Town of Dallas Planning Board Meeting

Agenda

Thursday, June 20, 2019

To be held at Fire Station Community Room at 6:30 pm

The following agenda is proposed:

1. Call to Order
2. Roll Call of Members Present; Declaring a quorum as present
3. Invocation or Moment of Silence
4. Pledge of Allegiance to the Flag
5. Announcements/Introductions
6. Approval of Agenda with Additions or Deletions
7. Approval of Minutes- May 16,2019
8. Old Business
    a. EVM Signs
9. New Business
    a) Waiver Request: Carpenter St Subdivision Curb &Gutter
    b) Conditional Use and/or Conditional Zoning Discussion
10. Other business
11. Adjournment

MINUTES

Town of Dallas

PLANNING BOARD

Meeting of May 16, 2019

The meeting was called to order at 7:40 PM by Chairman Curtis Wilson, following the Board of Adjustment meeting.

The following members were present: Curtis Wilson-Chair, Tim Farris, John Beaty, David Jones, Alternate Reid Simms

Members absent: Glenn Bratton- Co-Chair, Eric Clemmer, John O' Daly, and Alternate Gene Brown

Also present: Tiffany Faro-Director of Development Services, Johnny Denton-Town Engineer, Wade McLamb- business owner

There was an invocation lead by Chairman Wilson and pledge of allegiance.

Approval of Agenda: A motion by Tim Farris was made and seconded by Reid Simms to approve the agenda for this meeting, and the motion was adopted unanimously.

Approval of Minutes: A motion by Tim Farris was made and seconded by Reid Simms to approve the minutes for February 2019, and the motion was adopted unanimously.

New Business:

1) EVM Signs and Other Sign Regulations

Staff introduced this agenda item to determine if the Planning Board has any interest in updating the Town's sign ordinances in light of recent ambiguity. Wade McLamb attended and spoke regarding the technology and options available today with Electronic Variable Messaging (EVM) signs, and sharing his opinion that our ordinance could benefit from some updates in order to have better control of their appearance while also allowing local businesses and churches to benefit from their use. The Planning Board requested that Wade McLamb work with staff to share some well written EVM sign ordinances, and that staff present a proposed text amendment for review at the next meeting. Discussion of other sign ordinance regulations also to be continued.

2) Chickens

Staff recapped previous discussion on this topic, highlighting the Planning Board's desire to revisit this discussion once more research could be done to generate a proposed ordinance amendment to accompany this change. After reviewing the City of Gastonia and City of Lincolnton's ordinances on chickens, staff presented a proposed ordinance amendment to 90.01 and the proposed permitted uses chart for the Planning Board's review. Tim Farris made a motion to adopt the ordinance amendment as presented, seconded by David Jones. All others were in favor with the exception of John Beaty.

Old Business:

1) Permitted Uses

Staff requested an administrative vote for clarification to the approved recommendation of the Permitted Uses Chart and all associated text changes in order to ensure that the Town follows all procedures as outlined by the NC General Statutes. Any text amendment to the Zoning Ordinance requires a consistency statement- staff provided an option for the Planning Board to choose from, and informed them that they could recommend another as well. Tim Farris made a motion to approve the proposed permitted uses chart because it was consistent with the 2003 Land Use plan as it promotes a healthy and vibrant downtown area, provides for a mix of housing choices that complements the Town's character, and allows for further development of both office and industrial sites in the community. This motion was seconded by David Jones and approved by all.

Staff requested an administrative vote for clarification to the approved recommendation of the Non-Conforming Uses and Buildings text amendment in order to ensure that the Town follows all procedures as outlined by the NC General Statutes. Any text amendment to the Zoning Ordinance requires a consistency statement- staff provided 4 options for the Planning Board to choose from, or informed them that they could recommend another as well. Tim Farris made a motion to approve the proposed changes as they are consistent with the 2014 Town Center Plan to protect long-standing small independent businesses that help provide a "sense of place" to Dallas' historic square, and they are consistent with the 2003 Land Use Plan as the continued use of the structures on Town Square add to the economic vitality of the area while honoring its historic character. This motion was seconded by David Jones and approved by all.

Other Business and Adjournment:

John Beaty made a motion to adjourn, seconded by Tim Farris, and approved unanimously.

Respectfully Submitted,

_____

Tiffany Faro, Development Services Director

Approved:

_____

Curtis Wilson, Chairman

TOWN OF DALLAS, NORTH CAROLINA

PLANNING BOARD AGENDA ITEM

DESCRIPTION: EVM Signs and Other Sign Regulations

AGENDA ITEM NO. 8A MEETING DATE: 6/14/2019

BACKGROUND INFORMATION:

The Town has discovered that our ordinances regulating signs requiring a permit have not been updated recently, and we have had an increased interest in sign permits and questions regarding our existing requirements.

Of specific interest is EVM signage regulation, as we have 2 current requests for this signage type that are not allowed per our current ordinances.

At our last meeting, the Planning Board indicated that they would like staff to work with Wade McLamb of McLamb LED signs to try to come up with a revision of the Town's EVM signage ordinance.

Staff has prepared a sample ordinance for your consideration based on examples provided by Mr. McLamb.

BOARD ACTION TAKEN:

NEXT STEPS:

Print

Dallas, NC Code of Ordinances

§ 153.082 FLASHING, MOVING AND ELECTRONIC VARIABLE MESSAGE (EVM) SIGNS.

(A) EVM signs shall be permitted only within those zones which are classified as B-2 (Highway Business) and BC-1 (Shopping Center), or, in the case of EVM signs owned by, and located entirely on property of a subdivision of government, within the B-3 (Central Business) Zone, so long as the EVM sign is no closer than 500 feet from any other permitted EVM sign and providing that the government operates such EVM sign in service to the public.

(B) EVM signs shall be located a minimum distance of 25 feet from any street right-of-way within the B-2 (Highway Business) and BC-1 (Shopping Center) zones; and a minimum distance of eight feet from any street right-of-way within the B-3 (Central Business) zone.

(C) EVM signs shall be located a minimum distance of 25 feet from any street or highway intersection and a minimum distance of 150 feet from any residential zoned area.

(D) EVM signs permitted within the B-3 (Central Business) zone as provided herein, may, in addition to providing for public information dissemination and community messaging, allow for "off-premise advertising", but only if the Board of of Aldermen have first officially adopted a set of policies, guidelines, and pricing for such advertising which shall be non-discriminatory; reflective of community standards and values; and give defined preference to local and regional goods, products, and services.

(Ord. passed 11-3-1970; Am. Ord. passed 7-3- 1972; Am. Ord. passed 6-12-2012)

§ 153.002 DEFINITIONS

Sign, Digital Display: The portion of a sign message made up of internally illuminated components capable of changing the message periodically. Digital Displays may include but are not limited to television screens, holographic displays, programmable ink, LCD, LED, or plasma displays.

Sign, Electronic Variable Messaging (EVM): A sign or portion thereof on which the copy or symbols change automatically through electrical or electronic means, including: message center signs, digital displays, and Tri-Vision Boards.

Sign, Flashing: A sign whose artificial illumination is not kept constant in intensity at all times when in use and which exhibits changes in light, color, direction, or animation. This definition does not include electronic message centers signs or digital displays that meet the requirements set forth herein.

Sign, Interactive: An electronic or animated sign that reacts to the behavior or electronic signals of motor vehicle drivers.

Sign, Message Center: A type of illuminated electronic variable messaging sign that consists of electronically changing alphanumeric text often used for gas price display signs and athletic scoreboards.

Nit: A unit of measurement of luminance, or the intensity of visible light, where one nit is equal to one candela per square meter. Nits are used to describe the brightness of computer displays, such as LCD, and CRT monitors.

§ 153.082 FLASHING, MOVING AND ELECTRONIC VARIABLE MESSAGE (EVM) SIGNS

1. Installation of a new electronic variable messaging sign, or the conversion of a permitted non-digital sign to a digital sign, requires the issuance of a zoning permit. The addition of any digital display to a nonconforming sign is prohibited. Zoning permits may be revoked for any for any illuminated signage installed without first obtaining all required building and electrical permits and inspections from Gaston County.

2. **Location**
    a. Electronic Variable Messaging signage must be located a minimum distance of 25 feet from any street or highway intersection and a minimum distance of 150 feet from any residential zoned area.
    b. New EVM signage must be located 300’ or greater from any other EVM sign.
    c. EVM signage located within the B-3 requires approval by the Board of Alderman in addition to the requirements outlined in this section.

3. **Appearance**
    a. *Height*: Message center signs and digital displays shall have the same height limits as other permitted signs of the same type and location.

    b. *Brightness*: Message center signs and digital displays are subject to the following brightness limits:

i. During daylight hours between sunrise and sunset, luminance shall be no greater than five thousand (5,000) nits.
ii. At all other times, luminance shall be no greater than two hundred fifty (250) nits.
iii. Each sign must have a light sensing device that will automatically adjust the brightness of the display as the natural ambient light conditions change. To comply with the limits set here within.

Note to the Board: The luminance limits of 5,000 and 250 nits were chosen to help ensure that electronic signs are not significantly brighter than non-electronic signs. A luminance of 5,000 nits will result in surface brightness similar to non-digital signs that are illuminated during daylight hours by the sun.

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4. **Message Duration**: The length of time each message may be displayed on a message center sign, digital display, or Tri-Vision Board sign is based upon the visibility and speed limit unique to individual signs and adjacent road conditions. The following method should be used to calculate message duration for message center signs, digital displays, or Tri-Vision Board signs.
    a. Determine the greatest distance from which the sign becomes visible on the road the sign is primarily intended to serve. If a sign is intended to be seen by more than one roadway, the road with the lower posted speed limit shall be used for determining message duration.
    b. Multiply the road's posted speed limit (MPH) by 5,280, and then divide by 3,600 to obtain the speed limit in feet/second.
    c. Divide the visibility distance by the speed limit (feet/second).
    d. Add an additional ten (10) percent of this number to the total. v. The resulting amount of time is the minimum permitted message duration, except where this value is less than eight (8) seconds in which the minimum message duration shall be no less than eight (8) seconds.

5. **Public Service Announcements**: The owner of every message center sign and digital display shall coordinate with the local authorities to display, when appropriate, emergency information important to the traveling public including, but not limited to Amber Alerts or alerts concerning terrorist attacks or natural disasters. Emergency information messages shall remain in the advertising rotation according to the protocols of the agency that issues the information.

6. Type-Specific Regulations
    a. **Digital display signs** are subject to the following regulations in addition to all other requirements established in the Town's sign ordinance.
        i. *Area*: When used as an on-premises sign, digital displays shall not exceed more than 30% of the total sign area permitted on the site.
        ii. *Maximum Number per Property*: Where permitted, one (1) digital display sign is permitted per property

iii. Message Display:
    1. Any Digital Display containing animation, streaming video, or text or images which flash, pulsate, move, or scroll is prohibited. Each complete message must fit on one screen.
    2. One message/display may be brighter than another, but each individual message/display must be static in intensity.
    3. The content of a digital display must transition by changing instantly, with no transition graphics (e.g., no fade-out or fade-in).
    4. Default Design: The sign shall contain a default design which shall freeze the sign message in one position if a malfunction should occur.

b. **Message center signs** are subject to the following regulations, in addition to all other illumination requirements established in the Town's sign ordinance.
    i. *Area:* When used as an on-premises sign, message center signs shall not exceed 50% of the sign area for any one sign, and shall not exceed more than 30% of the total area for all signs permitted on a property.
    ii. *Maximum Number:* Where permitted, one (1) message center sign is permitted per street frontage, up to a maximum of two (2) message center signs per property.
    iii. *Message Display*:
        1. No message center sign may contain text which flashes, pulsates, moves, or scrolls. Each complete message must fit on one screen.
        2. The content of a message center sign must transition by changing instantly (e.g., no fade-out or fade-in).
        3. Default Design: The sign shall contain a default design which shall freeze the sign message in one position if a malfunction should occur.

7. Electrical Standards.

a. The electrical supply to all exterior signs, whether to the sign itself or to lighting fixtures positioned to illuminate the sign, shall be provided by means of concealed electrical cables. Electrical supply to freestanding signs shall be provided by means of underground cables.

b. The owner of any illuminated sign shall arrange for a certification showing compliance with the brightness standards set forth herein by an independent contractor and provide the certification documentation to the Town of Dallas as a condition precedent to the issuance of a sign permit.

TOWN OF DALLAS, NORTH CAROLINA

PLANNING BOARD AGENDA ITEM

DESCRIPTION: Waiver Request- Curb and Gutter

AGENDA ITEM NO. 9A MEETING DATE: 6/14/2019

BACKGROUND INFORMATION:

Greg Dimmer is currently under contract to purchase a property on the corner of Davis St. and Carpenter St.- PID# 132692- in Dallas. His intentions are to subdivide the lot into 5 separate parcels to build 5 new single-family residential homes.

Staff has advised that any new subdivision in Town limits requires sidewalk and curb/gutter unless a waiver is granted by the Planning Board.

He has submitted a waiver request per 152.074 (E)5(a) 2, which allows for a subdivision fronting an existing street, the abutting portion of which does not contain curb and gutter, to request that curb and gutter on the street be waived by the Planning Board or Town Board of Aldermen.

BOARD ACTION TAKEN:

NEXT STEPS:

T Faro

From: gregdevise <gregdevise@aol.com>
Sent: Wednesday, June 12, 2019 8:41 AM
To: Tiffany Faro zoning officer at Town of Dallas
Subject: Letter Request Waiver from curb & Gutter
Attachments: Offer to Purchase and Contract-Vacant LotLand - 72018.pdf

To Whom it may Concern:

My name is Greg Dimmer and my company is Dimmer & Sons Construction, Inc.

I am under contract to purchase a property on the corner of Davis St. and Carpenter St. PID# 132692 in Dallas. My intentions are to sub divide the lot into 5 separate parcels to build 5 new residential homes with an approximate size of 1300 square foot, 3 bedroom/2 bath and price range of approximately $155,000.00.

I am requesting a waiver from the curbing and gutter due to the cost of having to do so and making it feasible to be able to build the homes at a reasonable cost. I will however install sidewalks across the front of the Properties as I build the homes to help with site improvements and the look to help improve the area.

There are no other streets in this area with curb and gutter and I feel my request for a waiver is a reasonable ask. This project will bring a new tax base revenue to the Town as well as water and sewer revenue and also improve the look of the area and help boost the property values around the area.

I look forward to meeting with you to discuss further and to answer any questions needed.

Attached to this email is my contract with the existing owner which is set with my attorney to close on June 26th

Thank You
Greg Dimmer/Dimmer & Sons Construction, Inc.
704-309-0760

Sent from my T-Mobile 4G LTE Device


E MAIN ST
B3-P
I-2
R-8
CHADWICK CIR
E CHURCH ST
BEN RICH ST
R-6
S DAVIS ST
S PASOUR ST
E CARPENTER ST
B-1
S SUMMEY ST
STARR ST
E PEACHTREE ST

TOWN OF DALLAS, NORTH CAROLINA

PLANNING BOARD AGENDA ITEM

DESCRIPTION: Conditional Use vs. Conditional Zoning

AGENDA ITEM NO. 9B MEETING DATE: 6/14/2019

BACKGROUND INFORMATION:

The Town of Dallas currently has conditional use districts and conditional use permits in place to allow developers to request certain types of zoning districts in locations where it may not otherwise be appropriate in the absence of special conditions.

Currently, an owner or developer is unable to request a conditional use permit (quasi-judicial decision) without first requesting a rezoning (legislative decision).

Conditional Zoning allows both decisions to occur simultaneously, and allows the decision to be made legislatively- meaning decisions can be made based on opinions about what is in the Town's best interest.

Staff would like input and direction from the Planning Board on exploring a switch to this process to reduce Town liability and simplify the process for owners and developers.

Some municipalities allow both options, while others select either/or as part of their zoning ordinances.

BOARD ACTION TAKEN:

NEXT STEPS:

Coates' Canons Blog: A Conditional What? Clarifying Some Confusing Zoning Terminology

By David Owens

Article: https://canons.sog.unc.edu/a-conditional-what-clarifying-some-confusing-zoning-terminology/

This entry was posted on November 13, 2012 and is filed under Land Use & Code Enforcement

A contemporary zoning ordinance can be a complicated proposition. A small town or rural county's ordinance often runs over 100 pages. Some of the zoning ordinances in our larger cities approach (and if a few instances pass) 1,000 pages. All of the details can be confusing even for the staff and board members who work with it every day. Imagine how it must perplex the landowner, neighbor, or developer who is picking it up for the first time and trying to figure how it applies to a particular project.

One common dimension of the confusion with zoning ordinances stems from an unfortunate use of very similar terminology to describe very different things. In North Carolina land use law the leading example, and our topic for this post, is the use of the terms "*conditional use permit*," "*conditional use district*" zones, and "*conditional zoning*." These three things sound alike, but in the world of zoning they are very different.

Just what are these three things? A conditional use permit is an approval issued upon an applicant establishing that standards set out in the zoning ordinance have been met. A conditional use district rezoning involves two decisions – a rezoning to a district that has only conditional uses (and no permitted uses) plus concurrent consideration of a conditional use permit. A conditional zoning attaches individual, site-specific conditions to the rezoning and does not involve a separate conditional use permit. While the chart below summarizes these differences, it is easy to see why confusion arises.

Conditional use permit	Quasi-judicial permit
Conditional use district	Rezoning plus quasi-judicial permit
Conditional zoning	Rezoning only, but with conditions

So let's look at each of these in a little more detail.

Conditional Use Permits

The first of these terms to enter the zoning lexicon was the "conditional use permit." In the zoning ordinances of eighty years ago, a specific land use was either permitted in a particular zoning district or it was prohibited in that district. For example, a single family home was permitted (sometimes referred to as a "use by right") in a residential zoning district, while commercial and industrial land uses were prohibited in that zoning district. If you asked if a specific land use was permitted to be located on a specific parcel, the answer was yes or no, depending on whether or not it was a permitted use there. Simple rules for a simpler time.

But about fifty years ago many local governments decided they needed more nuanced land use rules – that we needed to add "maybe" to the options of "yes" or "no." The idea was to add some flexibility to zoning ordinances while retaining oversight of individual projects. For example, a city might want to allow a small multi-family building to be located in some portions of a residential zoning district. This use would not be suitable for every location in the district, but with a case-by-case review it could be allowed in some locations within the district.

The "conditional use permit" was zoning's answer as to how to accomplish this. Rather than making small multi-family buildings a permitted use in the zoning district, the zoning ordinance would allow it only where it could be established that specified conditions would be met, hence the name "conditional use permit." Over 90% of the zoning ordinances in North Carolina now include provisions for some conditional use permits. And to add one more layer of confusion, the law allows **individual "conditions"** to be added to any quasi-judicial approval – not just for conditional use permits — including

zoning variances and certificates of appropriateness under historic district regulations.

In addition to the concept itself, two factors related to this innovation immediately added complexity and confusion to the zoning world.

First, the conditions specified in the ordinance that determine whether or not the use would be permitted usually included discretionary standards. For example, the zoning ordinance could condition whether a use would be allowed on a particular parcel upon a determination that it would be harmonious with the surrounding neighborhood and that it would not have a significant adverse impact on neighboring property values. Our courts soon ruled that since a person has a legal right to their permit upon establishing that the conditions have been met and since facts have to be ascertained to determine if the standards involving judgment and discretion have been met, the board making these decisions must follow quasi-judicial procedures. This means a number of complex limitations on the decision-making process are required – testimony by witnesses under oath and subject to cross-examination, having substantial evidence in the record to support factual findings, limits on **opinion testimony** and gathering **evidence outside the hearing**, mandates for **impartiality** by decision-makers, requirements for a written decision that adequately explains how the decision was reached, and so forth. These requirements and how they are followed are described in more detail in this **report**.

Second, the terminology used for this “maybe” of the zoning world has from the outset been confusing. Many ordinances use the term “conditional use permit” to describe this type of approval. Others use the term “special use permit.” Still others call them “special exceptions.” Even more mystifying, some ordinances provide for both “conditional use permits” and “special use permits.” The key thing to remember is that all three of these terms describe the same thing. There is no legal difference between the three. For the most part it is just a matter of local preference which of the three is used in any particular ordinance.

The rationale for some ordinances having both conditional use permits and special use permits is straightforward. Under North Carolina law a zoning ordinance can assign final decision-making on these permits to the governing board, the board of adjustment, or the planning board. Some ordinances assign some of these to one board and others to a different board. For example, most of the permits may be assigned to the board of adjustment but a few more sensitive ones (such as projects with more than 100,000 sq. ft. of floor space) may be assigned to the governing board. In those situations, the ordinance may use the term “conditional use permit” for all of those that go to the board of adjustment and “special use permit” for those going to the city council. This is just a convenience and there remains no legal difference (other than the decision-making board) between the two differently named permits. But this differing terminology has been a source of confusion for decades.

Conditional Use District Zoning

North Carolina land use law prohibits imposing individual, site-specific conditions on a regular rezoning to a conventional zoning district. If city or county governing board considers only a particular proposed project rather than the full range of uses that would be allowed in the new zoning district, the courts will invalidate the rezoning if it is challenged in court. If an owner promises the governing board that the new zoning would be used only for a particular project, that promise is not binding. Once the property is rezoned, the owner (and anyone the person may sell the property to) can undertake any use permitted in the new zoning district. In addition, any special conditions imposed on a conventional rezoning—such as requiring a buffer strip of a certain size—are not enforceable. Only those standards that apply to all property in the zoning district are legally enforceable. In this situation, the North Carolina courts will generally uphold the rezoning but without the invalid condition. These limits on zoning are described in more detail in this **earlier post**.

These limits on the use of conditions with a standard rezoning led in the 1980’s to use of a new zoning tool in this state – the “conditional use district zone” (also called a “special use district zone” by some ordinances). A conditional use district rezoning is initiated when the owner asks for a rezoning to a new zoning district that does not have any automatically permitted uses, only uses allowed by the issuance of a conditional use permit. In the usual conditional use district rezoning process, the owner applies for a special or conditional use permit for a particular project at the same time the rezoning is requested and the two decisions (the rezoning and the permit) are considered in a single proceeding. This process is also described in more detail in an **earlier post**.

Conditional use district zoning is a complicated process. Although the rezoning request and the permit application are processed at the same time, the governing board treats the two proposals as legally independent, separate decisions. All

of the detailed conditions and specific restrictions on the project are attached to the conditional use permit (which is legal) rather than to the rezoning itself (which would not be enforceable). The board must make two decisions that have different procedural requirements, but usually the board attempts to make both at the same time and with a single hearing.

Conditional Zoning

The legal complexity and formality of the procedures required for conditional use district zoning led to an alternative that is increasingly common in North Carolina — "conditional zoning." In the last decade both the courts and the legislature have approved use of purely legislative conditional zoning. This is different from a conditional use district in that there is no accompanying conditional use permit. All of the site specific standards and conditions (sometimes including a site plan) are incorporated into the zoning district regulations. Conditional zoning is proving to be very popular with elected officials, landowners, and many neighbors because it allows zoning to be tailored more carefully to a particular situation. In some of the state's larger cities, 80 to 90 percent of the rezonings use conditional zoning.

State law only allows conditional zoning and conditional use districts at the owner's request; they cannot be imposed without the owner's agreement. Also, the individual conditions and site-specific standards that can be imposed are limited to those needed to bring a project into compliance with city and county ordinances and adopted plans and those addressing the impacts reasonably expected to be generated by use of the site. Conditional zoning is not exempt from a spot zoning challenge. If the new district is relatively small—and virtually all of these are—the local government must assure that all of the factors defining **reasonable spot zoning** are fully considered and that the public hearing record reflects that consideration.

So, while these three terms sound very similar, they are in fact very different. Some zoning ordinances use all three terms, so a user must pay careful attention to exactly which term is being used. But once you have the distinctions down, you are well on the way to becoming a zoning pro. After all, not just anybody knows the difference between conditional use permits, conditional use district zoning, and conditional zoning.

Links

- canons.sog.unc.edu/?p=1646
- canons.sog.unc.edu/?p=6874
- canons.sog.unc.edu/?p=5202
- canons.sog.unc.edu/?p=6839
- www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/SS_22_v4b.pdf
- canons.sog.unc.edu/?p=4781
- canons.sog.unc.edu/?p=4987
- canons.sog.unc.edu/?p=4150

Conditional Zoning

David W. Owens

April, 2014

Case summary(ies)

In North Carolina it is illegal to impose conditions on rezonings to conventional zoning districts. However, this can be done if either conditional use district rezoning or conditional zoning is used. There are, however, detailed legal requirements that must be followed if either of these two zoning tools are used.

Summary:

Conditions on Rezonings

Individual, particularized conditions on rezonings to a general use district are unenforceable in North Carolina. G.S. 160A-382 and 153A-342 provide that "all regulations shall be uniform for each class or kind of building throughout each [zoning] district."

In *Decker v. Coleman*,[1] the court held that this uniformity requirement precludes imposition of conditions on conventional, general rezonings. In this case the city of Asheville rezoned a 62-acre parcel from residential to commercial in order to allow construction of a shopping center. The rezoning was conditioned upon the owner's maintaining a 50-foot buffer without any access connections between the proposed commercial use and the adjacent residential neighborhood. While such a condition may be entirely appropriate and legal for a special or conditional use permit, here the condition was attached to the rezoning decision. Since such a buffer requirement was not uniformly applied throughout the zoning district, the court held that the city had no statutory authority to apply it as a condition of rezoning a particular parcel. The court thus held the condition invalid and unenforceable.

The inclusion of an invalid condition does not serve to invalidate the rezoning. Barring other legal defects, the rezoning stands; its conditions do not. In *Decker* the city council included a specific severability clause and the court applied it to sever the condition, invalidate it, and leave the remainder of the ordinance amendment in place. The same result was reached in *Kerik v. Davidson County*,[2] where the court invalidated a buffer requirement imposed on a rezoning but held the rezoning itself valid.

Conditional Use District Zoning

Conditional use district zoning is involved when a landowner requests that property be placed in a new zoning district that has no permitted uses, only special or conditional uses.

In the typical North Carolina zoning ordinance that allows conditional use district zoning, the ordinance text is amended to create a set of conditional use districts. These conditional use districts have no permitted uses as of right. No new use of land may be undertaken unless a special or conditional use permit is first secured. Often there is one conditional use district to correspond with each conventional or general zoning district, with all of the permitted uses in a particular zoning district being converted to special or conditional uses in the parallel special/conditional use district. These conditional use districts are "floating zones"; that is, they are not applied to any property until a petition to apply them is made by the landowner.

Concurrently with consideration of a petition to rezone property into a conditional use district—a legislative rezoning decision—the governing board considers an individual application for a special or conditional use permit for a particular project within the new district. The special or conditional use permit—a quasi-judicial decision—could be addressed at a later time and could be issued by the board of adjustment or the planning board rather than the governing board. However, the typical practice is to consider the rezoning and the permit at the same time, with both decisions made by the governing board.

The legal advantage of such a system is that the legislative rezoning decision is not technically based on a single project, as any number of conditional use permits could be considered within the district, and the problems raised in *Allred* and *Blades* are thereby avoided. The conditional use permit allows specific, enforceable conditions to be imposed on the project that is approved.[3] But since the individual conditions are imposed on the permit, not the rezoning, the problems raised in *Decker* are avoided.

This technique of conditional use district zoning was pioneered by Greensboro in 1972, was explicitly authorized by local legislation for several local governments in 1973,[4] and was incorporated into the general zoning enabling act in 1985.[5]G.S. 153A-342 and 160A-382 specifically allow use of special and conditional use districts but only upon the petition of the owners of all of the land to be included in the district. The rezoning and permit decisions are legally separate, but the governing board clearly has the opportunity to deny the initial rezoning request if it objects to the project presented in the conditional use permit application that is officially considered subsequently. Although this has the practical effect of allowing a rezoning to be based on a particular proposal, a practice ruled illegal in North Carolina in the *Allred* and *Blades* decisions, use of conditional use district zoning was upheld in *Chrismon v. Guilford County*.[6]

The court in *Chrismon* concluded that conditional use district zoning was not illegal contract zoning per se because the promise was unilateral: the owner offered to develop the property according to a subsequently issued conditional use permit without receiving a reciprocal promise from the local government; at the same time, the governing board retained its independent judgment because it did not make such a promise.[7]

Conditional use district zoning requires two separate decisions,[8] with the rezoning decision meeting all of the statutory requirements for legislative decisions and the permit decision meeting all of the constitutional requirements for quasi-judicial decisions. The initial legislative decision about rezoning is based on a consideration of the policy question of whether some limited alternative use is appropriate for the site, and the subsequent quasi-judicial decision about a conditional use permit is based on

whether the particular application meets the standards set in the first decision.[9] If the petition for the rezoning is denied, the board does not decide the permit application, as the rezoning is necessary to create the eligibility for the special or conditional use permit.[10]

The procedure and standards for making quasi-judicial zoning decisions are very different from those for making legislative rezoning decisions.[11] The difficulty confronting cities and counties is that this process requires making two legally different decisions—the rezoning and the permit decision—at the same time and based on a single hearing, although the legal requirements and procedures for the two hearings vary significantly. A rezoning decision is entirely legislative in nature.[12]Elected officials can discuss the matter with interested citizens at any time. At the hearing anyone can speak, and the decision is left to the good judgment and discretion of the elected officials, provided it is supported by a reasonable basis. The expansive range of discretion and judicial deference for the legislative aspect of the overall decision is one of the principal reasons the tool has been so popular with local elected boards. On the other hand, a conditional use permit decision is quasi-judicial. Board members are not to gather evidence or discuss the case outside of the hearing. The decision is to be made on the basis of evidence presented at the hearing, substantial evidence must be presented to establish that the application meets the standards in the ordinance, and written findings are required to support the decision. As a practical matter (and likely a legal mandate), since quasi-judicial standards are more rigorous, most boards follow the quasi-judicial process when making the concurrent legislative and quasi-judicial decisions in a conditional use district rezoning.[13]

The court in the *Chrismon* case explicitly noted that conditional use district rezoning was still subject to the limitations on small-scale rezonings:

> [I]n order to be legal and proper, conditional use zoning, like any type of zoning, must be reasonable, neither arbitrary nor unduly discriminatory, and in the public interest. It goes without saying that it also cannot constitute illegal spot zoning or illegal contract zoning. . . . The benefits of the flexibility of conditional use zoning can be fairly achieved only when these limiting standards are consistently and carefully applied.[14]

As the architects of the conditional use district system put it, this “system is not for amateurs.”[15] A prudent local government must follow all of the procedural and substantive limitations that apply to both legislative rezoning decisions and quasi-judicial conditional use permit decisions. Applying all of these rules simultaneously to a conditional use district rezoning petition and a conditional use permit application requires considerable skill and diligence.

Despite the complexity of the process, conditional use districts are widely used in North Carolina. 39 percent of the municipalities and 39 percent of the counties (and 77 percent of the cities with populations between 10,000 and 25,000) reported use of conditional use districts in a 2006 School of Government survey.[16]

Conditional Zoning

Many local governments struggle with the complexity of concurrently deciding a legislative rezoning and a quasi-judicial conditional use permit under the conditional use district zoning scheme.

One alternative is to treat the entire conditional use district rezoning as a quasi-judicial decision, as is mandated for all small-scale rezonings in several states. In *Gossett v. City of Wilmington*,[17] the court held that a provision in the city's charter providing that the entirety of a special use district rezoning and accompanying special use permit should be considered and reviewed as a quasi-judicial matter controlled.

A second alternative is to consider conditional use district zoning as a single decision and treat it as legislative rather than quasi-judicial, as is done in some other states.

Several North Carolina jurisdictions adopted this later view in the 1990s, though most still used the conditional use district terminology. For example, the practice that evolved in Charlotte and Mecklenburg County was to treat the conditional zoning process just as any other regular rezoning. No attempt was made to conduct a quasi-judicial hearing, to make findings, or limit consideration to evidence presented at the hearing. Some 75 percent of the Charlotte rezonings in 1997–1999 were made in this manner.

Judicial validation of the Charlotte approach in two court of appeals cases added the option of using true conditional zoning, without a concomitant conditional use permit, for North Carolina local governments.

The first case, *Massey v. City of Charlotte*,[18] involved the rezoning of a 42-acre parcel from R-3 to Commercial Center district to allow construction of two "big box" retailers along with five outparcels. The trial court held that while the city could undertake the two-step conditional use district zoning described above, the city had no authority to undertake "conditional zoning" without using a conditional use permit (and following the requisite procedure for those permits).

In response to this ruling, while the case was on appeal, Charlotte, Mecklenburg County, and the other cities within the county obtained local legislation authorizing conditional zoning without having a quasi-judicial conditional use permit as part of the process.[19] These bills allowed creation of "conditional zoning districts" with individualized development standards adopted as part of the ordinance. Property could only be rezoned to these districts "in response to and consistent with" a petition filed by the property's owner. The petition required including a site plan, a specification of the actual use planned, and any rules, regulations, or conditions that would govern development of the site. The petitioner would conduct at least one community meeting on the proposal prior to the official hearing on the rezoning. The rezoning decision would be made "in consideration of" relevant land use plans for the area, including the comprehensive plan, strategic plans, district plans, area plans, neighborhood plans, corridor plans, and other land use policy documents. These rezonings would not be made between the date of election of a new governing board and the time that new board takes office.

When the *Massey* case reached the court of appeals, the court held that the zoning enabling statutes authorized use of conditional use districts but did not mandate their use or by implication limit the use of other types of zoning decisions (such as the purely legislative conditional zoning used here), especially when these statutes are read with the mandate for broad construction in mind.[20] The court noted that *Chrismon v. Guilford County*, discussed throughout the text above, did not explicitly require an accompanying quasi-judicial decision on a special or conditional use permit.[21] The court also held that the petitioner's submission of detailed plans for site development did not constitute illegal contract zoning because this was a unilateral promise from the petitioner, not a bilateral agreement with obligations being made by the city. The court held that the appropriate standard of judicial review for conditional zoning was that applicable to legislative decisions.[22]

The second case addressed the constitutional dimensions of conditional zoning. In *Summers v. City of Charlotte*,[23] the court again held that conditional zoning decisions are legislative rather than quasi-judicial and are within the statutory authority delegated to the city. The court also found that the mandatory community meetings and formal legislative hearing provided in the course of the rezoning process afford neighbors adequate procedural due process.[24] The court held that the rezonings were not arbitrary and capricious, as they were based on fair and careful consideration of the planning board's review, technical staff reports, and public comments. The court noted that the rezonings were consistent with adopted small area plans for the affected area and there was no showing of bad faith or undue discrimination.

In 2005 the General Assembly amended the zoning statutes to explicitly authorize city and county use of conditional zoning.[25] G.S. 160A-382(a) and 153A-342(a) provide that zoning ordinances may include "conditional districts, in which site plans and individualized development conditions are imposed." As with special and conditional use districts, the statute provides that land may be placed in a conditional district only upon petition of all of the owners of the land to be included.

The use of conditional zoning rapidly became commonplace in North Carolina following the *Massey* decision, particularly for municipalities. A 2006 survey of North Carolina cities and counties indicated that a third of the responding cities and a quarter of the responding counties use conditional zoning.[26] Given the use of this type of district by the state's more populous jurisdictions, over a third of all rezonings considered in the previous year included site specific conditions.[27]

The standard practice in North Carolina cities and counties using conditional zoning is to amend the ordinance text to create a set of conditional zoning districts to correspond with each conventional zoning district. However, rather than requiring that all uses secure a conditional use permit, as is done with conditional use district zoning, individualized conditions and site plan provisions are incorporated (usually by reference) into the zoning district requirements. In most instances, the provisions in the conditional district are more stringent than those in the corresponding conventional districts. The conditional district may, for example, have a much narrower list of permitted uses and may increase the buffering requirements to provide additional protection to neighboring uses. In the absence of a local ordinance provision to the contrary, it is legally permissible to tailor standards that are less restrictive than those in the corresponding conventional district.[28]

The 2005 amendments also addressed the origin and nature of conditions that may be imposed. G.S. 160A-382(c) and 153A-342(c) provide that specific conditions may be suggested by the owner or the government, but only those conditions mutually acceptable to both the owner and the government may be incorporated into the ordinance or individual permit involved.[29]These statutes also provide that any conditions or site specific standards imposed are limited to those that address the conformance of the development and use of the site to city or county ordinances and officially adopted plans and those that address the impacts reasonably expected to be generated from the development or use of the site. These provisions regarding conditions apply to both conditional zoning and to special and conditional use district zoning.

While the North Carolina courts have consistently held site specific conditional zoning cases to be legislative, it is important to note that virtually all of these rezonings constitute spot zoning. As such, the presumption of validity usually accorded legislative zoning decisions is removed and the burden is on the local government to establish a reasonable basis for the rezoning.

Also see these blog posts in Coates Canons:

David Owens, Choosing the Right Development Review Process: Factors to Consider (Oct. 2013)

David Owens, A Conditional What? Clarifying Some Confusing Zoning Terminology (Nov. 2012)

David Owens, Rezoning Conditions Done Right (July 2011)

David Owens, Can We Add a Condition to this Rezoning? (June 2011)

For additional legal analysis, see:

David W. Owens, (2ed. 2011)

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[1] 6 N.C. App. 102, 169 S.E.2d 487 (1969).

[2] 145 N.C. App. 222, 551 S.E.2d 186 (2001). The court questioned the relevance of Decker in Massey v. City of Charlotte, 145 N.C. App. 345, 351, 550 S.E.2d 838, 843, review denied, 354 N.C. 219, 554 S.E.2d 342 (2001), noting that it applied only to general use district zoning and was decided prior to Chrismon. *Kerik*, a contemporaneous decision to Massey, illustrates*Decker's* continuing vitality outside of the conditional use district/conditional zoning context.

[3] For example, a condition could be placed on the permit that development of the site be initiated within a time certain or the permit expires and a new application must be submitted in order for the site to be developed. Such a condition may not generally be placed on the rezoning decision.

[4] 1973 N.C. Sess. Laws ch. 381 (Winston-Salem and Forsyth County), ch. 485 (Surry County and its municipalities), ch. 1283 (Charlotte–Mecklenburg County). The Greensboro ordinance was adopted under the city's general zoning authority. Between 1973 and 1985 more than twenty local governments sought and received local legislation authorizing this practice. A number of other local governments adopted conditional use district zoning under the general zoning enabling authorities.

[5] 1985 N.C. Sess. Laws ch. 607. In *Chrismon v. Guilford County*, 322 N.C. 611, 370 S.E.2d 579 (1988), the court ruled that the zoning enabling statutes provided adequate statutory authority for conditional use district zoning even before this specific authorization was adopted.

[6] 322 N.C. 611, 370 S.E.2d 579 (1988).

[7] Also, the decision does not bind future governing board action, as the property can be subsequently rezoned to some other district. The owner is protected, if at all, through securing a vested right or by the property having nonconforming status.

[8] Vill. Creek Prop. Owners' Ass'n, Inc. v. Town of Edenton, 135 N.C. App. 482, 520 S.E.2d 793 (1999).

[9] Some ordinances more closely bind the two decisions by providing for an automatic repeal of the conditional use district if the conditional use itself ceases.

[10] *See, e.g.*, Coucoulas/Knight Props. v. Town of Hillsborough, 199 N.C. App. 455, 683 S.E.2d 228 (2009), *aff'd per curiam*, 364 N.C. 127, 691 S.E.2d 411 (2010) (rezoning to special use district prerequisite to special use permit consideration).

[11] As the court of appeals noted in *Graham v. City of Raleigh*, 55 N.C. App. 107, 284 S.E.2d 742 (1981), *review denied*, 305 N.C. 299, 290 S.E.2d 702 (1982), in reviewing a rezoning:

> The procedures established under the General Statutes, Raleigh City Charter, and Raleigh City Code provide the basis for a legislative, rather than a judicial determination on the part of the City Council. Zoning petitioners are not required to offer evidence nor is the legislative body required to make findings that the requested rezoning promotes the health, morals, or general welfare of the people of Raleigh.

55 N.C. App. at 110, 284 S.E.2d at 744. The zoning enabling statute itself further blurs the boundary between the rezoning and permitting dimensions of these decisions. In 1991 G.S. 160A-385(a) was amended to provide that a protest petition, a device to require an extraordinary majority for a legislative zoning amendment, does not apply to certain conditional use district amendments. The amendments covered include those dealing with the size of buffers and screening, which are more appropriately permit conditions than district standards.

[12] In *Ashby v. Town of Cary*, 161 N.C. App. 499, 588 S.E.2d 572 (2003), the court affirmed that a conditional use district rezoning decision is a purely legislative decision and is to be overturned only if the record before the town council at the time of decision demonstrates that the decision had no foundation in reason and bore no substantial relationship to the public health, safety, morals, or welfare. If there is any plausible basis for the decision that has a basis in reason and relation to public safety, the decision must be affirmed.

[13] *See* McMillan v. Town of Tryon, 200 N.C. App. 228, 234–38, 683 S.E.2d 747, 752–54 (2009). The ordinance involved required a petition for a conditional use district rezoning be accompanied by a conditional use permit application and specified that the entire process be considered in a quasi-judicial manner. The court held the town was therefore bound to that quasi-judicial process.

[14] 322 N.C. 611, 622–23, 370 S.E.2d 579, 586 (1988) (citations omitted).

[15]. Stephen E. Davenport & Philip P. Green, Jr., Special and Conditional Use Districts: A Way to Impose More Specific Zoning Controls 10 (1980).

[16] David W. Owens & Andrew Stevenson, An Overview of Zoning Districts, Design Standards, and Traditional Neighborhood Design in North Carolina Zoning Ordinances 5 (School of Government, Special Series No. 23, 2007).

17]. 124 N.C. App. 777, 478 S.E.2d 648 (1996).

18]. 145 N.C. App. 345, 550 S.E.2d 838, *review denied*, 354 N.C. 219, 554 S.E.2d 342 (2001).

[19] S.L. 2000-84 did so for Charlotte, Cornelius, Davidson, Huntersville, Matthews, Mint Hill, and Pineville. S.L. 2000-77 did so for Mecklenburg County.

[20] *Massey*, 145 N.C. App. 345, 353–55, 550 S.E.2d 838, 844–46, *review denied*, 354 N.C. 219, 554 S.E.2d 342 (2001). Although *Massey* held conditional zoning to be permissible under the general zoning enabling act, Charlotte sought and obtained local legislation to make permanent its explicit authorization to use conditional zoning. S.L. 2001-276 did this for the seven municipalities in Mecklenburg County, and S.L. 2001-275 did this for Mecklenburg County.

[21] On the contrary, the *Massey* court noted, "[n]othing in *Chrismon* suggests that the Board [of County Commissioners] engaged in a two-step, part legislative, part quasi-judicial process which would warrant the 'competent and material evidence' standard of review. Rather, the re-zoning decision and the decision regarding the conditional uses that would be allowed on the land were determined in a single proceeding." 145 N.C. App. at 351, 550 S.E.2d at 843.

[22] The court cited the *Chrismon* standard that the rezoning be upheld if it is "reasonable, neither arbitrary nor unduly discriminatory, and in the public interest." *Id*. at 349, 550 S.E.2d at 842. *See also* Ashby v. Town of Cary, 161 N.C. App. 499, 588 S.E.2d 572 (2003) (conditional use district rezoning is to be overturned only if it has no foundation in reason and bears no substantial relationship to the public health, safety, morals, or welfare).

[23] 149 N.C. App. 509, 562 S.E.2d 18, *review denied*, 355 N.C. 758, 566 S.E.2d 482 (2002). This case involved neighbors' challenges to two Charlotte rezonings. The first rezoned 11.6 acres from an Office District to a Mixed Use Development District allowing office, retail, multifamily residential, and a hotel. The second rezoned the 95.6-acre site of SouthPark Mall from Shopping Center and Office Districts to a Commercial Center District. Both rezoning petitions included site plans, specifications of proposed uses, and proposed site specific development guidelines. After a series of public meetings and a legislative hearing, the city adopted both rezonings. In each rezoning the council specified that the general zoning ordinance provisions for the respective districts, the site plans, and the additional individualized proposed regulations and conditions all constituted the binding zoning regulations for each property. As a spot zoning allegation was not argued on appeal, the court deemed that issue abandoned by the plaintiffs.

[24] In most situations procedural due process is not an issue in legislative rezoning decisions, as neither the owner nor the neighbors have a property right in the existing zoning. Here the court noted that procedural due process only applied if a party's vested property rights were affected, and "even assuming Plaintiffs have a vested right," the notice and hearing procedures used for legislative zoning decisions were adequate. *Summers*, 149 N.C. App. at 518, 562 S.E.2d at 25.

[25] S.L. 2005-426, secs. 6(a) and 6(b).

[26] David W. Owens & Andrew Stevenson, An Overview of Zoning Districts, Design Standards, and Traditional Neighborhood Design in North Carolina Zoning Ordinances 6 (School of Government, Special Series No. 23, 2007). Interestingly, a number of jurisdictions reported having both conditional zoning and conditional use districts in their ordinances (17 percent of the cities and 8 percent of the counties).

[27] David W. Owens, Zoning Amendments in North Carolina 5 (School of Government, Special Series No. 24, Feb. 2008). The responding cities and counties reported consideration of 3,029 rezoning petitions. Fifty-seven percent were for rezonings to conventional districts, 21 percent to conditional use districts, and 15 percent to conditional districts. There was a significant difference between municipal and county experience on this point. Counties were far more likely to have petitions for conventional rezonings. 70

percent of all rezoning petitions in counties were for conventional rezoning, compared to 52 percent for municipalities. By contrast, cities much more frequently consider conditional zoning. 19 percent of all municipal rezoning petitions were for conditional rezoning, as compared to only 6 percent for counties. The trend toward use of legislative conditional zoning was even more pronounced for cities with larger populations. Cities with populations over 25,000 reported over half of their rezoning petitions were for conditional or conditional use district rezonings. For these cities, 32 percent of their rezoning petitions were for conditional rezoning and 22 percent were for conditional use district rezoning. *Id*. at 6.

[28] Rakestraw v. Town of Knightdale*,* 188 N.C. App. 129, 136, 654 S.E.2d 825, 830, *review denied*, 362 N.C. 237, 659 S.E.2d 739 (2008). In *Rakestraw* the rezoning to a highway commercial conditional district relaxed or decreased some twenty standards relative to the corresponding conventional highway commercial district. S*ee also* Sapp v. Yadkin County, ___ N.C. App. ___, 704 S.E.2d 909 (2011). The county rezoned a parcel to a Manufacturing-Industrial conditional zoning district and applied specific standards relative to a jail. The parallel Manufacturing-Industrial conventional district allowed jails as a conditional use permit with more restrictive standards, including a prohibition against siting jails within one mile of residential property. The court held that there was no requirement that the conditional zoning district standards incorporate the conditional use permit standards from a parallel conventional zoning district.

[29] If a proposed condition is unacceptable to the owner, the petition can be withdrawn and the proposed rezoning cannot go forward. Likewise, if a condition is unacceptable to the governing board (or the owner refuses to agree to a desired condition), the petition can be denied and there is no rezoning.

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