

A Citizens Guide to Conditional-Use Permits



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SPECIAL & CONDITIONAL USE PERMITS

Early zoning ordinances set out a list of land uses permitted in each zoning district, with all other uses prohibited in that district. Determining whether a particular use was allowed was a simple yes-or-no proposition. For example, an apartment building could be a permitted use in an R-10 district, in which case it is automatically allowed (sometimes referred to as a “use by right”). Otherwise it was prohibited.

Most modern zoning ordinances set up a category for these “maybes” of the zoning world. These may be called a special use permit, a conditional use permit, or a special exception (the terms are legally the same and interchangeable). They are uses that are not automatically permitted in a particular zoning district, but are permitted if certain specified conditions are met. Decisions on these permits are quasi-judicial.

DECISION-MAKING BODY

The decisions on permit applications may be made by the governing body, the board of adjustment, or the planning board. Each local government specifies the decision-making body in its zoning ordinance. These decisions cannot be assigned to an individual staff member for decision.

It is possible to assign some of these decisions to one board and some to a different board. Often, if a zoning ordinance splits the decisions on such permits between two boards, each board will use a different name for the permit it grants to reduce confusion. For example, the permits granted by the governing board may be called “special use permits” and those granted by the board of adjustment “conditional use permits”. Even so, both are quasi-judicial decisions, both require a full evidentiary hearing, and all of the standards discussed in Chapter 6 apply no matter which board is making the decision.

A number of cities and counties provide for an advisory review of special and conditional use permits by the planning board, perhaps using the required planning board review of rezonings as a model. While this is legally permissible, care must be taken to assure that any evidence to be considered by the decision-making board is properly presented to that board. If the governing board makes the final decision and holds the formal evidentiary hearing on the permit application, only evidence presented at that hearing may be considered. Evidence that is presented only to the advisory board cannot be the basis for a decision.

STANDARDS FOR DECISION

The zoning ordinance itself must spell out requirements for granting these permits. The decision-making standards must be included in the text of the ordinance. They cannot be developed on a case-by-case basis, as that would be leaving these decisions to the unfettered discretion of the board making decision. This is not permissible, even if it is the city council or board of commissioners making the decision. The decision to grant or deny the permit, or to impose conditions on an

approval, must be based on the standards that are actually in the ordinance and that are clearly indicated as the standards to be applied to this decision.

The standards must provide sufficient guidance for decision. The applicant and neighbors, the board making the decision, and a court reviewing the decision all need to know what the ordinance requires for approval. The courts have held there is inadequate guidance if the ordinance only provides an extremely general standard, such as that the project be in the public interest or that it be consistent with the purposes of the ordinance.

The courts have approved use of relatively general standards that are now incorporated into most North Carolina zoning ordinances. They are that the project

1. Not materially endanger the public health and safety,
2. Meet all the required conditions and specifications,
3. Not substantially injure the value of adjoining property (or alternatively that it be a public necessity),
4. Be in harmony with the surrounding area and be compatible with the surrounding neighborhood, and
5. Be in general conformance with adopted plans.

Some cities and counties also include specific standards for particular types of special uses. Typical specific standards include minimum lot sizes, buffering or landscaping requirements, special setbacks, and the like. Ordinances can use a combination of general and specific standards. For example, all special and conditional uses may be required to meet four or five general standards and then the

ordinance sets out a list of additional specific standards for various individual uses.

PRODUCTION OF EVIDENCE

The burden is on the applicant to present sufficient evidence to allow the board to make a finding that the required standards will be met. The burden is on the opponent to the permit to present evidence that a standard will not be met. If insufficient evidence is presented that the required standards will be met, the permit must be denied. If uncontradicted evidence is presented that all of the standards will be met, the board must issue the permit. Similarly, if uncontradicted evidence is presented that one of the general or specific standards will not be met, the permit must be denied. If there is conflicting evidence, the board decides what the facts are and issues or denies the permit accordingly.

CONDITIONS

The board can impose additional unique project-specific conditions on special and conditional use permits. However, it is very important to note that the board does not have the authority to impose any conditions it wants. Each condition must be related to bringing the project into compliance with the standards for decision already in the zoning ordinance. The ordinance can place an expiration date on a special use permit as well, so that if a building permit for the project is not secured within a certain time, the permit expires.

Once issued, the permit can be transferred by the applicant to another person, but not to another property. The permit applies to the property involved, not to the person receiving it. All of the conditions included in the original permit still apply to the new owner. For this reason, some local governments require that special use

permits be recorded in the chain of title so that future purchasers of property will be fully aware of all permit conditions.

PROTEST PETITIONS

Neither the landowner nor the neighbors have any legal right to the continuation of any particular zoning on a piece of property. A decision on whether and how to rezone property is left to the discretion and good judgment of elected officials, the notion being that if the citizens do not approve of their decisions, the remedy is at the ballot box. In cities a further protection, the protest petition, provides a degree of additional stability to zoning, allowing citizens to have more say in a decision.

The protest petition was included in the original 1916 New York zoning ordinance and the model statute that was adopted by most states, North Carolina included. The state statutes provide that if the owners of a sufficient amount of land most directly affected file such a petition, a municipal zoning amendment can be adopted only if approved by a three-fourths majority of the city council. The three-fourths majority is calculated on the basis of governing board members eligible to vote on the rezoning - vacant seats and the seats of members not eligible to vote due to a conflict of interest are not considered in making the calculation. This protest option must be provided by city governments, but the state statutes do not include a similar provision for counties.

There are two qualifying areas for a protest petition. The first requires a protest from the owners of 20 percent of the land included within the map amendment. The second requires a protest from the owners of 5 percent of the land included within a 100-foot-wide buffer surrounding the

property to be rezoned. A street right-of-way is not considered in computing this 100-foot buffer unless that right-of-way is more than 100 feet wide. If more than one area is being considered in a rezoning proposal, separate protest petitions can be made for each discrete area.

Protest petitions can be used only to object to changes in the zoning map. They cannot be filed to protest amendments to the zoning text. They cannot be filed to protest the initial zoning of an area, such as when zoning is first adopted for newly annexed territory of a city. ***Likewise, they cannot be used to protest modest changes in special and conditional use districts or conditional use zoning amendments.*** The protest petition does not apply to individual permit decisions, such as a special or conditional use permit.

A person may withdraw his or her signature to a protest petition at any time prior to the vote on the proposed amendment. The sufficiency of the protest is measured at the time of the vote.

CONDITIONAL AND SPECIAL USE PERMITS IN MOREHEAD CITY

- Permits granted by the Town Council are called “Conditional-Use Permits.
- Permits issued by the Board of Adjustment are called “Special Use Permits”.
- The Planning Board conducts an advisory review of Conditional Use Permit applications.
- Special Use Permit information can be found under Article 4 of the Unified Development Ordinance (UDO).
- Conditional Use Permit information can be found under Article 10 of the Unified Development Ordinance (UDO).