

# TOWN OF SMITHFIELD HISTORIC PROPERTIES AGENDA PACKET



**Chairman:** **Dr. Oliver Johnson**  
**Vice Chairman:** **Art Andrews**

## **Members:**

Jan Branch  
Paul Worley  
Rachel Ayers

Mary Nell Ferguson  
Deanna Simmons

Steve Wensman, AICP, ALA, Planning Director  
Julie Edmonds, Administrative Assistant  
Mark Helmer, AICP, CZO, Senior Planner

*Meeting Date:* *Thursday, January 17, 2019*  
*Meeting Time:* *3:00 p.m.*  
*Meeting Place:* *Town Hall Conference Room*

**AGENDA  
HISTORIC PROPERTIES COMMISSION  
REGULAR MEETING  
JANUARY 17, 2019  
MEETING TIME: 3:00 PM  
TOWN HALL CONFERENCE ROOM**

**Call to Order.**

**Approval of the minutes from November 8<sup>th</sup>, 2018**

**Swearing in of Rachel Ayers**

**Public Hearing**

**None**

**New Business**

**Discussion on goal and objectives of the HPC.**

**Old Business**

**Discussion on Town of Smithfield Code of Ordinances, Article III.**

**Discussion on Proclamation of Pine Acres Subdivision.**

**Discussion on:**

- **Historic Preservation Basics**
- **National Registry Vs Local Designation**
- **Who gets to speak at a hearing on quasi-judicial matters**
- **Receiving Evidence at Evidentiary Hearings**

**Adjournment**

**DRAFT**  
**Smithfield Historic Properties Minutes**  
**Thursday, November 8, 2018**  
**3:00 P.M., Town Hall, Conference Room**

**Members Present:**

Chairman-Oliver Johnson  
Vice-Chairman Art Andrews  
Jan Branch  
Mary Nell Ferguson  
Paul Worley

**Members Absent:**

Deanna Simmons

**Staff Present:**

Stephen Wensman, Planning Director  
Mark Helmer, Senior Planner  
Julie Edmonds, Administrative Support Specialist

**Staff Absent:**

**Call to Order**

**Approval of the Minutes from April 19, 2018**

Mary Nell Ferguson made a motion to accept the minutes as written, seconded by Art Andrews. Unanimous

**Swearing In of New HPC Members**

Paul Worley was sworn in as a new member by Chairman, Oliver Johnson and Oliver Johnson was sworn in as Chairman by Art Andrews.

**Acceptance of Nomination of Chairman by Dr. Oliver Johnson**

Oliver Johnson accepted nomination as Chairman.

**Approval of 2019 Meeting Schedule**

Mr. Johnson asked the HPC commission if they wanted to have quarterly meetings or meet once a year at a minimum and when necessary at other times. Mr. Wensman said he feels it is important to meet at least once year to maintain Chairman and board positions. He isn't sure there is enough business to meet quarterly unless the board becomes more active in projects. Paul Worley made a motion to accept the 2019 Meeting Schedule, seconded by Jan Branch. Unanimous

**Approval to the Draft UDO Amendment**

Paul Worley made a motion to approve the draft UDO amendment, seconded by Mary Nell Ferguson. Unanimous

**New Business:**

Mark Helmer stated that Rachel Ayers is requesting the Town of Smithfield Town Council issue a proclamation recognizing Pine Acres Subdivision for its rich heritage, history and cultural significance. Ms. Ayers submitted a letter to the residence of Pine

Acres as well as the Town of Smithfield Mayor, Andy Moore. Mr. Helmer asked Ms. Ayers if she would like to speak about her request.

Ms. Ayers stated that Pine Acres was the first subdivision for black people to buy land in. Johnston County Board of Education also helped with that, black teachers could buy in the subdivision. The black schools built the first seven or eight houses from Johnston County Training School, which was Johnston Central High School at the time. There are 28 educators that live on Pine Street; one is 92, 96 and another 98 years old that are still living. She feels they should have some recognition. John and Elizabeth Wells sold this land to the educators.

Mr. Johnson said he really appreciated Ms. Ayers bringing this to everyone's attention. He mentioned his wife, who is a lifetime Johnston County resident and has lived in Pine Acres for many years herself, was also an educator and was unaware of the partnership between Johnston County Schools and Pine Acres Subdivision.

Mr. Johnson said the HPC board needs to make a recommendation to the Town Council to adopt a proclamation recognizing the rich history and significance of Pine Acres Subdivision and especially Pine and Oak Streets. He requested a motion from someone to advance this recommendation.

Mrs. Ferguson asked if there was some document at the Heritage Center explaining what Ms. Ayers has shared with everyone and the history of Pine Acres Subdivision.

Ms. Ayers said she was given some documents by Todd Johnson, the Heritage Center Director. He didn't have much to offer but he said he would love to have more information.

Ms. Branch asked the HPC if as a legal Town entity if they needed documented proof.

Mr. Worley stated he thinks it would be prudent to have a body of work and information that supports it.

Mrs. Ferguson said she thinks it is a wonderful idea because she never knew why all her teacher friends live there through the years and now she knows. It makes perfectly good sense.

Mr. Worley asked if this request has to go before the National Historic Trust.

Mr. Helmer said no, it wouldn't be the same level of reporting as needed in a district or historic site.

Mrs. Ferguson said as a Heritage Center Commission member herself, she thinks as long as they have a copy of the documents Ms. Ayers has, then that would be sufficient. This way the documents are contained in one place.

Mr. Andrews stated he would have thought the Smithfield Herald would have covered information on this. He asked Ms. Ayers if she knew when the first house was built.

Ms. Ayers said the first house was built in 1953.

Mr. Andrews said it would take time, but possibly searching the Smithfield Herald would result in pictures or a story about the subdivision.

Mr. Worley stated he liked this idea. He asked what authority the Town would be doing this if approved.

Mr. Helmer said it would basically recognize the neighborhood. It may help support any future endeavors such as an overlay district for example.

Mr. Worley said so we're going to approve the drafting of a resolution we will review.

Mr. Helmer said yes, staff will draft the proclamation, bring it back to you or forward it straight to Town Council with the Town Managers blessing if that is okay with the HPC.

Mr. Worley said he thinks it needs to be called an area of interest. He asked if there wouldn't be a sign or notation for it.

Mr. Johnson said something like that might be necessary later if the board wanted to help further along the National recognition of Pine Acres.

Mr. Worley made a motion to ask the Planning Department staff to draft an appropriate resolution to bring before the Town Council that recognizes the Historic significance of the Pine Acres Subdivision, seconded by Mary Nell Ferguson. Unanimous

Ms. Ferguson asked later on if a sign can be issued saying what it is and the Town of Smithfield agrees on the information the signs provides.

Mr. Johnson said let's add the sign issue to the January meeting. He also asked if Ms. Ayers would come back to the next meeting and give an update on where she is with this.

Mr. Johnson suggested Ms. Ayers contact the Register of Deeds for information on Pine Acres. He thanked her for coming and sharing the information she has.

### **Town of Smithfield Code of Ordinances, Article III**

Mr. Wensman said he sent a draft around but didn't receive much feedback on it. Mr. Johnson provided some feedback, so we went back to the old language and changed the name from Historic Properties Commission to Historic Preservation Commission. Another change we would like to add is the Table of Uses. People will make an application for work on a historic property or structure that is in the jurisdiction of this board. There are various levels of work, major projects would be approved by the Historic Preservation Commission and minor work would be staff approved. There is a

list that needs to be adopted and inserted into the ordinance to be effective. There is nothing in the HPC Design Guidelines, which is not code it's just a Design Guideline. Something needs to be inserted into Article III, in doing so it will give this board authority to review and staff authority to issue permits for that type of work.

Mr. Worley asked Mr. Helmer if he was following examples of other towns. He said yes, first of all this board only regulates the exterior of a building. Usually anything that involves wholesale replacement will trigger board approval. If someone wanted to replace windows, siding or roof material that alters the appearance of the outside structure that will usually trigger full review of the board. The applicant can submit samples of the material they are going to use and give you the opportunity to review. Minor work would be replacing with a lighter material.

Mr. Wensman said so do we want to make these changes and bring back to this board for recommendation to the Planning Board.

Ms. Branch asked when this is submitted to the Town will it be included in the Design Guidelines.

Mr. Wensman said they will be referenced in the ordinance.

Ms. Branch asked if that will make them enforceable.

Mr. Helmer said yes, we are moving this article over to the UDO and making the necessary changes in the process.

Ms. Ferguson asked if she bought a downtown property and wanted to update the outside of it would she come to the Town of Smithfield to get approval to do that work.

Mr. Wensman said to get a building permit you have to come to the Town of Smithfield for a zoning permit. We see that it is in a Historic District, and then we let them know they need Historic Preservation approval, unless it is administrative and Mark will take a look at it. At that point when you guys issue a recommendation we can issue a zoning permit with whatever conditions are required. Then they can go to Johnston County and get their building permit.

Mr. Andrews asked how a structure is designated as historical.

Mr. Helmer said if the structure is 50 years or older.

Mr. Andrews said how about if a structure is torn down, a permit would be required to tear it down.

Mr. Helmer said as far as demolishing a historic structure in an existing historic overlay district locally, this board has the authority to slow that down by 1 year.

Mr. Worley said he was looking at the National Registry and there were two areas for Smithfield.

Mr. Helmer said you have North Smithfield and Brooklyn. There are three historic sites. The Hastings House, Downtown Overlay and possibly the Bingham House he will look into it. Mr. Wensman said they would insert the Table of Use chart in the ordinance and email the board the whole ordinance.

**Old Business**

None

Jan Branch made a motion to adjourn, seconded by Paul Worley.

The meeting concluded at 5:00 pm.

Submitted this 9th day of November, 2018.

A handwritten signature in black ink that reads "Julie Edmonds". The signature is written in a cursive, flowing style.

Julie Edmonds  
Administrative Support Specialist  
Planning Department

**DRAFT ORDINANCE # ZA-18-03  
AN ORDINANCE TO AMEND ARTICLE 3  
OF THE TOWN OF SMITHFIELD  
UNIFIED DEVELOPMENT ORDINANCE  
TO INCLUDE THE HISTORIC PRESERVATION COMMISSION.**

**WHEREAS**, the Smithfield Town Council wishes to amend certain provisions in the Unified Development Ordinance by making changes to the Town of Smithfield Unified Development Ordinance to incorporate the Town of Smithfield Code of Ordinances, Chapter 15, Planning, Article III, Historic Properties Commission into the Unified Development Ordinance, to change the Board of Adjustments voting procedures to reflect statutory requirements , amending the UDO Administrator’s duties, and other minor amendments.

**WHEREAS**, it is the objective of the Smithfield Town Council to have the UDO promote regulatory efficiency and consistency and the health, safety, and general welfare of the community;

**NOW, THEREFORE**, be it ordained that the following Articles are amended to make the following changes set forth in the deletions (strikethroughs) and additions (double underlining) below:

**Part 1**

[Revise Article 3, ADMINISTRATIVE / LEGISLATIVE / QUASI-JUDICIAL AUTHORITY, to amend Section 3.1 as it pertains to UDO Administrator’s duties.]

**3.1.2.5.** Review and approve zoning permit applications, ~~minor~~ site plans, minor subdivisions, and engineering drawings, ~~and final plats.~~

...

**3.1.2.7.** Provide nonconformity determinations, ~~including expansions of nonconforming uses and structures.~~

**And,**

[Revise Article 3, ADMINISTRATIVE / LEGISLATIVE / QUASI-JUDICIAL AUTHORITY, to amend Section 3.2 as it pertains to the Planning Board.]

**3.3.3.2. Organization, Rules, Meetings and Records.** A Chair and Vice-Chair shall be nominated from among the board membership and shall be appointed by majority vote of the board. Chair and Vice-Chair term shall be for two (2) years. Upon completion of a two-year term, the board shall make nominations and appoint new officers or reappoint existing officers. The ~~Town Building Inspector and~~ UDO Administrator shall serve as Secretary and advisor to the Planning Board and shall be responsible for keeping the record of minutes of the Planning Board. The Board shall adopt rules for transaction of its business subject to review and approval by the Town Council and shall keep a record of its member attendance and of its resolutions, discussions, findings and recommendations, which record shall be a public record. Except as otherwise stated in Section 3.3.3.4

below, the Board shall hold at least one meeting monthly, and all of its meetings shall be open to the public. There shall be a quorum of four (4) members for the purpose of taking any official motion required by this Ordinance.

...

**3.3.4.11.** To review and make recommendations to the Town Council on major site plans and major subdivisions in accordance with Section 5.6.

**And,**

[Revise Article 3, ADMINISTRATIVE / LEGISLATIVE / QUASI-JUDICIAL AUTHORITY, to amend Section 3.2 as it pertains to the Board of Adjustments.]

**3.4.2.1.** The Zoning Board of Adjustment shall be governed by the terms of the General Statutes of North Carolina (160A - 388).

...

**3.4.2.4.1.** The concurring vote equal to four-fifths of the full membership of the board present at a meeting and not excused from voting (a quorum being present), shall be necessary to grant any variance. All other actions of the board, including decisions relating to special use permits, shall be taken by majority vote of those present and not excused from voting, a quorum being present. A quorum shall consist of the number of members equal to four-fifths of the regular board membership (excluding vacant seats).

...

**3.4.2.5.3. Secretary.** The Zoning UDO Administrator shall serve as Secretary.

**And,**

[Revise Article 3, ADMINISTRATIVE / LEGISLATIVE / QUASI-JUDICIAL AUTHORITY, to create a section titled Section 3.5, Historic Preservation Commission. All text is carried over from the Town of Smithfield Code of Ordinances, Chapter 15, Planning, Article III. Historic Properties Commission with the exception of the commission's formal name to be changed to Historic Preservation Commission and add references to the Historic Preservation Commission throughout the Article as needed.]

**3.1.2.9.** Maintain the public records of the Planning Board, and Board of Adjustment and Historic Preservation Commission.

...

## **SECTION 3.2 CONFLICTS OF INTEREST.**

Members of the Town Council, Planning Board, **and** Board of Adjustment **and Historic Preservation Commission**, must act in the public interest and not to advance their own financial interests. A member of an elected board, planning board, **or** board of adjustment **or Historic Preservation Commission**, may not vote on a UDO action where there is a potential financial conflict of interest. A board or council member with a financial interest in the outcome of the decision may not participate in making rezonings and other legislative zoning decisions. With quasi-judicial zoning decisions, board members may not participate in a matter involving someone with whom they have a close family or business relationship, nor may they participate if they have a bias (defined as fixed opinion that is not susceptible to change upon hearing the facts at the hearing). When a member is disqualified for a conflict of interest, that member must not participate in the hearing in any way, neither asking questions, nor debating, nor voting on the case. If an objection is raised to a member's participation or the member states a conflict of interest, the remaining members shall by majority vote to decide if the member is excused from participation.

...

**3.3.4.11.** To review and make recommendations to the Town Council on **major site plans** **and** major subdivisions in accordance with Section 5.6.

...

**3.4.2.1.** The **Zoning** Board of Adjustment shall be governed by the terms of the General Statutes of North Carolina (160A - 388).

...

**3.4.2.4.1.** The concurring vote equal to four-fifths of the **full membership** of the board **present at a meeting** and not excused from voting (a quorum being present), shall be necessary to grant any variance. All other actions of the board, including decisions relating to special use permits, shall be taken by majority vote of those present and not excused from voting, a quorum being present. A quorum shall consist of the number of members equal to four-fifths of the regular board membership (excluding vacant seats).

...

## **SECTION 3.5 HISTORIC PRESERVATION COMMISSION.**

**3.5.1. Intent.** The purpose of this district is to promote and provide for land use activities which will reflect and preserve the heritage of the district through the cultural, educational, architectural and economic elements of the district.

**3.5.2. Commission Designated.** The State of North Carolina authorizes cities to safeguard the heritage of the town by preserving any historic site therein that embodies important elements of its cultural, social, economic, political, archaeological or architectural history and to promote the use and conservation of such site for the education, pleasure and enrichment of the residents of the town, county, and state as a whole. Pursuant to G.S. chapter 160A, article 19, part 3C, and the provisions of this chapter, the Town Council of Smithfield designates a commission to be known as the Smithfield Historic Preservation Commission.

### **3.5.3. Qualification of Members; Terms, Appointments, and General Duties.**

**3.5.3.1.** Effective May 3, 2005, the commission shall consist of seven (7) members appointed by the Town Council. All members shall reside within the Town limits. In addition, all members shall have demonstrated special interest, experience or education in history, architecture, archaeology or related fields. The commission shall serve without compensation except that they may be reimbursed for actual expenses incident to the performance of their duties within the limits of any funds available to the commission.

**3.5.3.2.** Commission members shall serve overlapping terms of two (2) years. The terms of office for all initial reappointments after the adoption of this section shall be configured as follows:

**3.5.3.2.1** Three (3) commissioners, with terms to expire on June 30 of odd years.

**3.5.3.2.2.** Four (4) commissioners, with terms to expire on June 30 of even years. Thereafter, all appointments shall be for three-year terms.

**3.5.3.3.** The commission shall select from among its members a chairperson and vice-chairperson who shall be elected annually by the commissioners.

**3.5.3.4.** Upon its first formal meeting, and prior to performing any duties under this article or under G.S. chapter 160A, article 19, part 3C, the commission shall adopt rules of procedure governing the commission's actions which are not governed by this article or the General Statutes. The commission shall also adopt principles and guidelines for new construction, alterations, additions, moving and demolition of designated historic landmarks and properties in historic districts. The guidelines may be amended by the Historic Preservation Commission. All guidelines and amendments shall be subject to approval by the Town Council.

**3.5.4. Attendance at Meetings.** Any member of the commission who misses more than three (3) consecutive regular meetings or more than four (4) meetings in a calendar year shall lose his or her status as a member and shall be replaced or reappointed by the Town Council. The council shall act within sixty (60) days to fill vacancies on the commission. Absence due to sickness, death in the family or other emergencies of like nature shall be recognized as approved absences and shall not affect the member's status on the commission, except that in the event of a long illness or any other such cause for prolonged absence, the member shall be replaced.

**3.5.5. Meetings.** The commission shall establish a meeting time and shall meet at least quarterly and more often as it shall determine and require.

**3.5.6. Minutes.** The commission shall keep permanent minutes of all its meetings, which shall be a public record. The minutes shall record attendance of commission members and the commission's resolutions, findings, recommendations and actions.

**3.5.7. Receipt of Gifts and Authority to Acquire Historic Properties.** The Town Council shall have the right to accept gifts and donations in the name of the town for historic preservation purposes. It is authorized to make appropriations to the commission in any amount necessary for the expenses of the operation of the commission, and acquisition, restoration, preservation, operation, and management of historic buildings, structures, sites, areas, or objects designated as historic landmarks or within designated historic districts, or of land on which such buildings or structures are located, or to which they may be removed.

**3.5.8. Role of Council.** The designation of a historic landmark or district shall be effected through the adoption of an ordinance by the Town Council. No landmark or district shall be recommended for designation unless it is deemed to be of special significance in terms of its historical, prehistoric, architectural or cultural importance, and to possess integrity of design, setting, workmanship, materials, feeling and/or association. The landmark or district must lie within the planning and zoning jurisdiction of the town.

**3.5.8. Overlay District Established; Boundaries; Permitted Uses.** An overlay district is hereby established to overlap with other zoning districts established by this Code. The boundaries of the historic district are established as indicated on the official zoning map of the town, which is on file for public inspection in the office of the department of planning and development. All uses permitted within zoning districts established by the town, whether by permitted use or by special use, shall be permitted within this overlay district according to procedures established by this section. No historic district or districts shall be designated until:

**3.5.8.1.** An investigation and report describing the significance of the buildings, structures, features, sites or surroundings included in any such proposed district, and a description of the boundaries of such district has been prepared, and

**3.5.8.2.** The department of cultural resources, acting through the state historic preservation officer or his or her designee, shall have made an analysis of and recommendations concerning such report and description of proposed boundaries. Failure of the department to submit its written analysis and recommendations to the Town Council within thirty (30) calendar days after a written request for such analysis has been received by the department of cultural resources shall relieve the municipality of any responsibility for awaiting such analysis, and said council may at any time thereafter take any necessary action to adopt or amend its zoning ordinance.

The Town Council may also, in its discretion, refer the report and the proposed boundaries to any other interested body for its recommendation prior to taking action to amend the zoning ordinance. With respect to any changes in the boundaries of such district subsequent to its initial establishment, or the creation of additional districts within the jurisdiction, the investigative studies and reports required by subsection (1) shall be prepared by the commission and shall be referred to the local planning agency for its review and comment according to procedures set forth in the zoning ordinance. Changes in the boundaries of an initial district or proposal for additional districts shall also be submitted to the department of cultural resources in accordance with the provisions of section 3.5.8.2. Upon receipt of these reports and recommendations, the town may proceed in the same manner as would otherwise be required for the adoption or amendment of any appropriate zoning ordinance provisions.

**3.5.9. Designation of Landmarks.** Upon complying with the landmark designation procedures as set forth in this article, the Town Council may adopt and from time to time amend or repeal an ordinance designation one or more historic landmarks.

**3.5.9.1.** No property shall be recommended for designation as a landmark unless it is deemed and found by the Historic Preservation Commission to be of special significance in terms of its historical, prehistoric, architectural or cultural importance and to possess integrity of design, setting, workmanship, materials, feeling and/or association.

**3.5.9.2.** The ordinance shall describe each property designated in the ordinance, the name or names of the owner or owners of the property, those elements of the property

that are integral to its historical, architectural, or prehistoric value, including the land areas of the property so designated and any other information the Town Council deems necessary. For each building, structure, site, area or object so designated as a historic landmark, the ordinance shall require that the waiting period set forth in G.S. part 3C be observed prior to its demolition. For each designated landmark, the ordinance may also provide for a suitable sign on the property indicating that the property has been so designated. If the owner consents, the sign shall be placed upon the property. If an owner objects, the sign shall be placed on a nearby public right-of-way.

**3.5.10. Required Landmark Designation Procedures.** As a guide for the identification and evaluation of landmarks, the commission shall undertake at the earliest possible time, and consistent with the resources available to it, an inventory of properties of historical, architectural, prehistoric and cultural significance within its jurisdiction. Such inventories and any additions or revisions thereof shall be submitted as expeditiously as possible to the division of archives and history. No ordinance designating an historic building, structure, site, area or object as a landmark nor any amendment thereto may be adopted, nor may any property be accepted or acquired by the commission or the Town Council, until all of the following procedural steps have been taken:

**3.5.10.1.** The Historic Preservation Commission shall prepare and adopt rules of procedure, and prepare and adopt principles and guidelines, not inconsistent with this part [article], for altering, restoring, moving, or demolishing properties designated as landmarks.

**3.5.10.2.** The commission shall make or cause to be made an investigation and report on the historic, architectural, prehistoric, educational or cultural significance of each building, structure, site, area or object proposed for designation or acquisition. Such investigation or report shall be forwarded to the Division of Archives and History, North Carolina Department of Cultural Resources.

**3.5.10.3.** The department of cultural resources, acting through the state historic preservation officer, shall either upon request of the department or at the initiative of the Historic Preservation Commission be given an opportunity to review and comment upon the substance and effect of the designation of any landmark pursuant to this part [article]. Any comments shall be provided in writing. If the department does not submit its comments or recommendation in connection with any designation within thirty (30) days following its receipt of the investigation and report of the commission, the commission and the Town Council shall be relieved of any responsibility to consider such comments.

**3.5.10.4.** The Historic Preservation Commission and the Town Council shall hold a joint public hearing or separate public hearings on the proposed ordinance. Reasonable notice of the time and place thereof shall be given. All meetings of the commission shall be open to the public in accordance with the North Carolina Open Meetings Law.

**3.5.10.5.** Following the joint public hearing or separate public hearings, the Town Council may adopt the ordinance as proposed, adopt the ordinance with any amendments it deems necessary, or reject the proposed ordinance.

**3.5.10.6.** Upon adoption of the ordinance, the owners and occupants of each designated landmark shall be given written notification of such ordinance and all amendments thereto shall be filed by the commission in the office of the register of deeds of the county in which the landmark or landmarks are located, and the copy shall be made available for public inspection at any reasonable time. Each designated landmark shall

be indexed according to the name of the owner of the property in the grantee and grantor indexes in the register of deeds office, and the commission shall pay a reasonable fee for filing and indexing. A second copy of the ordinance and all amendments thereto shall be given the town building inspector. The fact that a building, structure, site, area, or object has been designated a landmark shall be clearly indicated on all tax maps maintained by the town for such period as the designation remains in effect.

3.5.10.7. Upon the adoption of the landmarks ordinance or any amendment thereto, it shall be the duty of the commission to give notice thereof to the tax supervisor of the county in which the property is located. The designation and any recorded restrictions upon the property limiting its use for preservation purposes shall be considered by the tax supervisor appraising it for tax purposes.

**3.5.11. Powers of the Commission.** The commission shall be authorized, within the planning and zoning jurisdiction of the town, to:

3.5.11.1. Undertake an inventory of properties of historical, prehistoric, architectural and/or cultural significance;

3.5.11.2. Recommend to the Town Council structures, buildings, sites, areas or objects to be designated by ordinance as "historic landmarks" and areas to be designated by ordinance as "historic districts;"

3.5.11.3. Acquire by any lawful means the fee or any lesser included interest, including options to purchase, to any such properties designated as landmarks, to hold, manage, preserve, restore and improve the same, and to exchange or dispose of the property by public or private sale, lease or otherwise, subject to covenants or other legally binding restrictions which will secure appropriate rights of public access and promote the preservation of the property;

3.5.11.4. Restore, preserve and operate historic properties;

3.5.11.5. Recommend to the Town Council that designation of any area as a historic district or part thereof, of any building, structure, site, area or object as a historic landmark be revoked or removed;

3.5.11.6. Conduct an educational program with respect to historic landmarks and district within its jurisdiction;

3.5.11.7. Cooperate with the state, federal and local government in pursuance of the purpose of this article; to offer or request assistance, aid, guidance or advice concerning matters under its purview or of mutual interest. The Town Council, or the commission when authorized by the council, may contract with the state or the United States of America, or any agency of either, or with any other organization provided the terms are not inconsistent with state or federal law;

3.5.11.7. Enter, solely in performance of its official duties and only at reasonable times, upon private lands for examination or survey thereof. However, no member, employee, or agent of the commission may enter any private building or structure without express consent of the owner or occupant thereof;

3.5.11.8. Prepare and recommend the official adoption of a preservation element as part of the town's comprehensive plan;

3.5.11.9. Review and act upon proposals for alterations, demolition, or new construction

within historic districts, or for the alteration or demolition of designated landmarks pursuant to this section;

3.5.12.10 Negotiate at any time with the owner of a building, structure, site, area or object for its acquisition or its preservation when such action is reasonable, necessary or appropriate; and

3.5.11.11. Approve all design plans and sketches so insure that they meet the guidelines of the Historic Preservation Commission as established by the Smithfield Town Council.

**3.5.12. Certificate of Appropriateness Required.** From and after September 6, 2005, no exterior architectural features of any building or structure shall be altered, restored, erected or moved within the district until a certificate of appropriateness is issued by the Historic Preservation Commission; or under special circumstances, its staff person. For the purposes of this article, "exterior features" shall include the architectural style, general design, and general arrangement of the exterior of a building or other structure, including the kind and texture of the building material, the size and scale of the building, and the type and style of all windows, doors, light fixtures, signs, and other appurtenant features. In the case of outdoor advertising signs, "exterior features" shall be construed to mean the style, material, size and location of all such signs. Such "exterior features" may, at the discretion of the Town Council, include historic signs, color and significant landscape, archaeological, and natural features of the area.

3.5.12.1. Except as provided in subsection (2) below, the commission shall have no jurisdiction over interior arrangement and shall take no action under this section except to prevent the construction, reconstruction, alteration, restoration, moving, or demolition of buildings, structures, appurtenant features, or outdoor advertising signs or other significant features in the district of the landmark which would be incongruous with the special character of the landmark or district.

3.5.12.2. Notwithstanding subsection (1) above, the jurisdiction of the commission over interior space shall be limited to specific interior features of architectural, artistic or historical significance in publicly owned landmarks; and of privately owned historic landmarks for which consent for interior review has been given by the owner. Said consent of any owner for interior review shall bind future owners and/or successors in title, provided such consent has been filed in the office of the register of deeds of the county and indexed according to the name of the owner and the specific nature of the commission's jurisdiction over the interior.

All of the provisions of this article are applicable to the construction, alteration, moving, and demolition by the state, its political subdivisions, agencies and instrumentalities, provided however that they shall not apply to interiors of buildings or structures owned by the state. The state and its agencies shall have a right of appeal to the North Carolina Historical Commission or any successor agency assuming its responsibilities under G.S. 121-12(a) from any decision of the local commission. The decision of the North Carolina Historical Commission shall be binding upon both the state and the Historic Preservation Commission.

3.5.12.3. The town and all public utility companies shall be required to obtain a certificate of appropriateness prior to initiating work in a historic district for any changes in the character of street paving, sidewalks, trees, utility installations, lighting, walls, fences, structures and buildings on property, easements or streets owned or franchised by the town or public utility companies.

**3.5.13. Requirements for Issuance of Certificate of Appropriateness.** An application for a certificate of appropriateness shall be obtained from, and when completed, filed with the responsible staff person.

**3.5.14. Contents of Application for Certificate of Appropriateness.** The application shall, in accordance with the commission's rules of procedure, contain data that is reasonably necessary to determine the nature of the application. An application for a certificate of appropriateness shall not be considered complete until all required data has been submitted. Applications shall be considered by the commission at its next regular meeting, provided the applications have been filed, complete in form and content, at least fifteen (15) calendar days before the regularly scheduled meeting of the commission. Otherwise, they shall be deferred until the next meeting or considered at a special called meeting of the commission. Nothing shall prevent the applicant from filing, with the application, additional relevant information bearing on the application.

**3.5.15. Notification of Commission and Affected Property Owners.** Upon receipt of an application the responsible staff person shall notify the commission at least seven (7) days before the regularly scheduled meeting. Prior to any action taken on a certificate of appropriateness application, the owners of any property likely to be materially affected by the application shall be notified in writing, and the applicant and such owners shall be given an opportunity to be heard.

**3.5.16. Public Hearing.** When an application is presented to the commission a public hearing may be held when deemed necessary. All meetings of the commission shall be open to the public, in accordance with the North Carolina Open Meetings Law, G.S. chapter 143, article 33C.

**3.5.17. Action on an Application.** The action on an application shall be approval, approval with amendments, or denial.

**3.5.17.1.** Prior to any final action on an application, the review criteria in subsection (m) shall be used to make findings of fact indicating the extent to which the application is or is not congruous with the historic aspects of the district or landmark.

**3.5.17.2.** All applications for certificates of appropriateness shall be reviewed and acted upon within a reasonable time as defined by the rules of procedure, and not exceeding ninety (90) days from the date the application is filed. As part of its review procedure, the commission may view the premises and seek the advice of the department of cultural resources or other such experts as it may deem necessary under the circumstances.

**3.5.18. Appeals.** An appeal may be taken to the board of adjustment from the commission's action in granting or denying any certificate, which appeal:

**3.5.18.1.** May be taken by any aggrieved party.

**3.5.18.2.** Shall be taken within times prescribed by the commission in the rules of procedure, and

**3.5.18.3.** Shall be in the nature of certiorari.

Any appeal from the board of adjustment's decision in any such case shall be heard by the Superior Court of Johnston County.

**3.5.19. Submission of New Applications.** If a certificate of appropriateness is denied, a new application affecting the same property may be submitted only if substantial change is made in

plans for the proposed construction, reconstruction, alteration, restoration, or moving.

**3.5.20. Review Criteria for Certificates of Appropriateness.** To provide reasonable standards to assist in the review of the application for a certificate of appropriateness, the commission shall take into account the following elements to ensure that they are consistent with the historic or visual character or characteristics of the district:

**3.5.20.1.** The height and width of the building in relation to the height and width of adjacent, opposite and surrounding buildings.

**3.5.20.2.** The setbacks and placement of the building in relation to the setback of adjacent, opposite and surrounding buildings.

**3.5.20.3.** Exterior construction materials, including textures, but not to include color.

**3.5.20.4.** Architectural detailing such as lintels, cornices, brick bond and foundation materials.

**3.5.20.5.** Roof shapes, forms and materials.

**3.5.20.6.** Proportions, shapes, positions and locations, patterns and sizes of any elements of fenestration.

**3.5.20.7.** General form and proportions of buildings and structures.

**3.5.20.8.** Appurtenant fixtures and other features such as lighting and fencing.

It is the intention of these regulations to insure, so far as possible, that buildings or structure shall be in harmony with other buildings or structures located herein. It is not the intent of these regulations to require the reconstruction or restoration of individual or original buildings.

~~**3.5.21. Minor Works.** A certificate of appropriateness application, when determined to involve a minor work, may be reviewed and approved by the responsible staff person in the department of planning and development according to specific review criteria and guidelines. Minor works are defined as those exterior changes that do not involve substantial alterations, additions or removals that could impair the integrity of the property and/or the district as a whole. Such minor works shall be limited to those listed in the commission's rules of procedure. No application involving a minor work may be denied without the formal action of the commission.~~

### **3.5.21 Classification of Approvals**

The following lists classify the types of approvals required for work in a local historic district or landmark. Classifications are based on the scope of work, project scale, and amount of deviation from historic materials and methods.

#### **3.5.21.1 Normal Maintenance**

The Commission considers the following activities to be routine maintenance of historic properties. The following activities do not require a Certificate of Appropriateness. However, other Town permits may be necessary.

##### **3.5.21.1.1 For All Properties:**

**3.5.21.1.1.1.** All interior work as long as it has no exterior impact (i.e., window replacement is not considered interior work for these purposes).

**3.5.21.1.1.2.** Minor repairs to windows, including caulking or reglazing and replacement

of window glass as long as window size and style are not altered.

3.5.21.1.1.3. Minor repairs to doors, siding, trim, gutters, flooring, steps, fences, and walls, as long as the replacements match existing materials in scale, style, design, and materials.

3.5.21.1.1.4. Roofing, foundation, and chimney work, if no change in appearance occurs;

3.5.21.1.1.5. Replacement of roofing material with matching material.

3.5.21.1.1.6. Removing screen doors or storm doors.

3.5.21.1.1.7. Caulking and weather stripping.

3.5.21.1.1.8. Exterior painting of a previously painted surface, including when a change of color is proposed.

3.5.21.1.1.9. Replacement of existing mechanical equipment (including vents).

3.5.21.1.1.10. Repairing or repaving of flat paved areas, such as driveways, walkways, and patios, if the material used is the same or similar in appearance

3.5.21.1.1.11. Installing landscaping, including vegetable, flower, and rain gardens, shrubs, and trees.

3.5.21.1.1.12. Landscape maintenance, including pruning trees and shrubs (this does not include removal of landscaping required to screen mechanical equipment or utilities).

3.5.21.1.1.13. Curb, gutter, and pavement work involving granite curbs requires public works approval.

3.5.21.1.1.14. Non-fixed elements (that can be moved without the use of heavy equipment) such as rain barrels, planters, dog houses, bird baths, and similar decorative or functional items.

#### **3.5.21.1.2 For Noncontributing Properties:**

3.5.21.1.2.1. Painting of nonhistoric material, whether previously painted or not

3.5.21.1.2.2. Installation of prefabricated outbuilding or outbuilding of 80 square feet or less when located in the rear yard

3.5.21.1.2.3. Modifications to or demolition of outbuildings

3.5.21.1.2.4. Addition of new rear decks or porches

3.5.21.1.2.5. Modification, installation, or replacement of windows and doors not facing the street

3.5.21.1.2.6. Addition of screen doors or storm windows

3.5.21.1.2.7. Alteration or replacement of roof materials

3.5.21.1.2.8. Installation of skylights and solar panels not visible from the street

3.5.21.1.2.9 Installation of gutters

3.5.21.1.2.10. Alterations to ornamentation or to cladding material

**3.5.21.2. Work Requiring a Certificate of Appropriateness**

**3.5.21.2.1 Minor Works.** Certain activities are considered by the Commission to not have a significant impact on the exterior appearance of the historic structures, and are delegated to the appropriate staff person for administrative approval.

**3.5.21.2.2. Major Works.** Major Works consist of modifications which significantly alter the appearance of the structure or site. These projects are required to be reviewed by the Commission. The Commission shall hold public hearings for these cases.

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**3.5.21.2.3. Classification of Approvals by Scope of Work** The following chart indicates the level of approval required for various types of work.

| <b>Type of Work</b>  | <b>Minor Work<br/>Staff<br/>Approved</b> | <b>Major<br/>Work<br/>HPC<br/>Approved</b> |
|--|--|--|
| <b>Architectural Work</b>  |  |  |
| <b>New Construction</b>  |  |  |
| Installation of new pre-fabricated outbuilding or new structure 80 sq. ft. or less.                | ✓  |  |
| New structure greater than 80 sq. ft. and less than 144  |  | ✓  |
| New structure greater than 144 sq. ft.   |  | ✓  |
| <b>Relocation of Structures</b>  |  |  |
| Outbuilding less than 144 sq. ft.  | ✓  |  |
| Outbuilding greater than 144 sq. ft.   |  | ✓  |
| Primary structure  |  | ✓  |
| <b>Demolition</b>  |  |  |
| Contributing primary structure   |  | ✓  |
| Non-contributing primary structure   |  | ✓  |
| Contributing outbuilding   |  | ✓  |
| Non-contributing outbuilding   | ✓  |  |
| <b>Additions to Primary Structures</b>   |  |  |
| Addition of substantial spaces such as rooms   |  | ✓  |
| Addition of front or side decks or porches   |  | ✓  |
| Addition of new rear decks or porches  | ✓  |  |
| <b>Additions to Accessory Structures</b>   |  |  |
| Addition to contributing accessory structure   |  | ✓  |
| Addition to non-contributing accessory structure   | ✓  |  |
| <b>Windows and Doors</b>   |  |  |
| Replacement of original windows  |  | ✓  |
| Replacement of non-original windows  | ✓  |  |
| Modification or installation of windows and doors facing the street                                |  | ✓  |
| Modification or installation of windows and doors not facing the street                            | ✓  |  |
| Modification, installation, or replacement of storm windows or storm doors                         | ✓  |  |
| Alteration or new construction of storefronts  | ✓  |  |
| Restoration of original window or door openings where doors and windows match original or existing | ✓  |  |
| Installation of window air conditioning units not visible from the street                          | ✓  |  |
| <b>Roofs</b>   |  |  |
| Alteration of roof material  | ✓  |  |

|  |   |   |
|--|---|---|
| Alteration of roof form (including alteration, removal, or construction of dormers)                        |   | ✓ |
| Installation of skylights or solar panels visible on front facade  |   | ✓ |
| Installation of skylights and solar panels not visible on front facade                                     | ✓ |   |
| Construction of new or modification of character-defining chimneys   |   | ✓ |
| Installation of gutters  | ✓ |   |
| <b>Other Building Alterations</b>  |   |   |
| Alterations or construction of building elements (including columns, railings, stairs, landings, ramps and | ✓ |   |
| Alterations or construction of architectural details (including molding, brackets, or decorative woodwork) | ✓ |   |
| Change in original cladding material or style  |   | ✓ |
| Change in non-original cladding material or style  | ✓ |   |
| Painting of previously unpainted surface on contributing structure   |   | ✓ |
| Changes to any non-contributing outbuilding  | ✓ |   |
| Building additions, porches, or other extant features  |   | ✓ |
| Character defining building elements or details without reconstruction                                     |   | ✓ |
| Non-character defining building elements or details without reconstruction                                 | ✓ |   |
| <b>Site Work</b>   |   |   |
| <b>Parking areas</b>   |   |   |
| New residential driveways or changes to existing residential driveways                                     | ✓ |   |
| Changes to existing parking lots   | ✓ |   |
| New surface parking lots   | ✓ |   |
| <b>Fences or Walls</b>   |   |   |
| Within the street yard (between the facade of the structure and the ROW)                                   |   | ✓ |
| Within the rear or side yard   | ✓ |   |
| Planting or removal of trees and planting of shrubs in the street yard                                     | ✓ |   |
| Light fixtures and poles (new or replacement)  | ✓ |   |
| Walkways, patios or other paving   | ✓ |   |

|  |   |   |
|--|---|---|
| <b>ADA Compliance</b>  |   |   |
| Installation of ADA compliance updates (including ramps, etc.) where staff determines that the proposal will have a significant impact on the  |   | ✓ |
| Installation of ADA compliance updates (including ramps, etc.) where staff determines that the proposal will not have a significant impact on the character of the structure                   | ✓ |   |
| <b>Installation, relocation, or removal of mechanical</b>  | ✓ |   |
| <b>Additional site work or structure not described above</b>   | ✓ |   |
| <b>Minor modifications within the right-of-way</b>   | ✓ |   |
| <b>Modifications within the right-of-way deemed significant by staff</b>   |   | ✓ |
| <b>Other Work</b>  |   |   |
| <b>Renewal of Expired COA</b>  | ✓ |   |
| <b>Minor Amendments</b>  | ✓ |   |
| <b>Substantial amendments</b>  |   | ✓ |
| <b>Any project for which the State Historic Preservation Office has approved the scope of work through the state and/or federal tax credit process</b>   | ✓ |   |
| <b>Work items not listed here for which a clear citation can be made for conformance with the local review criteria</b>  | ✓ |   |
| <b>Work items not listed here that are deemed by staff to be substantial in nature, precedent setting, not addressed by the local review criteria, or not in conformance with the criteria</b> |   | ✓ |
| <b>Installation of temporary features to protect a historic resource that do not permanently alter the resource. Six month duration with in-kind reconstruction or an approved COA.</b>        | ✓ |   |

**3.5.22. Certain Changes Not Prohibited.** Nothing in this article shall be construed to prevent the ordinary maintenance or repair of any exterior architectural feature of a historic landmark or in a historic district which does not involve a change in design, materials, or outer appearance thereof, nor to prevent the construction, reconstruction, alteration, restoration, or demolition of any such feature which the building inspector or similar official shall certify is required by the public safety because of an unsafe or dangerous condition. Nothing herein shall be construed to prevent a property owner from making any use of his property not prohibited by other statutes, ordinances, or regulations. Nothing in this ordinance shall be construed to prevent (1) the maintenance or (2) in the event of an emergency, the immediate restoration of any exiting

above-ground utility structure without approval by the commission.

**3.5.23. Conflict with Other Laws.** Whenever any ordinance adopted for the designation of landmarks or districts requires a longer waiting period or imposes higher standards with respect to a designated landmark or district than are established under any other statute, Charter provision, or regulation, this article shall govern. Whenever the provisions of any other statute, Charter provision or regulation require a longer waiting period or impose higher standards than are established under this article, such other statute, Charter provision, ordinance, or regulation shall govern.

**3.5.24. Enforcement and Remedies.** Compliance with the terms of the certificate of appropriateness shall be enforced by the responsible staff person. Failure to comply with the certificate of appropriateness shall be a violation of the zoning ordinance and is punishable according to established procedures and penalties for such violations.

3.5.24.1. A certificate of appropriateness shall expire one (1) year after the date of issuance if the work authorized by the certificate has not commenced.

3.5.24.2. If after commencement, the work is discontinued for a period of six (6) months the permit shall immediately expire.

3.5.24.3. No work authorized by any certificate which has expired shall thereafter be performed until a new certificate has been secured.

In case any building, structure, site area or object designated as a historic landmark or located within a historic district established pursuant to this article is about to be demolished whether as a result of deliberate neglect or otherwise, materially altered, remodeled, removed or destroyed, except in compliance with the article, the town, the commission, or other party aggrieved by such action may institute any appropriate action or proceeding to prevent such unlawful demolition, destruction, material alteration, remodeling or removal, to restrain, correct or abate such violation, or to prevent any illegal act or conduct with respect to such a building, structure, site, area or object. Such remedies shall be in addition to any others authorized for violation of a municipal ordinance.

**3.5.25. Delay in Demolition of Landmarks and Buildings.**

3.5.25.1. An application for a certificate of appropriateness authorizing the demolition or destruction of a designated landmark or a building, structure, or site within the district may not be denied except as provided in subsection (3) below. However, the effective date of such a certificate may be delayed for a period of up to three hundred sixty-five (365) days from the date of approval. The maximum period of delay authorized by this section shall be reduced by the commission where it finds that the owner would suffer extreme hardship or be permanently deprived of all beneficial use of or return from such property by virtue of the delay. During such period the commission shall negotiate with the owner and with any other parties in an effort to find a means of preserving the building or site. If the commission finds that a building or site within the historic district has no special significance or value toward maintaining the character of the district, it shall waive all or part of such period and authorize earlier demolition or removal.

If the commission has voted to recommend designation of a property as a landmark or designation of an area as a district, and final designation has not been made by the Town

Council, the demolition or destruction of any building, site or structure located on the property of the proposed landmark or in the proposed district may be delayed by the commission for a period of up to three hundred sixty-five (365) days or until the Town Council takes final action on the designation, whichever occurs first.

3.5.25.2. The Town Council may enact an ordinance to prevent the demolition by neglect of any designated landmark or any building or structure within an established historic district. Such ordinance shall provide appropriate safeguards to protect property owners from undue economic hardship.

3.5.25.3. An application for a certificate of appropriateness authorizing the demolition or destruction of a building, site, or structure determined by the state historic preservation officer as having statewide significance, as defined in the criteria of the National Register of Historic Places, may be denied except where the commission finds that the owner would suffer extreme hardship or be permanently deprived of all beneficial use or return by virtue of the denial.

**And,**

[Revise Article 3, ADMINISTRATIVE / LEGISLATIVE / QUASI-JUDICIAL AUTHORITY, to relocate the text of Section 3.5 Town Council to a new section titled Section 3.6 Town Council and to amend the procedural requirements for site-specific development plans to reflect changes in the UDO.]

### **SECTION 3.6 TOWN COUNCIL.**

**3.6.1.** The Town Council, in considering special use permit applications, acts in a quasi-judicial capacity and, accordingly, is required to observe the procedural requirements set forth in Sections 4.11.1 through 4.11.4.

**3.6.2.** In considering proposed changes in the text of this Ordinance or in the zoning map, the Council acts in its legislative capacity and must proceed in accordance with the requirements of Section 4.10.1.

**3.6.3.** Unless otherwise specifically provided in this Article, in acting upon special use permit requests or in considering amendments to this Article or the zoning map, the council shall follow the regular, voting, and other requirements as set forth in other provisions of the Town code, the Town charter, or general law.

**3.6.4.** The Town Council, in considering the approval of a site-specific development plan (as defined in Section 4.7, Establishment of Vested Rights), shall follow the procedural requirements set forth in Section 4.69 ~~for the issuance of a special use permit.~~

## **PART 2**

That the Unified Development Ordinance shall be page numbered and revision dated as necessary to accommodate these changes.

**PART 3**

That these amendments of the Unified Development Ordinance shall become effective upon adoption.

Duly adopted this the \_\_\_\_ day of \_\_\_\_\_, 2019.

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M. Andy Moore, Mayor

ATTEST

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Shannan L. Parrish, Town Clerk

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**PROCLAMATION**  
**Town of Smithfield**  
**Community of Pine Acres - February 2019**

*Whereas, the Town of Smithfield includes historically significant neighborhoods that deserve recognition for their contributions to our Town; and*

*Whereas, the Town of Smithfield recognizes and celebrates 50 years of history of the neighborhood of Pines Acres; and*

*Whereas, the Town of Smithfield is committed to raising awareness of the historical significance of the neighborhood of Pine Acres and its contribution to the Town of Smithfield, and*

*Whereas, the Pine Acres was developed in partnership with Johnston County to provide housing opportunities for African American educators in the Town of Smithfield at a time when there were none, and*

*Whereas, the residents of Pine Acres have contributed to the wellbeing of the Town of Smithfield as and the children of Smithfield as both citizens and educators, and*

*Whereas, The Town of Smithfield appreciates the this rich history and the significance of the Pine Acres neighborhood, and*

*Now therefore, I, M. Andy Moore, Mayor of the Town of Smithfield do hereby proclaim Pine Acres Neighborhood to be historically significant to the growth and development of the Town of Smithfield.*

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*M. Andy Moore, Mayor*

*IN WITNESS WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the Town of Smithfield on this First day of May in the year of our Lord Two Thousand Sixteen.*

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## Coates' Canons Blog: Historic Preservation Commission Basics

By Adam Lovelady

Article: <https://canons.sog.unc.edu/historic-preservation-commission-basics/>

This entry was posted on September 27, 2013 and is filed under Board Structure & Procedures, Land Use & Code Enforcement

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“The historical heritage of our State is one of our most valued and important assets,” and our cities and counties are authorized to safeguard that heritage and promote the use and conservation of North Carolina’s historic landmarks and districts (G.S. 160A-400.1). Before the local government designates a historic district or landmark, though, it first must create a historic preservation commission to manage that effort. This blog considers the organization and authority of the local historic preservation commission, including an overview of standards and procedures for certificates of appropriateness.

### Organization and Authority

A standard preservation commission must have at least three members with terms of no more than four years. Members must reside within the zoning jurisdiction of the local government (including extraterritorial jurisdiction for municipalities). A majority of members must have “demonstrated special interest, experience, or education in history, architecture, archaeology, or related fields.” This is one of the few instances where the statutes specify expertise for local government board members. When needed, the commission may appoint advisory bodies and committees.

Alternatively, the governing board may choose a different structure for the commission. A local government may establish separate preservation commissions for districts and landmarks, may designate the planning commission or community appearance commission as the preservation commission, or may establish a joint commission with a city (or cities) and county. When the planning commission or community appearance commission serves as the preservation commission, it must still include at least three members with the demonstrated experience in related fields.

The governing board may authorize a preservation commission to carry out any of the following activities within the local government’s zoning jurisdiction:

- i) Inventory historic and significant properties
- ii) Recommend historic designations (and revocations) for districts and landmarks
- iii) Negotiate for, acquire and sell property to promote preservation
- iv) Restore and operate historic properties
- v) Conduct educational programs
- vi) Cooperate and contract with State, federal, and local governments
- vii) Recommend preservation elements of the local comprehensive plan
- viii) Review and act on certificates of appropriateness.

### Certificates of Appropriateness

After a historic district or landmark is established, a landowner may not alter the exterior portions of historic properties

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without obtaining a *certificate of appropriateness* (COA) from the preservation commission. Indeed, building permits and related development permits are withheld until the developer obtains a COA. The State has assigned the critical role of COA decision-making to the local preservation commission.

COAs are required for any erection, alteration, restoration, move, or demolition of an exterior feature of a structure. Structures include buildings, masonry walls, fences, light fixtures, steps and pavement, and other appurtenant features. Above ground utilities and outdoor advertising signs require a COA as well. Exterior features are defined to include, among other things, architectural style, size and scale of buildings, and types and styles of doors and windows. The local governing board, in its discretion, may define exterior features also to include historic signs, color, and significant landscape, archaeological, and natural features of the area.

Generally, COAs are not required for changes to the interior features of a building. COAs are not required for ordinary maintenance or repair that does not change the material or appearance, nor for changes required for public safety and certified by the building inspector. For minor works, the local government may authorize an administrative official to approve COAs pursuant to detailed standards (only the preservation commission may deny a COA, however).

COAs do not regulate use. The owner of property in a historic district may make any use of her property that is not otherwise prohibited by law.

Before a preservation commission may issue or deny any COA, the commission must adopt both (1) principles and guidelines for construction and alterations (design guidelines) and (2) rules of procedure. Those design guidelines and procedures reflect the local architecture and politics, but they must align with the state-established legal framework.

**COA Standards.** A certificate of appropriateness is just what the name denotes—it affirms that the proposed project is appropriate for the historic district or landmark. Indeed, the law states that a preservation commission may not deny a certificate except to prevent a project “which would be incongruous with the special character of the landmark or district.” §160A-400.9(a).

It is worth emphasizing that congruence is based on the district as a whole, not just neighboring properties or relatively uncommon feature within the district. Commissions must determine congruence based on a contextual standard derived “from the total physical environment of the Historic District.” *A–S–P Associates v. City of Raleigh*, 298 N.C. 207 at 222 (1979). The commission may not cherry pick certain properties or features of the district to determine congruity.

The required local design guidelines serve as the general standard for determining congruence. The design guidelines should establish the defining features of the district or landmark, and the commission looks to those guidelines to make its findings of fact regarding congruence. The commission is looking for general compatibility with the guidelines (not necessarily exact conformity). While the congruity standard is general and fairly loose, it is not an invitation for commission members to redesign projects according to the member’s personal style. For more on the role of district guidelines, see this blog by Richard Ducker.

**COA (Quasi-Judicial) Procedures.** When a preservation commission reviews an application for a certificate of appropriateness, it is applying a standard that involves judgment and discretion, so it is a quasi-judicial decision. As such, certain rules apply. The local ordinance and the commission’s required rules of procedure should follow the statutory framework and the judicial rulings for quasi-judicial decisions.

The commission must provide notice, as reasonably required by local ordinance or procedures, to owners of property likely to be materially affected by the certificate of appropriateness. Although, it is not formally required, a good guide for notice is the newly codified notice for other quasi-judicial hearings: posted notice on the site and mailed notice to adjoining property owners, between 10 and 25 days before the meeting. S.L. 2013-126.

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In order to ensure parties' due process rights, members of the commission must not have fixed opinions about the application prior to the hearing;; close family, business, or associational relationships with an affected party; or a financial interest in the outcome. Members of the commission may view the premises and seek advice of the NC Division of Archives and History or other experts, but that evidence and advice should be discussed and reflected in the record. Any *ex parte* communication (communicating with a party outside of the hearing) should be avoided, and disclosed at the hearing if it occurs.

The commission must act upon applications for COAs within a reasonable time, not more than 180 days from the date of the application. A COA for relocation or demolition of a historic property may be delayed up to 365 days—depending on the circumstances—for the commission to negotiate for preservation of the building or site.

The commission must hold an evidentiary hearing so that parties have a right to be heard in a contested case. The statute allows that the commission *may* hold a public hearing (for comments from the general public, not just the parties) when deemed necessary. For more on the distinction between an *evidentiary hearing* and a *public hearing* see this blog by Frayda Bluestein. Regardless of the type of hearing, all meetings of the preservation commission are subject to the NC Open Meetings Law.

During the evidentiary hearing, the commission hears evidence and sworn testimony from the parties. The record should include competent, material and substantial evidence that the proposed project meets the established standard—it is congruent with the district. The commission should provide a written decision, including a determination of any contested facts, to the applicant, property owner, and interested parties that have requested the decision. The commission may apply reasonable conditions to a COA to bring the project in compliance with the standards. An aggrieved party may appeal a commission decision on a COA to the Board of Adjustment. For more on quasi-judicial procedures, see these blogs by David Owens on testimony, opinions, and *ex parte* evidence.

## Conclusion

The state has charged local historic preservation commissions with an important task—to safeguard, promote, and conserve our historical heritage. To that end, those commissions are authorized to research historic sites and districts, plan for preservation, and even acquire property for preservation. Moreover, the state has authorized preservation commissions to ensure the appropriateness of new development in the many historic properties and districts around the state, following the legal procedures and guidelines provided in state and local laws.

## Links

- [www.ncleg.net/gascrpts/Statutes/StatutesTOC.pl?Chapter=0160A](http://www.ncleg.net/gascrpts/Statutes/StatutesTOC.pl?Chapter=0160A)
- [www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_160A/GS\\_160A-400.9.html](http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-400.9.html)
- [canons.sog.unc.edu/?p=2659](http://canons.sog.unc.edu/?p=2659)
- [www.ncleg.net/Sessions/2013/Bills/House/PDF/H276v6.pdf](http://www.ncleg.net/Sessions/2013/Bills/House/PDF/H276v6.pdf)
- [canons.sog.unc.edu/?p=5980#more-5980](http://canons.sog.unc.edu/?p=5980#more-5980)
- [canons.sog.unc.edu/?p=6322#more-6322](http://canons.sog.unc.edu/?p=6322#more-6322)
- [canons.sog.unc.edu/?p=1160](http://canons.sog.unc.edu/?p=1160)
- [canons.sog.unc.edu/?p=5202](http://canons.sog.unc.edu/?p=5202)



## A COMPARISON OF THE NATIONAL REGISTER OF HISTORIC PLACES WITH LOCAL HISTORIC LANDMARK AND DISTRICT DESIGNATIONS

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The National Register of Historic Places and local historic landmark and historic district designations are two very different programs that recognize and protect historic properties. Some historic properties and districts may receive both types of designation in communities where local historic preservation commissions have been established according to North Carolina enabling legislation. However, there is no direct correlation between National Register listing and local designation.

### THE NATIONAL REGISTER OF HISTORIC PLACES

The National Register of Historic Places is a federal program administered by the National Park Service in partnership with state governments. The National Register was created by the National Historic Preservation Act of 1966 to recognize and protect properties of historic and cultural significance that warrant consideration in federal undertakings such as highway construction and urban renewal projects, and to provide incentives for local and private preservation initiatives.

In each state the program is administered by a State Historic Preservation Officer (SHPO), who is usually an official in a state historical or environmental agency. In North Carolina, the State Historic Preservation Officer is the Director of the [N.C. Office of Archives and History](#). The SHPO is responsible for conducting the statewide survey of historic properties, coordinating nominations of eligible properties to the National Register, and conducting environmental review of federal and state projects that may affect properties listed or eligible for listing in the National Register. Nominations of properties to the National Register are prepared and reviewed at the local and state levels, but the final decision to list a property or district in the National Register is made by the National Park Service.

National Register listing is primarily an honor, meaning that a property has been researched and evaluated according to established procedures and determined to be worthy of preservation for its historical value. The listing of a historic or archaeological property in the National Register does not obligate or restrict a private owner in any way unless the owner seeks a federal benefit such as a grant or tax credit. For a private owner, the chief practical benefit of National Register listing is eligibility for a 20% federal investment tax credit that can be claimed against the cost of a certified rehabilitation of an income-producing historic building. There are also North Carolina investment tax credits for both income-producing and non-income-producing historic properties. For more information, see [Federal and State Historic Preservation Tax Credits](#).

For more information about the National Register, see the following numbered NATIONAL REGISTER FACT SHEETS:

1: "[WHAT IS THE NATIONAL REGISTER OF HISTORIC PLACES?](#)"

2: "[NATIONAL REGISTER CRITERIA FOR EVALUATION](#)"

3: "[HOW HISTORIC PROPERTIES ARE LISTED IN THE NATIONAL REGISTER OF HISTORIC PLACES](#)"

4: "[THE NATIONAL REGISTER OF HISTORIC PLACES IN NORTH CAROLINA: FACTS AND FIGURES](#)"

## **LOCAL HISTORIC PRESERVATION COMMISSIONS AND LOCAL HISTORIC LANDMARKS AND DISTRICTS**

**The Preservation Commission.** Local governments may establish a historic preservation commission under North Carolina [G.S. 160A-400.1-400.14](#). A preservation commission may carry out a comprehensive preservation program, including recommending individual properties and areas for designation by local governing boards as landmarks and historic districts. While a preservation commission works with both districts and landmarks, there are also commissions that work solely with districts (called historic district commissions) and those that work solely with individual properties (called historic landmarks commissions or historic properties commissions).

A local government is not obligated to create a preservation commission, regardless of how many National Register properties and/or districts there might be in the community. Preservation commissions are generally established only where there is sufficient local interest in historic preservation and the local planning environment is responsive to this interest. A preservation commission is established by an ordinance passed by the local governing board. The organization, operations, and powers of the preservation commission are prescribed by the state enabling legislation. The commission makes recommendations to the local governing board that certain historic landmarks or districts be designated, and such designations are made by local ordinance.

A community may designate local districts and landmarks that are not listed in the National Register. Since the state enabling legislation requires that a designation report be prepared before a local landmark or local district is designated, some local preservation commissions use a National Register nomination as the basis for the local designation report. (For this reason the two types of designations are sometimes confused.) However, National Register listing does not mean that local designation will necessarily follow.

**Local Landmarks.** Landmark designations apply to individual buildings, structures, sites, areas, or objects which are studied by the commission and judged to have historical, architectural, archaeological, or cultural value. Designation is an honor, meaning the community believes the property deserves recognition and protection. The local government designates landmarks through passage of an ordinance. Owners of landmarks are eligible to apply for an annual 50% property tax deferral as long as the property's important historic features are maintained. Recapture penalties may apply if the owner destroys the property or damages its historic value.

**Local Districts.** Historic district designation is a type of *zoning* that applies to entire neighborhoods or other areas that include many historic properties. The zoning provides controls on the appearance of existing and proposed buildings. Designation is an honor, meaning the community believes the architecture, history, and character of the area are worthy of recognition and protection. Historic district zoning can help to improve property values by stabilizing and enhancing the neighborhood's character, and it benefits property owners by protecting them from inappropriate changes by other owners that might destroy the special qualities of the neighborhood. Unlike landmark designations, local historic district designation has no effect on local property taxes for property owners within the designated district.

**Certificates of Appropriateness.** Owners of local landmarks and of property in local historic districts are required to obtain a certificate of appropriateness from their preservation commission

before making significant changes or additions to a property, before beginning new construction, or before demolishing or relocating a property. The commission's review of proposed changes ensures that work on property in districts or on a designated landmark is appropriate to the special character of the district or landmark. A certificate of appropriateness for demolition cannot be denied unless the property is deemed to be of statewide significance by the State Historic Preservation Officer. In all other cases, the commission may delay demolition or relocation for up to 365 days to explore alternatives to demolition or relocation.

**Federal and State Tax Benefits and Local Designations:** Locally designated landmarks and properties located within local historic districts are generally not eligible for [federal or state historic preservation tax credits](#) *unless* the landmark or district is *also* listed in the National Register of Historic Places. The only exceptions are those properties in local districts which are not listed in the National Register but which have been certified by the National Park Service as essentially meeting National Register criteria. There are only three such certified local districts in North Carolina: Blount Street Historic District in Raleigh, Goldsboro Historic District, and Decatur-Hunter Historic District in Madison.

An owner of a property that is *both* locally designated *and* listed in the National Register who is seeking federal or state investment tax credits for a rehabilitation must acquire a local certificate of appropriateness *and* federal or state tax certification through separate applications. Approval for one does not imply or guarantee approval for the other, though in most cases local design review guidelines and federal rehabilitation standards are in concurrence and are mutually reinforcing.

FOR MORE INFORMATION: See the [HPO Staff Roster](#) for the name, phone, and email of the current Preservation Commission Services / Certified Local Government Coordinator.

7/7/2016

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[Local Historic Preservation Commissions in N.C. Page](#)  
[National Register in N.C. Page](#)  
[N.C. State Historic Preservation Office Home Page](#)  
[Office of Archives and History Home Page](#)

HPO HOME SERVICES HPO STAFF ARCHAEOLOGY NATIONAL REGISTER SURVEYS  
RESTORATIONS TAX CREDITS COMMISSIONS PUBLICATIONS FEATURES LINKS

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## Coates' Canons Blog: Can I Be Heard? Who Gets to Speak at a Hearing on a Quasi-judicial Matter?

By David Owens

Article: <https://canons.sog.unc.edu/can-i-be-heard-who-gets-to-speak-at-a-hearing-on-a-quasi-judicial-matter/>

This entry was posted on February 15, 2012 and is filed under Land Use & Code Enforcement, Open Government, Public Hearings

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The town council makes decisions on special use permit applications under the Macomb zoning ordinance. The council is in the midst of a hearing on an application from Malcolm Tucker for a special use permit to build a new shopping center. The town planner has summarized the nature of the project and the applicable town standards. Tucker's project planner has testified about all the studies and reports they prepared to show compliance with the town standards. At this point Clara Edwards stands up and asks to be heard. Clara lives on the other side of town, but word is she plans to run for Mayor next time around. In any event, she has lately taken to showing up at most town council meetings and offering her views on whatever is before the council. Tucker, who has a long and acrimonious relationship with Edwards, objects to allowing her to speak. Addressing the council, Tucker says, "Madame Mayor, I submit that Mrs. Edwards has no right to testify about my project. She's not the applicant. She doesn't live or own property anywhere near the site. She is just a meddling busybody sticking her nose where it doesn't belong. You and I know she just wants to irritate me and bollix up this process. So, I respectfully request we move along and that you ask Ms. Edwards to take a seat."

Should the Mayor grant Malcolm's request or should she let Clara speak on the application?



Should Clara Edwards be allowed to testify?

The law on this point is not altogether clear. It is likely Mrs. Edwards should be allowed to speak, but the Mayor should limit her to relevant testimony about the application.

At the outset, it is important to note the nature of the proceeding before the town council. Here the council is making a quasi-judicial decision, not a legislative decision. The purpose of the hearing is not to seek citizen comments on the desirability of a policy choice. When the council is considering a special use permit application, the purpose of the hearing is to gather evidence as to whether or not this particular application is consistent with the standards set forth in the ordinance. If the applicant can produce competent, substantial evidence that the standards are met, the applicant is legally entitled to the permit. The council may deny the permit only if there is substantial evidence in the record that the standards would not be met.

If this were a *legislative* matter, such as a proposed rezoning or an amendment to the standards for approval of a special use permit, the council would have to hold a public hearing to solicit public comment on the wisdom of the matter. Any person could offer comments, send in written comments, or even chat with the council members about the matter prior to

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the hearing. Our statutes have long emphasized the importance of seeking public comments prior to making these legislative decisions. The zoning statutes mandate two published notices of the hearing. If a rezoning is involved, the statutes require mailed notice of the hearing to neighbors and posting the site. The council is also required to submit all proposed zoning amendments to the planning board for review and comment. All of this is designed to solicit broad public input prior to making a legislative decision. Mrs. Edwards (and everybody else) is not only allowed to give the council a piece of her mind at a hearing on a legislative matter, it would be illegal for the council to act without offering her that opportunity. A council can certainly impose reasonable limits on public comments at legislative hearings, such as reasonable time limits or that comments be germane to the issues presented. But for the most part those presenting comments are free to express their views on the matter.

A hearing on a *quasi-judicial* matter is altogether different. With a special or conditional use permit, the purpose of the hearing is not to solicit public opinion and comment about proposed policies. The policies have already been set and are in the ordinance. Instead, the council holds an evidentiary hearing to gather facts regarding whether this application meets the standards. The applicant has a constitutional right to present evidence, to cross-examine witnesses, and to present rebuttal evidence. In addition, persons who would be directly and substantially affected by the decision have a right to participate in the hearing. These persons include immediate neighbors whose property values (or use and enjoyment of their property) would be adversely affected. These persons are effectively also “parties” and have the right to present testimony, cross-examine witnesses, and otherwise participate in the hearing. Persons who are not parties to the case do not have a constitutional or statutory right to present evidence to the council.

In fact, since parties to the case have a constitutional right to have the decision based only on properly received material evidence, receipt of irrelevant evidence is problematic unless it is clear that the council has not relied on it in making a decision. Often the presiding officer will give witnesses some latitude in their testimony as most witnesses are not experienced in these procedures and it would be improper to prevent someone from presenting relevant information. Still, it is appropriate to remind witnesses to stick to the relevant facts should they begin to stray too far afield. If irrelevant testimony is presented, the board should make it clear that such evidence was not considered when it makes its factual findings.

The complicating fact here is that local government hearings on quasi-judicial matters are not conducted with the formality of a court proceeding. Most often the staff simply presents a summary of the application and applicable standards, the applicant summarizes its case, and any neighbors present are recognized to make comments on the case. Most of the cross-examination is in the form of questions from council members. At this stage persons are not formally designated as “parties.” The legal standing to participate (establishing that they are in fact an “aggrieved” person who would suffer some special damages distinct from the community at large) is rarely raised at this point. Most of the time neither the applicant nor the neighbors are represented by attorneys. [For a detailed report from N.C. cities and counties on their experiences with special and conditional use permit hearings, click [here](#).] As a practical matter, the board hearing one of these quasi-judicial matters is more concerned with acquiring quality evidence than identifying “parties” and relying on only the parties to present that information. After all, Mrs. Edwards may be a witness who has highly relevant information to present even if she is not herself a “party” to the case or has been called as a witness by one of the parties

While some degree of informality is appropriate, it is important for all involved to remember the purpose of the hearing in a quasi-judicial matter – securing high quality, reliable facts. As Justice Susie Sharp noted in a landmark zoning case involving a city council’s consideration of a special use permit, “Notwithstanding the latitude allowed municipal boards, . . . [the board] can dispense with no essential element of a fair trial.” *Humble Oil & Refining Co. v. Board of Aldermen*, 284 N.C. 458, 470-71 (1974).

So, should the Mayor allow Mrs. Edwards to speak the hearing on Mr. Tucker’s special use permit application? Assuming Mrs. Edwards lives on the other side of town and has no nearby property that would be affected by this decision, she has no legal right to present evidence at the hearing. She is not a “party” in the case and is unlikely to have legal standing to challenge the decision in court. But given the informality of these proceedings and the legitimate need to get relevant information in the record, those citizens who wish to offer testimony are generally allowed to do so.

To protect the rights of the applicant and those who could be parties, however, it is incumbent on the town to impose some limits on Mrs. Edwards and others who testify at these hearings. They should be sworn in as witnesses. They should be limited to offering relevant testimony. It is important that the presiding officer remind persons testifying at these hearing that this is not the time or place to offer policy suggestions, opinions about the wisdom of the existing ordinance, or



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anything else irrelevant to whether the project under consideration meets the standards in the ordinance. Unless they are formally qualified as expert witnesses, they should be limited to offering factual testimony, not offering opinions. These procedural safeguards protect and balance the interests of citizens in presenting information to the board and the constitutional rights of the parties.

These safeguards run counter to the expectations of many persons. Folks are used to being able to freely speak their minds at the comment period in governmental meetings. It is important then that those conducting quasi-judicial hearings clearly explain that the constitutional rights of the parties impose some constraints on the usual expectations of free expression. Some local governments have short pamphlets that explain this; others have the presiding officer explain it at the beginning of each hearing. It may even be appropriate for the presiding officer (or one of the parties) to ask a non-party witness asking to speak about the nature of their proposed testimony to determine whether it may be considered by the board. However it is done, it is important that the applicant, the neighbors, the board members, and the public have a common understanding of the rules governing these hearing and that everyone make a good faith effort to observe these basic rules of fairness.

## Links

- [canons.sog.unc.edu/can-i-be-heard-who-gets-to-speak-at-a-hearing-on-a-quasi-judicial-matter/clara\\_edwards\\_08/](https://canons.sog.unc.edu/can-i-be-heard-who-gets-to-speak-at-a-hearing-on-a-quasi-judicial-matter/clara_edwards_08/)
- [www.sog.unc.edu/sites/www.sog.unc.edu/files/SS\\_22\\_v4b.pdf](https://www.sog.unc.edu/sites/www.sog.unc.edu/files/SS_22_v4b.pdf)

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## Coates' Canons Blog: Is the Mayor Doing Her Job or Improperly Receiving Evidence?

By David Owens

Article: <https://canons.sog.unc.edu/is-the-mayor-doing-her-job-or-improperly-receiving-evidence/>

This entry was posted on August 10, 2011 and is filed under Land Use & Code Enforcement

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Mayor Juanita Beasley was stuck in the checkout lane at the supermarket. She was wondering why she always managed to pick the slowest line when she felt a tap on her shoulder.

She turned to find her old high school friend Clara Edwards smiling and leaning in. After a quick exchange of pleasantries, Clara says, "Juanita, you know that store they're talking about putting in across the street from me on Raleigh St.? The one that's up before the town council next week. A couple of folks from the neighborhood are getting together at my house Sunday afternoon to talk about it and it would be so nice if you could stop by and join us. We'd sure like to share our thoughts and see what you can do to help us."

"Well, Clara, I'd be delighted to stop by. You know I always have time for you. And what good's a mayor who doesn't take time to find out what on her constituents' minds? What time should I come by?"

Juanita knew exactly what project Clara was talking about. After a couple of quiet years, development was beginning to stir in Maycomb. The town had received a special use permit application for a new 24-hour drug store on Raleigh St. The hearing on the permit was coming before the town council next week. Juanita was more than a little familiar with the site proposed for the store. Although she now lived on the other side of town, she had grown up just a couple of blocks away from the proposed site and had seen firsthand how that neighborhood had changed over the years.

A couple of folks had already called Juanita to raise concerns about the traffic and noise the new store would bring to the old neighborhood. While Juanita was generally inclined to vote for a project that would bring jobs to town, she was concerned that this site might have some real problems. She had driven by the site just yesterday to take a look at how traffic moved during the evening rush and had made a mental note to drop by the planning office to chat with the staff about what conditions could be added to prevent this store from making things worse.

In all of this is Juanita being a good public servant, dutifully checking into the matter and meeting with folks to help get a good resolution of a community controversy? Or do we have a problem brewing?

While Mayor Beasley has been diligent and responsible so far, she may be about to cross the line between being a responsive and responsible official and violating the legal rights of a permit applicant.

Many critical land use regulatory decisions are made by citizen boards—city councils, county boards of commissioners, planning boards, and boards of adjustment. There are different legal rules for the process that must be followed that depend on the type of decision being made. For some decisions, such as the policy choice of whether or not to approve a requested rezoning, the process is designed to assure broad and open public discussion with the decision-making board. But for other types of decisions, those termed "quasi-judicial," the law's emphasis is on assuring a fair decision-making process for those most directly affected. Quasi-judicial decisions involve two critical elements—determining contested facts and applying standards that require application of some judgment. With quasi-judicial decisions—special and conditional use permits, variances, and appeals—there is not a policy choice being made. Rather these decisions must apply the policies already in the ordinance. The purpose of a public hearing for a quasi-judicial decision is not to gather public opinion about whether the proposal would be good for the community. The purpose of the hearing in a quasi-judicial matter is to gather quality evidence in a fair manner to determine the facts of the case. So what is lawful and perfectly appropriate in a rezoning hearing may be unlawful and inappropriate in a special use permit hearing.

And therein lies our potential problem. While some degree of informality is permissible even in a quasi-judicial matter,

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applicants and those neighbors who may be substantially affected have a constitutionally protected right to a fair hearing. In a case involving a decision by the town council on a special use permit for a gas station in downtown Chapel Hill, Justice Susie Sharp set forth specific due process requirements for a quasi-judicial land use regulatory decisions. She noted, "Notwithstanding the latitude allowed municipal boards, . . . a zoning board of adjustment, or a board of aldermen conducting a quasi-judicial hearing, can dispense with no essential element of a fair trial." *Humble Oil & Refining Co. v. Board of Aldermen*, 284 N.C. 458, 470, 202 S.E.2d 129, 137 (1974).

The court held that one of the "essential elements" of a fair trial is that each party have an opportunity to review all of the evidence being considered and have the chance to rebut that evidence. All of the decision-makers must see the same evidence and have a chance to assess the credibility of the witnesses, as well as the opportunity to ask questions of the witnesses. Thus the courts have long concluded that board members must not gather evidence outside of the hearing, a limitation on what the courts refer to as "ex parte" contact. Undisclosed ex parte communications can evidence impermissible bias or rise to a level of unfairness that will lead to judicial invalidation of the decision. *Crump v. Board of Education*, 326 N.C. 603, 392 S.E.2d 579 (1990). In addition to constitutional due process considerations, the zoning statutes also provide that members of boards exercising quasi-judicial functions must not participate in or vote on any quasi-judicial matter if they have a fixed opinion prior to hearing the matter that is not susceptible to change or have undisclosed ex parte communications. G.S. 160A-388(e1) and 153A-345(e1). Many local land use ordinances also specifically prohibit ex parte communications with decision-makers on quasi-judicial matters.

Our situation poses at least four potential dimensions of ex parte evidence. Mayor Beasley may be establishing facts outside of the hearing through: (1) her prior personal knowledge of the site; (2) her site visit to inspect traffic conditions; (3) phone calls and a potential meeting with neighbors to discuss the case; and (4) a potential visit with staff prior to the hearing to discuss potential permit conditions. Which of these pose a problem with the limits on ex parte evidence? Let's take a quick look at each.

#### *Prior personal knowledge*

Board members hearing quasi-judicial matters are members of the community in which these land use cases arise. They may well have personal knowledge about the site or a personal acquaintance with the parties. The courts have applied a rule of reason to ex parte communication in quasi-judicial proceedings. If a board member has prior or specialized knowledge about a case, it is entirely proper to consider that knowledge. But it is essential that knowledge be disclosed to the rest of the board and the parties during the hearing. *Humble Oil & Refining Co. v. Board of Aldermen*, 284 N.C. 458, 468, 202 S.E.2d 129, 136 (1974).

So in our case it is entirely appropriate for Mayor Beasley to consider what she already knows about the history of the site and the neighborhood. But she should be careful to lay that out at the hearing for the benefit of other council members, the applicant, and the neighbors. That way if anyone disagrees with her views of the facts or wants to offer rebuttals, they can do so.

#### *Site visit*

As with personal knowledge of the facts, the courts have long held that site visits by board members are permissible. Photographs, surveys, and even video tapes of the site may be submitted as exhibits, but often there is often no substitute for getting a look at the site and the conditions that exist there.

If board members do make a site visit, they should during the course of the hearing note that they have done so and summarize any pertinent facts they discern from the visit. Again, this allows all parties to know the evidence being considered and gives them an opportunity to present rebuttal information. Members should refrain from discussing the facts of the case with the applicant, neighbors, or staff during a site visit. Those comments are best made at the hearing for the benefit of all involved.

#### *Meetings with neighbors (or applicant)*

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It is not uncommon for a board member to have had casual conversations about the case prior to the hearing with staff, the applicant, or the neighbors. As long as those are relatively brief and are fully disclosed at the hearing, there is no legal problem.

That said, board members must avoid any extensive discussion about the facts of a case outside the hearing. The applicant has a legal right to know what the neighbors are saying about the case and have a chance to rebut factual assertions. Even if the conversations are innocent and well intentioned, the applicant has no way of knowing what is being said. Public confidence in the integrity of the decision depends on all of the evidence being presented openly and transparent to everyone affected. Evidence needs to be gathered at the hearing, not through the **grapevine**. So discussions with the neighbors (and with the applicant) outside the hearing must be minimized. Even disclosure may not cure extensive contact with a party about the case prior to the hearing.

So Mayor Beasley should politely tell folks who call her about the case that she appreciates their concerns, encourage them to come to the hearing and speak on the case, but let them know that she is not at liberty to hear about the case outside of the hearing. She could do the same at a brief drop-in with neighbors, but it would probably best to avoid attending meetings about the case with the neighbors or the applicant prior to the hearing.

#### *Meetings with staff*

The same rule applies, and for the same reasons, to a board member's discussions outside the hearing with the board's staff. Both the applicants and the neighbors have a right to see and hear all of the evidence being presented. It is acceptable to speak with staff about the ordinance and its requirements prior to a hearing, but those discussions should not include the facts of a pending case.

It would certainly be appropriate for Mayor Beasley to ask staff these questions at the hearing. It is acceptable for her to send staff a memo prior to the hearing alerting them to information she would like to see presented at the hearing. It is also appropriate for staff to prepare reports and recommendations to be presented to the board, provided that information is presented to all board members and to all parties (and the staff member should be available at the hearing to present the report and respond to queries). But a board member must be careful not to express an opinion about the ultimate outcome of the case or even the need for a particular condition prior to hearing the evidence at the hearing.

All of these rules may seem unduly formal and constraining. But the permit decision will have a significant impact on the applicant and the neighbors. Both have rights to a fair hearing. Board members making quasi-judicial decisions have a responsibility to observe and protect those rights. A fair hearing requires that all board members and the parties see the same evidence and have a fair chance to rebut and challenge that evidence. Avoiding undue receipt of information outside the hearing is therefore an essential duty for boards making quasi-judicial decisions.

## Links

- [www.youtube.com/watch?v=Y7dGdrP3pms](https://www.youtube.com/watch?v=Y7dGdrP3pms)