

Coates' Canons Blog: A Conditional What? Clarifying Some Confusing Zoning Terminology

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A contemporary zoning ordinance can be a complicated proposition. A small town or rural county's ordinance often runs over 100 pages. Some of the zoning ordinances in our larger cities approach (and if a few instances pass) 1,000 pages. All of the details can be confusing even for the staff and board members who work with it every day. Imagine how it must perplex the landowner, neighbor, or developer who is picking it up for the first time and trying to figure how it applies to a particular project.

One common dimension of the confusion with zoning ordinances stems from an unfortunate use of very similar terminology to describe very different things. In North Carolina land use law the leading example, and our topic for this post, is the use of the terms "*conditional use permit*," "*conditional use district*" zones, and "*conditional zoning*." These three things sound alike, but in the world of zoning they are very different.

Just what are these three things? A conditional use permit is an approval issued upon an applicant establishing that standards set out in the zoning ordinance have been met. A conditional use district rezoning involves two decisions – a rezoning to a district that has only conditional uses (and no permitted uses) plus concurrent consideration of a conditional use permit. A conditional zoning attaches individual, site-specific conditions to the rezoning and does not involve a separate conditional use permit. While the chart below summarizes these differences, it is easy to see why confusion arises.

Conditional use permit	Quasi-judicial permit
Conditional use district	Rezoning plus quasi-judicial permit
Conditional zoning	Rezoning only, but with conditions

So let's look at each of these in a little more detail.

Conditional Use Permits

The first of these terms to enter the zoning lexicon was the "conditional use permit." In the zoning ordinances of eighty years ago, a specific land use was either permitted in a particular zoning district or it was prohibited in that district. For example, a single family home was permitted (sometimes referred to as a "use by right") in a residential zoning district, while commercial and industrial land uses were prohibited in that zoning district. If you asked if a specific land use was permitted to be located on a specific parcel, the answer was yes or no, depending on whether or not it was a permitted use there. Simple rules for a simpler time.

But about fifty years ago many local governments decided they needed more nuanced land use rules – that we needed to add "maybe" to the options of "yes" or "no." The idea was to add some flexibility to zoning ordinances while retaining oversight of individual projects. For example, a city might want to allow a small multi-family building to be located in some portions of a residential zoning district. This use would not be suitable for every location in the district, but with a case-by-case review it could be allowed in some locations within the district.

The "conditional use permit" was zoning's answer as to how to accomplish this. Rather than making small multi-family buildings a permitted use in the zoning district, the zoning ordinance would allow it only where it could be established that specified conditions would be met, hence the name "conditional use permit." Over 90% of the zoning ordinances in North Carolina now include provisions for some conditional use permits. And to add one more layer of confusion, the law allows **individual "conditions"** to be added to any quasi-judicial approval – not just for conditional use permits — including

zoning variances and certificates of appropriateness under historic district regulations.

In addition to the concept itself, two factors related to this innovation immediately added complexity and confusion to the zoning world.

First, the conditions specified in the ordinance that determine whether or not the use would be permitted usually included discretionary standards. For example, the zoning ordinance could condition whether a use would be allowed on a particular parcel upon a determination that it would be harmonious with the surrounding neighborhood and that it would not have a significant adverse impact on neighboring property values. Our courts soon ruled that since a person has a legal right to their permit upon establishing that the conditions have been met and since facts have to be ascertained to determine if the standards involving judgment and discretion have been met, the board making these decisions must follow quasi-judicial procedures. This means a number of complex limitations on the decision-making process are required – testimony by witnesses under oath and subject to cross-examination, having substantial evidence in the record to support factual findings, limits on **opinion testimony** and gathering **evidence outside the hearing**, mandates for **impartiality** by decision-makers, requirements for a written decision that adequately explains how the decision was reached, and so forth. These requirements and how they are followed are described in more detail in this **report**.

Second, the terminology used for this “maybe” of the zoning world has from the outset been confusing. Many ordinances use the term “conditional use permit” to describe this type of approval. Others use the term “special use permit.” Still others call them “special exceptions.” Even more mystifying, some ordinances provide for both “conditional use permits” and “special use permits.” The key thing to remember is that all three of these terms describe the same thing. There is no legal difference between the three. For the most part it is just a matter of local preference which of the three is used in any particular ordinance.

The rationale for some ordinances having both conditional use permits and special use permits is straightforward. Under North Carolina law a zoning ordinance can assign final decision-making on these permits to the governing board, the board of adjustment, or the planning board. Some ordinances assign some of these to one board and others to a different board. For example, most of the permits may be assigned to the board of adjustment but a few more sensitive ones (such as projects with more than 100,000 sq. ft. of floor space) may be assigned to the governing board. In those situations, the ordinance may use the term “conditional use permit” for all of those that go to the board of adjustment and “special use permit” for those going to the city council. This is just a convenience and there remains no legal difference (other than the decision-making board) between the two differently named permits. But this differing terminology has been a source of confusion for decades.

Conditional Use District Zoning

North Carolina land use law prohibits imposing individual, site-specific conditions on a regular rezoning to a conventional zoning district. If city or county governing board considers only a particular proposed project rather than the full range of uses that would be allowed in the new zoning district, the courts will invalidate the rezoning if it is challenged in court. If an owner promises the governing board that the new zoning would be used only for a particular project, that promise is not binding. Once the property is rezoned, the owner (and anyone the person may sell the property to) can undertake any use permitted in the new zoning district. In addition, any special conditions imposed on a conventional rezoning—such as requiring a buffer strip of a certain size—are not enforceable. Only those standards that apply to all property in the zoning district are legally enforceable. In this situation, the North Carolina courts will generally uphold the rezoning but without the invalid condition. These limits on zoning are described in more detail in this **earlier post**.

These limits on the use of conditions with a standard rezoning led in the 1980's to use of a new zoning tool in this state – the “conditional use district zone” (also called a “special use district zone” by some ordinances). A conditional use district rezoning is initiated when the owner asks for a rezoning to a new zoning district that does not have any automatically permitted uses, only uses allowed by the issuance of a conditional use permit. In the usual conditional use district rezoning process, the owner applies for a special or conditional use permit for a particular project at the same time the rezoning is requested and the two decisions (the rezoning and the permit) are considered in a single proceeding. This process is also described in more detail in an **earlier post**.

Conditional use district zoning is a complicated process. Although the rezoning request and the permit application are processed at the same time, the governing board treats the two proposals as legally independent, separate decisions. All

of the detailed conditions and specific restrictions on the project are attached to the conditional use permit (which is legal) rather than to the rezoning itself (which would not be enforceable). The board must make two decisions that have different procedural requirements, but usually the board attempts to make both at the same time and with a single hearing.

Conditional Zoning

The legal complexity and formality of the procedures required for conditional use district zoning led to an alternative that is increasingly common in North Carolina — “conditional zoning.” In the last decade both the courts and the legislature have approved use of purely legislative conditional zoning. This is different from a conditional use district in that there is no accompanying conditional use permit. All of the site specific standards and conditions (sometimes including a site plan) are incorporated into the zoning district regulations. Conditional zoning is proving to be very popular with elected officials, landowners, and many neighbors because it allows zoning to be tailored more carefully to a particular situation. In some of the state’s larger cities, 80 to 90 percent of the rezonings use conditional zoning.

State law only allows conditional zoning and conditional use districts at the owner’s request; they cannot be imposed without the owner’s agreement. Also, the individual conditions and site-specific standards that can be imposed are limited to those needed to bring a project into compliance with city and county ordinances and adopted plans and those addressing the impacts reasonably expected to be generated by use of the site. Conditional zoning is not exempt from a spot zoning challenge. If the new district is relatively small—and virtually all of these are—the local government must assure that all of the factors defining **reasonable spot zoning** are fully considered and that the public hearing record reflects that consideration.

So, while these three terms sound very similar, they are in fact very different. Some zoning ordinances use all three terms, so a user must pay careful attention to exactly which term is being used. But once you have the distinctions down, you are well on the way to becoming a zoning pro. After all, not just anybody knows the difference between conditional use permits, conditional use district zoning, and conditional zoning.

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