

Special Permits: WHAT THEY ARE & HOW THEY ARE USED

by Neil Lindberg, Esq.

Communities frequently use a flexible approach to land use regulation that allows development decisions to be made on a “special permit” basis. I want to briefly discuss just what special permits are, and then comment on some of the standards local boards employ when reviewing special permit applications.

Special permits appear in various forms. Most common are “special exceptions,” suggested by the Standard State Zoning Enabling Act drafted in 1926. The same device may be termed a conditional use permit, or a special use permit in your community.

What are Special Permits?

Special permits are approvals given to uses that meet certain standards or conditions which are listed in the local zoning ordinance. The conditions are often designed to ensure that the use will not adversely affect nearby, existing uses. Special permits are commonly employed to protect residential neighborhoods against potentially disruptive uses -- uses which might generate substantial amounts of noise, odor, or traffic, or which might in some other way be incompatible with the neighborhood. For this reason, uses such as gas stations and convenience stores often require special permits.

Local governments are also increasingly coming to require special permits for major development proposals. This allows the local government, typically through its zoning board, increased flexibility in examining the impacts of large-scale uses, and the ability to impose conditions to lessen adverse impacts. Projects such as shopping centers or office parks are particularly likely to require special permits.

Special Permit Standards

Zoning ordinances must specify the standards by which the special permit application is to be reviewed. Some standards are narrow and fairly objective. For example, the special

permit use might be required to maintain a minimum of 35% open space. Many standards, however, are broad and general. These include standards like “the use must not be detrimental to the health, safety, or welfare of persons residing in the vicinity.” This type of broad language

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often leads to negotiations between the applicant and the reviewing body over how the standard will be met.

Standards that are too general are susceptible to challenge in court on the ground that they allow for arbitrary government action, violating individual due process rights. However, courts are becoming more liberal in reviewing special permit standards. There is much variation, nevertheless, and standards upheld in one community might well be struck down in another.

Courts will also examine the particular case before them to be sure that there was sufficient evidence and findings to support the action the local reviewing body took in either approving or disapproving the special permit application.

Local governments have used (or tried to use) a broad array of standards in dealing with special uses. Before concluding, let me quickly touch on

just a few to give you a “flavor” of what special permit standards or conditions can include:

◆ Conditions requiring that “adequate municipal services” be in place before approval can be granted. These conditions have generally been upheld when challenged.

◆ Conditions seeking to limit competition, by allowing only a certain number of a particular type of use. Not surprisingly, courts have generally invalidated these type of conditions.

◆ Conditions providing that the use cannot cause increased traffic congestion. Conditions like these have been litigated with mixed results. The more closely the condition relates to protecting public safety, the more likely it will be upheld.

◆ Conditions designed to ensure that the use will not diminish surrounding land values. Courts have upheld such conditions if authorized by state enabling law, and assuming there was sufficient factual evidence to demonstrate that the use would cause land values to fall.

Summing Up:

Special permits can give local governments considerable flexibility to tailor conditions to a particular land use proposal. But discretion must be carefully exercised in order to avoid possible judicial invalidation of the permit. ◆

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NOTES FROM THE EDITOR:

The Planning Commission & Special Permits

Most of you reading this column serve on planning boards or commissions that, by law, have no role in reviewing applications for special permits. Instead, in your municipality or county a zoning board of adjustment -- or, perhaps, your governing body -- acts on special permit or conditional use applications. This does not mean, however, that you should not familiarize yourself with the role of special permits in your ordinance.

One of the planning commission's responsibilities -- albeit one that often is either ignored or given a low priority -- is oversight of the zoning code. After all, the zoning code is perhaps the most important mechanism for implementing the policies set out in your municipal comprehensive or master plan.

Oversight of the zoning code means ensuring that it is functioning effectively. Find out how well the special permit requirements of your ordinance are working:

- ◆ Do you have too many uses requiring special permits?
- ◆ How much staff time do they involve, and do the benefits of the additional review outweigh the burdens the review process imposes on applicants?

- ◆ What problems, if any, has your community's zoning board encountered in applying the special permit standards?

Special Permits versus Variances

A distinction that can sometimes cause confusion is between special permits and variances. As explained by Neil Lindberg, special permits relate to uses which are allowed in specific zoning districts, provided they meet conditions set out in the ordinance -- conditions generally related to avoiding adverse impacts on the neighboring area. In contrast, variances allow for the approval of uses and structures which would otherwise be prohibited because they do not meet the ordinance's requirements (such as minimum setback or lot size requirements).

To obtain a variance, the applicant must ordinarily show "hardship" -- which typically means proving that the only way any use can be made of the property which will provide a reasonable return is by permitting the applicant to vary from the ordinance's requirements.

In contrast, an applicant for a special permit does not have to show hardship. Instead, the focus is on showing that the proposed use meets the conditions contained in the ordinance (which, again, generally relate to mitigating adverse impacts). Also, please bear in mind that many states and municipalities prohibit or severely restrict the availability of "use

variances." Please consult your municipal or county attorney for more details on the applicable law for your jurisdiction.

The "Down Side" of Special Permits

Neil Lindberg ably demonstrates the positive aspects of special permits/conditional uses. These include flexibility, and the ability to deal, on a case-by-case basis, with the potentially adverse impacts a particular use might have. The special permit review process also allows neighbors a greater feeling of security, by assuring them the opportunity to have a say -- or state their concerns -- before a board of their fellow citizens.

At the same time, it is important to be aware of the "down side" of special permits. The very fact of having a review and hearing process has its costs: the time planning department staff and zoning board members must spend in reviewing the permit application, and the time and cost to the applicant in having to seek a permit, and go through the various procedural "hoops."

Also, the hearing process can become a minefield for uses which, though they meet the ordinance's conditions for approval, are nevertheless a source of concern for nearby landowners or others in the community. All too easily, the hearings and review can turn into a political test of strength. ◆