

Georgia Association of Zoning Administrators

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SPECIAL USES and VARIANCES

Presented by

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

Special use permits are issued when certain criteria are met.

In either case, you have a use that is only permissible by legislative permission, rather than right or administrative permission.

However, the procedure for judicial review may be significantly different.

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.

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)

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 STANDARDS

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. One exception: developer's facial challenge under the dormant Commerce Clause.

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

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

Discussion topics

- Should everything be a special use? Or just the “Dirties”?
- Problems presented by certain uses:
 - Churches (RLUIPA)
 - Telecommunication Towers
 - Adult Entertainment
 - Signs

VARIANCES

Why do we need variances?

- Zoning ordinances attempt to impose regularity on an irregular landscape.

The role of the variance is to give the local government an out when the application of a reasonable land use restriction would have an unreasonable or unjustifiable result as to a particular property.

Administrative variances versus Board of Zoning Appeals variances.

- Less procedure
- Faster for applicant
- May put administrators in political situations

If you are going to allow an administrative official to grant variances:

- Make sure the ordinance clearly provides when an administrative variance is appropriate
- Provide due process
- If the administrative variance is denied, provide reasons and an appeal

Question:

Is a variance hearing subject to the Zoning
Procedures Law?

Answer:

- No, but the ordinance should have procedures, and they must be followed.
- Potential procedures:
 - Publication and notice letters to neighbors
 - Signs on the property
 - Public hearing

How do we handle a public hearing?

Fundamental rules for due process at a public hearing:

- Notice
- Applicant gets to present case and call witnesses.
- Interested parties should be allowed to speak, but Applicant always gets equal time to present rebuttal.

Public hearing, continued.

- Keep a record (audio and minutes count, but remember an appeal will be a record review).
- Don't forget about open meetings law.
- The decision should be in the form of a motion, with reasons, preferably reduced to writing.

Standards

The ordinance should state standards for grant of a variance.

Common standards:

- unjust hardship created by the ordinance,
- not a result of the property owner's act,
- usually related to a specific topographic character of the property

Standards

- Consider the impact on neighbors
- Consider the impact on the public welfare
- Not contrary to the intent of the code

Question # 1

What do you do if someone subdivides their property and sells part of it, only to find that the remaining property is below the minimum lot size?

- Can they still improve their property?
- Can you stop the subdivision?
- How do you prevent this in the first place?

Question # 2

What do you do with really small lots that existed before the zoning ordinance, and before health department regulations that required certain size lots for septic tanks?

- Do you require people to combine lots or get on sewer?
- What if sewer is not available?
- What if there is no lot to combine with?

King v. Putnam Cty Bd. of Comm's

Where a property owner had subdivided before land use ordinance was adopted *and* the new ordinance provided an exception for lots of record, he could build pursuant to that provision and was not required to get a variance.

Lot of record provision:

Any lot legally platted prior to the adoption of this Code and [, which] as a result of the adoption, does not meet the minimum lot or lot width requirements for the district in which it is located, may be developed with any use permitted in the district.

Question # 3

What if the ordinance did not have a lots of record provision?

Question # 4

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?

Answer:

No. A use variance is another way of saying rezoning, but it will not comply with the Zoning Procedures Law.

Question # 5

- Does the issuance of a variance give the property owner a vested right to build the structure that was the subject of the variance?
- What if a long period of time has passed since the variance was issued, and the structure still has not been built?

Meeks v. City of Buford

Where property owner obtained property and prior owner had a variance, but over a 15-year period neither ever expended significant money to develop the property pursuant to the variance, and the zoning regulations changed, the property owner had no vested rights.

Southern-States-Bartow County, Inc. v. Riverwood Farm
Property Owners Association, Inc., Ga. Ct. of Appeals, 2015.

What if a property owner acquires a variance,
transfers the property, and the new property owner
immediately seeks to develop under the variance?

Answer:

Variances (like rezonings) run with the land and not the property owner.

The new owner has the right to use the variance.