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## Coates' Canons Blog: Placing conditions on a conditional or special use permit approval.

By David Owens

Article: <https://canons.sog.unc.edu/placing-conditions-on-a-conditional-or-special-use-permit-approval/>

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The town council is holding a hearing on a special use permit application that would allow a small shopping center. The proposed site is on a major road and is adjacent to an existing residential neighborhood. At the hearing detailed information is presented on the traffic impacts of the project, including a required traffic impact analysis, testimony from the applicant's traffic engineer, and information from town staff. This evidence suggests the project as submitted needs to be modified to add a turning lane on the fronting street and a new traffic signal at the adjoining side street. The applicant is agreeable to adding these as conditions for approval. However, a large and vocal group of neighborhood residents appear at the hearing and object to the potential for additional traffic that might use the adjacent residential street. They ask the council to add a condition that limits vehicular access to the site to a single entry from the main frontage road and to prohibit vehicular access to the site from the adjoining side streets. The applicant objects to this condition, saying his tenants demand at least two points of entry and egress from the site and that there is not enough frontage on the main road for that, thus necessitating access from the side street. The council is, however, sympathetic to the neighborhood concerns and imposes the condition. The applicant then sues to strike the condition limiting access from the side street.

### What condition is this condition in?

The lawyerly response is, "It depends." But it is probably not in very good shape.

Conditional and special use permits allow the local government to approve a particular use if, after a detailed review, the unit determines that the standards for that use are met by an individual application. The law in North Carolina is clear that conditions can be added to special and conditional use permits by the decision-making board. The statutes specifically allow a board to impose "reasonable and appropriate conditions and safeguards" on these permits," so the consent of the applicant is not required for conditions. G.S. 160A-381(c); 160A-388(c); 153A-340(a); and 153A-345(c). Almost all of the zoning ordinances adopted by North Carolina cities and counties have provisions for special and conditional use permits – 93% of the jurisdictions responding to a 2004 **SOG survey** reported use of this zoning tool. The survey indicates that most all of the cities and counties that use special and conditional use permits take advantage of this authority. Only 10% of the responding jurisdictions reported that they never or only rarely impose conditions on these permits.

But there are at least four important limitations on imposing these conditions —

- The ordinance must provide authority and set a process to impose conditions;
- The ordinance must include standards the conditions will address;
- Substantial evidence in the record must support conditions actually imposed; and
- Conditions that impose an exaction must be reasonable related and proportionate to the impact of the development.

Authority and process in the ordinance. As the state statutes specifically authorize conditions, most ordinances do not have detailed provisions on this point. But any process in the ordinance must be followed. Still, it is worth taking a careful look at an ordinance on this point. A recent case (**Northwest Property Group, LLC v. Town of Carrboro**) with facts not too different from the example noted above wound up in the court of appeals on the issue of whether the town council had followed the process required by its ordinance to impose conditions. The key question in the case was whether the Carrboro ordinance allowed the imposition of any conditions after the town council voted to find the application met all the standards of the ordinance. A divided court held the ordinance allowed the town to do so, but remanded the case for new findings on whether the challenged condition was supported by the evidence in the record.

Standards in the ordinance. A condition cannot be imposed just because the council thinks it would be a good idea or because the neighbors want it. The board does not have unlimited discretion here. Any condition that is imposed must be based on bringing the project into compliance with standards that are included in the ordinance. For example, if the

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ordinance says a project authorized by a special use permit must not significantly increase traffic in adjoining neighborhoods, the proposed condition in our example would be within the scope of what could be required. If the ordinance has a more general standard that the project not have a significant adverse impact on public safety, the traffic impacts that affect safety could be the subject of a permit condition if needed to protect public safety. But it is critical that all conditions be based on meeting a relevant standard in the ordinance and that the condition reasonably relate to that standard.

Evidence in the record. This requirement is most likely to pose a problem for the contested condition in our example. When passing on special or conditional use permits, the decision-making board takes evidence in a formal hearing to determine if the standards are met. The courts require that there be substantial, competent, and material evidence in the record to support the board's findings on the permit decision. If the traffic impact analysis and testimony from the traffic engineer and town staff do not support the limit on access from the side street, where does the evidence to justify it come from? The fact that the neighbors asked for it is not enough. There must be some credible evidence presented to the board that without the condition the requirements of the ordinance would not be met. As noted in a prior **post**, this is particularly required when the issues are property value or traffic impacts. So in our example, the critical question would be whether there are facts in the record to support a conclusion that the side road access to the shopping center would create a relevant problem in meeting the requirements of the ordinance.

Exactions proportional. The U.S. Supreme Court has held that a condition that requires the developer to make a payment, donate land, or construct improvements as a condition of a regulatory approval is limited by the Takings Clause of the Constitution. This limitation that requires that the exaction be reasonably related to the impacts of the development and be no more than an amount proportional to the impacts of the proposed project. This factor not an issue in our example, so we can leave that issue for a later post (see pages 40-41 of **Land Use Law in North Carolina** for a summary of the law on this point).

It is vitally important that the applicant, the neighbors, and the decision-making board understand these limitations at the outset of consideration of a special use permit. If the applicant objects to the imposition of a condition, only those conditions that meet these limitations can be imposed. Even if the applicant accepts a condition, the applicant can later challenge it in court if there was no authority to impose it or if it is an unconstitutional condition. Attention to these limitations is therefore necessary to assure that conditions needed for special and conditional use permits are lawfully imposed and enforceable.

## Links

- [www.youtube.com/watch?v=oHEDGW9NQ-o](http://www.youtube.com/watch?v=oHEDGW9NQ-o)
- [www.sog.unc.edu/pubs/electronicversions/pdfs/ss22.pdf](http://www.sog.unc.edu/pubs/electronicversions/pdfs/ss22.pdf)
- [appellate.nccourts.org/opinions/?c=2&pdf=4480](http://appellate.nccourts.org/opinions/?c=2&pdf=4480)
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