

Recent Advisory Opinions by North Carolina State Bar May Affect Land Development Engineers Appearing at Quasi-Judicial Hearings

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A recent advisory opinion issued by the Authorized Practice Committee (“APC”) of the North Carolina State Bar (“State Bar”) may have engineers who work in the field of land development feeling a bit perplexed. The opinion holds that non-lawyers, such as engineers, architects, or land planners, who advocate for their clients at quasi-judicial (“QJ”) hearings, are engaging in the unauthorized practice of law (“UPL”). APC recognizes that engineers play a vital role at and should be encouraged to present factual evidence and expert testimony on behalf of their clients at QJ hearings. However, once the line is crossed into advocating for those clients, engineers risk injunctive action against them by APC.

Land development engineers are likely aware of the various hearings their clients must proceed through at the local governmental level in order to receive approval for their residential and commercial development projects. Hearings are considered legislative in nature where the local governmental entity (comprised of elected officials) is considering the enactment of ordinances to establish zoning areas, amending zoning ordinances or maps (rezoning), or rescinding existing zoning ordinances. Because anyone is allowed to appear on behalf of a client at a legislative hearing and advocate to the local governmental entity for a particular result for that client, engineers may continue to do so without engaging in UPL.

QJ hearings, however, occur when a local governmental entity applies legislatively determined policies to individualized situations, in effect a “land use regulatory adjudication.” These hearings may be before a planning board, a board of adjustment, or a town board, city council, or county commission. Two factors must exist for the hearing to be QJ: the finding of facts regarding the specific proposal and the exercise of discretion in applying predetermined policies to the situation. Common zoning related hearings that are QJ include (1) variances, (2) special and conditional use permits, and (3) appeals of administrative (staff) determinations. A variance is an authority to a property owner to use property in a manner forbidden by the zoning ordinance. Special and conditional use permits allow uses in a zoning district only if specified standards are met, requiring judgment and discretion. Administrative determinations could include a zoning administrator deciding a certain land use is not permitted on a site or how a setback is measured.

Due process requirements under the United States and North Carolina Constitutions mandate that the QJ decision-making process adequately protect the rights of the parties involved. Therefore, the QJ hearing must contain a fair evidentiary process that provides a foundation for the decision. The record must contain substantial, competent, and material evidence that supports the decision, with sufficiently detailed written findings to explain the basis of the decision. Substantial evidence is “that which a reasonable mind would regard as sufficiently supporting a specific result.” Persons

presenting evidence to a board should be under oath or affirmation. These processes are required to meet the judicial standards of review that apply to QJ hearings, which are different from those for legislative hearings.

Parties at QJ hearings may directly or cross-examine witnesses. While some boards have adopted rules of procedure to govern testimony and cross-examination, at the present time, most have not. Thus, it is not uncommon for there to be no set rules for determining who can offer testimony or conduct cross-examination. The recent APC advisory opinions may change that.

Engineers in North Carolina have routinely appeared on behalf of clients at QJ hearings, and have probably not thought twice about doing so. That is, at least until 2005 when a suspended North Carolina attorney requested an advisory opinion from APC as to whether he could represent clients before a city planning board or city council with respect to petitions for rezoning. APC is a standing committee of the State Bar charged with investigating and acting upon allegations of UPL. Allegations of UPL can be submitted by anyone to the staff counsel of APC. APC determines if probable cause exists to believe that UPL has occurred and how the State Bar should respond. The State Bar may then decide whether to sue for injunctive relief in North Carolina Superior Court in the appropriate county. When APC issues an advisory opinion, however, it simply “articulates how it believes a court would ultimately resolve the question for the guidance of the public.” Therefore, it is important to understand that no North Carolina court has yet ruled on the issue of whether engineers in North Carolina may continue to appear on behalf on their clients at QJ hearings in the manner engineers have been up until now.

The APC issued its initial findings in an October 31, 2005 letter. APC found that general rezoning cases and ordinance amendments are considered legislative in nature and that anyone could speak for another at such a hearing. APC, however, found that “special use permit proceedings” are QJ in nature, noting that witnesses are sworn in, provide testimony, and subject to cross-examination. Finally, APC said that it would be the UPL for “an individual who is not an active member of the North Carolina State Bar to appear for another at such a meeting or proceeding or to otherwise assist or represent another at such a meeting or proceeding.” It was this last part that caused concern for architects and engineers.

Because of the outcry arising from the October 31, 2005 letter, APC formed a subcommittee to further examine the advisory opinion issued in the letter. Many interested parties, including PENC, attempted to get APC to soften its stance towards architects and engineers representing clients at QJ hearings. APC received comments from architects, land use planners, and city and county attorneys. APC then issued another advisory opinion on July 19, 2006, in order to “supplement” its prior opinion.

In its July 19, 2006 advisory opinion, APC cited N.C. Gen. Stat. §§ 84-2.1 and 4, finding that the law is clear that “an appearance on behalf of another person, firm, or corporation in a representative capacity for the presentation of evidence through others, cross-examination of witnesses, and argument on the law at a QJ proceeding is the

practice of law.” Applying this to a variance hearing setting, APC found it would be the UPL for a non-licensed attorney to “appear in a representative capacity to advocate the legal position of another person, firm, or corporation that is a party to the proceeding.” Under this holding, advocating could potentially include simply asking the local governmental entity to grant the variance or special use permit.

In response to pleas to relax the restrictions on architects and engineers, APC noted that architects, land use planners, and engineers “play a vital role at these quasi-judicial proceedings by presenting necessary facts and information on behalf of their clients.” Furthermore, “these professionals are subject matter experts whose expert opinions, as witnesses, must be presented to the hearing body.” APC then explained that attorneys advocating for clients at QJ hearings should not “interfere with or inhibit the role of non-lawyer professionals who speak as witnesses and present information” on behalf of those clients, and in fact “their roles should be complementary.” APC appears to have defined the role of the attorney to include all matters of advocacy (direct examination of others, cross-examination, and argument on the law), while engineers should be limited to factual and expert opinion testimony.

APC found that effective representation of clients at QJ hearings is “becoming increasingly dependent upon legal advocacy of the rights of the parties” and “compiling a supportable record in the event of an appeal.” These are of course, as APC stated skills an attorney provides. APC further noted that even the most seemingly simple matters, such as the “height of residential fences” may become subject to appeal. And during appeals, the courts may only consider the official record produced at the hearing, making its legal sufficiency very important.

As the State Bar is the only entity which may bring legal actions against those engaging in UPL, many are wondering under what circumstances it would bring such an action. Unfortunately, it is impossible to tell. All attorneys are prohibited under the North Carolina Rules of Professional Conduct from assisting another person in UPL. Local governmental attorneys are now wondering what would happen if they were present at a QJ hearing where a non-lawyer appeared in a “representative capacity” for a client.

A proposed advisory opinion by the Ethics Committee of the State Bar, dated January 28, 2007, found that a lawyer in this situation should inform the local government entity of the APC holding in the July 19, 2006 advisory opinion and “advise the [local governmental entity] on the legal implications of the opinion.” If the local government entity decides to proceed with the hearing despite the attorney’s advice, the attorney may “continue to provide advice to the members of the [local governmental entity] on any matter that arises during the remainder of the hearing.” Thus, even if a local governmental attorney believes that an engineer would be engaging in UPL, the proposed ethics opinion merely requires the attorney to brief his client on such possibility. The local governmental entity, it appears, would make the determination as to who would be allowed to represent, or advocate, for the client.

Local governmental entities, however, would be expected to typically rely on their attorney's advice in this situation. The APC advisory opinions were discussed at a recent gathering of local governmental attorneys. The attorneys present were generally not pleased with the advisory opinions, describing them as "untenable" and "awkward." When this type of situation occurs, and the local governmental entity turns to the attorney for legal advice, they asked: "what should the attorney recommend – stop the hearing or deny the permit?" The attorneys said that sometimes there is not a clear line between testimonial opinion and argument on the law. The attorneys even worried about being "embarrassed" when asked what to do by the local governmental entity in this situation.

One possible solution may be for attorneys and engineers to work together in the representation of the client at a QJ hearing before the local governmental entity. The engineer would be relied on to provide factual and expert opinion testimony, while the attorney would handle any direct examination of other witnesses, cross-examination, and argument on the law (i.e. requesting approval of the permit.) We will just have to wait and see what transpires.

Bio

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