

Ohio Township Association  
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**BZA Hearings: What Could Go Wrong?**  
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**Focus on the Process for the Outcome**

A successful outcome is one that can be defended on appeal in the Court of Common Pleas under Revised Code Chapter 2506. So how do we get to where the courts, which generally disfavor zoning disputes and government restrictions on how people (especially voters) use their property, find that, “while reasonable minds may disagree over certain aspects of the issue, this Court must give deference to the BZA’s consideration of the evidence, presume that the decision was reasonable and valid, and not substitute its judgment for that of the BZA”?

The answer is to focus on the proper procedure so that all parties – the applicant and any interested parties – are able to submit their evidence, make their arguments, and be heard so that the BZA can issue a written decision laying out the necessary findings of fact that are ultimately reviewed by the court.

The community, through its Zoning Resolution and BZA, makes its own decisions about how property is used in, and that affect, the community and its standards. Courts may disagree with those decisions, but they are supposed to uphold those decisions if the BZA is careful and thorough with its process and the written decision.

The transcript and record of the hearing clearly demonstrates the BZA conducted its own discussion and analysis utilizing the *Duncan* factors. Despite no opposition to the request from the public, the BZA ultimately denied the variance request for additional signage by the majority of the board. The BZA issued the following relevant Findings of Fact: \* \* \* .

In reviewing the decision of the BZA in the limited capacity this appeal provides according to the statute, the Court cannot find the decision was unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the proper evidence. Therefore, in accordance with R.C. 2506.04, the Court finds the appeal filed by the Applicant is not well taken and the decision of the BZA is hereby affirmed in its entirety.

**What went wrong? (Or No-No’s)**

1. Missing Members; Use of Alternates
2. Board Member Conflict of Interest
3. Prior Ex Parte Communications between Applicant and BZA Member
4. Fail to Swear-In Witnesses
5. No Non-Oral Evidence Submitted into the Record
6. No Cross-Examination by Witnesses

7. Standing of Challengers
8. Appearance by Challengers
9. Closed v. Open Deliberation
10. Deliberations/Decision Not Based on the Evidence Submitted
11. Tie Votes
12. Tabling Final Decision for Tie-Break Vote

Any of these leave the BZA's decision open to reversal.

### **What to do?**

1. Ensure there is a clear record of the proceedings, preferably by court reporter but high-quality audio or video recording would work if transcribed later.
2. Follow the procedure for conducting hearings.
  - a. The applicant should be allowed a sufficient yet reasonable time to present its case.
  - b. If there are going to be any time limits for non-applicants, then those limits should be announced before any witnesses speak and they should be applied equally to everyone.
3. Be prepared. Know any standards or conditions that may apply before the hearing.
4. Be respectful of everyone.
5. Create a record.
  - a. It's the applicant's responsibility to make the presentation. But members should ask questions based on the factors/considerations that apply to the situation, even if the applicant does not specifically address them. It's the BZA's decision that will be under scrutiny.
  - b. Allow the applicant and any witnesses to submit evidence, present testimony, and ask questions of other witnesses.
  - c. Members' deliberations should be focused on these factors/considerations.
  - d. Make sure all exhibits are appropriately marked and organized before the hearing is closed.
6. Prepare a written decision in a timely manner.
7. Timely transmit the entire record to the Clerk of Court if an appeal is filed.

### **Applicable Revised Code Sections**

#### **R.C. § 2506.02 Notice of Appeal – filing transcript.**

Within forty days after filing a notice of appeal in relation to a final order, adjudication, or decision covered by division (A) of section 2506.01 of the Revised Code, the officer or body from which the appeal is taken, upon the filing of a praecipe by the appellant, shall prepare and file in the court to which the appeal is taken, a complete transcript of all the original papers, testimony, and evidence offered, heard, and taken into consideration in issuing the final order, adjudication, or decision. The costs of the transcript shall be taxed as a part of the costs of the appeal.

**R.C. § 2506.03 Hearing.**

(A) The hearing of an appeal taken in relation to a final order, adjudication, or decision covered by division (A) of section 2506.01 of the Revised Code shall proceed as in the trial of a civil action, but the court shall be confined to the transcript filed under section 2506.02 of the Revised Code unless it appears, on the face of that transcript or by affidavit filed by the appellant, that one of the following applies:

(1) The transcript does not contain a report of all evidence admitted or proffered by the appellant.

(2) The appellant was not permitted to appear and be heard in person, or by the appellant's attorney, in opposition to the final order, adjudication, or decision, and to do any of the following:

(a) Present the appellant's position, arguments, and contentions;

(b) Offer and examine witnesses and present evidence in support;

(c) Cross-examine witnesses purporting to refute the appellant's position, arguments, and contentions;

(d) Offer evidence to refute evidence and testimony offered in opposition to the appellant's position, arguments, and contentions;

(e) Proffer any such evidence into the record, if the admission of it is denied by the officer or body appealed from.

(3) The testimony adduced was not given under oath.

(4) The appellant was unable to present evidence by reason of a lack of the power of subpoena by the officer or body appealed from, or the refusal, after request, of that officer or body to afford the appellant opportunity to use the power of subpoena when possessed by the officer or body.

(5) The officer or body failed to file with the transcript conclusions of fact supporting the final order, adjudication, or decision.

(B) If any circumstance described in divisions (A)(1) to (5) of this section applies, the court shall hear the appeal upon the transcript and additional evidence as may be introduced by any party. At the hearing, any party may call, as if on cross-examination, any witness who previously gave testimony in opposition to that party.