

## Special Use Reviews

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### **I. Introduction**

Special use permits, conditional use permits and uses by special review are zoning approvals that may be approved by the governing body in certain circumstances subject to certain conditions attached to the permit. The conditions, which often involve negotiations between the zoning authority and the applicant, are intended to address the expected adverse affects of the permitted activity.

### **II. Description of Conditional Use/Special Use Permits**

#### A. Definition

1. Typical zoning ordinances identify two classes of authorized uses--permitted and conditional uses.

a. "Permitted uses" or "uses by right" are uses that are identified in the zoning code and cannot be denied unless they fail to meet applicable development criteria.

b. In contrast, a "conditional" or "special" use is a use that is allowed in a particular zone district only under certain circumstances and usually with special conditions attached to the use. The zoning authority has the discretion to deny the use if it does not fit in with its specific surroundings. These uses are dealt with on a case by case basis. See Juergensmeyer, Julian & Roberts, Thomas, Land Use Planning and Control Law, Section 5.24.

c. Conditional or special use permits generally run with the land. Rohan, Zoning and Land Use Controls, Section 44.01(4).

#### B. Purposes

1. There are several reasons for distinguishing conditional or special uses from permitted uses.

a. Certain uses, while they may cause impacts, may be necessary or appropriate in certain zone districts but not at all times or in all places. Allowing them on a conditional basis gives the zoning authority the ability to review the use and impose appropriate conditions on it. Examples of the kinds of uses that may be

appropriate in certain circumstances are utility transformers, pumping stations, airports, quarries, landfills, schools, hospitals, police and fire stations.

b. A conditional use permit requirement adds some flexibility to the zoning laws by allowing a municipality to regulate more closely particular types of controversial/problematic uses.

C. Distinction between special uses, conditional uses, variances and special exceptions.

1. Different jurisdictions use different terminology so it is important and necessary to read the zoning ordinances and their definitions.

2. In Colorado, the terms used in most zoning ordinances are “special use,” “conditional use,” or “use by special review.”

3. A variance differs from a special or conditional use because it allows a minor relief from the requirements of the zoning code (e.g. setbacks, heights) if the party can show unnecessary hardship. Variances are generally granted by a Board of Adjustment or Board of Zoning on appeal from the decision of a lower level official.

4. A special exception often (but not always) differs from a special or conditional use permit because it allows for administrative approval of specific uses or activities if certain conditions are met. Special exceptions are sometimes granted by staff and sometimes granted by the Board of Adjustment.

5. Denver’s Zoning Code differs by using several terms to describe uses that involve some sort of condition or special process, including “uses permitted after special review,” “uses permitted with conditions,” “uses permitted with limitations,” “uses permitted with distance requirements,” and “uses permitted after short review procedure.”

### **III. Types of Conditional Uses**

A. A conditional use or special use often involves potentially deleterious or noxious aspects associated with the use, such as additional traffic, obnoxious smells, increased noise, or the presence of hazardous materials.

B. Example uses: automobile services stations, drive-through fast food restaurants, convenient stores, trash disposal sites, taverns, adult businesses, telecommunication towers, child care centers, community correctional facilities and many, many more.

C. Cyclone Sand and Gravel Co. v. Zoning Board of Adjustments of the City of Ames, 351 N.W.2d 778, 781-82 (Iowa 1984). Special uses may provide desirable services for residents but because of unpleasant side effects, “may or may not be in

accord with the general purpose and intent of the municipality's land policy and the surrounding environment.”

#### **IV. Review and Conditions**

A. Prior to allowing a conditional or special use, a municipality or county often requires additional review of the proposed use and sometimes imposes specific conditions in order to mitigate the potential problems associated with the use. Some codes contain specific conditions tied to specific uses, while other codes contain general authority to impose the conditions.

B. The basic standards governing whether to allow the particular use, and process for reviewing a conditional use, typically are codified in the applicable sections of the applicable zoning code.

C. Approval of special or conditional uses can be done by the Planning Director, the Planning Commission, the final decision making body or some combination of the three.

1. In Aurora, most conditional uses are approved by the Planning and Zoning Commission, except that conditional uses in the E-470 zone district may be approved by the Planning Director. City of Aurora Zoning Code, Section 402.

2. In Littleton, conditional uses are approved by the Planning Commission. Littleton Zoning Ordinance, Section 10-8-1.

3. In Arapahoe County, uses by special review are approved by the Board of County Commissioners. Arapahoe County Land Development Code, 1-5605.04.

D. Denver's Zoning Code is more complicated than most other codes because it establishes different requirements for each of its restrictions (i.e., special review, conditional use, limited use, etc.) within each zone district.

E. Approval of the conditional or special use permit often involves negotiations and trade-offs among the applicant and the governing body. Because these permits almost always involve off-site impacts, neighbors and neighborhood organizations often are involved in the negotiations.

#### **V. Amendment of Special/Conditional Use Permits**

A. Some zoning codes require amendments to follow the same procedure as the original approval.

B. Other codes allow for administrative amendments so long as the change does not meet certain specified characteristics (e.g., change in use, reduction of required

off-street parking, a change to specified conditions.). See Littleton Zoning Ordinance, Section 10-8-5(B).

## **VI. Timeframes for Development of Special/Conditional Uses**

Most zoning codes impose timeframes on the development of conditional uses. Aurora, for example, requires a certificate of occupancy for development of the conditional use to be issued within three years of the date of approval. City of Aurora Zoning Code, Section 402. Littleton requires commencement of use of the conditional use within one year of approval with two six month extensions that may be granted by the Planning Commission. Littleton Zoning Ordinance, Section 10-8-3.

## **VII. Termination of Special/Conditional Uses**

Most zoning codes provide that the special/condition use terminates on certain events. For example, the City of Littleton provides that a conditional use terminates upon (1) failure to initiate the conditional use within 12 months, (2) changing the conditional use to a permitted use in the district, (3) discontinuance of the conditional use for a period of at least 12 months, (4) violation of, or failure to comply with, the approved conditional use permit. Littleton Zoning Ordinance, Section 10-8-3.

## **VII. Judicial Review**

Most courts consider the decision of whether or not to issue a special-use permit, to be “an administrative decision quasi-judicial in nature.” Pursuant to C.R.C.P. 106(a)(4), a quasi-judicial decision will be upheld if the record shows competent evidence to support the decision unless the challenging party can prove that the decision constitutes an abuse of discretion or was in excess of jurisdiction. City of Colorado Springs v. Board of County Commissioners, 895 P. 2d 1105 (Colo. App. 1994).

## **VIII. Recent Federal and Colorado Cases**

### **Federal Cases**

A. Nollan v. California Coastal Commission, 483 U.S. 825 (1987). The nature of the condition must relate to the impact caused by the permitted activity.

B. Dolan v. City of Tigard, 512 U.S. 374 (1994). The extent of the condition must be roughly proportional to the degree of impact.

C. City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985). Ordinance requiring residential units for mentally retard persons to obtain a special use permit violated equal protection rights of handicapped persons who were potential residents of units because the ordinance did not further any legitimate interest of the City.

## Colorado Cases

D. Oborne v. Board of County Commissioners of Douglas County, 764 P. 2d 397 (1988). Oil and Gas Conservation Act precluded Board of County Commissioners from imposing permit conditions on a special use permit to drill an exploratory oil well because the statute was meant to be the exclusive means of regulation and the General Assembly vested sole authority to regulate the subjects addressed by the Act in the Oil and Gas Conservation Commission.

E. Williams v. City of Central, 907 P.2d 701 (Colo. App. 1995). Central City's moratorium on the issuance of special use permits did not constitute a regulatory taking because the potential applicant did not have a reasonable investment backed expectation that he would be granted a special use permit to conduct gambling operation.

F. Elam v. Albers, 616 P.2d 168 (Colo. 1980). Landowners received conditional permit to operate a mobile home facility on property and chose not to act on permit. A year later the zoning classification for the property was changed to R-2, which does not allow mobile home facilities either as a permitted or conditional use. After change in zoning classification, landowners sought to exercise permit. District court ruled that conditional use permit ran with the land, thus, superceding change in zoning classification. Court of appeals reversed, stating: "because no steps were taken prior to the change in zoning to develop the land for such purposes, the owners cannot assert that they have a vested right to a "non-conforming" use of the land for a mobile home subdivision."

G. City of Colorado Springs v. Blanche, 761 P.2d 212 (Colo. 1988). Landowners began religious activities at a residential property, where applicable zoning regulations allowed religious activities only after applying for and receiving a conditional use permit (permissive type zoning regulation). Landowners claim that zoning regulations "deny them due process and equal protection of the law by unconstitutionally abridging [their] rights to freedom of speech, association, and religion." Court ruled that zoning regulation was constitutional and that evidence supported granting of temporary and permanent injunctive relief in favor of the city.

H. Hillside Community Church v. Olson, 58 P.3d 1021 (Colo. 2002), *appeal after remand* --- P.3d ----, 2005 WL 1303263 (Colo. App. 2005). Adjoining landowners had no property interest in the denial of a special use permit regarding an addition to a church sufficient to invoke procedural due process. Therefore, plaintiffs had no basis upon which to seek recourse under 42 U.S.C Section 1983.

I. Penrose Hospital of Colorado Springs v. City of Colorado Springs, 802 P.2d 1167 (Colo. App. 1990). A development plan granting the property owner a conditional use permit for operation of a hospital did not deprive the owner of the right to make use of the property in accordance with the underlying zoning.

J. C&M Sand & Gravel v. Board of County Commissioners of Boulder County, 673 P.2d 1013 (Colo. App. 1983). Zoning resolution setting out general standards for granting or denying a special use provide sufficient standards on which to base the denial of a special use.

K. Droste v. Board of County Commissioners of County of Pitkin, 85 P.3d 585 (Colo. App. 2003). Pitkin County denied two development applications under its permit system for new development in natural resource areas. The landowner correctly noted that the development was expressly exempted from regulation under the zoned land exemption of the Areas and Activities of State Interest Act's (AASIA) (more commonly referred to as House Bill 1041). However, the court held that the county could employ the Local Government Land Use Control Enabling Act (Enabling Act) to deny the development even though it was in an area of state interest as designated by the AASIA. The court reached its conclusion by interpreting the AASIA and the Enabling Act as separate and independent grants of authority in order to harmonize both statutes and avoid inconsistent results.

L. Crown Point I, LLC v. Intermountain Rural Elec. Ass'n, 319 F.3d 1211 (10th Cir. 2003). Town of Parker approved an electric utility's plan to construct an electrical transmission line through a developer's property without holding a public hearing. Developer brought a § 1983 action against the town and electric utility claiming a violation of its due process rights. The court held that the developer did not establish that it had a protected property interest in the special use review procedure.

## **IX. Sample Zoning Code Sections**

- A. City of Aurora
- B. Arapahoe County
- C. City of Littleton
- D. City of Fort Collins
- E. City and County of Denver
- F. Jefferson County

## **X. Practice Pointers**

- A. Read the zoning code carefully.
- B. When processing an application for a conditional use permit, remember interests of surrounding neighbors. It may be appropriate to involve them in the discussion of conditions.

C. Draft the permit conditions carefully. Make sure each required condition is clear and can be complied with over the long term. Beware of vague conditions that could be misinterpreted in the future. If possible, avoid negotiating conditions at the hearing on the permit.

D. Clarify the process for amending conditions or changing the conditional use.

E. Once permit is issued, establish an internal process to insure that the conditions are complied with.