Rules of Procedure and Guide to the Town of Boone Board of Adjustment

Effective November 20, 2014
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PURPOSE OF RULES

1. WHAT ARE THESE RULES?

These Rules, together with the provisions of the Town of Boone Unified Development Ordinance ("UDO"), govern the operation of the Board of Adjustment. These Rules also are designed to answer questions from people who are unfamiliar with the Board's processes in order to provide more predictability and therefore more timely processing of applications. They are an attempt to make the procedures more predictable and understandable, to address certain details of the Board's operation, to create uniform methods for dealing with recurring questions which arise during hearings before the Board, to provide guidance to people who appear before the Board so they can better prepare for Board hearings, and to facilitate the efficient administration of matters which come before the Board. The Town Council has given the Board the power to adopt these rules, and they are binding on participants in cases before the Board. However, if there is ever a conflict between the provisions in these rules and the UDO or state law, the UDO and state law always controls. The UDO is available on line at the Town of Boone's website, www.townofboone.net.

THE BOARD OF ADJUSTMENT

2. WHAT IS THE BOARD OF ADJUSTMENT?

The Board of Adjustment (the "Board" or the "BOA") is a citizen volunteer board which makes decisions regarding certain planning and zoning matters within the Town of Boone. The Board is a "quasi-judicial" board, meaning that it essentially functions as a court in the matters with which it is charged, basing its decisions only on the evidence and information presented to it during a hearing called for each case. The BOA is authorized under North Carolina law in N.C. Gen. Stat. § 160D-302.

3. WHAT DOES IT MEAN THAT THE BOARD IS "QUASI-JUDICIAL"?

A "quasi-judicial" board is one that operates like a court. Board members must make decisions on the issues before the Board based only on the evidence which is presented to the Board at a hearing. It must apply the Town's Unified Development Ordinance or "UDO" to the facts of each case, which may include any development plans which have been submitted. The Board, just like a court, can decide which evidence it will believe and which evidence it will reject. Just like a court, 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 §§ 55, 57.)

4. WHEN AND WHERE DOES THE BOARD OF ADJUSTMENT MEET?

Although the Board can set special meetings to conduct its business, its regular meeting is the first Thursday of each month beginning at 5:30 p.m. The Board normally conducts its meetings at the Town Council Chambers located at 1500 Blowing Rock Road, Boone, North Carolina. Under certain circumstances (such as states of emergency) and as authorized under state law and by the Town Council, the Board may conduct hearings remotely.

5. WHAT KINDS OF MATTERS COME BEFORE THE BOARD?

There are five different kinds of matters which are decided by the Board. They include:

A. Requests for variances, which allow development which does not strictly comply with one or more requirements of the UDO;

B. Applications for special use permits, which may allow developments which do not automatically fit into a particular zoning district; including modifications of existing permits;

C. Applications for approval of "major" subdivisions, that is, those with particular impact, as designated in the UDO; and

D. Appeals of certain decisions ("Administrative decisions") made by Boone's Planning and Inspections Department. The Board does not have the authority to hear appeals of decisions regarding building permits or certain other orders issued by the Town's building inspectors because such appeals are subject to different review processes under state law.

E. Appeals from decisions on applications for Certificates of Appropriateness issued by the Town's Historic Preservation Commission under Article 8 of the UDO.

6. HOW DOES A CASE GET BEFORE THE BOARD OF ADJUSTMENT?

Each of the matters which the Board considers has its own method for getting before the Board. For variances, special use permits and subdivision approvals, a written application must be filed with the Planning Department by a person who has the legal right to file the application and the application must generally be considered complete by the pertinent Department staff. (See § 17, UDO § 4.05.)

For appeals from Planning Department decisions, a written appeal must be filed with the Town Clerk at Boone Town Hall, located at 567 King Street, Boone, NC 28607, by one of the people listed in UDO § 6.04.02(A). An appeal of a staff decision must be filed within thirty days of the decision which is being challenged. (See UDO § 6.04.02(B).) Both the application procedure and the filing of an appeal involves the payment of a fee in an amount set by the Boone Town Council.

The Town of Boone has forms for applications and appeals available on its website and in the offices of the Planning Department, 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.

7. HOW MANY BOARD MEMBERS PARTICIPATE ON EACH CASE?

A full board is composed of five town residents. Board 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 §§ 12-16.)

BOARD MEMBERS

8. HOW ARE BOARD MEMBERS APPOINTED?

Board members are appointed by the Boone Town Council from people who live in Boone and who have applied to be on the Board.

9. DO BOARD MEMBERS RECEIVE COMPENSATION FOR THEIR SERVICE?

No. The members of the Board receive no compensation for their service.

10. WHAT IS EXPECTED OF MEMBERS OF THE BOARD OF ADJUSTMENT?

Service on the Board of Adjustment is challenging and carries great responsibilities. More than any other board of the Town of Boone other than the Town Council itself, the actions of the Board are governed and informed by state law and decisions of the North Carolina Supreme Court and North Carolina Court of Appeals. The Board is designed to function like a court, and the matters which come before it can be extremely important both financially and in terms of quality of life to the parties and witnesses who participate and to Town residents generally. Board members are expected to:

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

B. Disclose to the Board 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 Board member as to any particular matter to be heard by the Board (see § 12);

C. Review, become familiar with, and remain familiar with the UDO, the Comprehensive Plan, and all other adopted plans of the Town of Boone which relate to the decisions by the Board, as well as these Rules of Procedure;

D. Fairly apply the UDO, the Comprehensive Plan, and all other adopted plans of the Town of Boone which relate to the decisions by the Board, even when they personally disagree with the standards or policies which they contain or seek to implement;

E. Review and be familiar prior to the meeting with the Board Book and Staff Report on each matter that comes before the Board (see § 18);

F. Advise the Planning Department if the member is no longer eligible to serve on the Board due to a change of residence or other cause;

G. Attend all training sessions of the Board; and

H. Recognizing the gravity of the matters which come before the Board, conduct themselves in a manner befitting the heavy responsibilities which have been placed upon them, including:

i. Recognizing the high costs many parties incur in appearing before the Board, making all reasonable efforts to timely arrive for meetings of the Board so as to avoid keeping parties, their various witnesses and professionals, and members of the public from having to wait for advertised meetings to begin;

ii. 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 which come before the Board matters of serious concern to the participants and the public; and

iii. Maintaining a professional and serious decorum during public hearings, including the deliberations and decision-making of the Board, by:

a. Avoiding all whispered conversations with each other;

b. Refraining from interrupting other members of the Board, parties, or witnesses, absent an appropriate reason for doing so;

c. Treating all participants and witnesses in hearings, as well as other Board 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 Board.

11. WHAT HAPPENS IF A BOARD MEMBER CANNOT PARTICIPATE IN A PARTICULAR HEARING?

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

12. WHEN SHOULD A BOARD MEMBER NOT PARTICIPATE IN A HEARING?

A Board member should not participate in or vote on a matter 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 communications 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.

13. WHAT IS AN EX PARTE COMMUNICATION?

An ex parte communication occurs when a Board member discusses with any other person, including another Board member, party or staff of the Planning Department, the substance or merits of a case outside the hearing and before the decision in the case is announced. However, a Board member may and is encouraged to review materials provided to the Board by the Department, may individually visit the property which is the subject of the application or appeal to inform him or herself of the features of the property, and shall be entitled to review any materials relative to the case in the Planning Department file. (See §§ 18, 19, and 66) Should a Board 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 Board member then participates in the hearing on the case, he or she 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 his or her participation in the case.

14. WHAT HAPPENS IF A BOARD 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 Board member may not realize that a reason exists that makes it inappropriate to participate in a case until the hearing on the case has already begun. As soon as a Board member realizes that such reason exists, he or she should interrupt the hearing to announce the existence of the reason and should withdraw from the case, unless objection to the member's participation is waived by all parties. (See § 16) If an alternate member of the Board 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 it shall be treated as a new case when it is next heard. At the new hearing, the Board will be directed to disregard whatever evidence was presented to it during the initial hearing and shall base its decision only on the evidence from the new hearing.

15. WHAT HAPPENS IF A BOARD MEMBER DOES NOT WITHDRAW FROM A CASE, BUT ANOTHER BOARD MEMBER OR A PARTY BELIEVES THAT THE BOARD MEMBER SHOULD NOT PARTICIPATE IN THE CASE?

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

16. CAN AN APPLICANT OR APPELLANT WAIVE ITS OBJECTION TO A BOARD MEMBER PARTICIPATING IN THE HEARING?

Yes, under limited circumstances an objection can be waived. The Town of Boone disfavors any member of the Board participating in a case for which a valid basis exists for objection to his participation, as described in § 12. However, in unusual circumstances and when the hearing must be delayed if the Board member is excused from the case due to a lack of quorum (See § 11 for quorum requirements), if the Board 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 Board member nevertheless participate in the case, the Board member may do so. Generally, however, the Town itself will object to the participation of a Board member who has, or whose family member has, a direct or indirect financial interest in the case even if all other parties consent to the member's participation.

PRE-HEARING PROCEDURES

17. WHO IS ALLOWED TO SUBMIT AN APPLICATION OR APPEAL?

Either the party who is seeking the Board's decision on a matter within the jurisdiction of the Board, See § 5, 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 Board, but if the person proceeding is a representative, he or she must prove the proper authority to do so.

18. WHAT IS A STAFF REPORT?

In every case which comes before the Board, Planning Department staff 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 Board in a "Board Book" which is distributed to the members prior to the hearing. If not objected to, the staff report is considered evidence in the matter and can be considered by the Board in its decision.

19. WHO CAN EXAMINE A FILE PRIOR TO THE HEARING?

Files related to cases before the Board are available for inspection by members of the Board, parties, and members of the public. Because full files relating to certain types of cases, such as applications for special use permits, are often voluminous, not every item from such files is included in the staff report and Board Book. (See § 18) Board members and parties can arrange to review the file by contacting the Planning Department at (828) 268-6960 and making an appointment to do so. Members of the public who wish to examine the file or obtain copies of portions of the file must make a public record request by contacting the Town Clerk at (828) 268-6200.

20. ONCE A CASE IS SCHEDULED FOR A HEARING, CAN IT BE DELAYED?

Yes. Cases are generally placed on the agenda for the Board as soon as possible once all needed materials have been submitted by the applicant or person appealing a decision. If you are a party to a case (applicant, appellant, intervenor or Town of Boone (See § 28)) before the Board and you want to try to have consideration of the case delayed, you must submit a written request to the Planning Department, which will transmit your request to the Chair of the Board and will notify all other parties involved in the case of the request. Unless a party to a case objects to the request for a continuance, the Chair can either make the decision on the request or refer the request to the Board itself for a decision. If any party objects to a continuance, it must be decided by the Board. The Board 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.

21. 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 Board, 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.

22. HOW DOES A PERSON INTERVENE AS A PARTY IN A CASE?

The applicant or appellant and the Town of Boone are always considered parties in a case before the Board. (See § 28) 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 Board will be allowed to intervene in the case as a party. In order to intervene as a party in a case before the Board, at least twenty-four hours prior to the beginning of the Board meeting in which the case is to be considered, the person seeking to intervene must complete a "Request to Intervene" on a form provided by the Planning 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.

23. HOW DOES THE BOARD 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 Board 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 Board shall decide whether the person may intervene in the case. A decision allowing a person to intervene is by majority vote of the Board.

24. 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. (See § 28)

25. CAN A PERSON BE COMPELLED TO APPEAR AS A WITNESS OR PROVIDE DOCUMENTS?

Yes. Under state law, the Board Chair has the power to issue subpoenas 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.

26. 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. Alternatively, they can be served

by any means agreed to by the person being served, including email. 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 older and not a party, or by the coroner.

27. 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 Department. Any request for a subpoena by an applicant, appellant, or the Town must be served on the 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 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 Board. The Board 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 Board or the party seeking the subpoena may apply to the General Court of Justice for an order requiring that its subpoena be obeyed, and the court shall have jurisdiction to issue these orders after notice to all proper parties.

THE HEARING

28. HOW LONG DO BOARD MEETINGS LAST?

Because it is hard to predict or control how many matters will be placed on the Board's agenda at any of its regular monthly meetings, and because the matters which come before the Board demand its utmost attention and clarity, meetings which last too long interfere with the Board's ability to function effectively. The Board generally will adjourn approximately 3 1/2 hours after the start of its meeting and continue to the next meeting any cases which are not completed or heard. However, the Board 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.

29. WHO MAY PARTICIPATE IN HEARINGS BEFORE THE BOARD? (PARTIES AND WITNESSES)

There are two types of participants in hearings before the Board: "Parties" and "Witnesses."

A. Parties. The applicant or appellant, and the Town of Boone are always considered parties in a hearing before the Board. In addition, a person who has properly intervened in the case is considered a party to the case. (See §§ 22-23)

B. Witnesses. Any interested person, other than a party, may participate in a hearing before the Board by testifying and is considered a "witness." (See § 30.) At the start of each meeting of the Board, the Chair will announce the availability of sign-up sheets for any person wishing to appear in a case before the Board scheduled for that meeting. A person who wishes to testify as a witness

in a hearing must record his or her name on the sign-up sheet for the case in question unless the Chair or Board 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.

30. IF I AM NOT THE PERSON WHO FILED THE APPLICATION OR APPEAL, CAN I STILL APPEAR BEFORE THE BOARD?

Yes. All hearings before the Board are open to the public, and interested members of the public can participate in two different ways. People who wish to make statements to the Board 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 BOA is conducting its hearing. (See § 29) Since the sign-up sheets are turned into the Board 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 Board will be allowed to intervene in the case as a party. (See §§ 22-23.) 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.

31. WHO CAN REPRESENT A CORPORATION, LIMITED LIABILITY COMPANY ("LLC"), OR OTHER NONHUMAN ENTITY BEFORE THE BOARD?

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

32. WHO CAN REPRESENT A NATURAL PERSON BEFORE THE BOARD?

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 he or she 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 Board by summarizing the facts and offering legal argument, can testify, and can ask questions and cross-examine witnesses who appear.

33. WHAT HAPPENS IF THE PERSON APPEALING A CASE OR THE APPLICANT DOESN'T SHOW UP FOR THE HEARING?

If the party who has filed the application or appeal fails to show up for the scheduled hearing, the Board can either dismiss the case or it can continue it to another time to provide an opportunity for the party to justify the failure to appear. This decision shall be made by a majority vote of the Board.

34. IF AN APPLICATION OR APPEAL IS DISMISSED DUE TO THE FAILURE TO SHOW UP FOR THE SCHEDULED HEARING, CAN THE APPEAL OR APPLICATION BE REVIVED?

It depends. Once a case is dismissed, the party must file a new application for a special use permit, variance or subdivision approval if it wants it to be considered by the Board. 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. A new application requires that a party submit all required materials and pay the required fees as if no prior application had been submitted. (See § 6.) No credit is given for the fees paid in connection with a case that was dismissed.

A person wishing to appeal a staff decision can only do so within thirty days of the decision, so if the case is dismissed for an appellant's failure to show up for the scheduled hearing, it usually will be too late to attempt to file a new appeal. If the person acts within thirty days of the decision, however, an appeal can be re-submitted upon the completion of a new appeal form and payment of new fees. (See § 6.)

35. WHAT IS THE ROLE OF THE TOWN ATTORNEY AT HEARINGS?

The Town Attorney attends meetings of the Board and normally acts as the Board'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 Board members, and provide direction and clarification to Board members when he or she believes it is warranted to do so, including during the Board's deliberations.

In cases involving appeals of staff decisions, however, the Town Attorney will appear as attorney representing Town staff, and will assist staff in presenting its evidence and advocate the staff's position. When the Town takes a position against an application, that position is represented by the Town Attorney. When the Town Attorney acts as an advocate for a staff position or represents the Town against an applicant, he or she can still answer legal questions from Board members, but every party must also be given an opportunity to address those questions. Alternatively in such cases, independent counsel may be retained to advise the Board with regard to the case in question.

36. IN WHAT ORDER DOES THE BOARD HEAR CASES OR OTHER MATTERS SCHEDULED BEFORE IT?

Cases are placed on the Board's agenda on a first come-first served basis, based on the order in which they reach a readiness for hearing, the date an appeal from a staff decision is filed, or the date of an applicant's demand for hearing, should an applicant cut off the application development process by instructing department staff to place the item on the agenda pursuant to UDO § 4.05.02(B).

37. HOW MUCH TIME DOES AN APPLICANT OR APPELLANT HAVE TO PRESENT A CASE?

There is no time limit placed on the presentation of a case, but the Chair or the Board may prohibit the presentation of repetitive, irrelevant, unreliable or other evidence deemed to be of little to no usefulness to the Board in making the findings of fact and conclusions of law regarding the matter before it. (See §§ 75-78.) Although the North Carolina Rules of Evidence do not strictly apply to

proceedings before the Board, the Board will only consider evidence that meets at least minimal standards for reliability. (See §§ 55-66.) As to the length of Board meetings, see § 28 herein.

38. 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 Board does not schedule it for hearing at a special meeting, it will be scheduled for the next regularly-scheduled meeting of the Board and will hold its place in the line of cases to be heard.

39. WHAT HAPPENS IF AN APPLICATION OR APPEAL IS MODIFIED BETWEEN THE TIME THE STAFF REPORT IS DISTRIBUTED AND THE TIME IT COMES BEFORE THE BOARD?

In every case which comes before the Board, the staff of the Planning Department prepares an analysis of the case for the Board called the "staff report" that is distributed to the Board and all parties to the case about a week prior to the meeting. (See § 18.) 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 Board meeting, as soon as such a change becomes apparent to the Board, 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. Even if the case is an appeal of a staff decision, if the appealing party tries to bring up questions which are outside the scope of the stated appeal to such an extent that another party or the Town itself will be prejudiced if it does not have an additional opportunity to prepare a response to the additional questions, the Board may continue the case. The Board may question staff and others at the hearing to help it decide whether it should proceed or continue the case. If the Board decides it can fairly consider the case without a revised staff analysis, such as in cases in which any modifications are obviously minor, it can proceed with its hearing on the case without the benefit of an updated staff report.

40. CAN PARTIES TO AN APPEAL SUSPEND THE HEARING AND ENTER INTO A MEDIATION OR OTHER FORM OF ALTERNATIVE DISPUTE RESOLUTION TO SETTLE THE ISSUE?

Yes. The parties to an appeal may agree to mediation or other forms of alternative dispute resolution. If all parties confirm they wish to engage in alternative dispute resolution, the Board shall adjourn the hearing to give them a reasonable opportunity to do so.

41. IF MULTIPLE ISSUES ARE INVOLVED, CAN THE BOARD DIVIDE THEM INTO SEPARATE HEARINGS?

Yes. Upon motion of any party to a case or by motion of a Board member, second, and majority vote, the Board may divide a hearing by issue. For example, in a hearing on an application for a special use permit, the Board 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. As further example, if a motion is offered to dismiss an appeal based upon the assertion that it was not filed timely, and thus whether the Board has subject matter jurisdiction over the case, evidence on that issue alone can be solicited and a decision on that issue can be rendered before the case at large is presented. Using this system, in the event a vote is taken which bars the granting of the variance, appeal, or permit, 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 Board. (See § 83.)

42. CAN THE BOARD 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 Board request that the hearing be reopened, upon majority vote, the Chair will reopen the hearing. The Chair can also reopen the hearing on his or her own initiative. When a hearing is reopened, each party to the case shall be given an opportunity for follow up, if any, but only as to information elicited or solicited by a Board member of a witness or party. A party may not use the reopening of the hearing to present matters which are beyond the scope of the information elicited or solicited by the Board.

43. WHAT HAPPENS IF A CASE CAN NOT BE FINISHED AT A SINGLE MEETING OF THE BOARD?

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

44. IS A RECORD MADE OF HEARINGS BEFORE THE BOARD?

Yes. The Clerk records all cases before the Board. Any person wishing to record a meeting of the Board 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 Board may obtain a copy of the recordings made at the hearing, neither the Board nor the Planning Department shall have any responsibility to prepare a verbatim transcript of a Board 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).

45. MAY THE BOARD SCHEDULE A SPECIAL MEETING TO TAKE UP A CASE OR COMPLETE ONE?

Yes. If at a regularly scheduled meeting of the Board, it 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 unless the time and date of the special meeting is announced prior to the close of the regular meeting; and in any event, all parties required to be notified must be sent notice of the reconvened hearing in accordance with UDO § 6.01.04. The Board may not schedule a special meeting for which there is an inadequate time to provide the required notice.

PRESENTATION OF A CASE AT THE HEARING.

46. IF I APPEAR BEFORE THE BOARD WHAT IS EXPECTED OF ME?

The Board expects people who appear before it to prepare in advance, and to be truthful and respectful, not only of the Board itself, but of others who might appear on the matter, even if they have a different view. Most of the time the Board cannot simply consider whether people who appear before it support or oppose a particular application or decision; rather, Board members must consider the facts of the case and apply the criteria of the UDO that relate to the matter before the Board. (See §§ 77-83.)

If you are the person with the burden of proof before the Board (see § 49) such as an applicant for a special use permit or a person seeking a variance, you are expected to present the Board with sufficient information to allow it to decide all of the issues it must consider in your particular type of case. You can do this through your own testimony, documents and exhibits, and the testimony of others. The only way a person can understand what information is essential to his or her case is by reviewing the relevant sections of the UDO. In every case the Planning Department prepares an analysis of what it thinks the issues are in the case and that report may summarize all or some of the facts as staff sees them. This is called the "staff report." (See § 18) It is your responsibility to familiarize yourself with the staff report before the hearing so that you can tell the Board what parts of the report with which you agree and what parts, if any, with which you disagree. The staff report is not intended to present everything that you might want to have the Board consider, and it may not address each of the issues that the Board must decide to issue a decision in your favor. It may not present the facts or law in your case in the same way you see them. If you rely on the staff report to meet your burden of proof without having closely reviewed it, you do so at your own risk as it may be inadequate to fully prove your case.

If you appear in front of the Board as a "witness" because you have an interest in the matter before the Board or have information concerning a matter which is before the Board, you are expected to testify truthfully and to stick to the subject about which you are testifying. The Board appreciates it if people who appear are as concise as possible, but you should not leave important information about a matter out of your presentation because you are trying to save time.

47. WHO HAS THE BURDEN OF PROOF IN A CASE BEFORE THE BOARD?

The burden of presenting sufficient evidence to allow the Board to decide an issue is always upon the party or parties urging a particular position. However, at a minimum, the applicant or appellant must provide competent evidence which addresses every material issue. (See §§ 55-57, 65-66.) Each of the matters which must be proven for the Board to grant the relief in the type of case before it is considered a "material issue." Similarly, the burden of persuasion is on the applicant, appellant, or other party or person advocating a particular position.

48. WHAT ARE THE RULES FOR DECORUM OF PARTICIPANTS AND OBSERVERS AT HEARINGS?

Yes. Whether they are parties, attorneys, representatives, witnesses or simply spectators to a hearing before the Board, all persons are expected to conduct themselves in an appropriate and respectful manner while in the hearing chambers of the Board. Profanity, arguments between witnesses, arguments between attorneys and witnesses or other attorneys, arguments among spectators, noise

which interferes with the conduct of the hearing, and the like, shall not be tolerated, and that or any other such behavior seeking to disturb or which does disturb the presentation by a party or witness or the deliberations or vote of the Board may result, by order of the Chair, in the removal of the person(s) causing or engaging in such action, interference or disturbance from the hearing chamber.

49. DETERMINATION OF PRELIMINARY MATTERS; JURISDICTIONAL OBJECTIONS

Objections regarding jurisdictional, including, but not limited to, the timeliness of an appeal or the standing of a party, may be made to the Board. The Board Chair shall rule on any objections, and the Chair's rulings may be appealed to the full Board. The Board should address any other preliminary matters that might moot 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 the participation in the case by a Board member

50. WHAT IS THE ORDER OF A HEARING ON AN APPLICATION FOR A VARIANCE, SPECIAL USE PERMIT OR MAJOR SUBDIVISION APPROVAL?

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

A. Applicant is given an opportunity to object to any materials which were provided to the Board 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 §§ 55-66.

E. Town presents evidence pertinent to the application. However, at any time before, during or after the presentation of evidence by the Applicant, a Board member, with permission from the Chair or full Board, may request the testimony of Planning Department staff as to any matter relevant to the case, including their interpretation of provisions in the UDO, Boone 2030 Plan, or Comprehensive Plan.

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. Board deliberation begins. (See §§ 71-74.)

N. If, in the course of its deliberations, the Board entertains additional testimony or other evidence from any party, the Board shall allow all other parties and witness to address the particular subject area as to which the additional evidence was allowed.

51. WHAT IS THE ORDER OF A HEARING ON AN APPEAL OF AN ADMINISTRATIVE DECISION?

Preliminary matters: The Board first shall hear and determine any preliminary matters, such as a request to intervene, request for a continuance, a determination whether a modification to an application requires that it be delayed, or an objection to the participation in the case by a Board member.

Hearing procedures: After the disposition of any preliminary matters, cases on appeals from Administrative decisions shall proceed in the following order, although if the parties agree or there is no objection, deviations in this order shall not impair the decision in the case:

A. Appellant is given an opportunity to object to any materials which were provided to the Board in advance of the hearing;

B. Appellant is given the opportunity to make an opening statement;

C. Parties other than the Appellant are given an opportunity to make an opening statement;

D. Town presents evidence to explain/support the Administrative decision.

E. Appellant presents the evidence in support of the appeal. For an explanation of the types, forms and admission of acceptable evidence, see §§ 57-64.

F. Other parties present evidence pertinent to the appeal.

G. Non-party witnesses testify and offer evidence pertinent to appeal.

H. Town is given opportunity to present rebuttal evidence.

I. Appellant is given opportunity to present rebuttal evidence.

J. Appellant 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.

K. In the order they have qualified as intervenors, Parties other than the Town present their closing summary and argument.

L. Town presents its closing summary and argument.

M. If Appellant has deferred presentation, Appellant presents its closing summary and argument.

N. Chair closes evidentiary portion of hearing, and Board deliberation begins. (See §§ 71-74)

52. WHAT DOES AN APPLICANT HAVE TO PROVE TO BE GRANTED A VARIANCE?

The burden of proof in every hearing before the Board on a variance request is upon the applicant. A variance request must be specific to the lot and to the development for which it is requested and neither the nonconforming use of lands, buildings, or structures in the same zoning district; nor the permitted use of lands, buildings or structures in other zoning districts are grounds for the granting of a variance. Financial hardship alone is not a basis for a variance, and the fact that a lot may be used for greater profit if the variance is granted is not grounds for the granting of a variance. A variance cannot be granted to allow property to be used for something which the UDO does not allow in the zoning district the lot is located, and a variance cannot enlarge or expand existing nonconformities. In order to obtain a variance from the Board, each applicant for a variance must make a presentation which addresses each of the requirements of the UDO for a variance and must convince the Board that he or she is entitled to the variance. A failure to address each of the requirements may result in the dismissal of the case. In order to grant a variance, the Board must conclude that:

A. Unnecessary hardship would result from the strict application of the UDO (however, it is not necessary to demonstrate that in the absence of the variance no reasonable use can be made of the property); and

B. The hardship results from conditions which are peculiar to the property such as location, size or topography (hardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the neighborhood or the general public may not be the basis for granting a variance); and

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

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

53. WHAT DOES AN APPLICANT HAVE TO PROVE IN ORDER TO BE GRANTED A SPECIAL USE PERMIT?

The burden of proof in every hearing before the Board on an application for a special use permit is upon the applicant. In order to obtain a special use permit from the Board, each applicant for a special use permit must make a presentation which addresses each of the requirements of the UDO for a special use permit and must convince the Board that he or she is entitled to the permit. An applicant generally cannot meet its burden by simply endorsing the staff report as its presentation. (See § 18.) An applicant for a special use permit must prove all of the following:

A. The application is complete (Note that staff may have identified in the staff report areas in which they think the application is deficient or does not comply with the requirements of the UDO. An applicant is expected to address each such area to convince the Board the application is not deficient and does comply with the UDO, and a failure to do so may result in the dismissal of the case.

B. If completed as proposed, the development:

i. Will comply with the requirements of the UDO;

ii. Will not materially endanger the public health or safety;

iii. Will not substantially injure the value of adjoining or abutting property;

iv. Will be in harmony with the area in which it is to be located; and

v. Will be in general conformity with the Town's Comprehensive Plan, Boone 2030 Land Use Plan, and all other relevant plans officially adopted by the Town.

C. When the property to be developed triggers a transitional zone analysis: Because of the variable topography and characteristics of particular tracts of land within the Town's zoning jurisdiction, the solutions incorporated into the development plan by the applicant must be tailored to specifically address the characteristics of the particular location in relation to each protected district triggering a transitional zone analysis. In cases involving transitional zones, the applicant must show, by clear and convincing evidence, that the planned development will effectively and to the greatest degree reasonably possible mitigate the impacts of the proposed development upon the protected district, specifically offering the applicant's plans to mitigate those impacts. Only if an applicant can demonstrate by clear and convincing evidence that the normal requirements of the ordinance are themselves sufficient to protect the protected district may the application be approved without additional measures being incorporated into the site specific development plan. The applicant must address:

i. Noise impacts;

ii. Light impacts; and

iii. Any other predictable negative effect, including negative visual effects, negative traffic effects, and negative health effects.

54. WHAT DOES AN APPLICANT HAVE TO PROVE IN ORDER FOR A MAJOR SUBDIVISION TO BE APPROVED?

An applicant must show the same things to have a major subdivision approved as are required to obtain a special use permit. (See § 52.)

55. WHAT DOES AN APPELLANT HAVE TO PROVE IN ORDER FOR THE BOARD TO REVERSE OR MODIFY AN ADMINISTRATIVE DECISION?

In order for the Board to reverse or modify a decision by the Administrator, an appellant of an Administrative decision should present facts sufficient to establish that its rights were prejudiced because the Administrator's findings, inferences, conclusions, or decisions, in relation to the decision from which the appeal is taken, were:

A. In violation of constitutional provisions, including those protecting procedural due process rights; or

B. In excess of the statutory authority conferred upon the Town by ordinance; or

C. Inconsistent with applicable procedures specified by statute or ordinance; or

D. Affected by other error of law; or

E. Unsupported by substantial competent evidence in view of the entire record; or

F. Arbitrary or capricious.

EVIDENCE

56. WHAT EVIDENCE CAN THE BOARD RELY ON IN MAKING A DECISION, GRANTING A PERMIT OR GRANTING A VARIANCE?

The Board is required to base its decisions on "competent evidence." The term "competent evidence," does not prevent the Board 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 Board to rely upon it. It can rely on testimony of witnesses and documentary evidence. (See §§ 55-64). Evidence may even include hearsay evidence, such as an affidavit or letter written by a person who is not present. (See § 59.) Board members can also rely upon knowledge of the property which is the subject of the case 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 § 64.)

The Board can generally only rely on opinion evidence when it is offered by an expert if it pertains to any of the following:

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. (See § 57(D).)

57. 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. Statements by attorneys based upon facts not offered into evidence through the sworn testimony of a witness, properly authenticated documentary evidence, or other competent evidence shall have no weight and shall not be the basis for a Board's decision based upon the position urged by the attorney.

58. 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 Board must be offered under oath or affirmation administered by the Chair, another member acting as Chair, or the Board Clerk.

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 Board 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 Board 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. (See § 57(D)). 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 Board 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 Board 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 Board 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 Board 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 Board 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 Board 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 Chair shall render a determination as to whether the person has qualified as an expert. The Chair's determination can be overridden by the Board, by majority vote upon proper motion and second. A person who is offered as an expert to the Board may not provide opinion evidence until the Chair or the Board 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 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 Board may propose that the Board 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 Board may overrule the Chair's recommendation by motion, second and majority vote. If time limits are proposed by a Board of Adjustment member, such proposal shall be in the form of a motion and second, and shall be adopted by majority vote. The Board 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 Board in making the findings and decisions regarding the matter before it. However, if the applicant or appellant has chosen to appear on the "short agenda," the overall time of the presentation by the applicant or appellant will be limited to fifteen minutes. (See § 37)

G. WHO CAN CROSS-EXAMINE A WITNESS?

Each person who testifies before the Board 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. If the witness was not called by a party, questioning will begin with the Board itself, followed by the Town, any intervening party, and the applicant. If the witness was called by the applicant, after questioning by the Board, 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 Board, 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 Board, 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 Board have the right, when recognized by the Chair, to question any witness or party appearing before the Board. 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.

59. WHAT DOCUMENTS ARE ACCEPTABLE FOR PRESENTATION?

Any evidence which might assist the Board 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 Board, but there must be some indication of a document's reliability for it to be given any weight. (See § 59.) Any documentary evidence relied upon by the Board in making its decision or in deciding an issue must at a minimum be authenticated and relevant to the factual or legal issues which are under consideration.

60. CAN THE BOARD 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 which promotes its reliability, or if it contains sufficient indications of authenticity to assure the Board 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 Board. In general, the testimony of a person appearing before the Board, 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 Board 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.

61. 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: (1) certified as authentic, by signature, title and seal of a person who is the custodian of the record; or (2) 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.

62. HOW ARE DOCUMENTS SUBMITTED?

Once a document has been identified and authenticated, a witness or party wishing to offer it to the Board for its consideration must provide a copy to every other party for review, present it to the Clerk to mark the document with an identifying letter or number, and then hand it to the Board Chair. Unless objected to by a party, or rejected by a majority vote of the Board after motion and second to that effect, any such document shall be accepted into evidence. If any party objects to a document being accepted into evidence, the Board 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 documentary evidence submitted by a party or witness to a hearing shall be retained by the Board Clerk as part of the official record of the case.

63. HOW MANY COPIES OF A PROPOSED EXHIBIT SHOULD BE SUBMITTED?

Although the Board will accept a single copy of a proposed exhibit, it is strongly recommended that the person who wishes to submit a document into evidence bring enough copies for each of the five Board members, the Clerk, and each party to have his or her own copy.

64. CAN PROPOSED EVIDENCE WHICH HAS BEEN REFUSED BE PRESERVED IN THE RECORD?

Yes. If the Board by its own action, or by sustaining an objection to testimony or a document which is offered to it for consideration refuses to consider evidence which has been offered to it (see §§ 65-68), the party or witness offering the evidence can make an "offer of proof." That requires the witness or party announcing, "I wish to make an offer of proof" and then proceeding with the testimony which has been excluded or providing the excluded document to the Clerk, 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 Board in its deliberations or decision.

65. WHEN CAN BOARD MEMBERS RELY UPON THEIR OWN KNOWLEDGE OF THE SUBJECT PROPERTY?

If a Board member, while inspecting the property in question, has either noted some matter or feature which may influence the Board member's decision in the case, or, while inspecting the full departmental file in the case, has noted some document which is not included in the staff report, the

Board member can utilize such information under the following circumstances: While the evidentiary hearing is still open, the Board member must note the matter or feature observed or document noted. In the case of a document, the Planning Department shall produce the document for review by all parties and Board members. The Board shall allow all parties to reasonably inspect the document before it is inspected by other Board members, and each party shall be given an opportunity to offer evidence related to the document. When a Board 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

66. 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 Board, (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 which do not meet the requirements of § 59.

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 § 59; or (3) the evidence is unacceptable hearsay or contains hearsay statements which do not meet the requirement of § 59.

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.

67. WHAT EVIDENCE IS "RELEVANT"?

Relevant evidence is information which relates to a factual or legal issue which the Board may or must decide in a particular case, including issues of credibility. A documentary piece of evidence which 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 Board to determine any issue which the Board needs to decide.

68. 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.

69. HOW ARE OBJECTIONS DECIDED?

The Board Chair shall rule on any objections, and the Chair's rulings may be appealed to the full Board. Upon appeal to the Board, 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 Board, the objection will be overruled and the evidence considered by the Board. 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 Board. (See § 63.)

WEIGHING THE EVIDENCE BY THE BOARD.

70. HOW DOES THE BOARD DECIDE WHAT WEIGHT TO GIVE DOCUMENTS AND TESTIMONY?

In general, as with any court, the Board must weigh evidence which is presented to it. When there is conflicting evidence relating to an issue it must decide, the Board must resolve such conflict. It may also, however, refuse to give any weight to evidence which has been presented to it even when no conflict in the evidence exists. In determining the weight it will give to testimony and documentary evidence, the Board may consider such things as the credibility a witness, based on such things as demeanor; a witness's qualifications or expertise; a witness's ability to observe the conditions about which testimony is offered; the reliability and persuasiveness of documents which are offered for its consideration; and any other factors it discerns will help it in choosing the evidence it finds most persuasive. In general, the testimony of a person appearing before the Board 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 Board 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.

71. CAN THE BOARD MAKE CREDIBILITY DECISIONS?

Yes. In making its decision the Board may explicitly or implicitly make credibility determinations regarding the testimony of any witness or party, and where the Board 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 Board finds more reliable or persuasive, or any other factor it identified as the basis for finding a witness credible or incredible.

72. SHOULD BOARD MEMBERS DISCUSS THEIR VIEW OF A CASE WHILE EVIDENCE IS BEING PRESENTED?

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

THE DECISION

73. HOW DOES THE BOARD DECIDE A CASE?

After the Chair closes the evidentiary portion of a hearing, the Board begins its deliberation. Deliberations may be flexible and involve open discussion of the case among Board members or a process by which the Board 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 Chair or another member of the Board, the Board can also conduct "straw polls" about particular issues or facts before formally adopting findings of fact or conclusions of law. The Board 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 Board 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, Board 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 Board 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 which has been offered in favor of an applicant or appellant. However, there is no formal requirement that each Board 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 Board member raises an issue for which additional testimony is desired, a matter or issue which 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 which 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. Following the closing of the reopened hearing, the Board shall resume deliberations.

74. CAN THE BOARD 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 Board may recess a case between the close of the evidentiary hearing and the decision by the Board until (but not later than) the next scheduled meeting of the Board, to allow Board members an opportunity to review, but not discuss, the evidence which has been submitted to it.

75. 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 which must be decided by the Board in the particular type of case, at the conclusion of the evidentiary hearing, the Board can 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. For example, if an applicant for a variance fails to present any evidence at all on the issue as to whether the hardship resulted from actions taken by the applicant or the property owner, one of the matters which the Board must decide in order to grant a variance, the Board could adopt a motion to dismiss the application without deciding every other issue involved in the variance. If such dismissal is adopted in connection with an appeal of a staff decision, which ordinarily should not occur, the appellant may only file a new appeal if the time period for appealing the decision in question has not lapsed.

76. 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."

77. WHAT IS A "FINDING OF FACT"?

A finding of fact is a statement of one or more facts which the Board decides is pertinent to the decisions it must make to decide the issues involved in the case and which is adopted by the Board. Findings of fact should be based on information presented at a hearing. Generally, the Board should only adopt findings of fact which relate to the conclusions of law required in a particular case. See §§ 51-54. For example, if the Board is considering an application for a variance, one of the things it has to determine is whether an unnecessary hardship would result from the strict application of the UDO. A finding of fact relating to that decision should explain why specifically the applicant would have difficulty complying with the UDO, such as, "There is a creek which cuts through the middle of the property." The Board must also make a finding of fact to resolve any conflicts in the evidence presented to it if they relate 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 Board must make a finding as to which is correct.

78. HOW DOES THE BOARD ADOPT FINDINGS OF FACT?

Upon its deliberation following presentation of the case, the Board 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 Board members, and resolve by majority vote as necessary any contested issues of fact. Facts should be articulated in conclusory form as to what the Board member believes has been established by the evidence, rather than a recitation of a party's or witness' contentions. For example, an appropriate 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 §§ 57(C) and (D)), a finding of fact may be based upon that opinion. For example, the Board 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 who testified to matters which relate to those

issues. (See § 70.) 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, they should be specifically identified.

79. 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 Board. (See §§ 51-54.) For example, if the Board is considering an application for a variance, one of the things it must decide is whether competent evidence presented to the Board establishes that unnecessary hardship would result from the strict application of the UDO. That decision is a "conclusion of law." 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, Board members should articulate the findings of fact upon which each conclusion of law is based.

80. WHAT VOTE IS NEEDED FOR A VARIANCE TO BE GRANTED?

A decision by the Board to grant a variance requires an affirmative vote of four members of the Board hearing the case as to every conclusion of law that is required to establish entitlement to the variance.

81. WHAT VOTE IS NEEDED FOR A SPECIAL USE PERMIT OR MAJOR SUBDIVISION TO BE GRANTED OR APPROVED?

All decisions by the Board to grant a special use permit or approve a major subdivision require a majority vote on each legal conclusion which must be made, including the motion to actually issue the permit or approve the subdivision.

82. WHAT VOTE IS NEEDED TO REVERSE OR MODIFY A STAFF DECISION?

All decisions by the Board to reverse or modify a decision by a staff member require a majority vote in favor of reversal or modification.

83. CAN THE BOARD IMPOSE CONDITIONS ON AN APPROVAL?

Yes. If the Board approves a variance, a special use permit or a major subdivision, the Board can attach conditions to the approval, with or without the consent of the applicant, which the Board concludes are reasonably related to an impact or impacts of some feature of the application which requires additional measures beyond the normal requirements of the UDO. Conditions which simply reiterate requirements of the UDO are unnecessary and are disfavored. There are limits to the conditions which can be adopted as this in an area under the UDO, the North Carolina General Statutes and case law. If off-site improvements are considered by the Board as conditions for approval, the Board should generally seek legal guidance before requiring off-site improvements as conditions.

84. IF A VOTE IS TAKEN THAT HAS THE EFFECT OF ENDING THE CASE, CAN THE BOARD VOTE ON THE OTHER ISSUES WHICH WOULD BE DECIDED IF AN APPLICATION WERE APPROVED?

Yes. When requested by a party, the Chair, or any member of the Board, upon motion, second and majority vote, the Board may take provisional votes as to any and all issues which have not been reached in the Board's deliberation, even though an application or permit has been denied upon a preliminary vote which prohibits the Board from granting it. For example, if the first question in an application for a variance is decided against the applicant, the Board, using this procedure, can

nevertheless take provisional votes as to each other issue in the case which would have to have been decided if the negative vote had not occurred. 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 Board's decision.

85. WHAT INFORMATION SHOULD BE INCLUDED IN A MOTION?

A motion by a Board 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.

86. CAN BOARD MEMBERS DISCUSS A CASE ONCE THE DECISION HAS BEEN MADE?

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

87. IF I AM GRANTED A SPECIAL USE PERMIT, SPECIAL USE PERMIT MODIFICATION OR MAJOR SUBDIVISION APPROVAL, CAN I IMMEDIATELY START THE APPROVED DEVELOPMENT?

No. Once a special use permit or subdivision approval has been granted by the Board, an applicant must still submit applications for and must obtain all appropriate zoning, building and other relevant permits from the Planning Department.