

ZONING PRACTICE

May 2006

AMERICAN PLANNING ASSOCIATION



➔ ISSUE NUMBER FIVE

PRACTICE CONDITIONAL USES

A large, bold, black number "5" is positioned in the lower-left corner of the cover, partially overlapping the stone wall of the Rosehill Cemetery entrance. The background of the entire cover is a purple-tinted photograph of the Rosehill Cemetery entrance, showing a stone wall with a crenellated top and a central spire. The words "Rosehill Cemetery" are carved into the stone in a gothic script.

Conditional Uses: Using Discretion, Hoping for Certainty

By Gail Easley, FAICP

For 80 years counties and municipalities have been adopting, expanding, revising, and complaining about zoning as the primary means of implementing local comprehensive plans.

Communities adopt zoning ordinances because they are a familiar method of regulating the design and use of land. The complaints arise because zoning ordinances fall short of the predictability they promise and do not ensure the quality of design citizens desire.

Chief among the complaints is the need for flexibility and the ability to exercise discretion in the application of standards. Early on, the variance was created as a means of allowing a proposed development to vary from the terms of the zoning ordinance. A variance would be appropriate when there were special circumstances of the property, which, together with the imposition of the zoning standards, would result in unnecessary or undue hardship. In *The Zoning Game* (University of Wisconsin Press, 1966) author Richard Babcock calls this a “crude means to grant and deny favors,” and characterizes the variance not as a safety valve to avoid undue hardship but as “leakage” from the certainty of the zoning ordinance.

Ultimately, another means of achieving flexibility was created: the conditional use, which is the topic of this issue of *Zoning Practice*. The technique has several names, including special permit, special use, and special exception, all of which mean the assignment of conditions to the approval of a use. Local governments establish conditional uses as a technique in the zoning ordinance for flexibility and because special standards are sometimes required for desirable uses.

SPECIAL STANDARDS FOR DESIRABLE USES

The fundamental purpose of the zoning ordinance is to establish districts (zones) which have a common set of permissible uses and a common set of site design standards within each. Anywhere a particular zone is applied, so are the same set of uses and standards. Permissible uses are called “by-right” uses, meaning that the uses are named in the zoning ordinance and a property owner has the

CONDITIONAL USES: THE BASICS

- The local government wants to allow uses that are not typical for the zoning district and believes the “conditional” use can fit the zoning district if additional standards are imposed.
- There is an expectation that the conditional use will have impacts beyond those anticipated for the zoning district.
- It is often impossible to anticipate the type and intensity of impacts from a conditional use. A reviewing body can investigate to define the activities, identify the nature of the impacts, and assign conditions to ensure the compatibility of the use with the neighborhood.

- Complete neighborhoods require an array of uses, some of which require conditions. (From left) A day care center with an obscuring fence around the perimeter of the property to protect the children from the neighborhood and the neighborhood from the children. As churches become larger and include more activities, so too do the potential impacts: here, a modestly sized church in an urban residential neighborhood, with parking restrictions and landscaping requirements that allow for harmony both within the building and with neighbors. An example of commercial uses adjacent to residential properties, which is limited in size, with certain hours of operation, and requires special permits for outdoor seating. This dog day care facility is an urban essential, but with proper siting—next to an L track in Chicago’s Lakeview neighborhood, rather than near residents who may fear noise and odor.



ASK THE AUTHOR JOIN US ONLINE!

From June 12 to 19, go online to participate in our “Ask the Author” forum, an interactive feature of Zoning Practice. Gail Easley, FAICP, will be available to answer questions about this article. Go to the APA website at www.planning.org and follow the links to the Ask the Author section. From there, just submit your questions about the article using an e-mail link. The author will reply, and Zoning Practice will post the answers cumulatively on the website for the benefit of all subscribers. This feature will be available for selected issues of Zoning Practice at announced times. After each online discussion is closed, the answers will be saved in an online archive available through the APA Zoning Practice web pages.

About the Author

V. Gail Easley, FAICP, specializes in land development regulations and has prepared unified land development codes incorporating contemporary practices for clients across the country. Easley has written numerous model codes, model ordinances, and technical assistance guidebooks, and regularly provides training to both citizen and practicing planners.

right to establish the use so long as it conforms to the standards and criteria of the zoning ordinance. There is an underlying belief that the permitted uses are similar in type and range of impact. This similarity is intended to ensure compatibility within a district. The local government staff, a planning commission, or a development review board may grant approval for a permitted use when the proposed development meets the requirements of the ordinance.

However, there are often uses that would be welcome within the zoning district if additional standards could prevent them from undermining the purpose and intent of the district. Specifically, special uses must be governed by a set of standards to ensure compatibility with the by-right uses of the district. When adequate controls are in place, people want schools, churches, parks, playgrounds, day care centers, and even neighborhood shops within or near their residential neighborhoods. Indeed, the prevalent practice of mixed-use development indicates our desire to have certain uses close to home.

Business and industrial districts also benefit from uses other than those permitted by right. For example, day care centers and restaurants are welcome near employment centers. Because the standards that are necessary for an industrial use or an office building would not be appropriate for day care centers, the conditional use process ensures the application of the appropriate standards.

When a local government identifies some uses as potentially permissible through a conditional use approval process, the zoning board of appeals is obligated to investigate the proposal to make certain that sufficient conditions are assigned.

FLEXIBILITY BEGETS CREATIVITY

A rigid application and enforcement of the zoning ordinance often results in the similarity of the physical characteristics of a district. To achieve the prized certainty created by zoning, all development must meet the same set of standards within a district. Consequently, designers have little opportunity to exercise creativity. Standard or conventional design has little opposition in the approval process,

but when a local government wishes to encourage creativity, the standards must include flexibility and the decision-making process must allow for discretion.

One means to encourage flexibility is to identify in advance which conditional uses an appointed body would be willing to review to determine compatibility (or potential compatibility) with the neighborhood and decide what additional standards should be met to guarantee it. The extra standards will mitigate the impacts of any possible incompatibility. The flexibility inherent in this approach encourages creativity.

The flexibility and discretion needed to assign conditions may lead to significant problems in the implementation of the zoning ordinance—so planners, be cautious. Establishing criteria to guide the assignment of conditions is a good idea. For example, if conditional standards are as detailed as dimensional standards for permitted uses the flexibility of the conditional use process is compromised. Conversely, if the standards are broad and general (e.g., “must not be detrimental to the health, safety, or welfare of the



Photos by Michael Davidson

CONDITIONAL USE LEGISLATION

Planning and zoning officials: know the authority granted to your board by reviewing your state legislation.

Only Florida and Georgia have no enabling legislation for establishing a board of adjustment. Therefore, local governments in these states have considerable latitude on establishing them and defining their roles. This latitude also applies to the review of variance requests and hearing appeals of administrative decisions.

Several states do not have specific legislation about conditional uses, despite the authority to establish a board of adjustment. In these states, legislation authorizes the board and describes the state's role for variances. The local government, with help from its legal counsel, may include conditional uses within the zoning ordinance and assign review procedures to staff.

North Carolina grants general power in its enabling legislation. The board of adjustment is granted the "power to vary or modify any of the regulations or provisions of the ordinance so that the spirit of the ordinance shall be observed. . . ." (North Carolina General Statutes 160A-388). The board is also authorized to impose conditions. In contrast, California has specific requirements for the issuance of special use permits.

State ⁴	Conditional Use Permit	Special Exception	Special Use Permit	State ⁴	Conditional Use Permit	Special Exception	Special Use Permit
Alabama		X		Montana		X	
Alaska				Nebraska			
Arizona				Nevada	X	X	X
Arkansas				New Hampshire		X	
California	X		X	New Jersey	X		
Colorado		X		New Mexico			X
Connecticut		X	X	New York ³			X
Delaware		X	X	North Carolina	X	X	X
Florida ¹				North Dakota			
Georgia ¹				Ohio	X		
Hawaii			X	Oklahoma		X	
Idaho			X	Oregon	X		X
Illinois			X	Pennsylvania	X	X	
Indiana ²	X	X		Rhode Island			X
Iowa		X		South Carolina		X	
Kansas		X		South Dakota	X		
Kentucky	X			Tennessee		X	
Louisiana		X		Texas		X	
Maine	X	X		Utah	X	X	
Maryland		X		Vermont			
Massachusetts			X	Virginia		X	
Michigan				Washington	X		
Minnesota	X	X		West Virginia		X	
Mississippi	X	X		Wisconsin		X	
Missouri			X	Wyoming		X	

1. Florida and Georgia do not have enabling legislation for a board of adjustment. Each local government may define its own roles and responsibilities.

2. Indiana legislation includes "contingent use" and "use variance" as other ways to describe conditional uses.

3. New York legislation also provides for a "use variance."

4. Not all states have specific enabling legislation for conditional or special uses, even though there is specific legislation to establish a board of adjustment. Local governments may enact provisions for conditional or special uses according to the authority granted by the state.

neighborhood") the result could be a negotiation process between the property owner and the zoning board of appeals. An overly vague or ambiguous standard is susceptible to a legal challenge because the resulting conditions may appear arbitrary. The key is to find the balance between broad standards that can lead to abuse and those so narrowly defined that the ability to assign conditions to circumstance is removed entirely.

APPROVAL OF CONDITIONAL USES

Local decision makers should know if their state has enabling legislation for conditional uses. Depending on the authority established in the legislation, conditional uses may be approved administratively or by a review board, such as the board of adjustment or the planning commission.

Some states have no legislation to direct local governments on establishing conditional uses, which means city planners have significant latitude to establish the process and standards themselves. Other states have very general authorization in their statutes—again, allowing local government considerable latitude. Many states have enabling legislation with *some* direction on conditional uses. Finally, some states provide specific legislation that says a local government must meet the definition and requirements set forth in the state law.

Typically, there are two ways to assign conditions in the approval process. Where specific standards are set forth in the local regulations, a conditional use must demonstrate compliance with those standards. There is little or no discretion authorized to the board of adjustment to assign standards beyond those specified. The benefit is that this method adds certainty to the process. The potential impacts of a list of conditional uses were considered in advance and standards have been adopted to mitigate those impacts. All conditional uses are treated in a similar manner. However, a disadvantage may arise when a use is expected to have impacts that are not sufficiently addressed by the adopted standards. The impacts could be greater, or just different.

The standards may also be ad hoc—not set forth in the local regulations and leaving the board of adjustment to decide on the conditions (standards) on a case-by-case basis. The advantage to this approach is that every situation is addressed individually, based on the impacts of the proposed use. However, the standards imposed on a use in one ap-

proval may be different from those imposed on the same or a substantially similar use in that district. Equal treatment is more difficult when there are no standards established in the regulations.

In either situation, it is very important to ensure a reasonable relationship between the condition assigned and the impact it is intended to address. The conditions should be related to the type and amount of the potential impact. The imposed standards should ensure that the use

- is compatible with the area in form and function,
- will not endanger public health or safety, and
- is designed in such a way as to mitigate potential conflicts with adjacent and nearby uses.

The conditions imposed in granting a conditional use should ensure compatibility and mitigate the impacts.

Site features. Parking lots, lighting, outdoor storage, storage buildings, fences, signs, outdoor sales areas, and dumpsters can produce potentially negative impacts, including aesthetic degradation, noise, glare, and odor.

Materials, roof pitch, color, and architectural style help to determine if the building is a good fit in terms of appearance. For example, conditions that require building materials or colors that match the predominant theme of the area may be necessary; in a neighborhood of pitched roofs, for example, a flat roof can detract from neighborhood character and may lead the community to impose a condition calling for pitched roofs. In historic districts or districts with an established architectural style, conditions will likely be geared toward architectural features or style.

Noise impacts in commercial and indus-

■ (Left) Schools are a common conditional use. This one has a fence between it and the surrounding neighborhood. (Right) Good conditions make good neighbors. The neighbors of this small bar, with its poorly placed dumpster, may not feel very neighborly. Conditional use standards could require limited hours of operation for the bar, and landscaping and other measures to conceal the dumpster.



Photos by Michael Davidson

UNDER WHAT CONDITION?

The types and range of impacts from a particular use are potentially great. The conditions imposed in granting a conditional use should ensure compatibility and mitigate the impacts. This section describes typical conditions and provides guidance in selecting the standards planners should impose to address those impacts.

Building size. Conditions may be assigned to limit the height, bulk, and dimensions of a proposed building to make the use consistent with the surrounding area and to ensure that the new building does not overwhelm the adjacent building, add to overcrowding, result in loss of privacy, or other negative impacts.

The same situation may arise with a one-story building that is very large in length and width. It is also appropriate for such conditions to establish a maximum amount of deviation

from the average height and dimensions of buildings in the surrounding area. For example, an increase in building height of 1.5 times the height of nearby buildings may be compatible.

Building setbacks. When a proposed building has larger dimensions or height than buildings in the surrounding area, a condition to increase building setback is appropriate. The greater setback provides additional open space and separation between the proposed building and adjacent buildings. It also serves to mitigate the impacts of buildings with greater bulk, reduce the perception of crowding, and prevent the possible loss of privacy.

Building orientation. Problems with noise and light are common at entrance areas (typically in the front) and delivery or loading areas (typically in the back). Building orientation as a condition can reduce or alleviate these impacts.

trial areas often come from parking lots and loading docks. Conditions to mitigate noise could include the location and design of the parking lot and delivery area and noise abatement measures. Examples include using large setbacks to separate a parking lot or delivery area from nearby uses; placing the building between nearby uses and the parking and delivery areas (essentially acting as a buffer); or using fences, walls, or berms to help with noise reduction.

Glare from lights around parking lots and in pedestrian areas, on signs, and from security devices often spills onto adjacent properties. Conditions that limit the height of light poles and require shielding, directional standards, and reductions in the number or intensity of lights provides code drafters with a variety of effective options for glare prevention or reduction.

Tough odors are often associated with



Michael Davidson

■ Sidewalk sales are a joy for pedestrians in the summer months and a boon for local businesses. However, conditional requirements limit their hours of operation, amount and location of merchandise, and even the season in which they occur.

Depending on the neighborhood,
similar uses will have different impacts;
some will be tolerated in one
neighborhood but not in another.

manufacturing uses, but restaurants and their associated dumpsters bring the nuisance alarmingly close to home as more communities implement mixed use development practices. Conditions that require the placement of dumpsters away from nearby buildings—especially residential buildings—and that they be enclosed, will lessen the impacts of sight, smell, and rodents.

Other conditions for restaurants and other service and entertainment uses include hours of operation, location and design for outdoor sales and storage, driveway siting, location and design of landscaping and landscaped buffers, and placement and design of fences and walls. Limiting the hours of operation serves to reduce noise from people gathering, and also limits the amount of time the parking lots are in use. Outdoor sales areas may be located away from nearby uses to reduce noise and impacts from traffic; such areas may also have limited hours of operation. Driveways that are away from adjacent buildings will reduce vehicle noise. Landscaping (in particular, landscaped buffers) can soften a severe appearance, reduce glare, and even help with noise. When



Photos by Michael Davidson



■ (Above) A cemetery in the middle of a residential suburban neighborhood, complete with a gate and lock, prevents visitors past a specified hour. (Above, right) Conditional use requirements allow communities to zone for mixed use districts, as shown in this photo of a restaurant across the street from upscale rowhouses in a suburban community. (Below, right) Certainly not the prototype, this McDonald's restaurant in an affluent suburban community on Chicago's North Shore was transformed as a result of a conditional use process that altered its design and signage.



ALWAYS LOOK AHEAD

In the context of land-use planning, “impact” means the effect of one use on another, perhaps so much so that the character of the neighborhood or community is changed. Some of the impacts may bring positive, welcome changes, such as reusing or replacing abandoned buildings or providing amenities as part of a development project. However, negative impacts can reduce the quality of life in the neighborhood and community. Decision makers should consider whether the use could generate any of the following impacts:

Traffic Impacts

- Congestion
- Safety loss or reduction
- Noise
- Glare from vehicles

Visual Impacts

- Viewshed obstruction
- Lack of/substandard landscaping
- Unattractive/noncontextual buildings

Environmental Impacts

- Air and water pollution
- Loss or reduction of habitat
- Loss or reduction of natural resources, including sensitive areas (e.g., wetlands)

Nuisance Impacts

- Noise
- Glare (vehicles, parking lots, building lights, parking lot security lights, etc.)
- Odor
- Vibration
- Electronic interference

Privacy Impacts

- Tall building encroachment
- Poorly placed buildings
- Poorly sited outdoor gathering places (especially associated with recreation)
- Density and intensity of use increases

Safety and Welfare Impacts

- Exposure to fire, flooding, or natural disasters

In contrast to their more scholarly approach, Anthony Flint, a veteran journalist who has covered development issues for the *Boston Globe*, tells the stories of the foot soldiers who march for and against sprawl, including former Maryland Gov. Paris Glendening, architect Andres Duany, and developer Anthony Palazzolo, who challenged wetlands regulations all the way to the U.S. Supreme Court in *This Land: The Battle Over Sprawl and the Future of America*.

Together, the books offer good storytelling and hard economics on the hottest topic in zoning today.

Cover image by Michael Davidson; design concept by Lisa Barton. Cemeteries are common conditional uses. On the cover: The gate to Chicago's famous Rosehill Cemetery, a castle-lated Gothic structure of Joliet limestone built in 1864 and designed by architect William W. Boyington, who moved to Chicago in 1853 and became one of the city's first architects and the first president of the Chicago chapter of the American Institute of Architects. Rosehill is the final resting place of many famous Chicagoans, Civil War Union soldiers, and Confederate POWs.

combined with a berm, landscaped buffers will provide the illusion of separation between uses.

CONCLUSION

Assigning conditions is not an exact science. Depending on the neighborhood, even similar uses will have different impacts. Some will be tolerated in one neighborhood but not in another. Planners can consider past experience with specific uses by identifying the impacts that occurred and evaluating the success of the standards imposed to address those impacts.

There are resources to help planners and zoning officials understand the conditional use process. In particular, look for monographs, APA's Planning Advisory Service (PAS) reports, and articles on preparing zoning ordinances. Specialized texts, such as those that help in the preparation of historic preservation ordinances or architectural review standards, will also be helpful. Finally, resources that explain urban design concepts and standards should be particularly useful in identifying appropriate conditional use standards.



ZONING REPORTS

SPRAWL COSTS: ECONOMIC IMPACTS OF UNCHECKED DEVELOPMENT

Robert W. Burchell, Anthony Downs, Barbara McCann, and Sahan Mukherji. 2005. Island Press, Washington, DC. 200 pp. \$25.

THIS LAND: THE BATTLE OVER SPRAWL AND THE FUTURE OF AMERICA

Anthony Flint. 2006. Johns Hopkins University Press, Baltimore. 288 pp. \$24.95.

Zoning, for good or ill, stands front and center in the debates over sprawl and its impact on the metropolitan environment.

In *Sprawl Costs: Economic Impacts of Unchecked Development*, Burchell and his fellow authors have explored for several years the economic costs of low-density development that has allowed land development to expand at a rate far faster than population growth in virtually every metropolitan area in North America. In this new book, they continue their quest to attach real numbers to those costs to make the case that “sprawl costs us all.” But they also define an alternative mode of growth that could help to solve the problems they illuminate.

VOL. 23, NO. 5

Zoning Practice is a monthly publication of the American Planning Association. Subscriptions are available for \$75 (U.S.) and \$90 (foreign). W. Paul Farmer, FAICP, Executive Director; William R. Klein, AICP, Director of Research.

Zoning Practice (ISSN 1548-0135) is produced at APA. Jim Schwab, AICP, Editor; Michael Davidson, Guest Editor; Julie Von Bergen, Assistant Editor; Lisa Barton, Design and Production.

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Printed on recycled paper, including 50-70% recycled fiber and 10% postconsumer waste.

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ARE SPECIAL STANDARDS REQUIRED FOR DESIRABLE USES?

5