

Rules of Procedure  
Historic Preservation Commission  
*Town of Boone*



*Effective May 25, 2022*

# Table of Contents

Purpose of Rules .....	5
1. What are these Rules? .....	5
2. What happens if there is a conflict or absence of authority?.....	5
The Historic Preservation Commission .....	5
1. What is the Historic Preservation Commission?.....	5
2. What does it mean that the Commission is “quasi-judicial”?.....	5
3. When and where does the Commission meet?.....	6
4. How does a case come before the Commission? .....	6
5. How many Commission members participate on each case? .....	6
Membership.....	6
1. What is expected of Commission members? .....	6
2. How are Commission members appointed?.....	8
3. Do Commission members receive compensation for their service? .....	8
4. What happens if a Commission member cannot participate in a particular hearing? .....	8
5. When should a Commission member not participate in a hearing? .....	8
6. What is ex parte communication? .....	8
7. What happens if a Commission member does not discover that the member should not participate in the case until the hearing has started?.....	8
8. What happens if a Commission member does not withdraw from a case, but another Commission member or a party believes that the Commission member should not participate in the case? .....	9
9. Can an applicant waive its objection to a Commission member participating in the hearing? .....	9
Pre-Hearing Procedures .....	9
1. Who is allowed to submit an application?.....	9
2. What is a staff report? .....	9
3. Who can examine a file prior to the hearing? .....	10
4. Once a case is scheduled for a hearing, can it be delayed?.....	10
5. If a case is delayed, will it be heard the next month?.....	10
6. How does a person intervene as a party in a case?.....	10
7. How does the Commission decide if a person can intervene? .....	10
8. Can a person denied the right to intervene still participate in the case? .....	11
9. Can a person be compelled to appear as a witness or provide documents? .....	11
10. How are subpoenas served? .....	11

11. What are the procedures for issuance of subpoenas? .....	11
The Hearing.....	11
1. How long do Commission meetings last? .....	11
2. Who may participate in a hearing before the Commission? (Parties and Witnesses) .....	12
3. If I am not the person who filed the application, can I still appear before the Commission?.....	12
4. Who can represent a corporation, limited liability company (LCC), or other nonhuman entity before the Commission?.....	12
5. Who can represent a natural person before the Commission?.....	13
6. What happens if the applicant does not show up for the hearing? .....	13
7. If an application is dismissed due to the failure to show up for the scheduled hearing, can the application be revived? .....	13
8. What is the role of the Town Attorney at hearings? .....	13
9. In what order does the Commission hear cases or other matters scheduled before it? .....	13
10. How much time does an applicant have to present a case? .....	13
11. What happens if a case is not reached when it is first scheduled? .....	14
12. What happens if an application is modified between the time the staff report is distributed and the time it comes before the Commission? .....	14
13. If multiple issues are involved, can the Commission divide them into separate hearings? .....	14
14. Can the Commission reopen the evidentiary portion of a hearing after it has been closed? .....	14
15. What happens if a case cannot be finished at a single meeting of the Commission?.....	15
16. Is a recording made of the hearing before the Commission? .....	15
17. May the Commission schedule a special meeting to take up a case or complete one? .....	15
Presentation of a Case at the Hearing .....	15
1. If I appear before the Commission, what is expected of me? .....	15
2. Who has the burden of proof in a case before the Commission? .....	16
3. What are the rules for decorum of participants and observers at hearings? .....	16
4. Determination of preliminary matters; Jurisdiction objections .....	16
5. What is the order of a hearing on an application? .....	16
Evidence .....	17
1. What evidence can the Commission rely on in making a decision? .....	17
2. Are statements by an attorney appearing as the representative of a party considered evidence? ..	18
3. How is testimony (or testimonial evidence) presented? .....	18
4. What documents are acceptable for presentation? .....	21
5. Can the Commission consider hearsay evidence, such as a letter or affidavit? .....	21

6. How is documentary evidence, including photographs, authenticated? .....	21
7. How are the documents submitted? .....	21
8. How many copies of a proposed exhibit should be submitted?.....	22
9. Can proposed evidence, which has been refused, be preserved in the record?.....	22
10. When can Commission members rely upon their own knowledge of the subject property? .....	22
Objections to Evidence .....	22
1. What objections to evidence are allowed? .....	22
2. What evidence is “relevant”? .....	23
3. Who can object to evidence? .....	23
4. How are objections decided?.....	23
Weighing the Evidence .....	23
1. How does the Commission decide what weight to give documents and testimony? .....	23
2. Can the Commission make credibility decisions? .....	23
3. Should Commission members discuss their view of a case while evidence is being presented? .....	24
The Decision.....	24
1. How does the Commission decide a case? .....	24
2. Can the Commission recess a hearing after the evidentiary portion of the case has been closed and reconvene the hearing at a later time for the decision to be made?.....	25
3. Can a case be dismissed before full findings of fact and conclusions of law are adopted? .....	25
4. What is a fact?.....	25
5. What is a “finding of fact”? .....	25
6. How does the Commission adopt findings of fact? .....	25
7. What is a conclusion of law?.....	26
8. What vote is needed for approval to be granted?.....	26
10. Can the Commission impose conditions on an approval? .....	26
11. If a vote is taken that has the effect of ending the case, can the Commission vote on the other issues which would be decided if an application were approved? .....	26
12. What information should be included in a motion?.....	26
13. Can Commission members discuss a case once the decision has been made? .....	26
Appeal .....	27
1. May an applicant appeal a decision by the Commission? .....	27
Amendment of Rules .....	27
1. May these Rules be amended? .....	27

## Purpose of Rules

### 1. What are these Rules?

These Rules of Procedures (Rules) apply when the Boone Historic Preservation Commission (hereinafter, “the Commission”) acts in its quasi-judicial capacity to consider applications for Certificates of Appropriateness submitted pursuant to Section 8.03 of the Town of Boone’s Uniform Development Ordinance (hereinafter, “UDO”) by owners of properties designated as local historic landmarks or located within the Town’s designated historic district(s).

These Rules also are designed to answer questions from people who are unfamiliar with the Commission’s processes in order to provide more predictability and therefore more timely processing of applications. They are an attempt to make the procedures more understandable, to address certain details of the Commission’s operation, to create uniform methods for dealing with recurring questions that arise during hearings before the Commission, to provide guidance to people who appear before the Commission so they can better prepare for Commission public hearings, and to facilitate the efficient administration of matters that come before the Commission.

### 2. What happens if there is a conflict or absence of authority?

In the event of conflict between or among the legal authorities governing the Commission’s actions, the North Carolina General Statutes shall take precedence first, then the UDO, and then these Rules. To the extent applicable law and these Rules are silent or ambiguous as to a procedural matter, the Commission may consult the rules set forth at Chapter 35 of the Town’s Code of Ordinances and Robert’s Rules of procedures for small boards.

## The Historic Preservation Commission

### 1. What is the Historic Preservation Commission?

The Historic Preservation Commission is a citizen volunteer commission established by the Boone Town Council pursuant to Articles 2 and 8 of the UDO and §§ 160D-303 and 160D-942 of the North Carolina General Statutes. The Commission acts in a quasi-judicial capacity to consider applications for Certificates of Appropriateness submitted pursuant to UDO § 8.03 by owners of properties designated as local historic landmarks or located within the Town’s designated historic district(s).

The Commission also hears appeals from administrative denials of applications for Statements of Conformity for minor works. Such appeals shall be treated *de novo* as applications for Certificate of Appropriateness for all purposes under these Rules, except as may be otherwise mutually agreed by the Commission, the Town, and the applicant.

In its advisory (and non-quasi-judicial) capacity, the Commission also makes recommendations to Town Council with respect to a variety of matters related to historic resources within the Town. These Rules have no bearing on the Commission’s actions in its advisory capacity.

### 2. What does it mean that the Commission is “quasi-judicial”?

A “quasi-judicial” commission is one that operates like a court. Commission members must make decisions on the issues before the Commission based only on evidence presented to the Commission at a hearing and standards set forth in the UDO. The Commission, just like a court, can decide what evidence it believes and what evidence it rejects. Similarly, it can choose to believe a person who

appears before it, or it may find that the person’s information or testimony is not credible and it may reject it. In some areas, North Carolina General Statutes dictate what testimony and evidence the Board is allowed to consider. (See Evidence §§ 1,3.)

### 3. When and where does the Commission meet?

The Commission holds its regular monthly meetings on such dates and times as has been specified by the Boone Town Council and properly noticed by the Town Clerk. However, the date, time, and place (or method) of regular monthly meetings are subject to change at any time, subject to the notice requirements of open meetings law and any other limitations or requirements of applicable law. In addition, the Commission may continue regular meetings and may schedule special meetings as it deems appropriate, subject to the requirements of open meetings law and any other applicable law.

### 4. How does a case come before the Commission?

A written application for a Certificate of Appropriateness, on such forms as may be required by the Planning and Inspections Department (sometimes referred to as “Planning”), must be filed with Planning by a person who has the legal right to file the application and the application must generally be considered complete by the pertinent Planning staff.

The Town of Boone has forms for applications available on its website and in the Planning and Inspections Office. Planning and Inspections is located on the basement level of the Boone Downtown Post Office at 680 West King Street, Boone, NC 28607. The appropriate form must be fully filled out and the fees paid for Planning to process it. Planning will then set the application for hearing at the next available Commission meeting date and provide notice of the hearing to neighbors and the public as required by the UDO.

### 5. How many Commission members participate on each case?

A full commission is composed of five Town residents; a quorum of at least three members is required to hear a case. Commission members cannot participate in cases in which they have a fixed opinion on the case prior to the hearing that is not susceptible to change; in which they have undisclosed communications with others prior to the hearing regarding the substance of the case; in which they have a close familial, business, or another associational relationship with someone who will be affected by the decision; or in cases in which they have a direct or indirect financial interest in the outcome. (See Membership §§ 6-10)

## Membership

### 1. What is expected of Commission members?

Sections 2.04 and 2.05 of the UDO govern the conduct of the Commission’s business and of individual commission members, and shall be considered incorporated herein.

The applications that come before the Commission can be extremely important both financially and in terms of quality of life for the parties, neighboring property owners, and Town residents generally. Commission members are expected to:

- A.** Fully comply with all relevant provisions of the Town of Boone Code of Ethics, found at § 30.52 of the Town of Boone Code of Ordinances;

- B.** Disclose to the Commission and/or seek advice from the Town Attorney in the event of any concern about a potential conflict, ex parte communication, or any other matter which could call into question the impartiality and fairness of the Commission member as to any particular matter to be heard by the Commission;
- C.** Review, become familiar with, and remain familiar with these Rules, the UDO, the Comprehensive Plan, and all other adopted plans of the Town of Boone that may relate to decisions by the Commission;
- D.** Fairly apply the UDO and any other applicable law and Town plans to the application before them, even when they personally disagree with applicable standards or policies;
- E.** Review and be familiar prior to the meeting with the application and staff report on each matter that comes before the Commission;
- F.** Advise the Planning Department if the member is no longer eligible to serve on the Commission due to a change of residence or other cause;
- G.** Attend all training sessions of the Commission; and
- H.** Recognizing the gravity of the matters that come before the Commission, conduct themselves in a manner befitting the responsibilities that have been placed upon them, including:
  - 1. Recognizing the high costs parties may incur in appearing before the Commission, making all reasonable efforts to timely arrive for meetings of the Commission so as to avoid keeping parties, their various witnesses and professionals, and members of the public from having to wait for meetings to begin;
  - 2. Dressing for public hearings in appropriate attire so as to communicate to the parties, witnesses, and general public that they take their responsibilities seriously, and understand and consider the matters that come before the Commission matters of serious concern to the participants and the public; and
  - 3. Maintaining a professional and serious decorum during public hearings, including the deliberations and decision-making of the Commission, by:
    - a. Avoiding all whispered conversations with each other;
    - b. Refraining from interrupting other members of the Commission, parties, or witnesses, absent an appropriate reason for doing so;
    - c. Treating all participants and witnesses in hearings, as well as other Commission members, with the degree of respect with which they would like to be treated;
    - d. Avoiding cell phones ringing during meetings, as well as the receiving or sending of text messages during a meeting, absent an emergency; and
    - e. Paying attention to the presentations by parties and witnesses and carefully listening to the comments and questions of other members of the Commission.

## 2. How are Commission members appointed?

The Commission is comprised of town resident volunteers appointed by the Boone Town Council. A majority of the Commission shall have demonstrated special interest, experience, or education in history, architecture, archaeology, or related fields.

## 3. Do Commission members receive compensation for their service?

No, Commission members receive no compensation for their service.

## 4. What happens if a Commission member cannot participate in a particular hearing?

The Planning and Inspections Department attempts to determine in advance of each meeting whether any Commission member should not or is unavailable to participate in any particular case, and when possible arranges for the appearance of an alternate member for the regular member who is unable to participate. Quorum requirements for the Commission are set under state law and the UDO and the Commission cannot hear a case if there are fewer than three participating members. If a Commission member is recused from the hearing after it has been called and no alternate is present leaving the Commission with less than a quorum, the case cannot be heard and will be continued to a later date.

## 5. When should a Commission member not participate in a hearing?

A Commission member should not participate in or vote on an application if the member's participation would violate an affected person's constitutional rights to an impartial decision maker. Impermissible conflicts include, but are not limited to:

- A. Having a fixed opinion prior to hearing the matter that is not susceptible to change;
- B. Having undisclosed ex parte communication concerning the matter;
- C. Having a close familial, business, or other associational relationship with an affected person;
- D. Having a financial interest in the outcome.

## 6. What is ex parte communication?

An ex parte communication occurs when a Commission member discusses with any other person, including another Commission member, party, neighbor, or Town staff, the substance of a case outside the hearing and before the decision in the case is announced. Should a Commission member receive an unsolicited comment from a party or member of the public concerning a case, he or she shall inform the person seeking to comment that discussing a case prior to the hearing is prohibited and shall end the conversation. If that Commission member then participates in the hearing on the case, the member shall disclose at the beginning of the hearing the substance and source of any such unsolicited comment in order to allow any party an opportunity to object to the member's participation in the case.

## 7. What happens if a Commission member does not discover that the member should not participate in the case until the hearing has started?

Although every effort is made to avoid this, at times a Commission member may not realize until the hearing on the case has already begun that a reason exists that does or may make it inappropriate to participate in a case. As soon as a Commission member realizes that such reason exists or may exist, the member should interrupt the hearing to announce the existence of the reason and if appropriate should withdraw from the case, unless objection to the member's participation is waivable and is in fact waived

by all parties. (See Membership § 9) If an alternate member of the Commission is not present at the time of such withdrawal and a quorum is lost as the result of the withdrawal, the case will be continued and shall be treated as a new case when it is next heard. At the new hearing, the Commission will be directed to disregard whatever evidence was presented to it during the initial hearing and shall base its decision only on the evidence presented at the new hearing.

#### 8. What happens if a Commission member does not withdraw from a case, but another Commission member or a party believes that the Commission member should not participate in the case?

In the event a Commission member does not withdraw from a case, but another Commission member or a party to the case raises an objection to the Commission member's participation, the objecting person must state with specificity the basis for the objection. The Commission member whose participation is questioned shall be entitled to answer the objection, and following such response, the remaining members of the Commission, by majority vote of those participating in the vote, shall rule on the objection. The challenged member of the Commission shall not participate in the vote on the objection.

#### 9. Can an applicant waive its objection to a Commission member participating in the hearing?

Yes, in certain circumstances an objection can be waived. The Town of Boone disfavors any member of the Commission participating in a case for which a valid basis exists for objection to his participation, as described in Membership § 5. However, in some circumstances, if the Commission member discloses the full extent of the matter or circumstances which would prevent participation, and all parties to the case express on the record their wish that the Commission member nevertheless participate in the case, the Board member may do so. However, under state law a Commission member who has, or whose family member has, a direct or indirect financial interest in the case may not participate in the proceedings even if all parties consent to the member's participation.

## Pre-Hearing Procedures

### 1. Who is allowed to submit an application?

Either the party seeking the Commission's decision on a matter within the jurisdiction of the Commission or an authorized person acting on behalf of that party, such as an agent, attorney, employee, or other representative, can fill out an application or appeal for a matter that will be decided by the Commission, but if the person proceeding is a representative, he or she must prove the proper authority to do so.

### 2. What is a staff report?

In every case which comes before the Commission, Planning staff will prepare a report summarizing the issues and at least some of the history of the matter, and including copies of documents which the Planning Department considers important to an understanding of the case. Staff reports on each case are distributed to members of the Commission in a "Board Book" which is distributed to the members prior to the hearing. Except to the extent that a party objects to material contained in a staff report and the objection is sustained by the Commission, the staff report is considered evidence in the matter and may be considered by the Commission in its decision.

### 3. Who can examine a file prior to the hearing?

Files related to cases before the Commission are available for inspection by members of the Commission, parties, and members of the public. If a file is particularly voluminous, not every item from the file may be included in the staff report and Board Book. Commission members, parties, and members of the public may arrange to review the file by contacting the Planning and Inspections Department at (828) 268-6960 and making an appointment to do so.

### 4. Once a case is scheduled for a hearing, can it be delayed?

Yes. Cases are generally placed on the agenda for the Commission as soon as possible once all needed materials have been submitted by the applicant. If an applicant wishes to have consideration of a case delayed, the applicant must submit a written request to the Planning and Inspections Department. Planning staff will transmit the request to the Chair of the Commission, and will notify all other parties involved in the case of the request. Unless a party objects to the request for a continuance, the Chair can either make the decision on the request or refer the request to the Commission itself for a decision. If any party objects to a continuance, it must be decided by the Commission. The Commission can also decide to continue a case on its own initiative if it determines that the case is not ready for hearing or it will not be reached at a particular meeting, but this can only happen at the hearing.

### 5. If a case is delayed, will it be heard the next month?

Not necessarily. A case which is continued can be scheduled for the next month's regular meeting of the Commission, it can be continued for more than one month, or it can be continued to a special meeting. In unusual circumstances, a case might be continued for more than a month.

### 6. How does a person intervene as a party in a case?

The applicant and the Town of Boone are always considered parties in a case before the Commission. Other persons can also request that they be allowed to participate in a case as a party, but only a person who has a special and substantial interest in a case before the Commission will be allowed to intervene in the case as a party. In order to intervene as a party in a case, at least twenty-four hours prior to the beginning of the Commission meeting in which the case is to be considered, the person seeking to intervene must complete a "Request to Intervene" form provided by the Planning and Inspections Department. The completed form must state the name and address of the person seeking to intervene, and it must explain the nature of the interest such person has in the outcome of the case. Persons who own property adjacent to or within one-hundred-and-fifty feet of the property in question in the case shall, without further showing, be presumed to have a special and substantial interest in the outcome of a case and will be allowed to intervene. Other persons may establish a substantial interest by showing that the value of their property will be adversely affected by the outcome of the case, or by showing such other distinct and personal interest in the outcome of the case as to distinguish their interests from the interests of the public at large. Organizations whose members include persons with such substantial interest in a particular case may be permitted to participate on behalf of their members upon written proof that they include and are acting on behalf of such members.

### 7. How does the Commission decide if a person can intervene?

When a person has filed a timely request to intervene, a hearing to determine if intervention will be allowed will precede the hearing on the merits of the case. The Commission shall consider the written application to intervene, and after hearing from the person seeking to intervene and from all other

parties to the case their reasons in support of or against intervention, the Commission shall decide whether the person may intervene in the case. A decision allowing a person to intervene is by majority vote of the Commission.

#### 8. Can a person denied the right to intervene still participate in the case?

Yes. If an application to intervene is denied, the person can still participate in the hearing as a witness.

#### 9. Can a person be compelled to appear as a witness or provide documents?

Yes. Under state law, the Commission Chair has the power to issue subpoenas at the request of a party to require attendance of witnesses or to compel the production of documents or other evidence. To request issuance of a subpoena, the applicant, the Town, or any person with standing under G.S. 160D-1402(c) may make a written request to the Chair explaining why it is necessary for certain witnesses or evidence to be compelled.

#### 10. How are subpoenas served?

Subpoenas are served just as they are in any normal court proceeding (see N.C. Rule of Civil Procedure 45(b)). They can be served by personal delivery by the sheriff, by the sheriff's deputy, by a coroner, or by any person who is not a party and is 18 years of age or older; or they can be served by registered or certified mail addressed to the person, return receipt requested. Service of a subpoena for the attendance of a witness can also be made by telephone communication with the person named in the subpoena, but this type of service is only available if it is done by the sheriff, the sheriff's designee who is 18 years of age or older and not a party, or by the coroner. Alternatively, service can be achieved by any means agreed to by the person being served, including email.

#### 11. What are the procedures for issuance of subpoenas?

A subpoena will only be issued upon submission of a completed "Subpoena Request Form" provided by and returned to the Planning and Inspections Department. Any request for a subpoena by an applicant or the Town must be served on the Commission Chair and all persons who are parties to the case or have moved to intervene as a party at least 10 days prior to the hearing on the case at issue. Persons moving to intervene as a party must serve a subpoena request on the Chair and all persons who are parties to the case at least 24 hours prior to the hearing on the case at issue.

The Commission Chair shall issue requested subpoenas that the Chair determines to be relevant, reasonable in nature and scope, and not oppressive. The Chair shall rule on any motion to quash or modify a subpoena. Decisions regarding subpoenas made by the Chair may be immediately appealed to the full Commission. The Commission shall hear any such appeal in a duly-noticed meeting. If a person fails or refuses to obey a subpoena issued pursuant to this subsection, the Commission or the party seeking the subpoena may apply to the General Court of Justice for an order requiring that its subpoena be obeyed, and the court shall have jurisdiction to issue these orders after notice to all proper parties.

## The Hearing

### 1. How long do Commission meetings last?

Because it is hard to predict or control how many matters will be placed on the Commission's agenda at any of its regular monthly meetings, and because the matters that come before the Commission demand its utmost attention and clarity, meetings that last too long interfere with the Commission's

ability to function effectively. The Commission generally will adjourn approximately 3 hours after the start of its meeting and continue to the next meeting any cases which are not completed or heard. However, the Commission may shorten or allow lengthier hearings in its discretion, and in all other respects may adopt such other or additional rules for the length and conduct of its meeting or of a particular meeting as it may see fit, so long as the substantive and procedural due process rights of the parties are reasonably protected.

## 2. Who may participate in a hearing before the Commission? (Parties and Witnesses)

There are two types of participants in a hearing before the Commission: “Parties” and “Witnesses.”

- A. Parties.** The applicant and the Town of Boone are always considered parties in a hearing before the Commission. In addition, a person who has properly intervened in the case is considered a party to the case. (See Pre-Hearing Procedures §§ 6-7)
- B. Witnesses.** At the start of each meeting, the Chair will announce the availability of sign-up sheets for any person wishing to appear as a witness in a case scheduled for that meeting. A person who wishes to testify as a witness must record his or her name on the sign-up sheet for the case in question unless the Chair or Commission allows people who have not signed up to also testify. If people who did not sign up are allowed to testify, every person who wants to be heard but did not sign up must also be allowed to testify. Parties and witnesses who are called by parties to testify are not required to sign the sign-up sheet.

Any interested person, other than a party, may participate in a hearing before the Commission by testifying and is considered a “witness.” (See The Hearing § 3) Witnesses are subject to questioning/cross-examination with respect to their testimony by Commission members and the parties.

## 3. If I am not the person who filed the application, can I still appear before the Commission?

Yes. All hearings before the Commission are open to the public, and interested members of the public can participate in two different ways. People who wish to give testimony to the Commission about a particular matter can sign up prior to the hearing on the matter on sign-up sheets placed near the entrance of the room in which the Commission is conducting its hearing. (See The Hearing § 2) Since the sign-up sheets are turned into the Commission at the beginning of the hearing on a matter, it is important to arrive on time. Otherwise, you might not be able to speak. Other people can also request that they be allowed to participate in a case as a party, but only a person who has a special and substantial interest in a case before the Commission will be allowed to intervene in the case as a party. (See Pre-Hearing Procedures §§ 6-7.) A person who has intervened can ask questions of other witnesses at the hearing and can argue the facts and law of the matter under consideration, just as any other party to the case is entitled to do.

## 4. Who can represent a corporation, limited liability company (LCC), or other nonhuman entity before the Commission?

Only an attorney licensed by the State of North Carolina can represent a corporation, LLC, or other non-human entity before the Commission. Attorneys can argue the law and facts of a case, object to materials and evidence offered to the Commission, and question their witnesses and cross-examine

other witnesses. Other types of experts, such as engineers, architects, and appraisers, can testify in the hearing on a matter, but they cannot argue the law and facts of a case, object to materials and evidence offered to the Commission, or question other witnesses at a hearing.

#### 5. Who can represent a natural person before the Commission?

A natural person is the term in the law for a human being who is acting in his or her own name representing his or her own interests. A natural person may be represented by an attorney, or may represent himself or herself. If a natural person who is also a party chooses to represent him- or herself, that person can argue the case to the Commission by summarizing the facts and offering legal argument, can testify, and can ask questions and cross-examine witnesses who appear.

#### 6. What happens if the applicant does not show up for the hearing?

If the party who has filed the application fails to show up for the scheduled hearing, the Commission may by majority vote either dismiss the case or continue it to another time to provide an opportunity for the party to justify the failure to appear.

#### 7. If an application is dismissed due to the failure to show up for the scheduled hearing, can the application be revived?

Yes. Once a case is dismissed, the party may file a new application for a Certificate of Appropriateness to be considered by the Commission. Any new application requires that a party submit all required materials and pay the required fees as if no prior application had been submitted. (See The Historic Preservation Commission § 4.) No credit is given for the fees paid in connection with a case that was dismissed.

Generally, an application is evaluated against the requirements in the UDO at the time the application is filed. If the requirements of the UDO have not changed since the dismissed application, an identical application may be filed. If on the other hand, the requirements of the UDO have changed since the dismissed application was filed, it may no longer be possible to submit an identical application.

#### 8. What is the role of the Town Attorney at hearings?

The Town Attorney attends meetings of the Commission and normally acts as the Commission's attorney. In that role, the Town Attorney can call witnesses, cross-examine witnesses offered by any party, cross-examine witnesses who are appearing as members of the public, answer legal questions from the Commission members, and provide direction and clarification to Commission members when he or she believes it is warranted to do so, including during the Commission's deliberations. Alternatively, independent counsel may be retained to advise the Commission.

#### 9. In what order does the Commission hear cases or other matters scheduled before it?

Cases are placed on the Commission's agenda on a first come-first served basis, based on the order in which they reach a readiness for hearing.

#### 10. How much time does an applicant have to present a case?

There is no time limit placed on the presentation of a case, but the Chair or the Commission may prohibit the presentation of repetitive, irrelevant, unreliable or other evidence deemed to be of no substantial usefulness to the Commission in reaching the legal issues presented. (See The Decision §§ 3-

6.) Although the North Carolina Rules of Evidence do not strictly apply to proceedings before the Commission, the Commission will only consider evidence that meets at least minimal standards for reliability. (See Evidence §§ 1, 3.) As to the length of Commission meetings, see § 1 herein (How long do Commission Meetings last?).

#### 11. What happens if a case is not reached when it is first scheduled?

If a case is not reached when it is first scheduled on the agenda and the Commission does not schedule it for hearing at a special meeting, it will be scheduled for the next regularly-scheduled meeting of the Commission and will hold its place in the line of cases to be heard.

#### 12. What happens if an application is modified between the time the staff report is distributed and the time it comes before the Commission?

In every case that comes before the Commission, Planning staff prepares an analysis of the case for the Commission called the “staff report” that is distributed to the Commission and all parties to the case about a week prior to the meeting. (See Pre-Hearing Procedures § 2.) If an applicant has changed its plans or any other features of its application between the time the staff report is distributed and the meeting, there may be no opportunity for staff to thoroughly evaluate the revised application. Therefore, in every case in which there is a change between the application materials evaluated in the staff report and the Commission meeting, as soon as such a change becomes apparent to the Commission, it will suspend its hearing on the merits of the application and conduct a hearing to determine whether it should continue the case to a future meeting in order to allow staff to evaluate the modified application materials. The Commission may question staff and others at the hearing to help it decide whether it should proceed or continue the case. If the Commission decides it can fairly consider the case without a revised staff analysis, such as in cases in which modifications are obviously minor, it can proceed with its hearing on the case without the benefit of an updated staff report.

#### 13. If multiple issues are involved, can the Commission divide them into separate hearings?

Yes. Upon motion of any party to a case or by motion of a Commission member, second, and majority vote, the Commission may divide a hearing by issue. For example, the Commission may first admit evidence as to whether an application is complete, hearing from each party and witness as to that specific issue, closing the hearing as to that issue, and then voting on that issue. Using this system, in the event a vote is taken which bars the granting of approval, as the case may be, the case will end and no further votes need be taken unless a request for a provisional vote is made and approved by majority vote of the Commission. (See The Decision § 11.)

#### 14. Can the Commission reopen the evidentiary portion of a hearing after it has been closed?

Yes. After the evidentiary portion of a hearing has been closed, should any member of the Commission request that the hearing be reopened, upon majority vote the Chair will reopen the hearing. The Chair can also reopen the hearing on the Chair’s own initiative. When a hearing is reopened, each party to the case shall be given an opportunity for response and rebuttal as to the particular information elicited, but parties may not use the reopening of the hearing to present matters which are beyond the scope of the information elicited or solicited by the Commission.

### 15. What happens if a case cannot be finished at a single meeting of the Commission?

When a hearing or case is not concluded in one session of the Commission, it will be recessed and continued until a subsequent regular meeting of the Commission or until a special meeting called for the specific purpose of completing the case. Absent a stipulation on the record by all parties to the case to the contrary, the same Commission members who participated in the initial meeting must comprise the Commission that hears the case at the subsequent meeting(s). If circumstances prevent identity among the Commission members at the initial and continued hearings, such as the expiration of the term of a Commission member and the naming of the Commission member's replacement, and the parties are unwilling to waive their objections to this lack of identity, the case shall be presented to the Commission at the resumed hearing from the beginning, and no evidence presented to the Commission in the incomplete hearing shall be considered by the Commission in its decision.

### 16. Is a recording made of the hearing before the Commission?

Yes. The Commission Secretary records all cases before the Commission. Any person wishing to record a meeting of the Commission may also do so by utilizing a certified court reporter or any recording device so long as it does not disrupt the hearing. Although a party who has filed a petition for judicial review of a decision of the Commission may obtain a copy of the recordings made at the hearing, neither the Commission nor the Planning staff shall have any responsibility to prepare a verbatim transcript of a Commission hearing unless ordered to do so by a Court of competent jurisdiction upon the financial commitment of a party to pay for the transcription in accordance with N.C. Gen. Stat. § 160D-1402(h).

### 17. May the Commission schedule a special meeting to take up a case or complete one?

Yes. If at a regularly scheduled meeting the Commission concludes that it will be unable to complete all cases upon the agenda, it may schedule a special meeting to complete the agenda or hear a specific case. Notice must be published to the public in accordance with UDO § 6.01.04 unless the time and date of the special meeting is announced prior to the close of the regular meeting. The Commission may not schedule a special meeting for which there is an inadequate time to provide required notice.

## Presentation of a Case at the Hearing

### 1. If I appear before the Commission, what is expected of me?

The Commission expects people who appear before it to prepare in advance and to be truthful and respectful, not only of the Commission itself but of others who might appear on the matter, even if they have a different view. The Commission cannot simply consider whether people who appear before it support or oppose a particular application or decision; rather, Commission members must consider the facts of the case and apply the criteria of the UDO that relate to the matter before the Commission.

The applicant for a Certificate of Appropriateness bears the burden of proof before the Commission and is expected to present sufficient information to allow the Commission to decide all of the issues it must consider in deciding whether to grant the application. The applicant can do this through the applicant's own testimony, documents and exhibits, and the testimony of others.

In every case Planning staff prepares an analysis of the issues that staff deem to be presented by the case and that report may summarize all or some of the facts as staff sees them. This is called the "staff report." Parties should familiarize themselves with the staff report before the hearing so that they may object to any parts of the report with which they disagree. The staff report is not intended to present

everything that the parties might want to have the Commission consider; it may not address each of the issues that the Commission must decide to issue a decision in the applicant's favor; and it may not present the facts or law in the same way that each party sees them. If an applicant relies on the staff report to meet its burden of proof, it does so at its own risk that the staff report may be inadequate to fully prove the applicant's case.

A person who appears before the Commission as a "witness" is expected to testify truthfully and to stick to the subject about which the witness is testifying. The Commission appreciates it if people who testify as witnesses are as concise as possible, but a witness should not leave important information about a matter out of the witness's presentation merely in an attempt to save time.

## 2. Who has the burden of proof in a case before the Commission?

The burden of presenting sufficient evidence to allow the Commission to decide an issue is always upon the party or parties urging a particular position. At a minimum, the applicant must provide competent evidence which addresses every material issue presented by the application.

## 3. What are the rules for decorum of participants and observers at hearings?

Whether they are parties, attorneys, representatives, witnesses or simply spectators to a hearing before the Commission, all persons are expected to conduct themselves in an appropriate and respectful manner while in the hearing chambers of the Commission. Profanity, arguments between witnesses, arguments between attorneys and witnesses or other attorneys, arguments among spectators, noise that interferes with the conduct of the hearing, and the like, shall not be tolerated. Any such behavior may result in an order by the Chair for removal from the hearing chamber of the person(s) causing or engaging in such action, interference or disturbance.

## 4. Determination of preliminary matters; Jurisdiction objections

Objections regarding jurisdictional issues, including but not limited to, the standing of a party, may be made to the Commission. The Commission Chair shall rule on any objections, and the Chair's rulings may be appealed to the full Commission. The Commission should address any other preliminary matters that might moot, shorten, or otherwise change the presentation of the matter, including such matters as a request to intervene, request for a continuance, determination whether a modification to an application requires that the hearing be delayed, and objection to participation by a Commission member.

## 5. What is the order of a hearing on an application?

Cases generally shall proceed in the following order, although if the parties agree or there is no objection, deviations in this order are permitted and shall not impair the decision in the case:

- A.** Applicant is given an opportunity to object to any materials which were provided to the Commission in advance of the hearing;
- B.** Applicant is given the opportunity to make an opening statement;
- C.** Parties other than the applicant are given an opportunity to make opening statements;
- D.** Applicant presents the evidence in support of the application. For an explanation of the types, forms and admission of acceptable evidence, see Evidence §§ 1-3.

- E.** Planning staff presents evidence pertinent to the application. However, at any time before, during or after the presentation of evidence by the applicant, a Commission member, with permission from the Chair or full Commission, may request the testimony of Planning staff as to any matter relevant to the case, including their interpretation of provisions in the UDO or Comprehensive Plan or state law.
- F.** Other parties present evidence pertinent to the application.
- G.** Non-party witnesses testify and offer evidence.
- H.** Applicant is given opportunity to present rebuttal evidence.
- I.** Applicant is given the option of giving its closing summary and argument or deferring its presentation until all other parties are given the opportunity for closing summary and argument.
- J.** In the order they have qualified as intervenors, Parties other than the Town present their closing summary and argument.
- K.** Town presents its closing summary and argument.
- L.** If applicant has deferred presentation, applicant presents its closing summary and argument.
- M.** Commission deliberation begins. (See Weighing the Evidence by the Commission §§ 2-3, The Decision §§ 1-2.)
- N.** If, in the course of its deliberations, the Commission entertains additional testimony or other evidence from any party, the Commission shall allow all other parties and witness to address the particular subject area as to which the additional evidence was allowed.
- O.** The Commission completes its deliberations and issues its decision.
- P.** The Chair closes the case.

## Evidence

### 1. What evidence can the Commission rely on in making a decision?

The Commission is required to base its decisions on competent evidence presented at the hearing. To be considered “competent,” witness testimony requires that (a) the witness has personal knowledge of the subject of the testimony and (b) the subject of the testimony is relevant to an issue involved in the hearing. “Competent” documentary evidence requires that the document be authenticated by one of the following methods:

- a. Certification, by signature, title and seal, of the person who is the custodian of the records; or
- b. Information within the document which establishes its origin and reliability; or
- c. Testimony by a person with personal knowledge of the document’s origin and reliability.

The requirement that the Commission consider only “competent” evidence does not prevent the Commission from relying on evidence that would not be admissible under the Rules of Evidence as applied in North Carolina courtrooms so long as the evidence was admitted without objection or it appears to be sufficiently trustworthy and was admitted under such circumstances that it was

reasonable for the Commission to rely upon it. Evidence may include hearsay evidence, such as an affidavit or letter written by a person who is not present, in certain circumstances. (See Evidence § 5.) Commission members may also rely upon their own knowledge of the property at issue if their knowledge is fully disclosed during the hearing in order to give the parties a fair opportunity to address the knowledge upon which they intend to rely. (See Evidence § 10.)

The Commission may only rely on opinion evidence pertaining to any of the following if such evidence is offered by a person accepted by the Commission as an expert witness:

- A.** That the use of property in a particular way would affect the value of other property;
- B.** That the increase in vehicular traffic resulting from a proposed development would pose a danger to the public safety; and
- C.** Matters about which only expert testimony would generally be admissible under the North Carolina Rules of Evidence.

## 2. Are statements by an attorney appearing as the representative of a party considered evidence?

No. Attorneys representing parties participating in any hearing may not be sworn and their statements are not considered evidence. Statements made by an attorney representing a party shall be considered only as legal argument or a summary of evidence intended to be offered, or which has been offered by parties and witnesses participating in the hearing.

## 3. How is testimony (or testimonial evidence) presented?

- A.** MUST TESTIMONY BE GIVEN UNDER OATH OR AFFIRMATION? Yes. All testimony offered in connection with a case before the Commission must be offered under oath or affirmation administered by the Chair, another member acting as Chair, or the Commission Secretary.
- B.** WHAT TESTIMONY ARE WITNESSES COMPETENT TO OFFER? Testimony from non-expert witnesses should generally be comprised of factual information within the personal knowledge of the witness, as opposed to opinions. In general, the Commission cannot rely or base its decision or findings on the opinion testimony of lay witnesses. For example, a witness's testimony that "traffic will be a problem" is entitled to no weight while that same witness's testimony that "I watched and counted the traffic between 9:00 a.m. and 9:30 a.m. on a Friday morning and x number of cars drove past the site" is competent evidence which could be used by the Commission to help determine the facts of a case, to pose questions to a traffic engineer, and even to decide whether the testimony of a traffic engineer is credible.
- C.** WHAT OPINIONS CAN BE RELIED UPON BY THE BOARD? Only experts can give competent opinions concerning matters which are within the specialized knowledge of experts. If a witness is not testifying as an expert, testimony in the form of opinions or inferences is limited to those opinions or inferences which are rationally based on the perception of the witness and helpful to a clear understanding of his testimony or the determination of a fact in issue. For example, a lay witness might testify, "He appeared to be drunk." The Commission can never rely on opinion evidence when it is offered by a layperson or non-expert to establish that the use of property in

a particular way would affect the value of other property, including the witness's own property, or that the increase in vehicular traffic resulting from a proposed development would pose a danger to the public safety.

- D. WHAT OPINIONS MUST COME FROM AN EXPERT?** Competent opinions regarding scientific, technical or other specialized knowledge which will assist the Commission in understanding the evidence or determining a fact in issue must be provided by an "expert." A witness can be qualified as an expert by virtue of knowledge, skill, experience, training, or education. An expert may testify in the form of an opinion if all of the following apply: (1) The opinion is based upon sufficient facts or data; (2) The testimony is the product of reliable principles and methods; and (3) The witness has applied the principles and methods reliably to the facts of the case. The Commission can never rely on opinion evidence offered by a layperson or non-expert to establish that the use of property in a particular way would affect the value of other property, including the witness's own property, or that the increase in vehicular traffic resulting from a proposed development would pose a danger to the public safety.
- E. HOW DOES A WITNESS QUALIFY AS AN EXPERT?** A person who proposes to appear before the Commission as an expert must first present the credentials which qualify the witness as an expert. Specifically, the person must explain what knowledge, skill, experience, training, or education qualifies the person to give expert opinion testimony by instilling in the witness the superior knowledge of the area to be addressed in the testimony. Once the credentials of a witness are presented, the Commission must invite all parties, should they choose, to ask questions of the witness regarding the witness's credentials and at the conclusion of the questioning, to either agree that the person is an expert or object to the person being considered an expert. If an objection is made, the party offering the objection must explain how the person's credentials do not establish the capacity for the person to give a scientific, technical or other specialized opinion which will assist the Commission in understanding the evidence or in determining a fact in issue must be provided by an "expert." Once all parties have been given the opportunity to be heard as to the witness' qualification as an expert, the Commission Chair shall render a determination as to whether the person has qualified as an expert. The Chair's determination can be overridden by the Commission, by majority vote upon proper motion and second. A person who is offered as an expert to the Commission may not provide opinion evidence until the Commission Chair or the Commission has accepted the witness as an expert.
- F. CAN THE BOARD LIMIT A WITNESS'S TESTIMONY?** Yes. At the start of a hearing or at the beginning of testimony by non-party witnesses, the Commission Chair may request an estimate of the time each party anticipates it will take to present its case, and/or the Chair may review the sign-up sheet of witnesses. At that time, or at the conclusion of the presentation of their cases by parties to the hearing, the Chair or any member of the Commission may propose that the Commission limit the time for each non-party witness to testify and may further limit the number of witnesses offering testimony on any particular point. If time limitations for witnesses are proposed by the Chair, the Commission may overrule the Chair's recommendation by

motion, second and majority vote. If time limits are proposed by a Commission member, such proposal shall be in the form of a motion and second, and shall be adopted by majority vote. The Commission generally will not limit the number of witnesses or length of presentation by witnesses called by a party, except to prevent the presentation of repetitive, irrelevant, unreliable or other evidence deemed to be of little to no usefulness to the Commission in making the findings and decisions regarding the matter before it.. (See The Hearing § 10.)

- G. WHO CAN CROSS-EXAMINE A WITNESS?** Each person who testifies before the Commission is subject to cross-examination by every party to the case or appeal other than the party who called the witness, but not to cross-examination by persons only participating in the case as witnesses.
- H. WHEN CAN A WITNESS BE CROSS-EXAMINED?** After a witness testifies, any party to the case can ask the witness questions. The parties take turns asking, with the party who called the witness, if the witness was called by a party, going last. See subsection I below. If the witness was not called by a party, questioning will begin with the Commission itself, followed by the Town, any intervening party, and the applicant. If the witness was called by the applicant, after questioning by the Commission, the Town will be given a chance to ask questions, followed by any intervening parties and then the applicant. If the witness was called by the Town, after questioning by the Commission, intervening parties will be given a chance to ask questions, followed by the applicant. If the witness was called by an intervening party, after questioning by the Commission, the Town will be given a chance to ask questions, followed by the applicant. If requested, the Chair can allow additional rounds of cross-examination, and each round should follow this same order.
- I. AFTER A WITNESS HAS BEEN CROSS-EXAMINED, CAN A PARTY ASK THE WITNESS MORE QUESTIONS?** Yes. Following cross-examination, the party who called the witness is entitled to ask additional questions of the witness (“redirect testimony”), but that triggers the opportunity for further cross-examination of the witness as to matters which first arise during the witness’s redirect testimony, and such further cross-examination shall be conducted in the same order as the original cross-examination, followed by further redirect testimony, the party calling the witness always being afforded the final opportunity to question that party’s own witness. As to witnesses who are interested members of the public, the same opportunities are afforded using the same sequence of questioners, with the Applicant or Appellant always given the final opportunity to question the witness.
- J. WHEN CAN BOARD MEMBERS ASK QUESTIONS OF WITNESSES?** Members of the Commission have the right, when recognized by the Commission Chair, to question any witness or party appearing before the Commission. They may do so at any time after a witness has been sworn, whether during the presentation by a party, after the presentation by a party, during examination or cross-examination of a witness called by a party or who is appearing as an interested member of the public, or even after the witness has returned to his or her seat, until the hearing is closed, and they may inquire into any matter that may assist them in reaching a

decision, whether or not the matter was previously addressed by the witness in the witness's testimony.

#### 4. What documents are acceptable for presentation?

Any evidence that might assist the Commission in deciding an issue or case may be offered into evidence. The North Carolina Rules of Evidence do not strictly apply to proceedings before the Commission, but there must be some indication of a document's reliability for it to be given any weight. Any documentary evidence relied upon by the Commission in making its decision or in deciding an issue must at a minimum be authenticated and relevant to the factual or legal issues under consideration.

#### 5. Can the Commission consider hearsay evidence, such as a letter or affidavit?

Yes. Hearsay evidence, generally understood as a statement made by a person not present at the hearing, may be considered and given weight if the statement is made by a party or witness actually involved in the hearing in a setting that promotes its reliability, or if it contains sufficient indications of authenticity to assure the Commission that it is reliable. For example, information from the Internet should normally only be considered if the date and source of the information is disclosed, and the internet "address" is displayed on the information sought to be submitted. People who make statements against their own interests are generally considered reliable and such statements can be presented to the Commission. In general, the testimony of a person appearing before the Commission, who is thus subject to cross-examination, will be preferred over testimony contained in a sworn statement or affidavit, and testimony contained in a sworn statement or affidavit will be preferred over testimony contained in a non-sworn written statement. However, the Commission itself must ultimately determine how credible and reliable any evidence presented to it is, and it is free to reject evidence which it finds unreliable.

#### 6. How is documentary evidence, including photographs, authenticated?

No document can be admitted into evidence until it has first been identified by the person offering it into evidence and authenticated. Authentication of a document is accomplished if it is either:

- A. Certified as authentic, by signature, title and seal of a person who is the custodian of the record;  
or
- B. Confirmed through the sworn testimony of a witness who establishes, based upon first-hand knowledge, the date and author of the document, and, if a copy is used in place of an original, that the document is a true and accurate copy of the original document.

A photograph is authenticated by sworn testimony as to the date and place where the photograph was taken and the sworn statement that the photograph fairly and accurately represents the subject depicted at the time the photograph was taken.

#### 7. How are the documents submitted?

Once a document has been identified and authenticated, a witness or party wishing to offer it to the Commission for its consideration must provide a copy to every other party for review, present it to the Commission Secretary to mark the document with an identifying letter or number, and then hand it to the Commission Chair. The Chair may then accept the document into evidence. If a party or Commission member objects to a document being accepted into evidence, the Commission must rule on the objection by either overruling the objection and accepting the document into evidence or by sustaining

the objection and refusing to accept the document into evidence. All documents tendered as evidence by a party or witness (whether or not allowed into evidence) shall be retained by the Commission Secretary as part of the official record of the case.

#### 8. How many copies of a proposed exhibit should be submitted?

Although the Commission may accept a single copy of a proposed exhibit, it is strongly recommended that a person wishing to submit a document into evidence bring enough copies for each of the five Commission members, the Commission Secretary, the Town Attorney, and each party to have their own copy.

#### 9. Can proposed evidence, which has been refused, be preserved in the record?

Yes. If the Commission by its own action, or by sustaining an objection to testimony or a document that is offered to it for consideration refuses to consider evidence that has been offered to it (see Objections to Evidence §§ 1-4), the party or witness offering the evidence can make an “offer of proof.” This requires that the witness or party announce “I wish to make an offer of proof” and then proceed with the testimony that has been excluded or provide the excluded document to the Commission Secretary, who will mark the document for identification purposes. Any such document shall be retained as part of the record, but it shall not be considered by the Commission in its deliberations or decision.

#### 10. When can Commission members rely upon their own knowledge of the subject property?

If a Commission member, while inspecting the property in question, has either noted some matter or feature that may influence the Commission member’s decision in the case, or, while inspecting the full departmental file in the case, has noted some document that is not included in the staff report, the Commission member can utilize such information under the following circumstances: While the evidentiary hearing is still open, the Commission member must note the matter or feature observed or document noted. In the case of a document, the Planning staff shall produce the document for review by all parties and Commission members. The Commission shall allow all parties to reasonably inspect the document before it is inspected by other Commission members, and each party shall be given an opportunity to offer evidence related to the document. When a Commission member has noted a matter or feature relating to an inspection of the property in question, all parties shall be given an opportunity to present evidence that relates to the matter or feature.

## Objections to Evidence

### 1. What objections to evidence are allowed?

The only grounds for an objection to the testimony of a party or witness are that: (1) the testimony has no relevance to the case before the Commission, (2) the answer is not responsive to the question which was asked, (3) the person offering the testimony is not competent to offer the type of information or opinion being offered, or (4) the answer contains hearsay statements that do not meet the requirements of Evidence § 4.

The only grounds for objection to documentary evidence are that: (1) the evidence is not relevant; (2) the document has not been properly identified or authenticated in accordance with Evidence § 4; or (3) the evidence is unacceptable hearsay or contains hearsay statements that do not meet the requirements of Evidence § 4.

A party may also object to the form of a question, such as that it is argumentative, a compound question, improperly leads (puts words in the mouth of) the witness, or calls for information which is not relevant to the case.

## 2. What evidence is “relevant”?

Relevant evidence is information that relates to a factual or legal issue that the Commission may or must decide in a particular case, including issues of credibility. Documentary evidence that contradicts the witness’s testimony is always relevant since credibility of witnesses is an issue in every case. Relevant evidence should, by itself or in combination with other evidence, help the Commission determine any issue it needs to decide.

## 3. Who can object to evidence?

Only a party may object to the testimony of a witness, the admissibility of a document, or a question asked by another party.

## 4. How are objections decided?

The Commission Chair shall rule on any objections, and the Chair's rulings may be appealed to the full Commission. Upon appeal to the Commission, all participating members, including the Chair, shall vote, and any abstention by a member shall be counted as a vote in favor of the motion. In the event of a tie vote by the Commission, the objection will be overruled and the evidence considered by the Commission. If testimony is successfully objected to, a witness may make an “offer of proof” by stating those things which the witness intended to state, but such statements will only be for the purpose of preserving the record of the case and shall not be considered by the Commission. (See Evidence § 9.)

# Weighing the Evidence

## 1. How does the Commission decide what weight to give documents and testimony?

In general, as with any court, the Commission must weigh the evidence that is presented to it. When there is conflicting evidence relating to an issue it must decide, the Commission must explicitly resolve such conflict. It may also, however, refuse to give any weight to evidence that has been presented to it – even when no conflict in the evidence exists – when the Commission determines that the evidence is not credible or relevant. In determining the weight it will give to testimony and documentary evidence, the Commission may consider such things as the credibility of a witness (based on such considerations as the witness’ demeanor, qualifications or expertise, ability to observe the conditions about which testimony is offered) and the reliability and persuasiveness of documents that are offered as evidence. In general, the testimony of a person appearing before the Commission who is thus subject to cross-examination will be preferred over testimony contained in a sworn statement or affidavit, and in general, testimony contained in a sworn statement or affidavit will be preferred over testimony contained in a non-sworn written statement. However, the Commission may conclude that the information in a non-sworn statement is more reliable than the testimony of a person who has appeared and testified before it if it finds sufficient cause to do so.

## 2. Can the Commission make credibility decisions?

Yes. In making its decision the Commission may explicitly or implicitly make credibility determinations regarding the testimony of any witness or party. Where the Commission has concluded that the testimony of a particular witness is not credible or is otherwise unreliable, it is not bound to accept that

testimony and may not only reject it but, if warranted, may make a contrary finding from the facts which that witness asserted. A credibility decision may be based upon such factors as the demeanor of the witness, the consistency of the witness's testimony, the consistency of the witness's testimony with other evidence of record which the Commission finds more reliable or persuasive, or any other relevant factor.

### 3. Should Commission members discuss their view of a case while evidence is being presented?

Private discussions among Commission members should never take place regarding a case prior to a decision being rendered. Commission members should also limit open discussion with each other during the presentation of the evidence, and should instead use the evidentiary portion of the hearing to listen to, consider and elicit evidence relating to the issues that must be decided. After the evidentiary portion of the hearing is closed and before a decision is rendered, Commission members are encouraged to publicly discuss their views of the case, including those factors that might lead them to support a particular position or outcome in the case.

## The Decision

### 1. How does the Commission decide a case?

Deliberations may be flexible and involve open discussion of the case among Commission members or a process by which the Commission members identify proposed findings of fact and determine whether a majority of members endorse each such proposal, or a combination of the two. At the suggestion of the Commission Chair or another member of the Commission, the Commission can also conduct "straw polls" about particular issues or facts before formally adopting findings of fact or conclusions of law. The Commission may consider each of the conclusions for the type of case before it and upon motion and second, may vote on each such conclusion, and the Commission may include discussion and the adoption of findings of fact prior to any conclusion of law being adopted, or it may intersperse such discussion and adoption of findings among its actions to adopt conclusions of law. Once a motion has been made and seconded on either a proposed finding of fact or proposed conclusion of law, Commission members can offer proposed modifications to the motion, and if those are accepted by the person who made the motion and the person who seconded the motion, the modified motion will be substituted for the original one. In general, each Commission member is encouraged to explain his or her view of the case and the significant issues involved, particularly if the member intends to vote against a motion that has been offered in favor of an applicant. However, there is no formal requirement that each Commission member explain his or her individual view of the case.

If the evidentiary portion of the case has been closed and, during the discussion of a case, a Commission member raises an issue for which additional testimony is desired, a matter or issue that was not addressed at the hearing, information based upon the member's personal visit to the property in question or the member's review of the file and documents that are not part of the staff report and have not been addressed during the evidentiary hearing, or other good cause, the Chair may reopen the public hearing to allow evidence, argument and rebuttal evidence on that particular issue.

## 2. Can the Commission recess a hearing after the evidentiary portion of the case has been closed and reconvene the hearing at a later time for the decision to be made?

Yes. Upon majority vote, the Commission may recess a case between the close of the evidentiary hearing and the decision by the Commission until (but not later than) the next scheduled meeting of the Commission, to allow Commission members an opportunity to review, but not discuss, the evidence that has been submitted.

## 3. Can a case be dismissed before full findings of fact and conclusions of law are adopted?

Yes. If an applicant does not present evidence which at a minimum addresses every conclusion of law that must be decided by the Commission in the particular type of case, at the conclusion of the evidentiary hearing the Commission may adopt a motion dismissing the case. Such a motion must specify in what respect(s) the evidence or presentation was lacking. A dismissal of a case on this basis does not prevent the applicant from submitting a new application for the same approval unless there is some other reason that prevents that, such as a change in the requirements of the UDO.

## 4. What is a fact?

A fact is a description of a circumstance, event or occurrence as it actually takes place or took place, a description of a physical object or appearance as it actually exists or existed, or an actual and absolute reality, as distinguished from a supposition or opinion not provided by a qualified witness. For example, when talking about traffic, a fact might be that “in the last month there have been ten accidents” at a particular intersection, while a statement that “the intersection is dangerous” would be considered an opinion and not a “fact” unless it were established by a qualified expert, in which case it could be accepted as a “fact.”

## 5. What is a “finding of fact”?

A finding of fact is a statement of one or more facts that the Commission decides is true and pertinent to the issues it must determine in the case. Findings of fact should be based on evidence presented at a hearing. Generally, the Commission should only adopt findings of fact that relate to the conclusions of law required in a particular case. The Commission must also make a finding of fact to resolve any conflicts in the evidence presented to it if the conflict relates to an issue material to the case. Therefore, if one person testifies, “The road is ten feet wide,” and a second testifies, “The road is twenty feet wide,” the Commission must make a finding as to which is correct.

## 6. How does the Commission adopt findings of fact?

Upon its deliberation following presentation of the case, the Commission members should discuss the facts presented in the case, discuss the credibility of the witnesses if such has been put at issue by a party or raised as a concern by one or more Commission members, and resolve by majority vote as necessary any contested issues of fact. Facts should be articulated in conclusory form as to what the Commission member believes has been established by the evidence, rather than a recitation of a party’s or witness’ contentions. For example, a finding of fact is “the road is ten feet wide,” whereas a statement that “Mr. Jones testified that the road is ten feet wide” is not a finding of fact. When competent opinion testimony is provided (See Evidence §§ 3(C) and (D)), a finding of fact may be based upon that opinion. For example, the Commission may adopt as a finding of fact, “The intersection is dangerous,” but such a finding must be supported by an expert opinion to that effect. Findings of fact

should generally only relate to the issues before the Board that relate to the type of case before it. They may include findings regarding the credibility of witnesses. (See Weighing the Evidence § 1.) Findings of fact should always address the staff report submitted in the case, and if portions of the report or the report as a whole are not accepted as factually accurate, such should be specifically identified.

#### 7. What is a conclusion of law?

A conclusion of law is a decision about some requirement in the UDO needed to decide the type of case before the Commission. The conclusions of law pertinent to a particular case are generally set forth as potential motions in the staff report. In approving or rejecting any particular such motion, Commission members should articulate the findings of fact upon which each conclusion of law is based.

#### 8. What vote is needed for approval to be granted?

Approval of a Certificate of Appropriateness requires a majority vote of the members of the Commission. For the purposes of this paragraph, vacant positions on the Commission and members who are disqualified from voting on the case shall not be considered members of the Commission for calculation of the requisite majority if there are no qualified alternates available to take the place of such members. See UDO section 6.01.03. In any event, a quorum of at least three members and the affirmative vote of at least two members shall be required for approval of any Certificate of Appropriateness.

#### 10. Can the Commission impose conditions on an approval?

Yes. If the Commission approves a Certificate of Appropriateness, the Commission may do so subject to such reasonable conditions as the Commission concludes are necessary to carry out the purposes of historic preservation as contemplated by the UDO. See G.S. § 160D-947 (a). Conditions that simply reiterate requirements of the UDO are unnecessary and discouraged.

#### 11. If a vote is taken that has the effect of ending the case, can the Commission vote on the other issues which would be decided if an application were approved?

Yes. For the sake of judicial and quasi-judicial efficiency, and at the request of any party, the Commission Chair, or any member of the Commission, the Commission may (upon motion, second and majority vote) issue provisional votes as to any and all preliminary or alternative issues, even though an application or permit has been denied upon some other basis. However, such provisional consideration and votes are not required, and if not made then all parties retain their rights to litigate such issue(s) following any decision on appeal that does not affirm the Commission's decision.

#### 12. What information should be included in a motion?

A motion by a Commission member should usually include at least a brief statement of the reason(s) for the motion and may cite specific, adopted findings of fact as the basis for the motion.

#### 13. Can Commission members discuss a case once the decision has been made?

No. Because decisions by the Commission are subject to review by the courts of North Carolina, which may send a particular case back to the Commission for reconsideration, Commission members must avoid and refrain from discussing a case even after the Commission has made its decision.

## Appeal

### 1. May an applicant appeal a decision by the Commission?

An appeal may be made from the Commission's action granting or denying a Certificate of Appropriateness. The appeal is made to the Boone Board of Adjustment pursuant to the procedures set forth at Articles 4 and 6 of the UDO, and is in the nature of certiorari as set forth at N.C. Gen. Stat. § 160D, Article 4. The filing of an appeal is subject to a strict filing deadline and the payment of a fee in an amount set by the Boone Town Council.

The Town of Boone has forms for appeals available on the website and in the Planning and Inspections Office. Planning and Inspections is located on the basement level of the Boone Downtown Post Office at 680 West King Street, Boone, NC 28607. The appropriate form must be fully filled out and the fees paid for the Department to process it.

## Amendment of Rules

### 1. May these Rules be amended?

These rules may be amended by the Town Council on its own initiative or upon recommendation of the Commission.