

QUICKNOTES

CONDITIONAL USES

WHAT IS A CONDITIONAL USE?

A conditional use is a use that is permitted subject to compliance with a set of conditions or requirements set forth in the zoning ordinance. The conditions are designed to ensure that the use is in harmony with both the purposes section of the zoning ordinance and the specific requirements for that use detailed in the zoning ordinance, and that it will not adversely affect the neighborhood if such requirements or conditions are met. The terms “conditional use,” “special use,” “special exception use,” and “special permit” are used interchangeably, but the types of uses that are regulated as conditional uses and the board(s) in charge of administering the conditional use review process vary from jurisdiction to jurisdiction.

WHY ARE CONDITIONAL USES IMPORTANT?

The ability to regulate certain uses as conditional uses under a zoning ordinance is an important tool for public officials because it gives them flexibility while still ensuring that the use is and will remain in harmony with the purposes and intent of the zoning ordinance. Public officials can permit uses that might otherwise not be allowed in certain zoning districts by carefully crafting a set of conditions or requirements that must be met in addition to the general zoning criteria. Conditional uses are also important to applicants and the public alike because they allow for a greater variety of and diversity among uses. In most jurisdictions, property owners affected by a zoning provision creating or eliminating a conditional use have the ability to comment at the time such provision is adopted or amended. Likewise, parties aggrieved by the decision to grant or not grant a conditional use permit also have the ability to appeal that decision.

DIFFERENCES BETWEEN CONDITIONAL USES AND OTHER TYPES OF USES

Most contemporary zoning ordinances classify uses as either permitted by right, permitted with conditions, or prohibited in each zoning district. If a use is permitted by right, an applicant simply goes through the administrative processes required to obtain zoning approvals and building permits. Conditional uses, on the other hand, are subject to discretionary review, where the designated review body must determine whether or not the proposed use satisfies the purposes section of the zoning ordinance and meets any specific requirements detailed in the ordinance. Unlike a prohibited use, a conditional use is permitted provided that the general and specific criteria relating to such use have been met. In contrast, a prohibited use is not permitted unless relief from the zoning provisions has been obtained, usually in the form of a variance or through an amendment to the zoning ordinance.

CONSIDERATIONS AND METHODOLOGY FOR DETERMINING CONDITIONAL USES

Except in cases where the state legislature has mandated that certain uses must be permitted in certain zoning districts, the following types of uses are commonly regulated as conditional uses: adult homes, professional offices, group homes, nursing homes, religious institutions, or day-care centers in residential zones, and shopping centers, drive-through establishments, gasoline filling stations, and convenience stores in commercial zones. The advantage to regulating some uses as a conditional use versus relying on permitted uses is that special consideration can be given to some of the recurring problems associated with such uses—protected against by a condition or requirement—without having to apply that same condition or requirement to every other permitted use in the same zone. For example, increased stacking and queuing requirements can be imposed for fast-food restaurants with drive-through lanes, although

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these requirements may be overly burdensome for other uses with drive-through lanes in the district, such as banks or pharmacies. Some municipalities, however, overuse this regulatory power by classifying nearly every use as a special use or by overly conditioning uses to the point of prohibition. Too many conditional uses may discourage applicants from applying because of the cost and uncertainty associated with the application process or the increase in the amount of time it takes to obtain approval. The goal in regulating conditional uses should be to balance the need for diversity and proximity to certain uses against any potential impacts such uses may have on the surrounding community.

ISSUING ENTITY FOR CONDITIONAL USE PERMITS

Statewide land-use legislation or the local zoning ordinance will prescribe which board or boards have exclusive jurisdiction to hear a conditional use-based application. In some instances, the local legislative body can designate itself, the planning board, the zoning board, or a hearing examiner with the authority to review conditional use applications. In other instances, an applicant's ability to comply with the conditions required for a conditional use will dictate whether the applicant goes before the planning board or the zoning board. Likewise, in other localities, certain types of conditional uses will be heard by one board (such as the planning board) and other types of conditional uses will be heard by the local legislative body or the zoning board. Under this approach, uses that involve site planning concerns are typically assigned to the planning board while those that focus on neighborhood compatibility are assigned to the zoning board.

APPLICATION PROCESS AND PROCEDURES

Jurisdictions that regulate conditional uses are generally required to hold a public hearing as part of the review process. In most instances, proof of compliance with the conditions or requirements imposed for a conditional use must be made at the time of submission, either on the plans for the proposed use or separately in writing by detailing the applicant's compliance with each condition. This is critical in jurisdictions where compliance or the lack thereof dictates the board to which the application will be assigned. Proof of compliance must also be provided in writing or orally, in the form of testimony, at the public hearing in which permission for the use is being sought. Likewise, for jurisdictions where conditional use review and approval is being conducted concurrently with site plan review, it is also common for the municipality to require that a conditional use permit be obtained simultaneously with the granting of site plan approval.

DETERMINATIONS AND FINDINGS OF FACT

All determinations should be set forth in writing and should include a statement of findings upon which the reviewing board has relied in making its decision. In granting, denying, or granting a permit with conditions, the reviewing board should consider all evidence offered at or before any public hearing; any reports from other boards and federal, state, or local agencies; additional requested information; and all relevant facts and circumstances. The decision to deny a conditional use should not be based upon generalized objections or arbitrary and capricious concerns of neighboring community members but rather a review and application of the specific criteria and conditions for the conditional use.

CONDITIONS

The reviewing board has the authority to attach conditions to the issuance of a conditional use permit or approval. However, such conditions must be directly related to and incidental to the proposed use. Conditions that have been imposed must usually be fulfilled by the applicant prior to the receipt of any building permits or before a certificate of occupancy can be issued, unless they involve a continuing obligation that must be fulfilled once the property has been developed.

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