make sense to approve a permit for a matching dormer on a less-visible building elevation (the right elevation is less visible from the street).
- Staff recommends that, if approved, the additional dormer should meet the exact same design conditions established in the previously-approved permit (see Conditions # 1-3, above). These conditions stipulate the roof form (gabled), siding (horizontal clapboard), and window design of the dormer, in addition to ensuring matching trim elements and related details with the historic house.
- The Commission should consider if the proposal meets the Historic District Standards outlined in Section 2.5 (Roofs)(pp. 30-31) and Section 3.2 (Residential Additions)(pp. 46-48).

View of Right-Side Elevation (more photographs in Exhibit A):

Applicable Historic District Standards:

(*Based on 2022 Updated Standards)*

Section 2.5. Roofs (*Standards, pp. 30-31)*

- Standard 2.5.1. Retain and preserve roofs and roof forms that contribute to the overall historic character of a building, including their functional and decorative features, such as roofing materials, cresting, dormers, chimneys, cupolas, and cornices.
- Standard 2.5.11. It is not appropriate to introduce new roof features such as skylights, dormers, or vents if they will compromise the historic roof design, or damage character-defining roof materials or the character of the historic district.
- Standard 2.5.12. Install ventilators, solar collectors, antennas, skylights, or mechanical equipment in locations that do not compromise character-defining roofs or on roof slopes not visible from the street.

Section 3.2. Residential Additions (pp. 46-48)

- Standard 3.2.1. Design additions to be compatible with the existing historic building. The new work should be differentiated and discernible from the original while maintaining compatibility in terms of architectural style, massing, form, scale, height, orientation, setbacks, directional expression, roof forms, foundation, fenestration, materials, colors, and relationships of solids to voids in the exterior walls. Where applicable, conform to the design standards found in Section 3.1 when designing new additions.
- Standard 3.2.2. Avoid duplicating the form, material, style, and detail of the historic building so closely that the integrity of the original building is lost or compromised. Either reference design motifs from the historic building or introduce a contemporary design that is compatible with the historic building.
- Standard 3.2.3. Design additions so that the placement, configuration, materials, and overall proportion of windows and doors are compatible with those of the historic building. Select exterior surface materials and architectural details that are compatible with the existing building in terms of composition, module, texture, pattern, and detail.
- Standard 3.2.4. Limit the size and scale of the addition in relationship to the historic building so that it does not diminish or visually overpower the building.
- Standard 3.2.5. Attempt to locate the addition on the rear elevation so that it is as inconspicuous as possible and is minimally visible from the street.
- Standard 3.2.6. Construct additions, if feasible, to be structurally self-supporting to reduce any damage to the historic building. Sensitively attach them to the historic building so that the loss of historic materials and details is minimized. Attempt to attach new additions to existing buildings in

such a manner that, if the addition were to be removed in the future, the essential form and integrity of the building would be unimpaired.

- Standard 3.2.7. Design the roof form to be compatible with the historic building and consistent with contributing roof forms in the historic district. Maintain the existing roof pitch. Roof lines for new additions should be secondary to those of the existing structure. Typically, the original roof as visible from the public right-of-way should not be raised.
- Standard 3.2.8. Design the foundation height and the eave lines of additions generally to align with those of the historic building.
- Standard 3.2.10. It is not appropriate to construct an addition if it will detract from the overall historic character of the principal building and the site, or if it will require the removal of a significant building element or site feature.

Staff Suggested Findings:

FINDINGS OF FACT

Planning staff finds that the following proposal is **not incongruous** with the character of the District:

- Construction of new roof dormer on right-side roof slope to match previously-approved new roof dormer on left-side roof slope. Specifically, the proposed dormer features a gabled roof, horizontal clapboard siding, and a window substantially matching the existing windows on the house.

…Because:

1) The proposed roof dormer is located on the right-side building elevation, which is a less visible elevation and is not highly visible from the street (Standard 2.5.12).

2) With certain amendments to the roof form (see Conditions) the addition will be compatible with the existing historic home. The new work is differentiated and discernible from the original while maintaining compatibility in terms of architectural style, massing, form, scale, height, orientation, roof form (if gable), fenestration, materials, etc. (Standards 3.2.1).

MOTION (TO APPROVE)

Staff Recommendation:

Based on the above Findings of Fact and the applicable standards of the Spencer Historic District Standards, planning staff recommends that the Commission **approve** a COA for the proposal heretofore described at 709 4th Street (Tax Parcel ID # 033 143), located in the Spencer Local Historic District, **subject to the following conditions:**

1) The new roof dormer addition shall feature a gabled roof to maintain compatibility with the existing historic home, which is a front-gabled bungalow (Standard 3.2.1, 3.2.7, & 3.1.7). According to Standard 3.1.7, the style of the dormer should relate to the style of the house. The gable, eaves, soffit, and other roof trim elements of the new dormer should substantially match the appearance of the existing side gable eaves, soffit, and other roof trim elements (Standard 3.1.5); and

2) The new roof dormer addition shall feature horizontal clapboard siding that matches the existing clapboard siding on the house in terms of width of boards, profile, color, texture, and overall appearance (Standard 3.2.1 & 3.1.6). The siding material must be installed in a traditional manner that includes the installation of corner boards, architectural trim around windows, etc. (Standard 3.1.6).

3) The new roof dormer addition shall feature windows that match the existing windows on the house in terms of placement, configuration, size, material, detail, and overall appearance (Standard 3.2.3 & 3.1.3). This includes matching articulation of trim and detailing around the window and all parts of the window including headers, framing, casing, muntins, sills, sashes, etc. (Standard 3.1.3); and

4) Planning staff shall review and approve any revisions or deviations to any portion of the as-submitted work, that qualifies as a Minor Work, prior to commencement of that portion of the project.

Contact:
Kyle Harris, Town Planner
Email: kharris@spencernc.gov.
Phone: 704-633-2231 ext. 20

END OF REPORT

Exhibit A: Staff Photographs

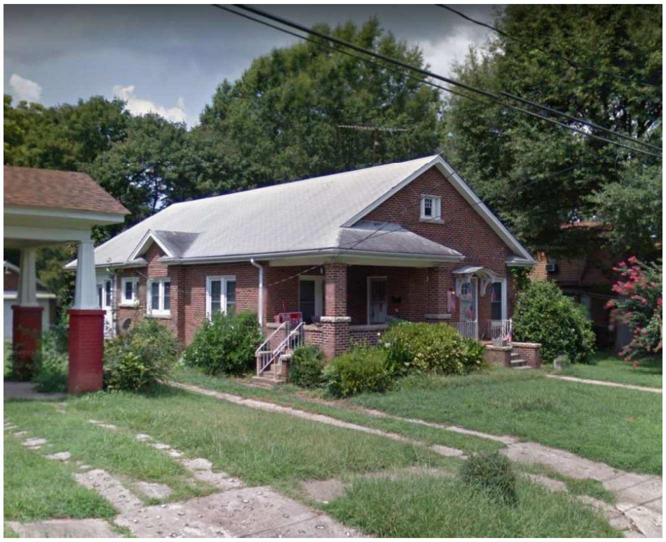


Exhibit A: Staff Photographs

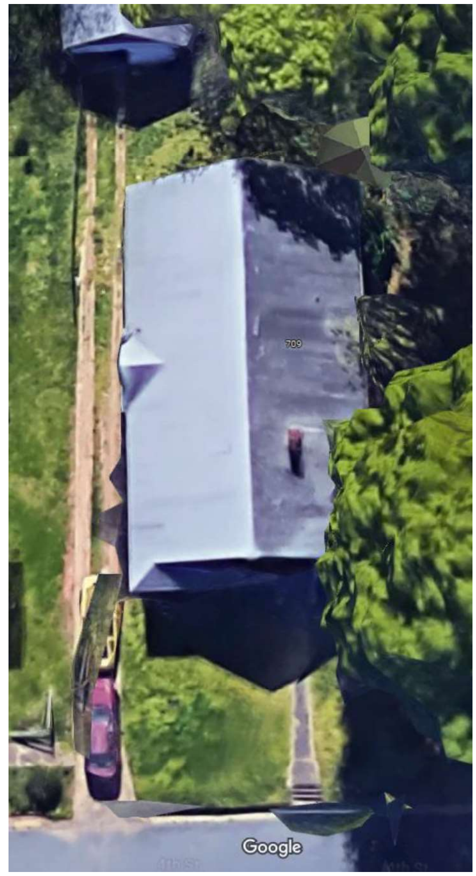


Exhibit A: Staff Photographs

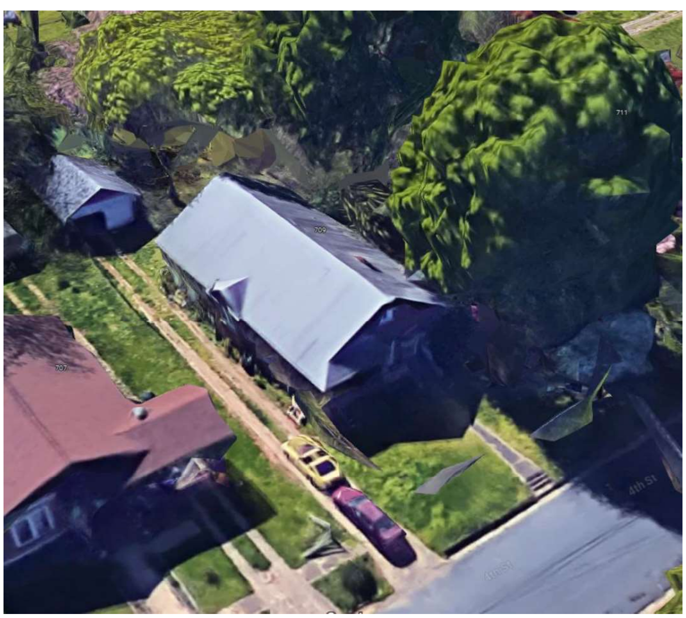


Exhibit A: Staff Photographs

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SPENCER
NORTH CAROLINA
Rowan's Original Gateway.

TOWN OF SPENCER HISTORIC PRESERVATION COMMISSION (HPC)
FINDINGS OF FACT & CONCLUSIONS OF LAW

SEPTEMBER RE-HEARING

PROJECT TYPE:	Certificate of Appropriateness (COA) Application	
STATUS:	**APPROVED (WITH CONDITIONS)**	
HEARING DATE:	September 18, 2023 (Third Hearing)	
	First Hearing:	July 3, 2023 (Decision Tabled)
	Second Hearing:	August 21, 2023 (Decision Tabled)
	Third Hearing:	September 18, 2023 (Approved w/ Conditions)
CASE PLANNER:	Kyle Harris, Town Planner & HPC Staff Liaison	
CASE:	COA-23-011	
APPLICANT:	John Haddock (Owner/Applicant)	
ADDRESS:	709 4th Street (Spencer Local Historic District)	
PARCEL ID:	033 143	
PROJECT TYPE:	*Installation of Roof Skylights & Dormer*	
EXISTING LAND USE:	Historic Residential	
EXISTING ZONING:	RMST (Residential Main Street Transition) | Corporate Limits	

MAJOR WORK # COA-23-011: 709 4TH STREET (PARCEL # 033 143)
CERTIFICATE OF APPROPRIATENESS (COA)
FINDINGS OF FACT & CONCLUSIONS OF LAW

Per Town Code Sec. 32.43, no exterior portion of any building or other structure located in Spencer's Historic District shall be erected, altered, restored, moved, or demolished until after an application for a Certificate of Appropriateness (COA) has been submitted to and approved by the Historic Preservation Commission.

Applicant Proposal:

CERTIFICATE OF APPROPRIATENESS (COA) APPLICATION:

COA-23-011 – 709 4th Street – John Haddock (Owner/Applicant)
Rowan County Parcel ID: 033 143

Proposed Project:

- (Updated September) Installation of Roof Skylights. Installation of two (2) flush-mounted egress skylights to the right-side roof slope; and construction of new roof dormer on left-side roof slope.

ROWAN COUNTY PARCEL # 033 143, SPENCER, NC

CERTIFICATE OF APPROPRIATENESS PERMIT

CASE COA-23-011

TOWN OF SPENCER HISTORIC PRESERVATION COMMISSION

FINDINGS OF FACT & CONCLUSIONS OF LAW

SEPTEMBER RE-HEARING

APPROVED (WITH CONDITIONS)

This application for a Certificate of Appropriateness (COA) pursuant to Section 32.43 of the Town of Spencer Code came before the Spencer Historic Preservation Commission (HPC) on Monday, September 18, 2023, for a quasi-judicial public evidentiary hearing. Based on the testimony of the witnesses, the documentary evidence, the Certificate of Appropriateness (COA) Application and related materials, the exhibits and other evidence presented at the August 21, 2023, hearing, the Historic Preservation Commission (HPC) finds that the Certificate of Appropriateness should be **APPROVED (WITH CONDITIONS)** and in support thereof, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

The Commission finds that the following proposal is **not incongruous** with the character of the District:

- (Updated September) Installation of Roof Skylights. Installation of two (2) flush-mounted egress skylights to the right-side roof slope; and construction of new roof dormer on left-side roof slope.

…Because:

1) The applicant has relocated two (2) skylights to the right-side roof slope, which is a less visible elevation and is not highly visible from the street (Standard 2.5.12). Additionally, the applicant has selected a skylight product that is flush-mounted with the roof, thereby minimizing the overall visual profile of the skylights and minimizing their conspicuity. Therefore, the project will not compromise the overall roof design or the character of the historic district (Standard 2.5.11).
2) With certain amendments to the roof form (see Conditions) the addition will be compatible with the existing historic home. The new work is differentiated and discernible from the original while maintaining compatibility in terms of architectural style, massing, form, scale, height, orientation, roof form (if gable), fenestration, materials, etc. (Standards 3.2.1).

B. Bish made a motion to approve the above Findings of Fact, **J. James** seconded. The motion was supported unanimously and was approved. Vote tally: **5-0. (**Note: J. Haddock was recused from this case because he was the applicant.)

MAJOR WORK # COA-23-011: 709 4^{TH} STREET (PARCEL # 033 143)
CERTIFICATE OF APPROPRIATENESS (COA)
FINDINGS OF FACT & CONCLUSIONS OF LAW

(APPROVAL WITH CONDITIONS)

CONCLUSIONS OF LAW

Based on the above Findings of Fact and the applicable standards of the Spencer Historic District Standards, the Spencer Historic Preservation Commission **approves** a Certificate of Appropriateness for the proposals heretofore described at 709 4^{th} Street (Tax Parcel ID # 033 143), located in the Spencer Local Historic District, **subject to the following conditions:**

1) The new roof dormer addition shall feature a gabled roof to maintain compatibility with the existing historic home, which is a front-gabled bungalow and does not feature shed roof forms (Standard 3.2.1, 3.2.7, & 3.1.7). According to Standard 3.1.7, the style of the dormer should relate to the style of the house. The gable, eaves, soffit, and other roof trim elements of the new dormer should substantially match the appearance of the existing side gable eaves, soffit, and other roof trim elements (Standard 3.1.5); and
2) The new roof dormer addition shall feature horizontal clapboard siding that matches the existing clapboard siding on the house in terms of width of boards, profile, color, texture, and overall appearance (Standard 3.2.1 & 3.1.6). The siding material must be installed in a traditional manner that includes the installation of corner boards, architectural trim around windows, etc. (Standard 3.1.6).
3) The new roof dormer addition shall feature windows that match the existing windows on the house in terms of placement, configuration, size, material, detail, and overall appearance (Standard 3.2.3 & 3.1.3). This includes matching articulation of trim and detailing around the window and all parts of the window including headers, framing, casing, muntins, sills, sashes, etc. (Standard 3.1.3); and
4) The skylights shall be designed to substantially match the overall roof color; and
5) The skylight shall be installed such that the roof shingles shall be installed abutting the skylight frame to minimize any uncovered framing structure; and
6) Planning staff shall review and approve any revisions or deviations to any portion of the as-submitted work, that qualifies as a Minor Work, prior to commencement of that portion of the project.

J. James made a motion to approve the above Conclusions of Law, **B. Bish** seconded. The motion was supported unanimously and was approved. Vote tally: **5-0. (**Note: J. Haddock was recused from this case because he was the applicant.)

ACCORDINGLY, based on the foregoing CONCLUSIONS OF LAW, the Spencer Historic Preservation Commission hereby grants a Certificate of Appropriateness (COA-23-011), as set forth above.

This the ______ day of September 2023.

(Signature) Leslie Ann Talbott, Chair
Spencer Historic Preservation Commission

DECISION RECORDATION FORM

ROWAN COUNTY PARCEL #033 143, SPENCER, NC

CERTIFICATE OF APPROPRIATNESS PERMIT

CASE COA-23-011

SEPTEMBER RE-HEARING

[X] **APPROVED (W/ CONDITIONS)** [ ] **DENIED**

________________________________ __________

Leslie Ann Talbott — Date

Spencer Historic Preservation Commission

Thomas Kyle Harris — 9/20/2023

Kyle Harris, Town Planner (HPC Staff Liaison) — Date

An ***approval is valid for six months*** *under state and local law. If a building permit is required, then a Zoning Permit by the Town and the Building Permit by Rowan County must be obtained prior to the beginning of any work. If a building permit is not required, then the work must be completed within six months of the issuance of the Certificate of Appropriateness.*

Contact:
Kyle Harris, Town Planner
Email: kharris@spencernc.gov
Phone: 704-633-2231 ext. 20

Exhibit B: Previously-Approved COA Permit # COA-23-011 (709 4th Street) for Skylights & Roof Dormer

April 3, 2024

NOTICE TO ADJACENT PROPERTY OWNER

SPENCER HISTORIC PRESERVATION COMMISSION (HPC)
NOTICE OF PUBLIC MEETING & EVIDENTIARY HEARING

This Notice is to inform you that you own property within one-hundred and fifty (150) feet of a property which is the subject of a Certificate of Appropriateness (COA) application. The Spencer Historic Preservation Commission (HPC) has scheduled a public quasi-judicial evidentiary hearing for **Monday, April 15, 2024, at 7:00 P.M**. The meeting will be held at Spencer Town Hall located at 460 South Salisbury Avenue, Spencer NC 28159. The purpose of this meeting is for the Commission to consider a Certificate of Appropriateness (COA) application for a project, described below, which is in the Spencer Historic District:

CERTIFICATE OF APPROPRIATENESS (COA) APPLICATION:

COA-24-004– 709 4th Street – John & Anne Haddock (Owner/Applicant)
Rowan County Parcel ID: 033 143
Proposed Project:

- Construction of new roof dormer on right-side roof slope to match previously-approved new roof dormer on left-side roof slope. Specifically, the proposed dormer features a gabled roof, horizontal clapboard siding, and a window substantially matching the existing windows on the house.

All interested persons are invited to participate in the public hearing at Town Hall. Applicants and other individuals who participate in the evidentiary hearings at this meeting will be required to sign-up and provide copies of all documents, exhibits, and any other materials they wish to present at the hearing, no later than 12:00 P.M. on Monday, April 15, 2024. If you have any questions about participating in this meeting, please contact Kyle Harris, Town Planner, at (704) 633-2231 ext. 20 or kharris@spencernc.gov as soon as possible. Additional information will also be posted on the Town's website (www.spencernc.gov).

To review Spencer's Historic District Standards and to find more information about the local historic district review and permitting process, please visit the Town's website at www.spencernc.gov/preservation or contact the Town Planner.

HADDOCK JOHN R & WF
HADDOCK ANNE M
709 4TH ST
SPENCER, NC 28159-1621

RIEDY WALTER ALLEN
220 HUNTER ST
SALISBURY, NC 28144-0441

HARTLEY NICOLE S
711 4TH ST
SPENCER, NC 28159-1621

JOHNSON FREDERICK
JOHNSON EMILIA
705 4TH ST
SPENCER, NC 28159

MCLAWHORN BRADLEY &
MCLAWHORN ANGELA
707 4TH ST
SPENCER, NC 28159

GRAY MELVIN J & WF
GRAY MARLENE L
234 NOTQUYTA RD
MURPHY, NC 28906-6227

LETULLE ASHLEIGH ELIZABETH & HUS
LETULLE GAVIN GARRITY
405 S BALDWIN AV
SPENCER, NC 28159-1600

TELEIOS LEGACY LLC
219 MITCHELL ST
SALISBURY, NC 28144-6240

THOMPSON VIRGINIA WINGFIELD
409 BALDWIN AV
SPENCER, NC 28159-0000

WAGONER MATTHEW BRANDON
PO BOX 283
ROCKWELL, NC 28138

LAIL DONALD DOUGLAS
411 S BALDWIN AVE
SPENCER, NC 28159

JOHNSON DIANNE WARD
710 4TH ST
SPENCER, NC 28159

BENNETT GREGORY R
406 HUDSON AVE
SPENCER, NC 28159-2226

AMBERHILL LLC
3426 HAGGARTY WAY
CUYAHOGA FALLS, OH 44223-3753

SPENCER
NORTH CAROLINA
Rowan's Original Gateway.

MEMO

Date: 9.28.22

RE: Quasijudicial Process and Decision-Making

Narrative:
All types of government related decision making can be complex and the quasijudicial process required for certain decisions is especially so, and thus staff will always be available to help elected and appointed boards during their hearings. As quasijudicial decisions are appealed directly to the Superior Court and as those appeals are based on a verbatim record of the meeting, it is important that those boards using the quasijudicial process (Board of Adjustment & HPC) understand the special rules of procedure required.

It is helpful to recognize the different types of governmental decision making to understand the concept of the quasijudicial process. The following is a list of the four different types of decisions. Note that in Advisory and Legislative Decisions, it is acceptable to use personal opinion when making a decision, but that Administrative Decisions are based on preestablished standards (setbacks, lot sizes, etc.) and that Evidentiary Decisions are based on the facts as established during the quasijudicial hearing.

Types of Decisions

- Advisory
  - Planning Board required to give recommendation to Board of Aldermen on rezoning issues
    - Vote based on personal opinion is allowed
- Legislative
  - After public input, Board of Aldermen approves or disapproves of rezoning requests
    - Public Hearing Required
    - Vote based on personal opinion is allowed
- Administrative
  - Planning staff makes decisions on subdivision requests based on proposal meeting requirements stated in development ordinance
    - Decision is based purely on yes/no evaluation, opinion of no value
- Evidentiary
  - Decisions based on evidence presented
    - Personal opinion not allowed to influence decision, must be fact-based
    - Quasijudicial process required
    - Board of Adjustment makes decisions on specified issues
      - Appeal of Administrative decision
      - Variance
      - Special or conditional use permit
      - Vested rights
      - Certificates of appropriateness by HPC

Decisions Based on Facts Presented

Quasijudicial decisions must be made based on the facts presented during the hearing. 160D-406 defines acceptable facts as information that is, ***"competent, material, and substantial evidence that is not repetitive as allowed by the board."*** The facts must be substantiated by either legally acceptable documentation or the confirmed "expert" status of the person offering the testimony. Prior to making a decision, the Board must agree what the facts are by reducing what has been presented to a "finding of facts."

Facts Presented Given Weight as Appropriate

In a contentious case, both sides of the argument may present expert witnesses who offer contradictory evidence. The board members will need to determine what weight to give facts either by the way they are presented or by the relative qualifications of the presenter.

Who Can Present Material- "Standing"

Per 160D guidelines, only people who have "standing" (per 160D-1402) or, "other witnesses who can present competent, material, and substantial evidence" (per 160D-406) are allowed to present evidence during the quasijudicial proceedings.

§ 160D-406. Quasi-judicial procedure.

(d) Presentation of Evidence. - The applicant, the local government, and any person who would have standing to appeal the decision under G.S. 160D-1402(c) shall have the right to participate as a party at the evidentiary hearing. Other witnesses may present competent, material, and substantial evidence that is not repetitive *as allowed by the board.*

160D-1402. Appeals in the nature of certiorari.

(c) Standing. - A petition may be filed under this section only by a petitioner who has standing to challenge the decision being appealed. The following persons have standing to file a petition under this section:

(1) Any person possessing any of the following criteria:

a. An ownership interest in the property that is the subject of the decision being appealed, a leasehold interest in the property that is the subject of the decision being appealed, or an interest created by easement, restriction, or covenant in the property that is the subject of the decision being appealed.

b. An option or contract to purchase the property that is the subject of the decision being appealed.

c. An applicant before the decision-making board whose decision is being appealed.

(2) ***Any other person who will suffer special damages as the result of the decision being appealed.***

(3) An incorporated or unincorporated association to which owners or lessees of property in a designated area belong by virtue of their owning or leasing property in that area, or an association otherwise organized to protect and

foster the interest of the particular neighborhood or local area, so long as at least one of the members of the association would have standing as an individual to challenge the decision being appealed, and the association was not created in response to the particular development or issue that is the subject of the appeal.

(4) A local government whose decision-making board has made a decision that the governing board believes improperly grants a variance from or is otherwise inconsistent with the proper interpretation of a development regulation adopted by the governing board.

Conflict of Interest

No member of the Board shall seek to influence a decision, participate in any action or cast a vote involving any matter that is before the Board, which may result in a private benefit to themselves, their immediate relatives or their business interests. A sitting member may be excused from voting on a particular issue under the following circumstances:

1. If the member has a direct financial interest in the outcome of the issue

2. If the matter at issue involves the member's own official conduct

3. If a member has such familial, business, or other associational relationship with an affected person that the member cannot reasonably be expected to exercise sound judgment in the public interest

4. ***If a member has a fixed opinion prior to hearing the matter that is not susceptible to change***

5. If a member has undisclosed ex parte communications.

Following Procedure

If appealed, the first thing a judge will review is if prescribed procedure has been followed. The Town of Spencer Development Ordinance and NCGS 160D (attached) give detailed directions on the process that must be followed during all steps of the quasijudicial process, and it is critical that staff and the board follows these requirements to the letter.

HPC- Quasijudicial Process for an Administrative Decision

160D-947. C requires that decisions on Certificate of Appropriateness be handled through the quasijudicial process saying, "…other than these administrative decisions on minor works, decisions on certificates of appropriateness are quasi-judicial and shall follow the procedures of G.S. 160D-406." The HPC has recently created a detailed set of standards for consideration when granting or denying a requested Certificate of Appropriateness. Applying specific standards to the decision-making process makes the consideration of these almost an administrative process- either they meet the requirements and are approved, or they don't meet the requirements and are disapproved. This should make the decision-making process simpler, but that doesn't excuse you from following the quasijudicial process. All of the elements explained above (standing, decision on facts not opinion, weighting of facts, conflict of interest, etc.) apply equally to your proceedings.

Examples:

Facts vs Opinions vs Standing vs Weight

Case- XYZ Company has requested a Special Use Permit for a lot on N Salisbury Ave. to build a car dealership. The use is allowed by the zoning classification but requires the Special Use Permit.

Staff includes in their presentation traffic flow data from an NCDOT website that shows actual traffic flow counts on Salisbury Ave. and the traffic capacity estimates for this road. The estimated increase in traffic activity is provided by a civil engineer's report provided by the applicant.

Mrs. Smith states she has lived on S Salisbury Ave. for 20 years and during the last two years the traffic has gotten so bad she can't back out of her driveway. She thinks the car dealership will add so much traffic that someone will get killed in a wreck. She offers a petition signed by 50 people that agree with her assertions. All of those people are in the audience and want to speak against the car dealership.

Questions:

1. Does staff's presentation of NCDOT data qualify as expert testimony?
2. Does Mrs. Smith have standing?
3. If she has standing, has she presented acceptable facts?
4. Does the petition add and weight to her argument?

Mr. Jones, who lives on the lot next door to the proposed car dealership, also opposes the car dealership based on the increased amount of traffic. He testifies that he has spoken to a traffic engineer who thinks the NCDOT data is wrong and that the current traffic counts exceed the road's capacity.

Questions:

1. Does Mr. Jones have standing?
2. Should his testimony be accepted?

Mr. Smarts lives on the lot on the other side of the proposed car dealership. He presents to the Board a traffic study done by a professional engineer with 20 years of traffic study experience. The report states that the additional traffic created by the car dealership will elevate traffic on Salisbury Ave. beyond its carrying capacity. He further states that the new driveways are in such close proximity to the existing driveways that it will increase the possibility of wrecks by 50%.

Questions:

1. Does Mr. Smart have standing?
2. Should his testimony be accepted?

During its deliberations the board discusses the difference between the NCDOT data and the engineer's report. They agree that both seem factual and are both supported by actual measured data. It is pointed out that they use different traffic measurement processes and that the NCDOT report is based on two-year-old data where the engineer's date was just recently gathered.

Questions:

1. What should the board do with contradictory data?
2. Does the board as a whole have to agree on how the contradictory data is used or can individual board members apply their own evaluation?

Conflict of Interest

Prior to the hearing, Board Member One saw Mr. Smart at a bar and they discussed the case but didn't discuss any details.

Questions:

1. How should Board Member One handle this chance encounter?

Prior to the hearing Board Member Two met with the 50 citizens who signed the petition opposing the car dealership. Those citizens convinced Board Member Two that this was a bad location for a car dealership, and she promised the group she would vote against its approval.

Question:

1. What should Board Member Two do about this situation?

Board Member Three has listened to all of the material presented at the hearing and all of the arguments presented by his fellow board members. When casting his vote he says, "I don't care what has been presented here today, I just don't think this town needs a car dealership so I'm going to vote no."

Question:

1. What impact will this statement have if the decision is appealed?

It turns out that Board Member One's wife owns the construction company that will build the car dealership.

Question:

1. What should Board Member One do about this?

Procedure

Staff mails a notice of the hearing to adjacent property owners on the side of Salisbury Ave where the car dealership is located but not to those living on the other side.

Questions:

1. What impact with this have if the decision is appealed?

HPC

It turns out that the proposed car dealership is in the Historic District and has worked with staff to meet all of the technical details as shown in the adopted district standards. The HPC denies the Certificate of Appropriateness stating they don't think this is the right place for a car dealership.

Questions:

1. Can the HPC do this?
2. What happens on appeal of this decision?

NCGS 160D

§ 160D-406. Quasi-judicial procedure.

(a) Process Required. - Boards shall follow quasi-judicial procedures in determining appeals of administrative decisions, special use permits, certificates of appropriateness, variances, or any other quasi-judicial decision.

(b) Notice of Hearing. - Notice of evidentiary hearings conducted pursuant to this Chapter shall be mailed to the person or entity whose appeal, application, or request is the subject of the hearing; to the owner of the property that is the subject of the hearing if the owner did not initiate the hearing; to the owners of all parcels of land abutting the parcel of land that is the subject of the hearing; and to any other persons entitled to receive notice as provided by the local development regulation. In the absence of evidence to the contrary, the local government may rely on the county tax listing to determine owners of property entitled to mailed notice. The notice must be deposited in the mail at least 10 days, but not more than 25 days, prior to the date of the hearing. Within that same time period, the local government shall also prominently post a notice of the hearing on the site that is the subject of the hearing or on an adjacent street or highway right-of-way. The board may continue an evidentiary hearing that has been convened without further advertisement. If an evidentiary hearing is set for a given date and a quorum of the board is not then present, the hearing shall be continued until the next regular board meeting without further advertisement.

(c) Administrative Materials. - The administrator or staff to the board shall transmit to the board all applications, reports, and written materials relevant to the matter being considered. The administrative materials may be distributed to the members of the board prior to the hearing if at the same time they are distributed to the board a copy is also provided to the appellant or applicant and to the landowner if that person is not the appellant or applicant. The administrative materials shall become a part of the hearing record. The administrative materials may be provided in written or electronic form. Objections to inclusion or exclusion of administrative materials may be made before or during the hearing. Rulings on unresolved objections shall be made by the board at the hearing.

(d) Presentation of Evidence. - The applicant, the local government, and any person who would have standing to appeal the decision under G.S. 160D-1402(c) shall have the right to participate as a party at the evidentiary hearing. Other witnesses may present competent, material, and substantial evidence that is not repetitive as allowed by the board.

Objections regarding jurisdictional and evidentiary issues, including, but not limited to, the timeliness of an appeal or the standing of a party, may be made to the board. The board chair shall rule on any objections, and the chair's rulings may be appealed to the full board. These rulings are also subject to judicial review pursuant to G.S. 160D-1402. Objections based on jurisdictional issues may be raised for the first time on judicial review.

(e) Appearance of Official New Issues. - The official who made the decision or the person currently occupying that position, if the decision maker is no longer employed by the local government, shall be present at the evidentiary hearing as a witness. The appellant shall not be limited at the hearing to matters stated in a notice of appeal. If any party or the local government would be unduly prejudiced by the presentation of matters not presented in the notice of appeal, the board shall continue the hearing.

(f) Oaths. - The chair of the board or any member acting as chair and the clerk to the board are authorized to administer oaths to witnesses in any matter coming before the board. Any person who, while under oath during a proceeding before the board determining a quasi-judicial matter, willfully swears falsely is guilty of a Class 1 misdemeanor.

(g) Subpoenas. - The board making a quasi-judicial decision under this Chapter through the chair or, in the chair's absence, anyone acting as chair may subpoena witnesses and compel the production of evidence. To request issuance of a subpoena, the applicant, the local government, and any person with standing under G.S. 160D-1402(c) may make a written request to the chair explaining why it is necessary for certain witnesses or evidence to be compelled. The chair shall issue requested subpoenas he or she determines to be relevant, reasonable in nature and scope, and not oppressive. The chair shall rule on any motion to quash or modify a subpoena. Decisions regarding subpoenas made by the chair may be immediately appealed to the full board. If a person fails or refuses to obey a subpoena issued pursuant to this subsection, the board or the party seeking the subpoena may apply to the General Court of Justice for an order requiring that its subpoena be obeyed, and the court shall have jurisdiction to issue these orders after notice to all proper parties.

(h) Appeals in Nature of Certiorari. - When hearing an appeal pursuant to G.S. 160D-947(e) or any other appeal in the nature of certiorari, the hearing shall be based on the record below, and the scope of review shall be as provided in G.S. 160D-1402(j).

(i) Voting. - The concurring vote of four-fifths of the board shall be necessary to grant a variance. A majority of the members shall be required to decide any other quasi-judicial matter or to determine an appeal made in the nature of certiorari. For the purposes of this subsection, vacant positions on the board and members who are disqualified from voting on a quasi-judicial matter under G.S. 160D-109(d) shall not be considered members of the board for calculation of the requisite majority if there are no qualified alternates available to take the place of such members.

(j) Decisions. - The board shall determine contested facts and make its decision within a reasonable time. When hearing an appeal, the board may reverse or affirm, wholly or partly, or may modify the decision appealed from and shall make any order, requirement, decision, or determination that ought to be made. The board shall have all the powers of the official who made the decision. Every quasi-judicial decision shall be based upon competent, material, and substantial evidence in the record. Each quasi-judicial decision shall be reduced to writing, reflect the board's determination of contested facts and their application to the applicable standards, and be approved by the board and 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 or such other office or official as the development regulation specifies. The decision of the board shall be delivered within a reasonable time by personal delivery, electronic mail, or first-class mail to the applicant, landowner, and any person who has submitted a written request for a copy prior to the date the decision becomes effective. The person required to provide notice shall certify to the local government that proper notice has been made, and the certificate shall be deemed conclusive in the absence of fraud.

(k) Judicial Review. - Every quasi-judicial decision shall be subject to review by the superior court by proceedings in the nature of certiorari pursuant to G.S. 160D-1402. Appeals shall be filed within the times specified in G.S. 160D-1405(d). The governing board of the local government that is a party to the judicial review of the quasi-judicial decision shall have the authority to settle the litigation, subject to Article 33C of Chapter 143 of the General Statutes. (2019-111, s. 2.4; 2020-3, s. 4.33(a); 2020-25, s. 51(a), (b), (d); 2021-168, s. 3(a).)

§ 160D-405. Appeals of administrative decisions.

(a) Appeals. - Except as provided in G.S. 160D-1403.1, appeals of administrative decisions made by the staff under this Chapter shall be made to the board of adjustment unless a different board is provided or authorized otherwise by statute or an ordinance adopted pursuant to this Chapter. If this function of the board of adjustment is assigned to any other board pursuant to G.S. 160D-302(b), that board shall comply with all of the procedures and processes applicable to a board of adjustment hearing appeals. Appeal of a decision made pursuant to an erosion and sedimentation control regulation, a stormwater control regulation, or a provision of the housing code shall not be made to the board of adjustment unless required by a local government ordinance or code provision.

(b) Standing. - Any person who has standing under G.S. 160D-1402(c) or the local government may appeal an administrative decision to the board. An appeal is taken by filing a notice of appeal with the local government clerk or such other local government official as designated by ordinance. The notice of appeal shall state the grounds for the appeal.

(c) Repealed by Session Laws 2020-25, s. 10, effective June 19, 2020.

(d) Time to Appeal. - The owner or other party has 30 days from receipt of the written notice of the determination within which to file an appeal. Any other person with standing to appeal has 30 days from receipt from any source of actual or constructive notice of the determination within which to file an appeal. In the absence of evidence to the contrary, notice given pursuant to G.S. 160D-403(b) by first-class mail is deemed received on the third business day following deposit of the notice for mailing with the United States Postal Service.

(e) Record of Decision. - The official who made the decision shall transmit to the board all documents and exhibits constituting the record upon which the decision appealed from is taken. The official shall also provide a copy of the record to the appellant and to the owner of the property that is the subject of the appeal if the appellant is not the owner.

(f) Stays. - An appeal of a notice of violation or other enforcement order stays enforcement of the action appealed from and accrual of any fines assessed during the pendency of the appeal to the board of adjustment and any subsequent appeal in accordance with G.S. 160D-1402 or during the pendency of any civil proceeding authorized by law or appeals therefrom, unless the official who made the decision certifies to the board after notice of appeal has been filed that, because of the facts stated in an affidavit, a stay would cause imminent peril to life or property or, because the violation is transitory in nature, a stay would seriously interfere with enforcement of the development regulation. In that case, enforcement proceedings are not stayed except by a restraining order, which may be granted by a court. If enforcement proceedings are not stayed, the appellant may file with the official a request for an expedited hearing of the appeal, and the board shall meet to hear the appeal within 15 days after the request is filed.

Notwithstanding any other provision of this section, appeals of decisions granting a development approval or otherwise affirming that a proposed use of property is consistent with the development regulation does not stay the further review of an application for development approvals to use the property; in these situations, the appellant or local government may request and the board may grant a stay of a final decision of development approval applications, including building permits affected by the issue being appealed.

(g) Alternative Dispute Resolution. - The parties to an appeal that has been made under this section may agree to mediation or other forms of alternative dispute resolution. The development regulation may set standards and procedures to facilitate and manage such voluntary alternative dispute resolution.

(h) No Estoppel. - G.S. 160D-1403.2, limiting a local government's use of the defense of estoppel, applies to proceedings under this section.

§ 160D-947. Certificate of appropriateness required.

(a) Certificate Required. - After the designation of a landmark or a historic district, no exterior portion of any building or other structure, including masonry walls, fences, light fixtures, steps and pavement, or other appurtenant features, nor above-ground utility structure nor any type of outdoor advertising sign shall be erected, altered, restored, moved, or demolished on the landmark or within the district until after an application for a certificate of appropriateness as to exterior features has been submitted to and approved by the preservation commission. The local government shall require such a certificate to be issued by the commission prior to the issuance of a building permit granted for the purposes of constructing, altering, moving, or demolishing structures, which certificate may be issued subject to reasonable conditions necessary to carry out the purposes of this Part. A certificate of appropriateness is required whether or not a building or other permit is required.

For purposes of this Part, "exterior features" include the architectural style, general design, and general arrangement of the exterior of a building or other structure, including the kind and texture of the building material, the size and scale of the building, and the type and style of all windows, doors, light fixtures, signs, and other appurtenant fixtures. In the case of outdoor advertising signs, "exterior features" mean the style, material, size, and location of all such signs. Such "exterior features" may, in the discretion of the local governing board, include historic signs, color, and significant landscape, archaeological, and natural features of the area.

Except as provided in subsection (b) of this section, the commission has no jurisdiction over interior arrangement. The commission shall take no action under this section except to prevent the construction, reconstruction, alteration, restoration, moving, or demolition of buildings, structures, appurtenant fixtures, outdoor advertising signs, or other significant features in the district that would be incongruous with the special character of the landmark or district. In making decisions on certificates of appropriateness, the commission shall apply the rules and standards adopted pursuant to subsection (c) of this section.

(b) Interior Spaces. - Notwithstanding subsection (a) of this section, jurisdiction of the commission over interior spaces is limited to specific interior features of architectural, artistic, or historical significance in publicly owned landmarks and of privately owned historic landmarks for which consent for interior review has been given by the owner. The consent of an owner for interior review binds future owners and/or successors in if the consent has been filed in the office of the register of deeds of the county in which the property is located and indexed according to the name of the owner of the property in the grantee and grantor indexes. The landmark designation shall specify the interior features to be reviewed and the specific nature of the commission's jurisdiction over the interior.

(c) Rules and Standards. - Prior to any action to enforce a landmark or historic district regulation, the commission shall (i) prepare and adopt rules of procedure and (ii) prepare and adopt principles and standards not inconsistent with this Part to guide the commission in determining congruity with the special character of the landmark or district for new construction, alterations, additions, moving, and demolition. The landmark or historic district regulation may provide, subject to prior adoption by the preservation commission of detailed standards, for staff review and approval as an administrative decision of applications for a certificate of appropriateness for minor work or activity as defined by the regulation; provided, however, that no application for a certificate of appropriateness may be denied without formal action by the preservation commission. Other than these administrative decisions on minor works, decisions on certificates of appropriateness are quasi-judicial and shall follow the procedures of G.S. 160D-406.

Town of Spencer Development Ordinance

C. Conflict of Interest
No member of the Board shall seek to influence a decision, participate in any action or cast a vote involving any matter that is before the Board, which may result in a private benefit to themselves, their immediate relatives or their business interests. A sitting member may be excused from voting on a particular issue under the following circumstances:
1. If the member has a direct financial interest in the outcome of the issue; or
2. If the matter at issue involves the member's own official conduct; or
3. If a member has such familial, business, or other associational relationship with an affected person that the member cannot reasonably be expected to exercise sound judgment in the public interest; or
4. If a member has a fixed opinion prior to hearing the matter that is not susceptible to change; or
5. If a member has undisclosed ex parte communications.

D. Discussion of Board Cases
Board members shall refrain from discussing forthcoming or anticipated matters of business with any parties, including other Board members, prior to the meeting at which such items are to be publicly discussed.
Members may receive and/or seek general technical information pertaining to a case from the Clerk to the Board or Zoning Administrator prior to the Board meeting at which the case is to be heard. Such requested information shall be provided to all members in writing, and shall also be entered into the case record by the Clerk to the Board.
Members of the Board shall not express individual opinions on the proper judgment of any case with any parties thereto, or one another, before or during the hearing for that case.

E. Voting
The concurring vote of at least three-fifths (3/5) of the sitting members of the Board shall be necessary to reverse any order, requirement, decision, or determination of the Planning, Zoning and Subdivision Administrator, or to decide in favor of the applicant on any other matter upon which the Board is required to pass; however, a concurring vote of at least four-fifths (4/5) of the sitting members of the Board shall be necessary to grant a variance from the provisions of the Zoning Ordinance.

F. Conduct of Hearing
All Board hearings shall be conducted in a quasi-judicial manner. The Chairman may limit discussion among parties present or ask unruly members of the public to leave the meeting.
Any party may appear in person or be represented by agent or by attorney at any hearing. All persons desiring to present evidence before the Board shall first be placed under oath by the Chairman. Presentation of evidence carries with it the obligation to submit to cross-examination by any opposing party.

The order of business for each case presented at a Board hearing shall be as follows:
1. All persons desiring to give testimony, and having signed up beforehand with the Clerk to the Board to present evidence or arguments, shall be sworn in. In the event any individual(s) declines to be sworn, they may still be heard, but shall be advised by the Chairman that the Board will consider their statements merely as information, not as evidence.

2. The Chairman shall request that any sitting Board member, or any other person present, advise

of the existence of any potential conflict of interest regarding the case about to be heard. Any such indication in the affirmative shall be disposed of in accordance with Rule III.C before proceeding further.

3. The Planning, Zoning & Subdivision Administrator, or such other person as the Chairman may direct, shall give a preliminary statement of the case.

4. The applicant shall present evidence and arguments in support of their application.

5. Other persons in favor of granting the application shall present arguments for the application.

6. Persons opposed to granting the application shall present arguments against the application.

7. Both sides will be permitted to present rebuttals to opposing testimony, and cross-examine the opposing party(s). The Chairman shall ensure that cross-examinations are conducted with brevity and decorum, and limited to matters directly relevant to the case at hand.

8. The Chairman, or their designee, shall summarize the evidence, which has been presented, giving all interested parties the opportunity to make objections or offer corrections.

9. The Chairman shall close this case for public discussion, and shall proceed to the next case, if any, and thereafter to the next item of business on the meeting agenda. The Board shall subsequently and publicly discuss the case, calling upon the Planning, Zoning & Subdivision Administrator for input, clarification, etc. as deemed desirable, but without further input from the public. Board members, however, may seek further input, clarification, etc. from persons previously sworn and eligible to give evidence who are seated in the audience on any piece of evidence heretofore presented. Cross-examination of any rebuttals by opposing parties at that time shall only be permitted on any such new evidence presented.

The Board shall render a decision on the matter in the manner prescribed in Rule IV.E, or, as it so chooses, the Board may continue the hearing to a publicly stated date, time, and location. No further notice of a continued hearing need be published unless a period of six weeks or more elapses between hearing dates.

Quasi-Judicial Decisions Workshop

Chapel Hill, N.C.

January 4, 2017

David Owens
School of Government
The University of North Carolina at Chapel Hill

Roles and Types of Decisions

Decisions regarding development regulation can be grouped into four categories: legislative, quasi-judicial, advisory, and administrative. Often the body charged with making the decision varies according to the type of decision involved. Governing boards usually make legislative decisions but can also make quasi-judicial decisions. Planning boards usually make advisory decisions but can also make quasi-judicial decisions. However, more important than which *board* is making the decision, the rules that must be followed change depending on the *type* of decision involved, and these rules apply no matter which board is making the decision. Therefore knowing the type of decision is vital to determining what decision-making process should be used.

Legislative decisions affect the entire community by setting general policies applicable through the zoning or other ordinance. They include decisions to adopt, amend, or repeal the ordinance. The zoning map is a part of the zoning ordinance, so amending the map to rezone even an individual parcel is considered a legislative decision. Because legislative decisions have such an important impact on landowners, neighbors, and the public, state law mandates broad public notice and hearing requirements for these decisions. Broad public discussion and careful deliberation are encouraged and substantial discretion on these decisions is allowed. These decisions are generally made by the local government body, which "legislates" or sets policy.

Quasi-judicial decisions involve the application of ordinance policies to individual situations. Examples include variances, special- and conditional-use permits (even if issued by the governing board), appeals, and interpretations. These decisions involve two key elements—the finding of facts regarding the specific proposal and the exercise of judgment and discretion in applying predetermined policies to the situation. Since quasi-judicial decisions do not involve setting new policies, the broad public notice requirements that exist for legislative decisions do not apply. However, the courts have imposed fairly strict procedural requirements on these decisions in order to protect the legal rights of the parties involved. Quasi-judicial decisions are most often assigned to boards of adjustment, appointed by the governing board. But these decisions can also be assigned to the planning board or to the governing board itself.

Advisory decisions are made by bodies that may recommend decisions on a matter but have no final decision-making authority over it. The most common example is the advice on rezoning petitions given by planning boards to the city council or board of county commissioners. There are few rules set by state law or by the courts on how advisory decisions are made.

Administrative decisions are typically made by professional staff in various government departments. Such decisions cover the day-to-day non-discretionary matters related to the implementation of an ordinance, including issuing basic permits, interpreting the ordinance, and enforcing it. Examples include issuing a certificate of zoning compliance for a permitted use or a notice of violation. These decisions may be appealed to the board of adjustment.

Some Key Differences Between Legislative and Quasi-judicial Decisions

	Legislative	Quasi-judicial
Decision-maker	Only governing board can decide (others may advise)	Can be board of adjustment, planning board, or governing board; must be set in ordinance
Notice of hearing	Newspaper; mailed notice to owners and neighbors and posted notice for map amendments; actual notice to owner if others initiate map amendment	Mailed notice to applicant, owner, and abutting owners; posted notice; others as ordinance mandates
Type of hearing	Legislative	Evidentiary
Speakers at hearings	Can reasonably limit number of speakers, time for speakers	Witnesses are presenting testimony, can limit to relevant evidence that is not repetitious
Evidence	None required; members free to discuss issue outside of hearing	Must have substantial, competent, material evidence in record; witnesses under oath, subject to cross-examination; no ex parte communication allowed
Findings	None required (statement on rationale required for zoning amendments)	Written findings of fact required; must determine contested facts
Voting	Simple majority	Simple majority except 4/5 to grant a variance (unless local variation allowed by legislation)
Standard for decision	Establishes standards	Can only apply standards previously set in statute and ordinance
Conditions	Not allowed, except with conditional zoning districts	Allowed if based on standard in ordinance
Time to initiate judicial review	Two months to file challenge map amendment; one year from standing for text amendment	30 days to file challenge
Conflict of interest	Requires direct, substantial, and readily identifiable financial interest to disqualify	Any financial interest, personal bias, or undisclosed ex parte communication disqualifies; impartiality required
Creation of vested right	None	Yes, if substantial expenditures are made in reliance on it

Preliminary Matters

Notice of hearings. A local government must give *notice* of its quasi-judicial hearings to all parties to the case. State law requires individual mailed notice to:

1. The applicant;
2. The owner of the affected property;
3. The owner of abutting properties; and
4. Anyone else required to receive notice under the ordinance.

The mailed notice must be deposited in the mail at least 10 but not more than 25 days prior to the date of the hearing. A notice must also be posted on the site within the same time period. The zoning statutes impose no published notice requirements for quasi-judicial decisions (unlike proposed zoning amendments). If a zoning ordinance itself requires additional notice, such as publication in the newspaper or a wider mailing, that additional notice is mandatory. The open meetings law also has requirements for meeting notices. Once a hearing has been opened, it may be *continued* to a later date if that is necessary to receive additional evidence. Additional notice of the continued hearing is not required by law, but many boards provide it.

Jurisdictional issues. If questions arise regarding the standing of a person to bring an action before the board of adjustment, the timeliness of an appeal, or other matters involving the board's jurisdiction to hear a matter, those issues must be resolved by the bboard and not by the staff. If, for example, an appeal is filed too late, it is presented to the board and the board dismisses the appeal without the necessity of taking evidence on the substance of the appeal.

Open meetings law. G.S. 143-318.9 to 143-318.18. All meetings of a majority of the board, or any committees of the board, for the purpose of conducting business must be open to the public. Closed sessions may be held only for narrow purposes set forth by statute (e.g., receiving legal advice regarding pending litigation). A board may not retire to a private session to deliberate a case. Public notice must be provided for all meetings (regular schedule filed with clerk, special meetings notice posted and mailed to media).

Quasi-Judicial Hearings and Decisions

Collecting Evidence

Competent, material, and substantial evidence required. There must be "substantial, competent, and material evidence" to support each critical factual determination. Key points need to be substantiated by the factual evidence in the hearing record; the findings cannot be based on conjecture or assumptions. For example, for the board to find that neighboring property values would be significantly reduced by a proposed project, there must be some testimony in the record to support that finding, such as testimony from an appraiser about the impacts of a similar project elsewhere in town or presentation of facts that would allow a reasonable person to conclude property values would go down. Where conflicting evidence is presented, the board has the responsibility of deciding how much weigh to accord each piece of evidence.

Since only evidence that shows how the proposal does or does not meet the applicable stand is relevant. The board should not consider irrelevant evidence and in fact should limit testimony that is not relevant.

*Subpoenas***.** Boards conducting these hearings have the authority to issue subpoenas to compel testimony or production of evidence deemed necessary to determine the matter. Requests for subpoenas and objections to subpoenas are made to the board chair prior to the hearing, who then rules on and issues the subpoena. Objections to the chair's rulings may be taken to the full board.

Burden. The person requesting a variance or special/conditional use permit has the burden of producing sufficient evidence for the board to conclude the standards have been met. If insufficient evidence is presented, the application must be denied (or the board can 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 approval. If conflicting evidence is presented, the board must determine which facts it believes are correct.

Oaths. Those offering testimony are usually put under oath. This reminds witnesses of the seriousness of the matter and the necessity of presenting factual information, not opinions or speculation. All of the witnesses may be sworn in at one time at the beginning of the hearing or each witness may be sworn in as they begin to testify. While oaths may be waived if *all* of the parties agree, most local governments routinely swear in all witnesses, including the staff members and attorneys who are making presentations. If a witness has religious objections to taking an oath, they may affirm rather than swear an oath. The oath is generally administered by the chair or clerk of the board receiving the testimony (it may also be administered by any notary public).

Cross-examination. Parties have the right 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.

Hearsay. Hearsay evidence (a statement about the facts made by someone who is not present and available for cross-examination) is generally not allowed. If that is the best evidence available the board can receive it, but the board may well decide to limit the weight or credibility it gives such evidence. Critical factual findings should not be based on hearsay alone.

Opinions. Opinion evidence generally should be offered only by a properly qualified expert witness. The statutes specifically prohibit use of opinion testimony by nonexperts on how a project would affect property values, how traffic would affect public safety, and any other matter for which only expert testimony would be permitted in court. Nonexpert witnesses can offer factual testimony about matters that affect property values and traffic, but the board may not rely on their opinions to or conclusions about these matters.

False testimony. A person who deliberately gives false testimony under oath in a zoning hearing is subject to criminal charges for perjury.

Outside evidence. Persons affected by a decision have the legal right to hear all of the information presented to board members, to know all of the "facts" being considered by the board. Therefore members of the decision-making body are not allowed to discuss the case or gather evidence outside of the hearing (what the courts term *ex parte* communication). Only facts presented to the full board at the hearing may be considered. It is permissible for board members to view the site in question before the hearing, but they should not talk about the case with the applicant, neighbors, or staff outside of the hearing. If a site visit is made, the member should disclose that at the hearing and note for the record any significant observations. If a member has personal knowledge about a site or case, the member should disclose that at the hearing.

Time limits. While unduly repetitious or irrelevant testimony should be barred, an arbitrary time limit on the hearing cannot be used. It would not be appropriate, for example, to limit each side in a variance proceeding to ten minutes to present their case. It is acceptable to allow only a single witness representing a group with similar concerns.

Exhibits. Witnesses may present documents, photos, maps, or other exhibits. Once presented for consideration by the board, exhibits are evidence in the hearing and become part of the record (and must be retained by the board). Each exhibit should be clearly labeled and numbered as it is received into evidence.

The application for the permit and any correspondence submitted as part of the application file should also be entered into the hearing record and may be considered by the board. Most application forms are designed to solicit sufficient information for a decision. It is a good practice to have a person familiar with the information in the application (usually the applicant or an agent of the applicant) available to answer any questions the board may have about the written submissions.

Continuances. If the board determines there is insufficient time to fully hear a case or would like to give the parties additional time to collect and present evidence, a hearing may be continued. Whether or not to continue a hearing is a decision for the board. A party generally does not have an automatic right to a continuance nor must all the parties approve a continuance. The board does need to be careful to eventually resolve the case and not table a matter indefinitely.

Summarizing Evidence and Findings

Findings. Simply repeating the standards for the ordinance and noting each is met is not sufficient. The board must determine any contested facts and apply the facts to the applicable standards. The board's written decision document must reflect that this has been done.

The written decision must be signed by the board chair and filed with the clerk to the board. It is effective upon filing. The decision must be mailed to the applicant, the property owner, and anyone else who requested a copy in writing prior to the effective date of the decision. It can be delivered by email, first class mail, or personal delivery.

Making a Decision

Quorum and voting. The general rule is that a majority of the board is a quorum. Most decisions require a simple majority of the board, but a variance requires a *four-fifths majority* (a few local government charters vary this requirement). Members who are recused due to a conflict of interest and seats that are vacant are not considered when computing the required majority.

Conflicts of interest. The Constitution and the statutes give parties to a quasi-judicial decision a legal right to an *impartial decision maker*. Thus boards must avoid conflicts of interest. In addition to financial impact, bias (defined as a predetermined opinion that is not susceptible to change), undisclosed ex parte communications about the case, and close family or business ties also disqualify members from participating. Nonparticipation includes the discussion as well as voting.

Participation in continued hearing. If a hearing is continued or conducted over several days, a member may miss part of the hearing, but be present when a vote is called. The courts allow a member who was not physically present for the presentation of all evidence to vote, but only if the member had full access to the record of evidence presented in the member's absence (such as an opportunity to read the minutes, see the exhibits, or listen to a tape). This is also allowed for a new member appointed after some of the evidence was presented. Some jurisdictions have local legislation or rules of procedure that disqualify a member who did not actually hear all of the evidence from voting on that case.

Precedents. Prior decisions are not legally binding on a board. Each case must be decided on its own individual merits. Subtle differences in individual facts and situations can lead to differing results. However, a board should be aware of previous decisions and, as a general rule, similar cases should usually produce similar results. If a board reaches a different result for a very similar fact situation, the board's written decision must clearly explain why there was a different conclusion.

Rehearings. As a general rule, a board may not hear a quasi-judicial case a second time. The applicant and other affected parties must present their evidence at the initial hearing. Appeals of the initial decision may be made to the courts, not back to the board. If there is a substantially different application, or there has been a significant change of conditions on the site or in the ordinance, a new hearing may be held. Some boards allow a case to be *withdrawn* without a formal decision anytime up to a vote; others do not allow withdrawal after the hearing begins and some limit withdrawal after publication of notice of the hearing.

Record. Complete records must be kept of the hearings. Detailed minutes must be kept noting the identity of witnesses and giving a complete summary of their testimony. Any exhibits presented should be retained by the board and become a part of the file on that case. An audio or video tape of the hearing should be made, though that is not mandated by statute. Any party may request the tape be included in the record of the hearing. Any party may include a transcript of the hearing in the record if the case is appealed to the courts, with the cost of the transcript being borne by the party requesting it.

Variances

Variances must be allowed in a zoning ordinance. Other development regulations may provide for variances, but that is not required. If they are allowed, the variance standards are the same as set out above for zoning.

Purpose. A zoning variance gives an owner permission to do something that is contrary to the requirements of the zoning ordinance. Variances are a safety valve in zoning that allows adjustment of the rules to fit individual unanticipated situations. The standards for obtaining a variance are very strict, as this is one of the most powerful tools available to boards of adjustment and can be subject to substantial abuse if not carefully administered. Variances must not be used as a substitute for amendments to the zoning ordinance. Members of boards of adjustment must be careful not to substitute their judgment for what the zoning ordinance should be for that of the elected officials who are responsible for adoption of the ordinance.

Standards. A variance may be granted only if *all* three of these general standards are met. Meeting one of the standards, but not the others, is insufficient.

1. The applicant must show that strict application of the rules would create *unnecessary hardships*. State law provides several tests regarding unnecessary hardships:
   - It is not necessary to show that no reasonable use can be made of the property without a variance, but the hardship must be real and substantial. Mere inconvenience or additional expense is not adequate.
   - The hardship must be peculiar to the property, such as the property's location, size, or topography. Conditions common to the neighborhood or the public are not sufficient.
   - The hardship must not have been self-created. Purchase of the property knowing it may be eligible for a variance is not a self-created hardship.
2. The applicant must show that the variance would be consistent with *intent and purpose* of ordinance. This means:
   - No "use variances" can be allowed
   - Nonconformities may not extend beyond what the ordinance allows
3. The applicant must show that the variance would be consistent with the overall *public welfare* and that substantial justice will be done. The variance must not create nuisance or violation of other laws.

Conditions. Any variance that is granted may impose individual conditions. The conditions imposed may be enforced, but only conditions reasonably related to variance standards may be imposed.

Special and Conditional Use Permits

Standards. The decision-making standards must be included in the text of the ordinance. They cannot be developed on a case-by-case basis. The decision to grant or deny the permit, or to impose conditions on an approval, must be based on the standards that are actually in the ordinance and that are clearly indicated as the standards to be applied to this decision.

The standards must provide sufficient guidance for decision. The applicant and neighbors, the board making the decision, and a court reviewing the decision all need to know what the ordinance requires for approval. The courts have held there is inadequate guidance if the ordinance only provides an extremely general standard, such as that the project be in the public interest or that it be consistent with the purposes of the ordinance. The courts have approved use of four relatively general standards that are now incorporated into many North Carolina zoning ordinances. These are that the project:

1. Not materially endanger the public health and safety,
2. Meet all required conditions and specifications,
3. Not substantially injure the value of adjoining property (or be a public necessity), and
4. Be in harmony with the surrounding area and in general conformance with the comprehensive plan.

Specific standards may also be included. Typical specific standards include minimum lot sizes, buffering or landscaping requirements, special setbacks, and the like. Many ordinances use a combination of general and specific standards.

Burden. The burden of proof in these cases is allocated as follows: The applicant must present evidence that standards in ordinance are met. It is not the staff's responsibility to produce this basic information. Often application forms are required that will elicit most of this information. If the applicant presents sufficient evidence that the standards are met, the applicant is legally entitled to a permit. If contradictory evidence is presented, the board must make findings and then apply the standards.

Conditions. Individual conditions may be applied. These conditions are fully enforceable. A board may only impose conditions related to the standards that are already in the ordinance.

However, the conditions are limited to those needed to bring the project into compliance with the standards specified in the ordinance for that decision. For example, a design change may be need to make the project "harmonious" with the surrounding neighborhood or a buffer may be needed to prevent harm to neighboring property values (assuming those are standards applicable to that decision).

Certificates of Appropriateness

Preliminary Matters

Notice of hearings. The state mandated mailed notice discussed above is slightly different in the historic preservation statutes. G.S. 160A-400.9(c) provides:

> Prior to issuance or denial of a certificate of appropriateness the commission shall take such steps as may be reasonably required in the ordinance and/or rules of procedure to inform the owners of any property likely to be materially affected by the application, and shall give the applicant and such owners an opportunity to be heard. In cases where the commission deems it necessary, it may hold a public hearing concerning the application. All meetings of the commission shall be open to the public, in accordance with the North Carolina Open Meetings Law, Chapter 143, Article 33C.

As a practical matter, many ordinances and most local government provide the same mailed notice of hearings as is done for quasi-judicial decisions under zoning provisions.

Process

For the most part the same process discussed above must be followed when deciding on a COA application. There are a few modest tweaks to these general provisions for COA's. G.S. 160A-400.9(d) specifically allows site visits and seeking the advice of the state Division of Archives and History and other experts as deemed necessary under the circumstances. G.S. 160A-400.9(d) requires action on applications for COAs within a reasonable time, not to exceed 180 days.

Guidelines and standards.

The mandatory basic standard for a certificate of appropriateness is congruity with the character of the historic district. G.S. 160A-400.9(a) provides that the commission shall:

> prevent the construction, reconstruction, alteration, restoration, moving, or demolition of buildings, structures, appurtenant fixtures, outdoor advertising signs, or other significant features in the district which would be incongruous with the special character of the landmark or district.

The historic commission is required to follow guidelines that help define congruity and also define minor work that can be administratively approved. G.S. 160A-400.9(c) provides:

> Prior to any action to enforce a landmark or historic district ordinance, the commission shall (i) prepare and adopt rules of procedure, and (ii) prepare and adopt principles and guidelines not inconsistent with this Part for new construction, alterations, additions, moving and demolition. The ordinance may provide, subject to prior adoption by the preservation commission of detailed standards, for the review and approval by an administrative official of applications for a certificate of appropriateness or of minor works as defined by ordinance; provided, however, that no application for a certificate of appropriateness may be denied without formal action by the preservation commission.

Appeals in the Nature of Certiorari

As a general rule, all quasi-judicial zoning decisions are appealed directly to *superior court* (not to the governing board). Appeals must be made within 30 days of mailing a written decision to the parties (and anyone who requested a written decision at the hearing) and filing of the written decision with the board's clerk, whichever is later (the time is not measured from the date of decision).

The one exception to this general rule is with certificates of appropriateness issued by a city or county historic preservation commission. State law requires an appeal of these decisions to the zoning board of adjustment prior to seeking judicial review. In this instance, the board of adjustment plays the role the superior court usually plays.

Evidence. When hearing the appeal of a certificate of appropriateness, the board of adjustment must act only as an appeal court. The board of adjustment review is based entirely on the record developed at the board's hearing. The board is not allowed to take any new testimony or review any new evidence. If the record before the historic commission does not contain sufficient evidence to support the HPC's decision, the usual course of action to remand the case to the commission for a new hearing. The board of adjustment is not allowed to take new evidence.

If supported by the record, the findings of fact made by the historic commission are binding on the board of adjustment. The board of adjustment is not allowed to change or make new findings of fact.

Standards to be applied. There are limited grounds for board of adjustment reversal of a historic preservation commission decision:

1) Errors in law;
2) Procedures mandated by statute or ordinance were not followed;
3) Due process requirements for the hearing were not met;
4) There is inadequate competent, substantial, material evidence in the whole record to support decision; or
5) There was an arbitrary and capricious decision. This does not mean the reviewing board disagrees with the conclusion reached. Rather, this requires a conclusion that the challenged decision has not foundation in reason and amounts to an irrational exercise with no substantial relation to legitimate objectives.

QUASI-JUDICIAL HEARING PROCEDURAL GUIDELINES

POLICY STATEMENT 167

QUASI-JUDICIAL HEARING PROCEDURAL GUIDELINES

Prepared by: Chris Simpson, Town Attorney

Supersedes: 5/22/2014

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1. Purpose and General Information
2. Who May Appear at the Hearing
3. Prior to the Hearing
4. Responsibilities of the Presider
5. Responsibilities of the Hearing Body
6. Responsibility of those who Testify
7. Conduct of the Hearing
8. Burden of Proof, Testimony, and Evidence

I. Purpose and General Information

Quasi-judicial decisions arise in a variety of local government settings. In Cary, the Town Council holds quasi-judicial hearings for special use permits, certain subdivision and site plan applications and for certain other applications. The Historic Preservation Commission ("HPC") holds quasi-judicial hearings on requests for certificates of appropriateness for major works and demolition (collectively, "COA"). The Zoning Board of Adjustment ("ZBOA") holds quasi-judicial hearings for variance and reasonable accommodation requests, appeals of staff decisions, including zoning and minimum housing appeals, and appeals from decisions of the HPC on requests for a COA. The Town Council, HPC, and ZBOA are collectively referred to in this policy as the "Hearing Body." The Cary Land Development Ordinance is referred to as the "LDO."

During a quasi-judicial hearing, the Hearing Body must hold an evidentiary hearing and make its decision based on the written and oral evidence presented. Unlike legislative decisions (like rezonings), a quasi-judicial decision must be based solely on the evidence presented and cannot be based on opinions of members of the Hearing Body. Put differently, a quasi-judicial decision is one that requires the Hearing Body to find facts and exercise discretion when applying the standards of an ordinance to a specific situation.

This policy is adopted not as binding rules of procedure but to provide flexible guidance for the conduct of quasi-judicial hearings. It is designed to be used in conjunction with Rules of Procedure for the Cary Town Council (Policy 143), the HPC Rules of Procedure, and the ZBOA Rules of Order. This policy is based on NC law, but is not designed to create any additional rights or obligations and does not provide any procedural rights to any person. The failure of Hearing Body or any other person to adhere to this policy shall not affect the validity of any hearing, action taken or decision made. To the extent there is conflict or any discrepancy between these recommended procedures and the NC General Statutes, case law, or Town ordinances (collectively "law"), the law shall prevail.

II. Who May Appear at the Hearing

Both individual applicants and individuals opposed to the application who are aggrieved (as defined in N.C.G.S. § 160A-393(d)) may represent themselves or be represented by an attorney, and they may have expert witnesses testify for them. All applicants are strongly advised to have an attorney represent them. Applicants that are corporations ('corporate applicant') must be represented by an attorney. Engineers, architects, real estate agents, planners and other non-attorneys may only appear as expert witnesses; they may not represent an applicant or those opposed to an application. If a non-corporate applicant desires to have a non-attorney act as his or her representative (and not solely as an expert witness), the applicant should notify the attorney advising the Hearing Body who will then advise the Hearing Body that it must vote on whether to allow the representation. The request may be denied. Therefore, applicants or their attorney should always be present at the hearing.

III. Prior to the Hearing

To the greatest extent practical, all exhibits and evidence to be relied on during the hearing should be submitted electronically with the application or to the Town Clerk (if the hearing is before the Town Council) or the Commission or Board Clerk (if the hearing is before HPC or ZBOA) at least fourteen (14) days before the hearing date. The Clerk for the Hearing Body may designate Town staff members responsible for processing each application (sometimes 'Staff Representative') as the person to whom such exhibits should be submitted. Copies should also be provided to any other known party. By receiving exhibits and evidence with the application or no later than the deadline~~s~~ shown above, the Town is able to post such exhibits with the hearing agenda. Failure to provide evidence or exhibits by the date and time specified shall mean the applicant or other witness is responsible for providing a sufficient number of copies of such exhibits at the hearing and may result in the hearing being continued. If possible, electronic submissions should meet ADA accessible guidelines (i.e., screen-reader friendly PDF, text file format, etc.). Photos and illustrations should be provided as jpeg or tiff format images. These jpeg or tiff images may be embedded in the PDF or text file provided but must also be provided as separate files. If prior to the hearing an applicant or a person opposed to an application has questions about the process, he or she may contact the Staff Representative for more information. It is inappropriate for anyone to contact any member of the Hearing Body.

Prior to the hearing the Staff Representative, applicant or other person may suggest time limits for testimony and agreement on other procedural issues, and agreement may be reached on such matters. The applicant may also request a continuance prior to the hearing by contacting the Staff Representative.

IV. Responsibilities of the Presider

The Mayor (if the hearing is before the Town Council) or the Chair of the HPC or ZBOA (if the hearing is before one of those bodies), shall preside over the hearing (the “Presider”). The Presider must recognize speakers and members of the Hearing Body before they may be heard. The Presider may rule on any objections or requests from participants in the hearing regarding the procedure of the hearing or evidence presented. The Presider may rule on the competence (i.e. the admissibility) of evidence with or without an objection from a participant. The Presider should allow every speaker to be heard, but may limit and/or cut off evidence or testimony that is irrelevant, repetitive, incompetent, inflammatory, or hearsay. The Presider may place reasonable and equitable limitations on the presentation of evidence, arguments, and cross-examination of witnesses so that the matter at hand is heard without undue delay.

The Presider may impose additional requirements and take actions as may be necessary or desirable to facilitate the fair and efficient conduct of the hearing and other agenda items. Additional requirements or actions may include requiring witnesses to sign up in advance of the hearing, allocating reasonable time for each side to present their testimony and evidence, limiting the overall time for the hearing, and delaying a hearing to a later point in the agenda or continuing the hearing to a later meeting.

V. Responsibilities of the Hearing Body

Members of the Hearing Body must make their decision solely on the written and oral evidence presented and cannot consider information obtained through independent research or undisclosed *ex parte* communications. Members may, however, view the premises at issue before the hearing so long as at the commencement of the hearing the members disclose the site visit and any facts or information gleaned from the site visit that are relevant to the case. Likewise at the commencement of the hearing, or during the hearing if it only becomes evident then, members must disclose any specialized knowledge they may have that is relevant to the case.

Members of the Hearing Body should refrain from *ex parte* communications about upcoming or ongoing cases with any parties or other members of the Hearing Body, and at the commencement of the hearing, members must disclose any intentional or inadvertent *ex parte* communications. Members may seek and receive general, technical information pertaining to the case from Town staff prior to the hearing, but Town staff should provide the information to all during the hearing before the entire Hearing Body.

VI. Responsibilities of those who Testify

In addition to other responsibilities of the applicant and others who testify ("witnesses"), witnesses shall observe time limits imposed on testifying unless the Presider grants additional time for good cause shown. Witnesses shall avoid all hearsay evidence. Hearsay evidence is testimony that the witness does not know of his or her own personal knowledge, including that which someone else told the witness and the use or introduction of signed petitions and letters. Witnesses shall focus their testimony on the applicable criteria. Unless they are a qualified expert, witnesses are not competent to testify about the impact of a proposed land use on the value of nearby property, the danger to public safety resulting from increases in traffic or other matters that require special training or expertise like the level of noise that will be generated. Non-expert witnesses are competent to testify about facts known to them and their opinion so long as it is not about the impact on property values, the danger to public safety from increases in traffic, and other matters that require special training or expertise.

VII. Conduct of the Hearing

This section discusses the general format for a quasi-judicial hearing. Section VIII provides details about testimony and evidence. The order of business for each hearing should be as follows:

(a) All persons, including Town staff, who intend to present evidence must be sworn in.

(b) The Presider shall call the case as advertised on the agenda. The Presider may state something along the lines of:

This matter requires this body to conduct a quasi-judicial hearing, which means the body must find facts and base its decision upon the application of the ordinance standards/criteria and the competent, substantial and material evidence received during this hearing. All testimony must be competent and not repetitious. Speculative opinions and general expressions of fear of potential increases in crime, traffic or impacts on property values do not constitute competent evidence.

(c) If the applicant is to be represented by anyone other than a licensed attorney, the applicant shall request the consent of the Hearing Body for such representation. *See*, Section II, above.

(d) Members of the Hearing Body should disclose the following

(1) Any site visits;

(2) *Ex parte* communications;

(3) Specialized knowledge they have relevant to the case;

(4) Whether they have a fixed opinion that is not susceptible to change based on what they learn at the hearing

(5) Whether they have a close familial, business or other relationship with the applicant or other affected person;

(6) Whether they have a financial interest in the outcome of the case; and

(7) Any other information relevant to determining whether a conflict of interest exists.

If necessary, the Hearing Body will vote on recusal of members at this time. A member shall not participate in the hearing if the member has a fixed opinion prior to the hearing that is not susceptible to change; has engaged in undisclosed *ex parte* communications; has a close familial, business or other associational relationship with the applicant or an affected person; or has a financial interest in the outcome of the matter.

(e) The applicant or other affected person (having been sworn in) shall present any objections they may have to a member's participation. If an objection is made to the participation of a member based on personal bias or other ground for disqualification, the Hearing Body shall determine the matter as part of the record.

(f) The Presider shall open the hearing.

(g) The Staff Representative should present the staff report.

(h) Evidence and the appropriate number of exhibits that were not provided by the deadline in advance of the hearing shall be given to the Clerk and any opposing party. The Clerk shall number the exhibits if they have not already been numbered and shall distribute to Hearing Body. If an exhibit is presented it becomes part of the record and will not be returned.

(i) If all parties are represented by attorneys, the applicant, followed by any opposing party, may present a brief opening statement.

(j) The applicant shall present the arguments and evidence in support of his/her case or application. The applicant shall address applicable approval criteria. Members of the Hearing Body or any attorney representing the Hearing Body or the Town may ask questions for clarification. If all parties are represented by attorneys, opposing parties may ask questions of (cross-examine) the applicant (if the applicant testifies) or supporting witnesses at this time. If those opposed to the applicant are not represented by attorneys, the Presider may prefer to delay cross-examination until all sides present their arguments and evidence.

(k) Persons opposed to granting the application shall present the arguments and evidence against the application based on the applicable approval criteria. Members of the Hearing Body or any attorney representing the Hearing Body or the Town may ask questions for clarification. If all parties are represented by attorneys, the applicant may cross-examine the speaker or opposing witnesses at this time.

(l) The Presider will provide Town staff and/or their attorney an opportunity to present relevant arguments or evidence.

(m) If cross-examination was not done at the conclusion of each side's case, then both sides will be permitted to cross examine previous witnesses. Those who oppose the application should cross examine the applicant (if the applicant testified) and the applicant's supporting witnesses first. Then the applicant may cross examine those witnesses who spoke in opposition to the application. Both sides will be permitted to present rebuttals to opposing testimony. Both sides may, as necessary, object to incompetent evidence and testimony (such as improper lay opinion testimony and hearsay) offered by other witnesses. The Presider may rule on such objection or take it under advisement.

(n) After all evidence has been presented, the Presider may ask the parties if there is additional relevant information that has not been presented that would make a continuance in order. The Presider will entertain objections and rule on the admissibility of the evidence or exhibit.

(o) Unless the Presider continues the public hearing to the next regularly scheduled quasi-judicial meeting of the Hearing Body or to a publicly stated date, time and location, the Presider shall close the period for public discussion. The Hearing Body shall publicly discuss the case without further general input from the public. Members of the Hearing Body, however, may seek clarification or ask questions of persons previously sworn on any piece of evidence presented. Cross-examination and rebuttals may be made only on new evidence presented. The hearing shall be closed after Hearing Body deliberations are complete.

(p) Unless the hearing has been continued, the Hearing Body shall render a decision on the matter, or, if it so chooses, recess the case to the next regularly scheduled quasi-judicial meeting of the Hearing Body or to a publicly stated date, time and location. The Town Council and HPC may approve an application by vote of a majority of the members. The ZBOA may approve variances only by a vote of four-fifths of the members of the board (excluding vacant positions and members who are disqualified from voting, if there are no qualified alternates available); all other ZBOA decisions may be made by majority vote.

(q) Any motion to approve an application that does not receive the required majority or super-majority vote effectively means the application has been denied. Even if an application is effectively denied, however, the better practice is to approve a formal motion denying an application and then make findings of fact and conclusions to support that decision. A motion to deny an application that fails does not mean that an application has been effectively approved. An application can only be approved on an affirmative vote.

(r) The Hearing Body may attach conditions to the approval of any application in accordance with LDO § 3.1.8, or other applicable authority. Note, however, the Hearing Body's authority to attach conditions as part of an appeal is limited (See Section IX)

(s) A written decision must be approved for every quasi-judicial application, generally at the next scheduled meeting of the Hearing Body. As part of the written decision, the Hearing Body must make findings of fact and conclusions as to applicable standards and any conditions (See Section X).

VIII. Burden of Proof, Testimony, and Evidence

(A) Burden of Proof for Special Use Permits and Subdivision/ Site Plan Approvals: The applicant has the burden of producing sufficient substantial, competent and material evidence for the Hearing Body to conclude that the standards of the applicable ordinance(s) have been met. If the applicant shows they meet all the standards of the LDO, the applicant is entitled to approval unless those opposed to the application produce substantial, competent and material evidence that one or more of the standards have not been met. If the applicant fails to put forth sufficient evidence to show they meet all the criteria, then the Hearing Body must deny the application. For example, for a special use, the applicant must establish that the application meets the specific criteria for the specific use proposed and that it meets all of the general criteria of LDO § 3.8.3. For site/subdivision plan, the applicant must establish that the application meets the criteria of LDO § 3.9.2(I).

(B) Burden of Proof for Variances: The applicant has the burden of producing sufficient substantial, competent and material evidence for the Hearing Body to conclude that unnecessary hardships would result from carrying out the strict letter of the zoning ordinance. The ZBOA must deny a request for a variance unless the applicant puts forth sufficient evidence that all of the criteria of LDO § 3.20.5 have been met.

(C) Burden of Proof for Certificates of Appropriateness: The applicant has the burden of producing sufficient substantial, competent and material evidence for the Hearing Body to conclude that the request complies with the standards contained in the principles and guidelines adopted by the HPC for review of changes and that the proposed changes are congruous with the special character of the landmark or district. If the applicant fails to meet this burden, the HPC must deny a request for a COA for major works and must deny or delay a request for a COA for demolition, as appropriate.

(D) Burden of Proof for Appeals: Appeals of administrative and HPC decisions are only quasi-judicial decisions in the limited sense that they require the same due process protections as are given in other quasi-judicial proceedings (for example, the rights to present evidence and cross examine). Unlike other quasi-judicial decisions, however, an appeal of an HPC or administrative decision presents a question of law, which the Hearing Body considers *de novo*. "*De novo*" means the Hearing Body is not bound by the interpretation of the HPC or Town staff.

When deciding an appeal of an administrative decision, the Hearing Body must seek to interpret the ordinance so as to give effect to the Town Council's intent when it adopted the ordinance. Pursuant to § 3.21.4 of the LDO, the Hearing Body shall not reverse or modify an administrative decision unless it finds that the administrative officer erred in the application or interpretation of the terms of the LDO, Town Code, or related policies adopted by the Town. The other common rules of statutory construction apply as well.

When deciding an appeal of an HPC decision regarding Certificates of Appropriateness, the Hearing Body hears the appeal "in the nature of certiorari." G.S. § 160A-400.9. This means that the Hearing Body hears no new evidence and reviews the matter strictly on the record of the case forwarded to it by the HPC. The Hearing Body must defer to the judgment of the HPC on matters of fact. The HPC's decision should be reversed or remanded only when the HPC's decision is in violation of constructional provisions, in excess of statutory authority, inconsistent with applicable procedures specified by statute or ordinance, affected by other error of law, unsupported by substantial competent evidence in the record, or arbitrary or capricious.

In appeals, neither party has the burden of proof and neither party has any right to any affirmative decision.

(E) Testimony and Evidence: All testimony, including from Town staff, must be sworn testimony. All persons wishing to speak will be given a reasonable time in which to be heard; however, groups are encouraged to select a spokesperson to speak for the group in order to avoid repetitive testimony. Inflammatory, irrelevant, repetitive and incompetent testimony and hearsay is not permitted.

The Hearing Body's decision must be based on substantial, competent, and material evidence. Substantial evidence is "that which a reasonable mind would regard as sufficiently supporting a specific result." Competent evidence is evidence that can be subjected to cross-examination, inspection, explanation and rebuttal. Courts often refer to competent evidence as being "admissible." Material evidence is evidence that is relevant to the issue being considered by the Hearing Body.

(F) Lay Versus Expert Testimony: As a general rule, anyone with knowledge material (i.e. relevant) to the case may provide factual information, but only experts may provide opinion testimony. Except as provided in G.S. § 160A-393(k)(3), lay witnesses may provide opinion testimony, but this testimony is generally deemed incompetent unless it is corroborated by competent evidence. Even expert testimony must be competent (i.e. the expert has qualifications relevant to the issue) and material before the Hearing Body can rely on it.

G.S. § 160A-393(k)(3) requires expert testimony in three cases:

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; and,
3. other matters about which only expert testimony would generally be admissible under the rules of evidence, such as the level of noise that will be generated.

IX. Conditions of Approval

(A) Conditions Generally: The Hearing Body may attach conditions to approvals of special use permits, subdivision and site plans, COAs, and variances, and such other approvals as law may permit. For special use permits and subdivision and site plans, conditions must be reasonable and appropriate and limited to those that require changes in a project "that are necessary to bring the project into compliance with the standards" of the applicable statutes and ordinances. For variances, conditions must be "reasonably related to the variance."

Conditions cannot require the applicant to take action with regard to a piece of property that is not a part of the application being considered, and conditions cannot require the alteration of a special use permit previously issued to a third party.

(B) Conditions on Appeals Decisions: Unlike conditions on special use permits, subdivision plans, site plans, and variances, the Hearing Body's authority in an appeal is limited to reversing or affirming, wholly or partly, or modifying the decision. An appeal of an administrative decision cannot be used to impose conditions or vary the ordinance.

X. Written Decision

The Hearing Body must reduce its decision to writing, and the written decision must reflect the Hearing Body's determination of contested facts and their application to the specific standards for the particular use and the general standards contained in LDO § 3.8.3 for special uses, § 3.9.2(I) for subdivision plans and site plans, § 3.20.5 for variances, and § 3.25.4 for reasonable accommodations. For approvals or denials of these types of applications, the Hearing Body should make conclusions as to each applicable standard as appropriate. Even if the Hearing Body denies an application because it fails to meet one or two criteria, the better practice is to make findings of fact and conclusions as to all standards, so the record is clear in the event the decision is appealed. Findings of fact must also be made to support conditions attached to any approval.
There are no specific LDO standards that apply to the appeal of an administrative or HPC decision; instead, the Hearing Body should make findings of fact and conclusions that are relevant to the specific ordinance or guideline that is at issue in the appeal.

The written decision must be signed by the Presider or other authorized member of the Hearing Body, and becomes effective upon filing with the Planning Department. A copy of the written decision must be delivered to the applicant, property owner, and others as required by state law.

XI. Withdrawal of the Application

An application or appeal will be considered to have been withdrawn under the following circumstances:

(1) The applicant submits a written request to withdraw the application or appeal;

(2) The property owner, if different than the applicant, submits a notarized request to withdraw the application or appeal;

(3) The Hearing Body requests the applicant to furnish additional information within a specified period of time, and such information is not furnished by the applicant within the time period allowed;

(4) Without prior notification to the Presider or Clerk, the applicant does not appear at the scheduled hearing to testify regarding the merits of the application; or

(5) The applicant appears at the scheduled hearing and requests that the application be withdrawn.

XII. Reconsideration/Reopening

Substantive decisions on the merits of a request cannot be reconsidered and decided cases cannot be reopened following the approval of a written decision. If there has been a material change in circumstances, the case may be submitted as a new case under the LDO.