

Georgia Association of Zoning Administrators

August 18, 2016

HOW TO DEFINE & HANDLE SPECIAL & CONDITIONAL USES

Presented by

Brandon L. Bowen

JENKINS & BOWEN P.C.
ATTORNEYS AT LAW

15 South Public Square
Cartersville, Georgia 30120
(770) 387-1373
bbowen@ga-lawyers.pro

Conditional zoning is when property is rezoned subject to conditions (which may or may not be listed in the ordinance).

Common conditions:

- Limit permissible uses.
- Mitigation
- Infrastructure (project improvements)

Problem conditions

- Contract zoning
- Exactions (i.e. requiring system improvements)

Special use permits are issued when certain criteria are met.

A use that is only permissible by special legislative permission, rather than by right or administrative permission.

Special use permits can have conditions placed on them just like conditional zoning.

Does your ordinance specifically allow conditional zoning and conditions on the grant of a special use permit?

Special use permit vs conditional use permit

The terms “special use permit” and “conditional use permit” mean essentially the same thing. Both involve a special use authorized by the zoning ordinance, but the ordinance provides that such uses are allowed only upon condition that it’s approved by the appropriate local government subject to meeting certain standards or conditions.

City of Atlanta v. Wansley Moving & Storage Company, 245 Ga. 794, 267 S.E.2d 234 (1980)

Special use permits and variances

- Distinguish special use permit from (administrative) variance.
- Use variances are illegal.

Discussion topics

Should everything be a special use? Or just the “Dirties”?

- Landfills
- Asphalt Plants
- Industrial Uses
- Junkyard
- Racetrack
- Special Event Facility
- Tattoo Parlors
- Vape Shop
- Bars
- Music Venues
- Pawn Shop
- Gun Range

Discussion topics

- Problems presented by certain uses:
 - Churches (RLUIPA)
 - Telecommunication Towers
 - Adult Entertainment
 - Signs

Special use permits must be either approved or denied based upon standards listed in the ordinance.

Without standards, a special use permit ordinance is unconstitutional.

Unfettered discretion = unconstitutional

City of Atlanta v. Wansley Moving & Storage Company, 245 Ga. 794, 267 S.E.2d 234 (1980)

- Special Use Permit must be granted if the applicant meets objective standards.

Fulton County v. Bartenfeld, 257 Ga. 766, 363 S.E.2d 555 (1988)

Examples of Objective Criteria

- Minimum lot size
- Buffer
- Frontage on arterial street
- Distance from drinking water wells
- Distance from schools / churches / parks

These are criteria that are readily measureable and identifiable.

Examples of Subjective Criteria

- Traffic
- Property values
- Nuisance
- Noise

These are criteria for which reasonable people could reach different conclusions.

This creates discretion in the governing authority.

City of Roswell v. Fellowship Christian School, Inc.,
281 Ga. 767, 642 S.E.2d 824 (2007).

Discretionary standards give the local governing body discretion when deciding whether to grant a permit...

... but there must be some evidence to support the exercise of discretion.

EXAMPLES OF DISCRETIONARY CRITERIA

The board may give a particular emphasis to the evaluation of the characteristics of the proposed use in relation to the immediate neighborhood and compatibility of proposed use with the neighborhood.

Gwinnett County v. Ehler Enterprises, 270 Ga. 570, 512 S.E.2d 239 (1999)

Compare to Guhl factors (you might reference in ordinance)

**Suddeth v. Forsyth County, 258 Ga. 773, 373
S.E.2d 746 (1988)**

Supports a discretionary balancing test:

“The benefits of and need for the proposed [land use] are greater than any possible depreciating effects and damages to the neighboring properties.”

Elbert County v. Sweet City Landfill, LLC, Ga. Supreme Ct., 2015.

Property owner wished to develop a landfill in Elbert County, which had a special use permit requirement. After several years of negotiations with the County that did not result in a final decision on the landfill special use permit, the developer filed suit. The Georgia Supreme Court held that most of the developer's claims failed because it had not exhausted its administrative remedies – it had never gotten a final decision. Therefore, its claims were not ripe for judicial review.

Record review of special use permit decisions – this means the only evidence before the Court should be the evidence before the local government.

De novo review of appeal of rezoning grant or denial- this means it's a new trial.

Jackson County v. Earth Resources, Inc., 280 Ga. 389, 627 S.E.2d 569 (2006).

Any evidence standard (also called substantial evidence standard): the court is bound to uphold the decision of the local government where there is any evidence supporting its decision.

Bulloch County Board of Commissioners v. Williams, Ga. Ct. of Appeals, 2015.

This case was an appeal from the denial of a conditional use permit to operate a personal care home. The planning commission gave a thorough written decision recommending approval, but the Board of Commissioners voted 3:2 to deny, apparently relying on opponents' testimony that the proposed personal care home was located on an unpaved "washboard" road and was in close proximity to a neighbor's unfenced pond – which may be a threat to patients non compos mentis.

The trial court struck down the denial, but the Court of Appeals affirmed, highlighting that appeals of special use permit hearings are record reviews (in this case the record was the minutes), and the trial court must look to see if any evidence supports the decision. In this case, the washboard road and unfenced pond fit the bill.

City of Suwanee v. Settles Bridge Farm, LLC, 292 Ga. 434: Does the mere existence of a special use permit requirement take property?

- Moratoria
- Exhaustion of Remedies
- Damages

Question # 1

Which is an example of objective criteria?

- Will the use negatively affect traffic patterns?
- Are the utilities to the site adequate?
- Is the lot at least 20 acres?

Question # 2

Which is not a legitimate condition of zoning?

1. Developer to install evergreen trees in buffer.
2. Developer to install accel / decel lane at entrance.
3. Developer to contribute \$100,000 to county paving fund.

Question # 3

Can you grant a variance to allow a use that would not otherwise be allowed in that district if it is reasonable for the particular property?

Question 4

Do special uses run with the land?

Can you limit the special use to the applicant?