Zoning Board of Adjustment
Monday, September 9, 2019
6:30 PM
Council Chambers
316 N. Academy Street, Cary Town Hall, Cary, NC 27513

I. Call to Order

II. Adoption of Agenda

III. Approval of Minutes

3.1 Zoning Board of Adjustment - Quasi-Judicial Meeting - May 6, 2019 6:30 PM

3.2 Zoning Board of Adjustment - Regular Meeting - Jun 3, 2019 6:30 PM

3.3 Zoning Board of Adjustment - Regular Meeting - Aug 5, 2019 6:30 PM

IV. Case Hearings

4.1 19-V-02 109 Murdock Creek Court

V. New/Old Business

5.1 Review of amendments to Policy Statement 167

VI. Closed Session

Closed Session will be called if necessary.

VII. Adjournment

Please contact Debra Grannan, Assistant Planning Director, at debra.grannan@townofcary.org or at (919)460-4980 with any questions regarding this agenda.

The Town of Cary is committed to providing all citizens with the opportunity to participate fully in the public meeting process. Any person with a disability who needs an auxiliary aid or service in order to participate in any meeting may contact the Town Clerk at least 48 hours prior to the meeting. The email address is virginia.johnson@townofcary.org; the phone number is (919) 469-4011; the TDD number is (919) 469-4012.

Zoning Board of Adjustment
Monday, May 6, 2019
6:30 PM
Council Chambers
316 N. Academy Street, Cary Town Hall, Cary, NC 27513

Chairman Richard Roddy: Present, Vice Chairman Jamie Weiss: Absent, Board Member Michael Kent: Present, Board Member Chris Hoina: Present, Board Member Stephen Kalland: Present, Alternate Member Jamey Sharlow: Present, Alternate Member Russell Busick: Present.

Roddy:	Richard Roddy, Chairman
Kent:	Michael Kent, Board Member
Hoina:	Chris Hoina, Board Member
Busick:	Russell Busick, Board Member
Kalland:	Stephen Kalland, Board Member
Silverstein:	John Silverstein, Zoning Board of Adjustment Attorney
Glover:	Lisa Glover, Town of Cary Senior Assistant Attorney
Nicholas:	Wayne Nicholas, Staff
Realander:	Michelle Realander, Staff
Clark:	Joel Clark, Applicant
Jones:	Todd Jones, Applicant's Attorney
M/F:	Male/Female Speaker

I. CALL TO ORDER

Roddy: Good evening, ladies and gentlemen. The chair will now call the May 6th, 2019 Zoning Board of Adjustment for the Town of Cary meeting to order.

II. ADOPTION OF AGENDA

Roddy: The agenda has been published. First item is to deal with the agenda. Are there any amendments to be made to the agenda? If not, is there a motion to adopt the agenda?

Busick: I'll make a motion to adopt the agenda.

Roddy: Thank you, Mr. Busick. Is there a second?

Kent: I'll second, Mr. Roddy.

Roddy: Thank you, Mr. Kent. All in favor, say aye.

M: Aye.

Roddy: Any opposed? Five-zero; ayes have it.

RESULT:	APPROVED [UNANIMOUS]
MOVER:	Russell Busick, Alternate Member
SECONDER:	Michael Kent, Board Member
AYES:	Roddy, Kent, Hoina, Kalland, Sharlow, Busick

III. APPROVAL OF MINUTES

3.1 Zoning Board of Adjustment - Quasi-Judicial Meeting - Feb 4, 2019 6:30 PM

Roddy: Next item on the agenda is the approval of the minutes. Looking first at the minutes of the February 4, 2019 meeting, are there any changes necessary in that—those minutes? If not, is there a motion to adopt—to approve those minutes for the February 4, 2019 meeting?

Kent: So moved.

Roddy: Thank you, Mr. Kent. Is there a second?

Busick: Second.

Roddy: Thank you, Mr. Busick. Any discussion? No. All in favor, say aye.

M: Aye.

Roddy: Any opposed? No? Five-zero. Minutes have been approved for the February 4 meeting.

RESULT:	**ACCEPTED [UNANIMOUS]**
MOVER:	Michael Kent, Board Member
SECONDER:	Russell Busick, Alternate Member
AYES:	Roddy, Kent, Hoina, Kalland, Sharlow, Busick

3.2 Zoning Board of Adjustment - Regular Meeting - Mar 4, 2019 6:30 PM

Roddy: Next item, minutes for the March 4 meeting of the Zoning Board of Adjustment. Any changes? Seeing none, is there a motion to adopt—to approve those minutes?

Busick: So moved.

Roddy: Thank you, Mr. Busick. Is there a second?

Kent: I'll second.

Roddy: Thank you, Mr. Kent. Any discussion? All in favor of approving the minutes of March 4, say aye.

M: Aye.

Roddy: Any opposed? No? Five-zero. Minutes have been approved.

RESULT:	**ACCEPTED [UNANIMOUS]**
MOVER:	Russell Busick, Alternate Member
SECONDER:	Michael Kent, Board Member
AYES:	Roddy, Kent, Hoina, Kalland, Sharlow, Busick

IV. CASE HEARINGS

4.1 18-CP-01 Wackena Road

Roddy: Next item on the agenda is Case 18-CP-01—CP for Civil Penalty, and it's listed as Wackena—did I say that correctly?—Wackena Road issue. Have the parties been sworn in? Thank you. And for the Town, go ahead, Mr. Nicholas. Your appearance for the record, please.

Nicholas: Wayne Nicholas, with the Planning Development Services Department.

Roddy: Okay. Chair notes that it seems that the entire appeal worksheet—there was no—there is no controversy relative to what's set forth in the appeal worksheet.

Nicholas: Correct.

Roddy: Notwithstanding, Mr. Nicholas, go ahead with what the Town of Cary wants to put on the record in regard to this matter.

Nicholas: Okay. Thank you. Good evening, board members. The case before you this evening is an appeal of a civil penalty that was issued in association with a zoning violation for the illegal removal of tree protection fencing and unauthorized land disturbance at multiple locations within the Reserve at Wackena subdivision.

The subdivision is comprised of multiple properties located off Wackena Road, southwest of the intersection with Indian Wells Road, which you can see here on the map. On the slide here, the parcels that make up the Reserve at Wackena are shown in red. There are several parcels. The properties that are outlined in yellow are the properties where the violations within the subdivision occurred. As you can see on the map, some of the properties that make up the subdivision up near the intersection with Indian Wells Road have already been subdivided to create the building lots for the detached dwellings that will be constructed as part of this development.

This is an image of the approved Reserve at Wackena Subdivision plan. The overall development plan is comprised of multiple parts, including sheets that show the lot and road layouts, proposed landscaping, and proposed grading and erosion control measures. The approved landscape land sheets designate certain areas on the property as streetscape, buffer, and landscape areas. These are areas that are required to be protected.

As mentioned in the staff report, the erosion control plan depicts the limits of land disturbance, which is also demarcated in the field with orange tree protection fencing. In a minute, Michelle Realander, one of our development compliance officers, will be presenting some photos that show the tree protection fencing and also the—a little more detail about the violations that occurred.

In addition to showing the fencing on those plan sheets, there's also notes included on the erosion control plan that reference the Land Development Ordinance requirements that pertain to tree protection fencing and tree protection areas. I will not go into a lot of detail about those. Those notes are explained in the staff report in pretty good detail.

On this slide here, you can see there were a total of eight separate areas within the overall subdivision where tree protection fencing had been accessed and unauthorized land disturbance had occurred. These areas are indicated on the map with red stars. The violations that were observed included areas where trees had been removed. There were impacts to the critical root zone of a champion tree, and there were also damage to trees that had not been removed.

At this point, I'll have Michelle Realander come up, and she will go over—provide a little more detail about some of these violations and what was observed out in the field.

Roddy: State your name for the record, please.

Realander: Good evening. Michelle Realander, Town of Cary development compliance officer.

Roddy: And are you the officer who issued the notice of the violation?

Realander: Yes, sir.

Roddy: Thank you. Go ahead.

Realander: So as Mr. Nicholas explained, there were eight different locations where an encroachment occurred. The first one that's on the screen is an area that was being accessed by vehicles. They were driving in the site via this old driveway, so they were crossing over the tree protection fence for this designated buffer.

The second area was actually a sewer outfall. And as you can see, the tree fence had been removed and trees were removed from this area as well as damage to existing material. The critical root zone of those existing trees were also impacted due to the removal and driving and equipment being in that tree protection area.

Area number three was actually a champion tree. There was some vegetation removed and the ground was disturbed in this area, as well as some damage to existing vegetation in that area.

Roddy: Do you have any sense of when that photograph was taken? How long

ago was that taken?

Realander: It was back when the initial violation was found, which, I believe, was back in—

Roddy: 2017?

Realander: Yes, sir.

Roddy: Thank you. Go ahead.

Realander: Sure. This location was actually—some vegetation had been disturbed and a tree had been removed in this area, as shown in the picture.

Roddy: Is that stump—is that the champion tree?

Realander: No, that was just a regular tree that had been removed—

Roddy: I see.

Realander: —in the tree protection area. This also shows disturbance of the ground as well as some vegetation that had been removed in Area 5, as well as in Area 8. Actually, all the tree protection fence in Area 8 had been removed and vegetation and the ground had been disturbed in that area.

Area 6 also had some disturbance. This was after the tree protection fence had been reinstalled, so you can see where the ground appears different where the ground was disturbed.

This last location shows where the fence had also been removed and they were accessing the tree protection area. Some vegetation had been removed. There was an old driveway along that side as well that was being accessed and used.

Roddy: Were these violations self-reported or were they determined by your inspection?

Realander: So, they were actually found by my inspection. However, the developer was quick to try to remedy the situation and they did get the tree fence reinstalled per our request, so that we could figure out what areas were actually impacted and be able to measure those areas.

Roddy: Thank you.

Realander: Sure.

Kalland: Actually, could I ask a follow-up on that?

Roddy: Yes, go ahead, Mr. Kalland.

Kalland: You mentioned a moment that—ago that there was damage to one of the areas after the fence was reinstalled?

Realander: No, it was prior to, but the picture was taken after they had already reinstalled the fence.

Kalland: Got you.

Realander: Yes, sir.

Kalland: Thank you.

Realander: Sure. So this next slide shows part of the revegetation plan that was approved by staff—myself—and that was actually done on 11/16/18. And so this shows one of the areas to be revegetated, and then this one shows the second area. This is an estimate that was submitted for the cost of the material that was to be planted per that vegetation—revegetation plan.

Roddy: That's Exhibit 9 in what was provided to us.

Realander: Yes, sir.

Roddy: Is that correct?

Realander: Mm-hmm.

Roddy: Thank you.

Realander: And this is the first area that they replanted for the revegetation plan. This was an existing buffer, but due to the nature of that buffer we approved for it to be enhanced and supplemented with more material. And this is the second area, and this is most of the revegetation, due to this area was impacted the most during the tree fence violation. And then I'll turn it back over to Mr. Nicholas.

Roddy: A couple questions.

Realander: Sure.

Roddy: Now that corrective action has been taken, has it been restored to a condition that is satisfactory to the Town of Cary?

Realander: They complied with the regulations for the notice of violation, yes, sir.

Roddy: And is there a way to characterize it? Was it done on the cheap, or is there something significant in terms of restoring it to the condition it used to be in?

Realander: Well, there was multiple areas that were impacted, and so we always give them the benefit of the doubt when we're measuring those areas. And so the last area that you saw was the one that was impacted the most. That's why we had them plant the material in that specific area. And they did comply with the revegetation plan, which was part of their notice.

Roddy: And some of the pictures were done in 2017. This is 2019.

Realander: Yes, sir.

Roddy: Considerable period of time has elapsed. Is there any—why would—did it take so long to get to where we are today? Do we have any sense of that?

Realander: So—

Roddy: Or is that a question that maybe I should direct to the applicant?

Realander: You can definitely ask that of them. It was—this is a very large

project, and so there were multiple things that delayed it, and the violation itself took a long time for us to get measured, and we were working with the applicant on how to remedy it. They did get the tree fence reinstalled. Then we worked on the—their application for this hearing, as well as the revegetation plan. So it did take a while. They also had to get their approve—their plan approved for their development.

Roddy: It makes it sounds like you and/or the town, together, spent a considerable amount of time to get to where we are today.

Realander: Yes, sir.

Roddy: Do you have any sense of how much effort that involved?

Realander: It was a lot of effort on multiple departments as well as just meetings and time—putting the presentation, the notice of violation. So it was a lot of time, just due to the gravity of the violation.

Roddy: And in terms of doing it, how was the cooperation that you got, or didn't get, from the violators?

Realander: They were very prompt to respond, and they worked with us throughout the process.

Roddy: Okay, thanks. Before you step down, any member of the board have any questions?

Busick: Can you define a champion tree?

Realander: A champion tree is—depending on the type of tree, there's different classifications for the diameter of the tree, and that is depicted on their approved plan, as this specific tree was to be saved due to its champion tree classification. The tree was not—the tree itself was not damaged, but we—the tree protection fence encompasses where the canopy of the tree is, to protect the roots of that tree. And so it was impacted a little bit by them getting into that area.

Roddy: Is that it, Mr. Busick?

Busick: Yes. Thank you.

Roddy: Any other questions from the board?

Hoina: I have one.

Roddy: Mr. Klein?

Hoina: Hoina.

Roddy: Hoina.

Hoina: Good evening. I notice that the tree—some of the trees that were replanted were Leyland pines, which seems to be different than what was indigenous there. Is that correct?

Realander: They didn't plant any Leyland.

Hoina: Okay. The evergreens that I'm seeing?

Realander: Yes. So we—that is part of the plant schedule on their notice of violation, and so there was a certain amount of material that was the evergreen component. The buffers are normally supplemented with evergreen material, and so that was consistent with what would be supplemented in other areas via their plan.

Hoina: So I'm not seeing a Leyland pine? Do you know what that tree was that was replanted?

Realander: They—there's a—they show eastern redcedars and—just eastern redcedars. That's what the mid-level evergreens are.

Hoina: That could be where I'm seeing—

Realander: Sure.

Hoina: —what looks like a Leyland and it's a cedar.

Realander: Sure.

Hoina: And now, is that an indigenous plant?

Realander: That, I'm not sure. I just know that according to the notice of violation schedule that a mid-level evergreen is required.

Hoina: Okay. Thank you.

Realander: You're welcome.

Roddy: Mr. Hoina, anything else? Mr. Kalland?

Kalland: I just had a quick question. The champion tree, it wasn't the one that was in the picture that was damaged, then? The—

Realander: No. That's not the champion tree. That was just damage to an existing tree in that area.

Kalland: Okay. Do we know, in 2019, what the condition of that champion tree is today? Because it didn't look like there was any remediation that took place in that area.

Realander: So they had reinstalled the tree protection fence. We have not been out there to check on that section since that time, due to they have not—they've just completed the infrastructure in that section, and so they have not begun to build. But according to their plan, the approved plan, the tree has to remain alive for a certain amount of time. So if something happens in between that, then we would take the next step.

Kalland: Thank you.

Realander: You're welcome.

Roddy: Any other questions? Thank you.

Realander: Thank you.

Roddy: Mr. Nicholas?

Nicholas: I'm just going to quickly wrap things up here, from the Town's perspective. Give you a quick summary just of the events that occurred in this issue. There was an early grading permit that was issued for limited site work, and that's based on the erosion control plan. That's not uncommon with developments in Cary. As long as there's an approved erosion control plan which does get incorporated into the actual approved development plan as well, developers can do a limited amount of site work based on that erosion control plan. And I point that out just because some of the dates that were in the staff report may have seemed conflicting.

Next, there was violations of the tree protection fence, and those areas were observed on October 30th of 2017. And the staff report says that the development plan was approved on December 6th, so that's why you saw violations occurring before the final plan was approved, because the erosion control plan was actually approved before then, which allowed them to go out and do a limited amount of site work and grading. And like I said, that's not uncommon in Cary.

Since the October 30th inspection where the violations were found, there had been multiple meetings, as Michelle indicated, with the owner's representatives to discuss the violations, what corrective actions would be taken, which included also a revegetation plan as well.

As she said, the notice of zoning violation was issued in April of 2018 for the unauthorized land disturbance. The total fine was $60,604, broken down as you see here on the screen—2,000 for entering the tree area and 58,604 for—based on a $4 per square foot of disturbed area.

Following the notice of zoning violation, there was an application for the appeal of the civil penalty. One of the things that was included with that was a estimate, which I believe was in the exhibits in your worksheet. There was an estimate of what the cost was going to be to implement that revegetation plan. There was also a copy of a check that indicated—showed that it was paid—the amount—that same amount was paid for for that vegetation. And then, as Michelle explained, the revegetation plan had been implemented by the applicant—or the property owner, when the time was right for planting.

So, in considering the applicant's appeal of the civil penalty, the ordinance sets out criteria that the board needs to consider. These include what you see here on the screen—the gravity of the violation, any corrective actions taken by the violator, the cost of the action to correct the violation, and any previous violation committed by the violator on the same or different site. So those are the criteria you need to keep in mind tonight as you deliberate this.

And at this point, I'll turn it over to the applicant. I would recommend that the board allow the applicant to make their presentation and then

conduct the public hearing before proceeding to questions. I believe the answers to some of these questions will probably be answered by what the applicant is going to say and what the property owner is going to say as well.

Roddy: Before you step down, sir —

Nicholas: Sure.

Roddy: —could you maybe put that slide back up about the four criteria that are involved.

Nicholas: Yeah.

Roddy: I'd like you to address each of those criteria from the town point of view.

Nicholas: I'm sorry?

Roddy: The gravity of the violation. How would you characterize the gravity of this—these violations?

Glover: Good evening, board. Lisa Glover, assistant town attorney for the Town of Cary. I think, as—we have a little bit of this in your staff report—I think the Town—obviously, tree protection, champion tree protection, preservation of vegetation is very important to the Town, so this is considered a serious violation. Obviously, the violators did take the corrective action that we asked for. They did it timely. They implemented what we asked and we're satisfied with that. They've submitted evidence on the cost. And we did not find any previous violations on this site or by the property owner here. So that would be the staff's comments on the four factors.

Roddy: Thank you, Ms. Glover. Any questions of Mr. Nicholas before he steps down?

Hoina: I have one.

Roddy: Go ahead.

Hoina: I wasn't clear if there were previous violations by this contractor or just on that site.

Nicholas: Not that—we have no record of any violation—previous violations by this contractor.

Hoina: Thank you.

Roddy: The observations—there was, I believe, eight violations. And they seemed scattered over the subdivision.

Nicholas: Correct.

Roddy: Were you able to ascertain how or why that occurred from the point of view of the Town? We've had prior cases where it was all in one area, but this seems to be eight distinct, separate areas, not a contiguous area.

Realander: Sure. Michelle Realander. I think that's part of what they're going to present in their side of it. So I think they can answer that.

Roddy: That's fair. Okay. Thank you, Mr. Nicholas.

Nicholas: Okay.

Roddy: Is there representatives for the—let's see. Mr. Silverstein, we are dealing with corporations or limited partnerships or something of a—away from the individual. They should be represented by attorneys. Is that—

Silverstein: Correct.

Roddy: —correct?

Silverstein: That's correct. Yes, sir.

Roddy: Okay. Your name and—

Jones: Yes, sir. My name is Todd Jones, from the firm Anderson Jones. We are a firm in downtown Raleigh. And I'm here representing Cardinal Civil Contracting, LLC.

Roddy: Okay. You're an attorney, sir?

Jones: Yes, sir.

Roddy: Thank you.

Jones: Cardinal Civil Contracting was the site work contractor. The property is actually owned by HHHunt. But because, through our contractual agreement, we have the ultimate responsibility for what happened out there, we're—we are the applicant here tonight and the party that received the citation and took the action to rectify everything. So.

Gentlemen, I appreciate you having us here tonight. And before I bring my client up here to speak with you and answer some of the questions that you had, I just want to say that Cardinal Civil, when they received the notice of violation, they acted with great haste in correcting everything. This is not an instance here tonight where we're fighting over what happened or what didn't happen. Clearly, they took the responsibility, and we're not here about any of that. We agree. It occurred.

Cardinal Civil immediately took the corrective action that the Town ordered them to take. They went out and got a vegetation—revegetation plan, got it implemented to the Town's specifications and requirements, has been in constant communication with the Town employees. And so, you know, they have done everything possible to rectify. They do not deny that it occurred. It's unfortunate. But I'm happy to tell you they've never had a previous violation—not in this town or any other—and to—additionally, there's been no more issues out at this site since all of this occurred. And I'm going to bring up Joel Clark, who has already been sworn, to kind of tell the board what transpired. So, Joel.

Roddy: State your name again—

Clark: Joel Clark.

Roddy: And for the record, your affiliation?

Clark: Project manager with Cardinal Civil Contracting.

Roddy: Thanks.

Clark: I would like to start by thanking Michelle Realander. She's been great to work with through this whole process. Like Todd said, we don't deny what happened. It was the result of, you know, laziness, cutting corners. And since then, we've taken actions in making sure this doesn't happen again—walking with our contractors, given these maps. And then follow-ups. Because sometimes, what happens with the manager might not be conveyed down to the field, so it's key to have those follow-ups once the field crews hit the job sites. And with these implemented measures, we haven't had any further issues, and hopefully there won't be any more in the future. So hopefully, you'll have some mercy and see that we've done the right thing and be willing to reduce or eliminate the penalty.

Roddy: Any questions of the—of Mr. Clark by the board? Go ahead. Mr. Kalland?

Kalland: Yeah, I was just curious. Do you have other projects, either in the past or at present, in Cary?

Clark: This is my only one in Cary, but I have several in the Apex and Morrisville area.

Kalland: Thank you.

Roddy: Any other questions? Thank you, Mr. Clark.

Clark: Thank you.

Jones: So, members of the board, the contractor by way of the property owner, is here tonight, requesting some abatement of the penalty and fines that have been—that are considering to be assessed. The contractor has spent almost $40,000 in vegetative remediation to correct all the issues there. There's been no further issues. And of course, we'd love to have the penalties abated completely, but if that is not possible, we would ask that the board take into consideration all of the things that the contractor has done to rectify the situation.

Roddy: Any questions of the attorney? Seeing none from the board.

Jones: Thank you.

Roddy: Are there any other—any other testimony? That appears to be it. Mr. Silverstein?

We're at the point now of closing the evidence proceeding and deliberation among the board. Okay. If it'll assist the board, I put an Excel chart together based on the findings. **(EXHIBIT A)** Pass them to—give one to Mr. Silverstein too—and would you—I don't know if I got enough copies here, but to the Town and to the parties so that they see what we're talking from, in

case anybody has any issues. Sometimes we handle these cases and there's a lot of numbers involved, and sometimes it's good to have the numbers in front of you.

The testimony we've heard thus far is the original penalty was 60,604. There was no revised notice of violation. We've, in the past, had—the Town has revised their initial based on findings that have been made subsequent to the initial notice of violation. That was not the case here. There was, in the file, exhibit number nine, the cost of the action to correct the violation, presented by a Environmental Landkeepers, to the tune of 37,950. And it's our understanding, based on the evidence, that's the amount that has been paid for the remedial action. And, just the math, the difference there is 22,654. Those numbers.

Now, let's have a discussion among the board on the issue presented to us, which is to modify—the applicant has presented the issue to modify, and as the attorney indicated, to perhaps abate completely, the $60,000 penalty that has been imposed.

Looking at the town ordinance—and we have a view graph—a slide up, and it's in front of us right now—the gravity of the violation, corrective action taken by the violator. They have taken the action to put the condition of the property in a form that the town is satisfied meets their town requirements. The town attorney has indicated that this is a very grave violation from the Town point of view. The cost of the action to correct the violation, we now know, was almost 38,000, and that money has been paid. And there has been no previous violation committed by the violator on the same or a different site. That's the testimony I believe I have heard, unless another member of the board has heard something different and wants to comment on that.

With that background, open for discussion. Who wants to start? I usually start to the right and stick it to Mr. Kent. Go for it, Mr. Kent.

Kent: Sure, Mr. Roddy. As I think I did last time we did this, I'm going to take them in reverse order if you're all right with that.

Roddy: Yeah, you do it your way.

Kent: I agree—you know, the evidence suggests there's no record of previous violation, either on this property or by the parties involved. Cost of corrective action—Mr. Roddy has the right figure, 37,950. Not insignificant amount, and I think the corrective action taken—the Town's testimony is that it has satisfied them, all of which counsels in favor of some kind of modification, I think.

I am concerned about the first factor, though, the gravity of the violation. I think this is one of the more severe violations that I've seen since we have been—since I've been—sorry—on this board. Trees removed from a protective area. Driving across the tree fences. Taking down the tree fences. Damaging trees that were left. Damaging root systems. Goodly amount of time of the Town's resources being expended to get to the point where we are.

And while I appreciate Mr. Clark's testimony, candidly, that it was laziness and cost-cutting that got us to this point, I think that actually weighs against them in the infinite scheme of things. So I think I'm inclined to maybe do some modification, but not to abate. That's where I'm at right now.

Roddy: Your comments suggest to me it's not just carelessness, but perhaps gross carelessness that was involved here. Am I—

Kent: Well, I'll let the testimony stand. It was laziness and cost-cutting.

Roddy: Okay.

Kent: Or cutting corners. That's what I've got.

Roddy: Mr. Kalland, your comments?

Kalland: Well, I would agree with Mr. Kent on his reverse order and on his assessment of the bottom three factors. And I would also agree with him on the gravity of the violation. I'm particularly concerned about the fact that it was scattered across the site in such a random fashion. It really does speak to a lack of control of monitoring subcontractors, if it was indeed subcontractors, it sounded like from the testimony, that committed these violations. And while there's no record of other fines applied to this particular company in Cary, it sounds like they are doing work in the area and may be doing work in the future in Cary since they're already doing work in Apex. So—and on top of that, I'm just concerned about the precedent it would set based on the level of, frankly, negligence, although that's maybe a lawyer word that I should be careful to throw around.

Kent: I'm not using it.

Kalland: What was the word that was used? Carelessness and laziness, or something to that effect?

Silverstein: Cutting corners.

Kalland: Thank you. Cutting corners. I'll strike the negligence and go with cutting corners. But that's a bad precedent, I believe, to be set. So I would also agree that while there might be some opportunity to abate—or to reduce the fine, I don't think that it would be appropriate to fully abate the fine.

Roddy: Mr. Hoina?

Hoina: I concur. It's the worst violation I've seen since I've served on this committee, of any tracts of land.

Roddy: Mr. Busick?

Busick: I concur as well. The gravity of the violation, it is—is pretty drastic here. And I do agree, you know, the corrective actions that have taken place. Just a question. I don't know if I can ask a question now.

Roddy: Go ahead.

Busick: The 60,000 number—what does that civil penalty mean? Is that if they did nothing how much it would cost the Town of Cary to restore this area?

Roddy: That's in the—the ordinance has an algorithm that says it's $2,000 as a first cost plus $4 per square foot of impacted area. And the Town has determined that it was 14,651 square feet. So it's—

Silverstein: Mr. Roddy.

Roddy: —just a matter of adding the numbers together.

Silverstein: If we can direct attention to Item 11 in the staff report. That's the paragraph that explains it now.

Roddy: Thank you, Mr. Silverstein.

Busick: Thank you. Yeah, so I would agree, too, that I think it—we're to the point where some abatement is possible, but—not abatement, but some reduction of cost, but abatement is not possible at this time.

Roddy: Okay. The fine is in front of us. And we put aside the 37—or 38,000 already spent, that was for the corrective action. The fine that we're dealing with, if I understand it correctly, Mr. Silverstein, we're dealing with 60,604 is the number that they're seeking some modification of.

Silverstein: That's correct.

Roddy: Not a lesser number, but that is the number. So in theory, if I understand it correctly, it would be the 38,000 plus nine—60,000, totaling roughly 98,000, would be the exposure that the violator has in front of him. We are now only focused on the 60,000 issue. Do you follow? That's my understanding of what we're dealing with. Mr. Silverstein, do you have any thoughts about that?

Silverstein: No. I believe that as the board has stated, no one is in favor of abatement, and the question is whether or not you want to reduce the fine.

Roddy: Yeah. And the fine is 60,604.

Silverstein: Correct.

Roddy: Right? So that's the number we start with, gentlemen, in terms of the applicant seeking some modification of. I see a nod from Ms. Glover for the town attorney. She agrees. Thank you, Ms. Glover.

So, starting with the 60,000, what—there seems to be concurrence on the board that some of—some modification is in order, and that's based on the cooperation and the efforts already undertaken by the "violator," is the word used in the ordinance, and the applicant in this case. So where do we go from here? There is no guidance specific in the ordinance. This comes to—I don't know what it comes to. Reasonable, prudent men? Is that the idea?

Silverstein: It's within your province to determine what the amount of the fine should be.

Roddy: Yeah. So we have that authority based on what our attorney is telling us. From there, where do we go? One suggestion would be, just looking at the numbers in the sheet I just gave you, is that—subject them to the full

60,000, give them a credit for the 38 that they've paid, leaving a balance of 22. That would be one, I guess, mathematical kind of thing. But is that what you really think is appropriate based on the gravity of the violation and the—as you pointed out, Mr. Kalland, there's eight different violations scattered and not contiguous, so it really must have taken an effort to jump from one to the second to the third through eight. I mean, that just didn't happen. That had to take—that had to take some—I don't know what you call it—some thought, to be able to move around that way. Which leads to what Mr. Kent was pointing out, and dealing with the testimony we heard about somewhere around careless to gross negligence is the kind of scenario that we seem to be dealing with.

You know? As a starter—I—you know? I'd say the entire 60,000 they're—ought to pay, and they've already paid 38 of it in the context—this is a civil penalty, not a criminal penalty. And part of it had to go to somebody fixing up the property, leaving a balance of roughly 22. Is that too much credit for them? Is that not enough credit for them? They have been very cooperative, based on what the Town has told us. They've worked with the Town. They haven't scattered the liability here. They've admitted the wrongdoing. And they're sort of on their knees, pleading to us, to say, "Hey, guys, we did what we could. We're very sorry, but, you know, help us out here a little bit."

Kalland: Mr. Roddy, if I may?

Roddy: Mr. Kalland, go ahead.

Kalland: I would argue that the 22,654 number, which is the difference, probably is the floor for the conversation. Because of the severity of the violation, I think that the company should bear the full amount of the penalty and the question is how much credit do we give them for the remediation work that they've done, versus, you know, trying to ensure that this kind of situation doesn't occur again in the future. But I would argue that probably the 22,654 is a floor for this conversation, just based on the severity of the violation and the amount of time that the Town has put in in dealing with the problem.

Roddy: Okay. What's the other members of the board think about that, as that as a floor? Should it be more? Are you satisfied with the floor? Do you want to—what's your thoughts?

Busick: I think I'm satisfied with the 22,654.

Roddy: Okay. Mr. Busick, okay. Mr. Hoina?

Hoina: I think it's extremely fair, and probably should be higher, based on the amount of effort that the Town went through for following up with the cutting corners and laziness. I would hope that corporations moving forward would be much more responsible about how they proceed moving forward. So I think that $22,654 is very fair, and I would give that a aye if we move forward on it.

Roddy: Okay. Mr. Kent?

Kent: Well, Mr. Roddy, this is a weakness in the ordinance. I mean—

Roddy: It is. But then, tort law is always weak in terms of trying to establish what a number ought to be. This is civil.

Kent: I think I would probably be inclined to just reduce it by 50%, which is a fine of 30,302 if I do the math correctly. I'm a lawyer, remember? You math guys make sure I got [LAUGHS] that right.

Kalland: I think you're in the neighborhood.

Kent: This was a fairly simple equation; 50% for the satisfaction of the Town and for the cooperation—just pick a number. And that's—I think that's where I would probably go, but—

Roddy: Okay.

Kent: —if my colleagues think 22,654 is reasonable, I, upon hearing a motion, wouldn't say I would vote against it.

Roddy: So, if I divide that 60,604, I get 30,302.

Kent: Yes, sir.

Roddy: So we're somewhere—based on what I'm hearing—between 30,302 and 22,654. Am I hearing you correctly, gentlemen?

Busick: Yes.

Roddy: All right. So that's a—who's got the calculator? Eight—what is that, about 8,000 difference?

Busick: Seven-six something.

Roddy: Whatever that number is. Okay. iPhones. 30,302 minus 22,654. That's—7,648 is the difference between those two. Well, we crossed one hurdle. We sort of set an upper and lower bound right now.

Busick: Yes, we did.

Kent: Mr. Roddy, I'm going to make a motion.

Roddy: Make your motion, sir.

Kent: For the reasons we've discussed, I would move that we modify the civil penalty amount and assess a civil penalty of $30,302.

Roddy: Okay. Is there a second for that?

Kalland: I'll second that.

Roddy: Mr. Kalland seconds. Is there any discussion on that? No? Hearing none. Let's go down. Mr. Busick, how do you vote?

Busick: I vote to approve the reduction down to 30,302.

Roddy: Mr. Hoina?

Hoina: I approve it at 30,302.

Roddy: Mr. Kalland?

Kalland: I also approve it at 30,302.

Roddy: Mr. Kent?

Kent: I'm a yea.

Roddy: I'm—I see no reason to come to a different number. I agree. Five-zero. The town will make it 30,302, and I'd ask if you could put together the appropriate resolution.

Glover: We do have a draft. If you would like to look at it tonight and try to finalize it tonight, we could do that.

Roddy: I—the answer is yes.

Glover: Okay.

Roddy: We'll stick around. What the Town Attorney is referring to—the Town—the staff has been marvelous to deal with in these kind of matters in that we have a hearing tonight—it's been like three months since we had our last hearing. These things don't go into effect until such time as we sign it and do all the dotting the i's, crossing the t's, and the paperwork.

So we'll take a little bit of a time break right now, while the Town prepares the paperwork. We'll review it, we'll vote on it, sign the papers tonight, and then put it into effect. If we didn't do that, it would have to be held off for a period of months, until our next meeting, which may be next month, but then again may not be next month. So as a courtesy to the public and all the parties involved, we try to dispose of things on the night in question.

Silverstein: Mr.—yeah, we may be able to shortcut this a little bit. I hate to use the word "shortcut," but it appears that Ms. Glover has utilized the paragraphs in the staff report as the findings of fact in the resolution. Is that correct, Ms. Glover?

Glover: Mm-hmm. That's correct.

Silverstein: So to the extent you have reviewed the staff report, you have actually already reviewed this report—this resolution.

Roddy: Okay.

Silverstein: So—

Roddy: Is there any facts?

Silverstein: Yeah. And if you'll notice, Mr. Roddy, in the last paragraph, it has a blank where you would insert the amount of—

Roddy: 30,302?

Silverstein: That's correct.

Roddy: Okay. Can you run this off without the word "draft" on it?

Glover: We can. We thought we'd let you look at it and go ahead and vote on it, telling us to add that number in. And then, actually, we could excuse the rest of the board, and Mr. Roddy could stay while we print a clean copy for him to sign.

Roddy: Okay. Take a look at it, gentlemen.

M: [INDISCERNIBLE]

Roddy: Oh. Town voted five-zero.

Glover: Right. We'll add in the five to zero, and we'll add in 30,302 if that's your desire.

Roddy: Taking a look at the resolution, any comments, questions, adjustments needed by the board? Can you run it off and do it?

Silverstein: Yeah. You should vote.

Kent: Mr. Roddy, I move that we adopt this resolution—the draft resolution that was sent to us by the Town just a moment ago—with the addition of the five-zero vote on page one and the number $30,302 on page three in the blank.

Roddy: Okay.

Kalland: I'll second that.

Roddy: Okay. Any discussion? Is this the form I can sign?

Glover: No, we're going to get a—

Silverstein: No.

Glover: —clean copy for you.

Roddy: Okay. Why don't you do that?

Kent: Let's vote.

Silverstein: You need to vote.

Glover: Yeah, you can go ahead and finish the vote.

Roddy: Can we finish the vote?

Silverstein: Yes.

Roddy: Okay. All in favor?

M: Aye.

Roddy: Any opposed? Five-zero to grant the reduction. Okay. Do they have to look at the one I actually sign, or—

Glover: No. I think with that, we'll make the adjustments as stated in the motion and we'll bring it out for you to sign. And then, if there's no further business, I think you could entertain a motion to adjourn.

Roddy: Can I do that now, Mr. Silverstein?

Silverstein: Yes.

Roddy: Adjourn and just I guess I stick around to sign it? Is that—

Silverstein: You've approved the resolution. The only thing that's left is the formality of you signing the resolution.

Roddy: Okay. And I can do that after the meeting adjourns?

Silverstein: Yes.

RESULT:	**ACCEPTED [UNANIMOUS]**
MOVER:	Michael Kent, Board Member
SECONDER:	Stephen Kalland, Board Member
AYES:	Roddy, Kent, Hoina, Kalland, Sharlow, Busick

V. NEW/OLD BUSINESS

VI. CLOSED SESSION

VII. ADJOURNMENT

Roddy: Okay. All right. So we've already approved it, and now we'll entertain a motion to adjourn. Is there such a motion?

Busick: So moved.

Roddy: Thank you, Mr. Busick. Is there a second?

Kent: Second.

Roddy: Thank you, Mr. Kent. All in favor?

M: Aye.

Roddy: Any opposed? No. Five-zero, meeting is adjourned.

RESULT:	**ADJOURNED [UNANIMOUS]**
MOVER:	Russell Busick, Alternate Member
SECONDER:	Michael Kent, Board Member
AYES:	Roddy, Kent, Hoina, Kalland, Sharlow, Busick

EXHIBIT A

3.1

In Re: Wackena Subdivision Civil Penalty Appeal
Cary ZBOA Case 18-CP-01

			Area SqFt	$ per SqFt			
Original	Civil Penalty Per LDO						
Original	Initial Civil Penalty					$2,000.00	
Original	Additional Civil Penalty		14,651.00	$4.00		$58,604.00	
Original	**Total Civil Penalty per ORIGINAL Notice of Violation**					$60,604.00	
REVISED	Civil Penalty Per LDO						
REVISED	Initial Civil Penalty						
REVISED	Additional Civil Penalty						
REVISED	**Total Civil Penalty per REVISED Notice of Violation**					N/A	
							Cost of the action to correct the violation
11/27/2018	Repair proposal from Environmental Landkeepers	Exhibit 9					$37,950.00
	Cost of the action to correct the violation						$37,950.00
						Revised Civil Penalty	**Original Civil Penalty**
	Civil Penalty					N/A	$60,604.00
	Cost of the action to correct the violation				LESS	$37,950.00	$37,950.00
	Difference					N/A	$22,654.00
	Criteria to consider in determining the Civil Penalty:						
1	Gravity of the violation						
2	Action taken by the violaor to correct the violation						
3	Cost of the action to correct the violation						
4	Previous violations committed by the violator						

Minutes Acceptance: Minutes of May 6, 2019 6:30 PM (Approval of Minutes)

Zoning Board of Adjustment
Monday, June 3, 2019
6:30 PM
Conference Room 21275
316 N. Academy Street, Cary Town Hall, Cary, NC 27513

Chairman Richard Roddy: Present, Vice Chairman Jamie Weiss: Present, Board Member Michael Kent: Absent, Board Member Chris Hoina: Absent, Board Member Stephen Kalland: Present, Alternate Member Jamey Sharlow: Present, Alternate Member Russell Busick: Absent.

I. CALL TO ORDER

Roddy called the meeting to order at 6:31 p.m.

II. FOR DISCUSSION

2.1 Process Update for Quasi-Judicial Public Hearing Cases

Scot Berry, Director of Planning, Inspections, and Development Services, greeted the board and introduced Russ Overton, Deputy Town Manager, to give the presentation that was shared with the Town Council.

Overton shared his presentation with the Board and reviewed what qualifies as a quasi-judicial case, how decisions are made regarding the cases, and stats of the quasi-judicial cases that have been heard by the Town of Cary since 2013. **(Exhibit A)**

The Board expressed concerns over needing to hold meetings more frequently. Overton felt this would not be necessary. He shared that previous years indicate an average of 11 cases being heard per year and each meeting could have capacity for hearing 2-4 cases.

Overton anticipates the meeting in October to be a training session and November to be when the Board begins hearing all quasi-judicial cases that have been traditionally heard by Town Council.

Roddy questioned what type of cases the Zoning Board of Adjustment has legal authority to handle. Silverstein stated that the North Carolina General Statutes allows Towns and Cities to give authority to the Zoning Board of Adjustment.

Glover encouraged the Board to review the Staff Reports for the two quasi-judicial cases being heard by Town Council on June 13, 2019 to familiarize themselves with the new types of cases that they will be seeing in the future.

III. CLOSED SESSION

IV. ADJOURNMENT

Meeting adjourned at 7:11 p.m.

EXHIBIT A

3.2

Minutes Acceptance: Minutes of Jun 3, 2019 6:30 PM (Approval of Minutes)

QUASI JUDICIAL FRAMEWORK

Zoning Board of Adjustment

June 3, 2019

QUASI JUDICIAL FRAMEWORK

Q3 Council Meeting

May 9, 2019

3 THINGS…

- Move QJ to ZBOA
- QJ Stats
- Recruitment of ZBOA

"In general, it is advisable for the governing board to focus on legislative actions and to allow . . . other boards to handle quasi-judicial matters."

"Quasi-Judicial Handbook" by David Owens & Adam Lovelady (2017)

WHAT IS QJ FOR COUNCIL?

- 100,000 SF Commercial
- 100 Residential Units
- Drive-Throughs
- Special Uses
- Modifications

WHAT DOES QJ AT ZBOA LOOK LIKE?

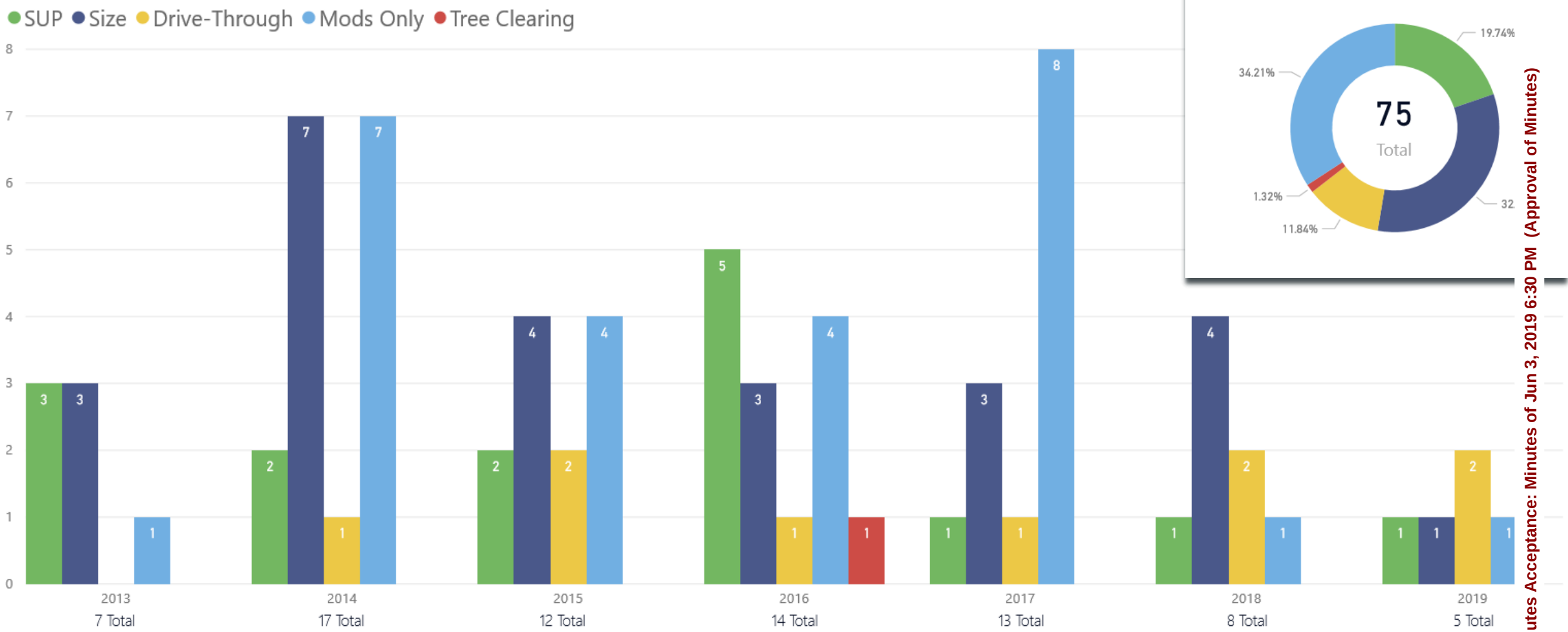
- 99% of all QJ cases can be moved to the ZBOA
  - Some QJ items are outdated and will be removed entirely
  - One minor item is required by statute to be heard by Council
  - Requires LDO and Code amendments (Summer 2019)
- Remember: Applications that come in before the change is made can choose TC or ZBOA
- Staff will monitor effectiveness; you should anticipate changes
  - Need to review Special Uses
  - Are triggers still appropriate?

CURRENTLY WHAT IS QJ FOR ZBOA?

- Variances
- Appeals

Minutes Acceptance: Minutes of Jun 3, 2019 6:30 PM (Approval of Minutes)

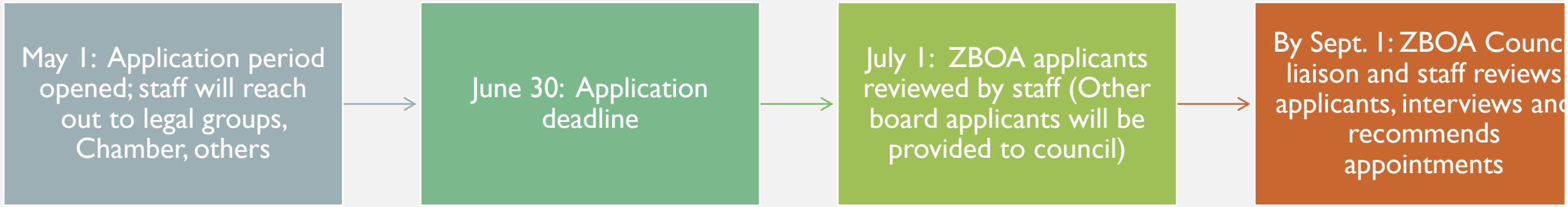
Primary Reason for QJ



ZBOA MEMBER CHARACTERISTICS

- Technical Experts that will fulfill the Cary's vision
- Citizens that share Council values
- Volunteers that think objectively
- People that love the Town of Cary

ZBOA RECRUITMENT PROCESS



QUESTIONS

Zoning Board of Adjustment
Monday, August 5, 2019
6:30 PM
Conference Room 21275
316 N. Academy Street, Cary Town Hall, Cary, NC 27513

Chairman Richard Roddy: Present, Vice Chairman Jamie Weiss: Present, Board Member Michael Kent: Present, Board Member Chris Hoina: Present, Board Member Stephen Kalland: Present, Alternate Member Jamey Sharlow: Remote, Alternate Member Russell Busick: Present.

I. CALL TO ORDER

Roddy called the meeting to order at 6:30 p.m.

II. ADOPTION OF AGENDA

RESULT:	**ADOPTED [UNANIMOUS]**
MOVER:	Michael Kent, Board Member
SECONDER:	Jamie Weiss, Vice Chairman
AYES:	Roddy, Weiss, Kent, Hoina, Kalland

III. FOR DISCUSSION

2.1 Process Update for Quasi-Judicial Public Hearing Cases

Russ Overton, Deputy Town Manager, updated the Board on the process of moving quasi-judicial hearings from Town Council to the Zoning Board of Adjustment. In order to move these hearings to the Zoning Board of Adjustment, changes needed to be made to the Town Ordinances. Those amendments are in process and once they take effect, the Zoning Board of Adjustment will be trained on how to handle the new types of cases. Training is anticipated to occur in October once the new Board Members are appointed.

Overton shared that there are 3 vacancies coming up on the Board, some potentially may be reappointments. Town Council is currently looking over applications. Once they review the applications, they will conduct interviews and make their recommendations by September. Overton thanked the Board members for their work to the Town of Cary.

IV. CLOSED SESSION

V. ADJOURNMENT

Motion to adjourn at 6:55 p.m.

RESULT:	ADJOURNED [UNANIMOUS]
MOVER:	Stephen Kalland, Board Member
SECONDER:	Chris Hoina, Board Member
AYES:	Roddy, Weiss, Kent, Hoina, Kalland, Busick

Staff Report for Zoning Board of Adjustment

Meeting Date: September 9, 2019

19-V-02 109 Murdock Creek Court
Purpose:

Prepared by: Julie Clifton, Planning and Development Services

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TOWN OF CARY
ZONING BOARD OF ADJUSTMENT HEARING
September 9, 2019

VARIANCE WORKSHEET

IN THE MATTER OF: CASE NO. 19-V-02

TOWN OF CARY

STATE OF NORTH CAROLINA

APPLICANT NAME:

Isabel Worthy Mattox, Attorney at Law

ADDRESS OF SUBJECT PROPERTY:

109 Murdock Creek Court
Cary, NC 27519

PROPERTY OWNER NAMES/ADDRESS (if different from above):
Marc and Kimber Steinberg
109 Murdock Creek Court
Cary, NC 27519

STAFF REPRESENTATIVE:
Contact: Wayne Nicholas, Zoning Administrator
Phone: (919) 465-4610
Email: wayne.nicholas@townofcary.org

REQUEST: The applicant requests variances from Land Development Ordinance (LDO) Section 6.3.1(G)(2) to allow the following encroachments into the 25-foot rear setback for

the property: encroachment of the principal structure (screened porch) up to 10 feet into the setback; encroachment of an uncovered deck and stairs up to 10 feet into the setback.

THE VARIANCE PROCESS is intended to provide limited relief from the LDO in those cases where strict application of a particular requirement will create unnecessary hardship. Variances are not intended, and should not be used, to remove inconveniences or financial burdens that the requirements of the LDO may impose on property owners in general. Instead, a variance is intended to be used to provide relief where a hardship results from conditions peculiar to the property itself. Neither state nor federal laws or requirements may be varied by the Town. [3.20.1]

The following standards are eligible for a variance [3.20.2]:

- Any of the development or zoning district standards listed in Table 3.19-1 or any building encroachment into a required setback, but only when the Minor Modification procedures in Section 3.19 are unable to address the hardship; and,
- Any other provision of the LDO, so long as the LDO does not provide a mechanism for modification or waiver of the provision, and the requested variance would not constitute a use variance.

The board may not grant a variance to allow a use expressly, or by implication, prohibited under the LDO for the zoning district containing the property for which the variance is sought [3.20.4(E)]. The board may not grant a variance from any written conditions attached by the council to its approval of a Special Use, subdivision plat or site plan, conditional use district, or aspect of an approved planned development master plan [3.20.4(F)]. There may be no variance from the Overlay District regulations unless specifically permitted in Section 4.4. There may be no variance that modifies the thoroughfare buffer or vegetation [4.4.4(E)].

Exhibit A: Variance Application
Exhibit B: Book of Maps 1997 Page 1193
Exhibit C: Land Development Ordinance Section 6.3.1(G)(2)

BACKGROUND:

1. The application for a variance (Exhibit A) was filed by all the owners for the land affected by the variance.
2. The applicant took part in the pre-application conference required by LDO Section 3.20.3 (B).
3. The property is described as follows:
   Site Address: 109 Murdock Creek Court, Cary, NC 27519
   Wake County PIN: 0733879347
   Lot: 228
   Subdivision: Brookstone Subdivision, Phase 10
   Total Lot Size: 0.27 acres

Current Zoning District: Residential 8 Conditional (R-8-C)

4. The Subject Property is platted as part of a subdivision recorded with the Wake County Register of Deeds in Book of Maps 1997 Page 1193 (Exhibit B).
5. The recorded plat for the Subject Property (Exhibit B) depicts the minimum front, side, and rear setbacks that are applicable to this lot.
6. Land Development Ordinance (LDO) Section 6.3.1(G)(2) (Exhibit C) reads: "*If setbacks are shown on the recorded plat, those setbacks shall control. This shall apply even if the setbacks on the recorded plat are in conflict with those shown on the subdivision or site plan and/or the requirements for corresponding zoning district set forth in Section 6.1 of this Ordinance. This applies even if changes are made to this Ordinance subsequent to plat recordation that would require greater setbacks than those shown on the plat.*"
7. The property is improved with a detached dwelling with an existing uncovered deck. At the time the existing dwelling and deck were constructed, the zoning regulations in place permitted an uncovered deck to encroach into the rear setback provided it remained a minimum of 5 feet from the property line.
8. The property owner, who purchased the home in 2008, proposes to construct, as shown on the survey plan submitted by the applicant (included with Exhibit A), an addition (screened porch) to the principal structure in the location of the existing uncovered deck and a new uncovered deck and stairs, all to be located at the rear of the existing dwelling (collectively, "Improvements"). Elevation and architectural drawings of the proposed Improvements are included with Exhibit A.
9. To construct the proposed Improvements the applicant is requesting, as listed in Exhibit A, variances to allow the following encroachments into the 25-foot rear setback: encroachment of the principal structure (screened porch) up to 10 feet into the setback; and, encroachment of an uncovered deck and stairs up to 10 feet into the setback. The proposed encroachments are depicted on the survey plan of the property submitted by the applicant and included with Exhibit A.
10. The Subject Property has frontage on a cul-de-sac and is irregular in shape.
11. The Subject Property, in comparison to other properties in the vicinity, is smaller in size and has less depth between the front and rear lot lines than other lots.
12. The recorded plat for the Subject Property (Exhibit B) specifies a minimum front setback of 20 feet. Based on the survey plan of the property submitted by the applicant and included with Exhibit A, the existing dwelling on the Subject Property is set back 30.08 feet from the closest point along the front property line, which reduces the amount of buildable area between the rear of the dwelling and the rear setback line.
13. The property adjacent to the rear of the Subject Property is located within the same subdivision plan (Brookstone Phase VI-XIII, Town of Cary plan # 96-SB-002) and shown on the same recorded plat (Exhibit B). At the time the subdivision plan was approved (March 26, 1996), the zoning regulations (Unified Development Ordinance) in effect at that time did not require a landscape area or buffer between lots of similar size within the same subdivision.
14. The zoning regulations (the Town's prior Unified Development Ordinance) in effect at the time the subdivision plan was approved specified a minimum rear setback of 20 feet for lots located within the Residential 8 (R-8) zoning district. The zoning conditions applicable to the property (as listed in Conditional Use Permit Z-748-94-1, approved May 25, 1995) did not require minimum building setbacks greater than those required under the general zoning regulations for properties located within R-8 zoning. The zoning

regulations currently in effect (the Land Development Ordinance) also specify a minimum rear setback of 20 feet for lots located within the Residential 8 (R-8) zoning district.

15. Based on the information submitted by the applicant and included in Exhibit A, both the existing vegetation and an approximately 6-foot wooden fence along the rear property line will not be removed or disturbed with construction of the proposed Improvements being considered by this variance request.
16. Director's Modification procedures (LDO Section 3.19.3) were unable to address the hardship.
17. There are no specific zoning conditions or conditions that are part of a special use permit or a Planned Development District (PDD) approval that will be varied by this request.
18. The application and other records pertaining to the variance request are part of the record.
19. Notice of the public hearing on this variance request has been provided as required by law.

The Board may approve the Variance only if it finds that all of the criteria below have been met:

3.20.5 Approval Criteria

(A) Unnecessary hardship would result from the strict application of the ordinance. It shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property.

Applicant Position: "Yes, without the requested variance, the Owners will be unable to improve the appearance and functionality of their home by improving the existing deck. The lot is located on a cul-de-sac and is abnormally shaped, leaving little room for additional deck space. The side setbacks, abnormal lot shape, and HOA governance, prohibit the construction of additional deck space along the side property lines. The existing deck at the rear of the property was constructed at the same time as the home and is currently located within the rear setback, 17.3 feet from the rear property line."

Staff Comments: The applicant is proposing to construct a screened porch at the rear of the dwelling in the location of an existing uncovered deck. At the time the existing dwelling and deck were constructed, the zoning regulations in place permitted an uncovered deck to encroach into the rear setback provided it remained a minimum of 5 feet from the property line.

(B) The hardship results from conditions that are peculiar to the property, such as location, size, or topography. Hardships resulting from personal circumstances, as well as

hardship resulting from conditions that are common to the neighborhood or the general public, may not be the basis for granting a variance.

Applicant's Position: "The hardship conditions are unique to this property. They include (1) the abnormal shape of the lot; (2) the built location of the home 30 feet from the street, causing the existing deck to encroach in to the rear setback; (3) topography of the lot; and (4) restrictive covenants and architectural committee rules on the property that restrict the location of additional deck space to the rear of the property. The existing porch at the rear of the property was built encroaching in to the rear setback at the time the home was constructed. Although the front setback requirement is only 20 feet, the home is located 30 feet from the road, leaving less space at the rear of the lot. There is an approximately 10-foot drop in grade from the western property line to the eastern property line; however, there is a relatively flat area where the deck expansion is proposed."

Staff Comments: The Subject Property has frontage on a cul-de-sac and is irregular in shape. Based on the recorded subdivision plat (Exhibit B), the Subject Property, in comparison to other properties in the vicinity, is smaller in size and has less depth between the front and rear lot lines than other lots. Based on the survey plan of the property submitted by the applicant and included with Exhibit A, the existing dwelling on the Subject Property is set back from the closest point along the front property line further than the minimum front setback distance, which reduces the amount of buildable area between the rear of the dwelling and the rear setback line.

(C) The hardship did not result from actions taken by the applicant or the property owner. The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship.

Applicant's Position: "The property owner purchased the property with the existing hardship conditions as well as the existing encroachment in to the rear setback."

Staff Comments: The property owner purchased the property in 2008. The 25-foot rear setback requirement, as shown on the recorded plat (Exhibit B), has been in existence since the Subject Property was platted in 1997. At the time the subdivision plan was approved (March 1996) and the lot was platted (1997), the minimum rear setback for lots located within the Residential 8 (R-8) zoning district was 20 feet. Under the current Land Development Ordinance, the minimum rear setback requirement for lots within the R-8 zoning district is 20 feet. The zoning conditions applicable to the property (as listed in Conditional Use Permit Z-748-94-1, approved May 25, 1995) did not require minimum building setbacks greater than those required under the general zoning regulations for properties located within R-8 zoning.

(D) The requested variance is consistent with the spirit, purpose, and intent of the Ordinance, such that public safety is secured, and substantial justice is achieved.

Applicant's Position: "The existing side and front setbacks will remain unchanged. After the renovations, the deck will only encroach 2.3. feet further in to the rear setback than the existing deck. The adjacent neighbor to the rear will not be negatively affected by the requested variance. The adjacent house is over 30 feet from its rear property line and will be approximately 45 feet from the proposed improvements. Further, there is a significant mature tree buffer and an approximately 6 foot wood fence along the rear property line. Neither the fence nor the existing tree buffer will be removed or disturbed. If the requested variance is granted, the property will have an aggregate front/rear setback of 45 feet."

Staff Comments: Based on the survey plan of the property submitted by the applicant and included with Exhibit A, the proposed improvements to the subject property (screened porch and uncovered deck/stairs) will not be located any closer to the adjacent properties to the west and east than the existing dwelling. The applicant does not propose (Exhibit A) removal or disturbance of the existing vegetation and an approximately 6-foot wooden fence along the rear property line in association with the proposed improvements being considered by this variance request. This has not been offered as a condition by the applicant, but the Board may consider imposing it if deemed necessary and appropriate to satisfy the approval criteria of section 3.20.5. Public services or utilities are not impacted by the proposed encroachments.

SUGGESTED MOTIONS

MOTION TO GRANT VARIANCE

For the reasons discussed, I move that we GRANT the variance as it meets all the approval criteria in section 3.20.5 of the Land Development Ordinance.

OR

MOTION TO GRANT VARIANCE WITH CONDITIONS

For the reasons discussed, I move that we GRANT the variance with the following conditions deemed necessary and appropriate to satisfy the approval criteria of section 3.20.5 of the Land Development Ordinance:

1. [*insert conditions*]
2.

OR

MOTION TO DENY VARIANCE

For the reasons discussed, I move that we deny the variance request as it does not meet all of the approval criteria set out in Section 3.20.5, specifically, [*indicate the reason why the request does not meet the approval criteria*]:

#3782

POLICY STATEMENT 167
QUASI-JUDICIAL HEARING PROCEDURAL GUIDELINES

Prepared by: Chris Simpson, Town Attorney
Supersedes: ~~5~~10/~~22~~30/2014
Approved by Council: ~~10~~9/~~30~~ __ /~~2014~~2019
Effective: ~~10~~9/~~30~~26/~~2014~~2019

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~~ on requests for special use permits, certain development plans, variances, ~~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 may, on limited occasions, hold quasi-judicial hearings as well. 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 at the hearing. 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 or information obtained outside the hearing. 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 Policy 143 (Rules of Procedure for the Cary Town Council), the HPC Rules of Procedure, and the ZBOA Rules of Order. This policy is based on ~~NC~~ North Carolina 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 federal

law, state law, ~~the NC General Statutes,~~ case law, or Town ordinances (collectively "law"), the law shall prevail.

II. Who May Appear at the Hearing

Applicants, and any individual who has competent, material, and substantial evidence to present, may appear at the hearing. Applicants are considered to be "parties" to the case, together with the Town. No one else who testifies is considered a "party" to the matter. Interested persons who believe they have standing and desire to be a party may make a motion to intervene, which the Hearing Body will decide.

All applicants and any other party are strongly advised to have an attorney represent them. ~~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 or other parties that are corporations or other legal entities ('corporate applicant') must be represented by an attorney. Individual (non-corporate) applicants or parties may represent themselves, and they may have expert witnesses testify for them. ~~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 or party desires to have a non-attorney act as his or her representative (and not solely as an expert witness), the applicant/party 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, the ~~applicants~~ applicant/party or their attorney should always be present at the hearing.

Individuals who testify but who are not the applicant or a party are not entitled to have an attorney representing them. Engineers, architects, real estate agents, planners, and other non-attorneys may only appear as expert witnesses for a party to the matter.

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. Any additional exhibits or evidence shall be submitted to the ~~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 member~~s~~ responsible for processing each application (sometimes 'Staff Representative') at least fourteen (14) days before the hearing date. ~~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 above 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 any party ~~other person~~ may suggest time limits for testimony and agreement on other procedural issues, and agreement may be reached on such matters. The applicant or any other party 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 person, including ~~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. Impermissible communications can lead to the disqualification of a Member from participating in the consideration of an application. 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 as experts, 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 or any party is to be represented by anyone other than a licensed attorney, the applicant/party shall request the consent of the Hearing Body for such representation. *See*, Section II, above. Throughout the remainder of this section, "applicant" or "party" means the applicant's or party's attorney or other approved representative.

(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 any other party ~~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~~introduce the case.

~~(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~~h) ~~If all parties are represented by attorneys, t~~The applicant, followed by any opposing party, may present a brief opening statement.

(~~j~~i) The applicant shall present the arguments and evidence in support of his/her case or application. The applicant shall address applicable approval criteria. 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 party and one copy should be made available for access by the public in attendance at the hearing. The Clerk shall number the exhibits if they have not already been numbered and shall distribute to the Hearing Body. If an exhibit is presented it becomes part of the record and will not be returned.

(j) -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, o~~Opposing parties may ask questions of (cross-examine) the applicant (if the applicant testifies) or supporting witnesses at this time or at a later time, as determined by the Presider. ~~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) Parties ~~Persons~~ opposed to granting the application shall present the arguments and evidence against the application based on the applicable approval criteria. 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 party and one copy should be made available for access by the public in attendance at the hearing. The Clerk shall number the exhibits if they have not already been numbered and shall distribute to the Hearing Body. If an exhibit is presented it becomes part of the record and will not be returned.

(l) 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, t~~ The applicant may cross-examine ~~the speaker or opposing~~ witnesses of the opposing party at this time or at a later time, as determined by the Presider.

(~~l~~m) Any person not a party who desires to testify may present competent, material, and substantial evidence at this time. 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 party and one copy should be made available for access by the public in attendance at the hearing. The Clerk shall number the exhibits if they have not already been numbered and shall distribute to the Hearing Body. If an exhibit is presented it becomes part of the record and will not be returned.

(n) Members of the Hearing Body or any attorney representing the Hearing Body or the Town may ask questions for clarification. The applicant and any other party may cross-examine the non-party witness at this time or at a later time, as determined by the Presider.

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

(~~m~~p) If cross-examination was not done at the conclusion of each side's case, then ~~both sides~~all parties will be permitted to cross examine previous witnesses, as directed by the Presider. ~~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~~All parties will be permitted to present rebuttals to opposing testimony. ~~Both sides~~All parties 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~~q) 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 may also ask the Hearing Body if new evidence was presented at the hearing that would make a continuance in order. ~~The Presider will entertain objections and rule on the admissibility of the evidence or exhibit.~~

(~~o~~r) 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~~s) 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.

(~~d~~t) 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~~u) 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~~v) 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~~Production, Testimony, and Evidence

(A) Burden of Production ~~Proof~~ for Special Use Permits and ~~Subdivision/ Site~~Development 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. Also note that by including a use as a special use in a certain district, the use is presumed to be in harmony with other uses permitted in that district. For ~~site/subdivision~~ a development plan, the applicant must establish that the application meets the criteria of LDO § 3.9.2(I).

(B) Burden of ~~Proof~~ Production 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~~ Production 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~~ Production 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 involving interpretation of a Town ordinance, 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 enforcement action, the Town bears the burden of proving the existence of the zoning violation.

When deciding an appeal of an HPC decision regarding Certificates of Appropriateness, the Hearing Body hears the appeal "in the nature of certioriari." 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 constitutional 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:

a. The use of property in a particular way would affect the value of other property;
b. The increase in vehicular traffic resulting from a proposed development would pose a danger to the public safety; and,
c. 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.

POLICY STATEMENT 167
QUASI-JUDICIAL HEARING PROCEDURAL GUIDELINES

Prepared by: Chris Simpson, Town Attorney
Supersedes: 10/30/2014
Approved by Council: 9/26/2019
Effective: 9/26/2019

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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 any party may suggest time limits for testimony and agreement on other procedural issues, and agreement may be reached on such matters. The applicant or any other party 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 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 person, including other members of the Hearing Body, and at the commencement of the hearing, members must disclose any intentional or inadvertent *ex parte* communications. Impermissible communications can lead to the disqualification of a Member from participating in the consideration of an application. 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 qualified as experts, 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 or any party is to be represented by anyone other than a licensed attorney, the applicant/party shall request the consent of the Hearing Body for such representation. *See*, Section II, above. Throughout the remainder of this section, "applicant" or "party" means the applicant's or party's attorney or other approved representative.

(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 any other party 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 introduce the case.

(h) The applicant, followed by any opposing party, may present a brief opening statement.

(i) The applicant shall present the arguments and evidence in support of his/her case or application. The applicant shall address applicable approval criteria. 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 party and one copy should be made available for access by the public in attendance at the hearing. The Clerk shall number the exhibits if they have not already been numbered and shall distribute to the Hearing Body. If an exhibit is presented it becomes part of the record and will not be returned.

(j) Members of the Hearing Body or any attorney representing the Hearing Body or the Town may ask questions for clarification. Opposing parties may ask questions of (cross-examine) the applicant (if the applicant testifies) or supporting witnesses at this time or at a later time, as determined by the Presider.

(k) Parties opposed to granting the application shall present the arguments and evidence against the application based on the applicable approval criteria. 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 party and one copy should be made available for access by the public in attendance at the hearing. The Clerk shall number the exhibits if they have not already been numbered and shall distribute to the Hearing Body. If an exhibit is presented it becomes part of the record and will not be returned.

(l) Members of the Hearing Body or any attorney representing the Hearing Body or the Town may ask questions for clarification The applicant may cross-examine witnesses of the opposing party at this time or at a later time, as determined by the Presider.

(m) Any person not a party who desires to testify may present competent, material, and substantial evidence at this time. 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 party and one copy should be made available for access by the public in attendance at the hearing. The Clerk shall number the exhibits if they have not already been numbered and shall distribute to the Hearing Body. If an exhibit is presented it becomes part of the record and will not be returned.

(n) Members of the Hearing Body or any attorney representing the Hearing Body or the Town may ask questions for clarification. The applicant and any other party may cross-examine the non-party witness at this time or at a later time, as determined by the Presider.

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

(p) If cross-examination was not done at the conclusion of each side's case, then all parties will be permitted to cross examine previous witnesses, as directed by the Presider. All parties will be permitted to present rebuttals to opposing testimony. All parties 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.

(q) 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 may also ask the Hearing Body if new evidence was presented at the hearing that would make a continuance in order.

(r) 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.

(s) 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.

(t) 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.

(u) 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).

(v) 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 Production, Testimony, and Evidence

(A) Burden of Production for Special Use Permits and Development 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. Also note that by including a use as a special use in a certain district, the use is presumed to be in harmony with other uses permitted in that district. For a development plan, the applicant must establish that the application meets the criteria of LDO § 3.9.2(I).

(B) Burden of Production 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 Production 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 Production 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 involving interpretation of a Town ordinance, 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 enforcement action, the Town bears the burden of proving the existence of the zoning violation.

When deciding an appeal of an HPC decision regarding Certificates of Appropriateness, the Hearing Body hears the appeal "in the nature of certioriari." 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 constitutional 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.

(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:

a. The use of property in a particular way would affect the value of other property;
b. The increase in vehicular traffic resulting from a proposed development would pose a danger to the public safety; and,
c. 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.