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SPECIAL AND CONDITIONAL USE PERMITS

This manuscript discusses special use permits (“SUPS”) and conditional use permits (“CUPS”). The two terms refer to the same process and are used interchangeably.¹ By either name, it is a glorified site plan, to which the permit-issuing board may attach “reasonable and appropriate conditions.” “Special use” permit is probably the more prevalent term. The term SUP will be used in this manuscript for that reason.

The statutory bases for such permits are NCGS §160A-381 and NCGS §160A-382. (NCGS §153-320 simply adopts municipal zoning for counties, except as provided.) The relevant part of NCGS §160A-381, issuance of such permits, reads as follows:

The regulations may also provide that the board of adjustment or the city council may issue special use permits or conditional use permits in the classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified therein and may impose reasonable and appropriate conditions and safeguards upon these permits.

For counties, see NCGS §160A-340(c1).

The 1987 statute amendment which authorized conditional use zoning additionally provided that a municipality may use “special use districts or conditional use districts, which uses are permitted only upon issuance of a special use permit or conditional use permit.”²

A SUP is required where the local ordinance says it is required. Whether it is required can typically be found by consulting the local ordinance’s Table of Permitted Uses. That may appear as a matrix, with the zoning districts running one way, across the top for example, and the categories of land uses going the other way, e.g. up and down the left margin. At the intersection

¹ *Coastal Ready-Mix Constr. Co. v. Board of Commissioners*, 299 N.C. 620, 266 S.E.2d 379 (1980).

² NCGS §160A-387.

of a particular land use and a particular zoning district, there may be simply an “X” denoting either that the use is a use by right in that district, or there may be a designation such as “SUP” showing that the use is permitted only if such a permit has been issued. By either name, it is a glorified site plan. A SUP may also be required with conditional use zoning.

The specificity with which a particular local government’s ordinances deal with the SUP process is subject to substantial variation. Some ordinances have detailed provisions governing the conduct of the hearing, and the presentation of evidence, the making of the motions, the voting upon the motions, and so on.

An application must be filed, to be signed either by the owner or by a prospective vendee. The latter practice was approved in a recent Court of Appeals opinion, *Cox v. Hancock*.³ While a site plan is reviewed and approved or denied “administratively,” e.g., by a staff person in the planning department, the SUP is reviewed by the governing board or Board of Adjustment. Another principal difference between a SUP and site plan approval is that the permit reviewing board may impose reasonable conditions upon the permit, whereas a planning department employee approving a site plan may not add conditions.

When it conducts a hearing on a SUP application and grants or denies the permit, and/or imposes conditions, a governing board or Board of Adjustment is acting in a quasi-judicial capacity. “Quasi-judicial” means “sort of like a court.”

A body of case law has grown up around the SUP permit reviewing and permit issuing process, in order to protect property rights (of the owner and/or of the neighbors) from arbitrary government. The opinion of Justice Sharpe in *In Re Application of Ellis*⁴ expressed, in pure Lockean terms, the need to protect the “absolute enjoyment” of one’s property from the “arbitrary will of the governing authorities” as follows:

...It is equally clear that if an ordinance is passed by a municipal corporation which, upon its face, restricts the right of dominion which the individual might otherwise exercise without question, not according to any general or uniform rule, but so as to make the absolute enjoyment of his own depend upon the arbitrary will of the governing authorities of the town or city, it is unconstitutional and

³ 160 N.C. App. 473, 586 S.E.2d 400 (2003).

⁴ 277 N.C. 419, 178 S.E.2d 77 (1970).

void, because it fails to furnish a uniform rule of action and leaves the right of property subject to the despotic will of aldermen who may exercise it...

A long line of cases beginning in the late 1960s with *Jackson v. Guilford County Board of Adjustment*,⁵ established standards to which local governments are held in connection with such permits, based on constitutional guarantees against arbitrary government and a generalized sense of fair play (which may be the same thing).

If the SUP is granted, the developer then typically makes final modifications to the plat for recording, adds notations reflecting required conditions, and proceeds to develop the property. Development, however, can be interrupted by a petition for judicial review by an “aggrieved party,” typically a disgruntled neighbor.

On the other hand, if the permit is denied, the applicant can seek judicial review. If the local government fails to issue such a permit, then the landowner/developer applicant is adversely affected, or “aggrieved.” If the local government board denies the permit after properly following all the applicable rules and the result is for the public good, then the adverse impact on the property owner can be found to be acceptable if the board followed the rules created by common law and statutes. If the board violated the rules, it may be reversed. Overall, the instances of the appellate courts reversing local boards have generally (if not exclusively) been where the board denied the permit.

Theoretically, an applicant can also appeal the imposition of a particular condition. However, time is money and a few extra landscaping bushes are typically cheaper than paying a land use lawyer to take this case up on appeal for a year.

In many jurisdictions, SUPs are reviewed and issued by the Board of Adjustment. The statute authorizing creation of a Board of Adjustment also states that it “...shall hear all matters referred to it.”⁶

A seminal case regarding the limits of power of a Board of Adjustment is *Jackson v. Guilford County Board of Adjustment*.⁷ *Jackson* arose from the denial of a “special exception” to construct a mobile home park in an A-1 Agricultural District. The ordinance provided that the Board of Adjustment could grant a special exception “in accordance with the principles,

⁵ 275 N.C. 155, 166 S.E.2d 78 (1969).

⁶ NCGS §160A-388(c); NCGS §153A-345(c).

⁷ 275 N.C. 155, 166 S.E.2d 78 (1969).

conditions, safeguards, and procedures specified in this ordinance, or to deny special exceptions when not in harmony with the purpose and intent of this ordinance,..."

The neighbors who opposed the mobile home park sought judicial review. They argued, and the trial court found, that the delegation to the board of authority to grant special exceptions is "an unlawful and unconstitutional delegation of power and authority to the Board of Adjustment."

Our Supreme Court disagreed, holding as follows:

(1) In *Harrington & Co. v. Renner*, *supra*,⁸ this Court recognized that "the General Assembly may delegate power to a municipal corporation to enact zoning ordinances in the exercise of police power of the State," and innumerable decisions of this Court have recognized such power..."

(2) The authority of the General Assembly to delegate to municipal corporations power to legislate concerning local problems, such as zoning, is an exception (established by custom in most, if not all, of the states) to the general rule that legislative powers, vested in the General Assembly by Art. II, §1, of the Constitution of North Carolina, may not be delegated.

(3) The delegation exception extends to counties.

(4) The zoning statute permits delegation of special exceptions in turn to the Board of Adjustment.⁹

(5) There is a distinction between "...a delegation of a power to make a law which necessarily includes a discretion as to what it shall be, and the conferring of authority or discretion as to its execution."¹⁰

(6) The local government may not delegate legislative power to the Board of Adjustment.

(7) Specifically, the local government may not delegate to the Board of Adjustment the power to zone.

⁸ 236 N.C. 321, 72 S.E.2d 838 (1952).

⁹ NCGS §160A-388.

¹⁰ *Jackson*, *supra*, quoting *Coastal Highway v. Turnpike Authority*, 237 N.C. 52, 74 S.E.2d 310 (1953). The proposition was stated as follows in *Lee v. Board of Adjustment*, 226 N.C. 107, 37 S.E.2d 128 (1946), which arose out of an application for a variance, "...the Board of Adjustment is not a law-making body. The statute "...confers it no legislative authority. Hence, it has no power to amend the ordinance under which it functions."

(8) As a result, the Board of Adjustment “...is not left free to make any determination whatsoever that appeals to its sense of justice,” including whether the application “...adversely affects the public interest.”

The same rules apply to a governing board when it is acting in a non-legislative context. After *Jackson v. Board of Adjustment*,¹¹ the Guilford County Board of Commissioners substituted itself in place of the Board of Adjustment as the permit-reviewing body for special exceptions. It hoped to retain the “legislative” ability to interpret the “public interest,” as follows:

The resolution of 28 April 1968, by which the county board of commissioners purported to substitute itself for the board of adjustment in all cases involving applications for special exceptions because it ‘feels that the public interest should be heard and considered in all questions involving a special exception to the Guilford county Zoning Ordinance,’...

The case came back up on a second appeal as *In Re Application of Ellis*,¹² in which the Court noted:

Obviously, they have interpreted the decision to mean that, although the commissioners cannot delegate to the board of adjustment authority to grant or refuse a permit for a mobile-home park (or other special-exception permit) according to its notion of the public interest, the commissioners themselves, as the law-making body, do possess such power. We did not so hold.

The key words on the “legislative” side are thus “discretion,” and “public interest.” The key words on the non-legislative permit-issuing side, whether “administrative” or “quasi-judicial” are determining “the absence or existence of the circumstances specified by the ordinance” and granting or denying the permit accordingly.

The typical SUP/CUP ordinance will attempt to keep the legislative function, i.e., the rezoning, and the permit-issuing function separate. There will be a two-step process with a zoning

¹¹ *Supra.*

¹² *Supra.*

public hearing and a SUP hearing. One is legislative; the other is quasi-judicial.¹³ Pursuant to case law,¹⁴ a quasi-judicial proceeding must meet the following common law criteria:

- (1) Be free of errors of law;
- (2) Follow applicable statutes and ordinances;
- (3) Protect the petitioner's due process rights, including rights to offer evidence, cross-examine witnesses and inspect documents;
- (4) The decision must be supported by competent, material and substantial evidence in the whole record;
- (5) The decision must not be arbitrary and capricious.

The procedures for conducting quasi-judicial hearings and issuing SUPs/CUPs were refined by a series of cases in the decade following *Jackson v. Guilford County Board of Adjustment* and *In Re Application of Ellis*. Those cases were *Keiger v. Board of Adjustment*,¹⁵ *Keiger v. Board of Adjustment ("II")*,¹⁶ *Humble Oil & Refining Co. v. Board of Aldermen*,¹⁷ and *Humble Oil & Refining Co. v. Board of Aldermen ("II")*,¹⁸ *Woodhouse v. Board of Commissioners*,¹⁹ *Coastal Ready-Mix Concrete Co. v. Board of Commissioners*.²⁰

In *Keiger v. Board of Adjustment*,²¹ the ordinance under which the petitioner applied for an SUP for a mobile home park contained a provision, among others, that for the SUP to be granted, it must be in "the public interest." The landowner contested the denial. Chief Justice Bobbitt framed the principal constitutional question: "...whether the denial of petitioner's

¹³ One obvious anomaly is the procedure used in Wilmington in which there was a single hearing, which Wilmington deemed to be legislative in nature, but a charter provision, which the Court concluded provided for judicial review of even the zoning decision by certiorari, even the re-zoning issue subject to writ of certiorari. As a consequence, the Court of Appeals held the re-zoning to be quasi-judicial. *Gossett v. City of Wilmington*, 124 N.C. 777, 478 S.E.2d 648 (1996), *Trinity Presbyterian Church*, 2005 N.C. App. LEXIS 813 (unpublished).

¹⁴ *Jackson, supra*.

¹⁵ 278 N.C. 17, 178 S.E.2d 616 (1970).

¹⁶ 281 N.C. 715, 190 S.E.2d 175 (1972).

¹⁷ 284 N.C. 458, 202 S.E.2d 129 (1974).

¹⁸ 286 N.C. 171, 209 S.E.2d 447 (1974).

¹⁹ 299 N.C. 211, 261 S.E.2d 882 (1980).

²⁰ 299 N.C. 620, 265 S.E.2d 379 (1980).

²¹ *Supra*.

application for the Special Use Permit constituted an unlawful exercise of legislative power by the board....”²²

In *Jackson v. Board of Adjustment*,²³ the Court had ruled a similar “public interest” delegation to a board of adjustment as invalid. The Court relied on the law in *Jackson* and *Ellis*, which were special exception cases. The Court remanded the case to Superior Court for further proceedings for grounds based on the composition of the record before the Court.

The issues were presented to the Court again in *Keiger v. Board of Adjustment*.²⁴ The trial court had determined that the re-zoning ordinance was enacted after petitioner’s application for a building permit was filed. The trial court concluded that the ordinance under which the application was processed had no affect on that project and remanded the proceeding to the board with orders to issue the permit. The constitutional issue originally before the Court was not presented in *Keiger II*. The Court found that the Aldermen rushed to enact the ordinance, failing to follow the notice statutes and that the ordinance was invalid. While not dealing with the merits of SUP procedures, the Court’s opinion set the stage for future judicial supervision of local governments, by noting that a municipality’s authority is limited and that “these limitations forbid arbitrary and unduly discriminating interference with property rights in the exercise of such power....”²⁵

In *Refining Co. v. Board of Aldermen*,²⁶ Humble Oil & Refining Co. sought an SUP to build a gas station on West Franklin Street at Merritt Mill Road.

²² *Supra.*

²³ *Supra.*

²⁴ *Supra.*

²⁵ *Supra.*

²⁶ *Supra.*

Persons in opposition spoke about trees being destroyed, traffic problems, mentioning a church across the intersection. The Board of Aldermen denied the permit. Our Supreme Court held that Humble had standing as an optionee to apply for the SUP and to challenge the denial. The Court enunciated two propositions:

(1) When an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to it.

(2) A denial of the permit should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record.

(3) If there be facts within the special knowledge of the members of a Board of Aldermen or acquired by their personal inspection of the premises, they are properly considered, but those facts must be revealed at the public hearing and made a part of the record so that the applicant will have an opportunity to meet them by evidence or argument and the reviewing court may judge their competency and materiality.

(4) Opinions which "...are conclusions unsupported by factual data or background, are incompetent and insufficient to support the Aldermen's findings."

Our Supreme Court reversed and remanded the proceeding to the Chapel Hill Board of Aldermen to consider the application in accordance with the principles announced.

In *Refining Co. v. Board of Alderman ("II")*,²⁷ the matter made its way back to our Supreme Court after further proceedings. The board denied the permit again and the matter worked its way back to the Supreme Court. This time the minutes of the board indicate the denial of the permit was based on (1) a letter to the board after the public hearing from the North Carolina Highway Commission opposing the permit, (2) a model zoning ordinance regarding gas stations obtained from a publication, and (3) the special knowledge of the individual members of the board which was not disclosed at any public hearing and was unknown to the petitioners, and (4) that the Board of Aldermen discussed the permit application at a subsequent meeting conducted without notice or participation by the applicant where the denial was again reversed and remanded.

²⁷ 286 N.C. 171, 298 S.E.2d 447 (1974).

In *Woodhouse v. Board*,²⁸ the Board of Commissioners of the Town of Nags Head denied a CUP for a planned unit development on the grounds of “unsuitability.” Following *Ellis, supra*, and *Keiger v. Winston-Salem, supra*, and *Refinancing Co. v. Board of Aldermen, supra*, the Court concluded that the evidence relied on by the board to support its finding “...is incompetent as opinion testimony and is highly speculative in nature.”

In *Ready-Mix Concrete Co. v. Board of Commissioners (also called Concrete Co. v. Board of Commissioners)*,²⁹ the concrete company applied for a CUP to build a concrete plant. Finding that a concrete plant could not be screened from other property given the level terrain, they denied the permit. The Supreme Court opinion stated as follows:

Determination of the issue involves the continuing attempt to establish a proper balance between limiting arbitrary exercise of local zoning power while maintaining flexible local authority to control growth and development.

The only procedural issue that the concrete company could present was a claim that the board did not follow the procedural requirements of the North Carolina Administrative Procedure Act, NCGS §150A-50. Technically, a municipal board is exempt from the NCAPA procedures.³⁰ However, the Administrative Procedure Rules are essentially the same as the common law rules applied by our Supreme Court to quasi-judicial hearings and the *Concrete Co.* opinion bases the origin of those common law rules back to the NCAPA rules which were in effect back when the Supreme Court established the due process rules for such hearings. See *Humble Oil & Refining (“II”), supra*.

To complete the review of the most significant SUP cases, it is instructive to note *Goforth Properties, Inc. v. Town of Chapel Hill*,³¹ where lay testimony in opposition to the project was supplemented by testimony of a traffic study expert, and *Ghidorci Construction, Inc. v. Town of Chapel Hill*,³² where the town denied an SUP for an apartment project based on a traffic study by the town planning department.

2005 STATUTORY CHANGES

²⁸ 299 N.C. 211, 261 S.E.2d 882 (1980).

²⁹ *Supra*.

³⁰ NCGS §150A-2(1).

³¹ 76 N.C. App. 231. (1986).

³² 80 N.C. App. 438, 382 S.E.2d 545 (1986).

The zoning enabling statute³³ which authorizes SUPS/CUPS does not mandate specific procedures.

Senate Bill 814, Session Laws 2005 imposed new standards for SUP hearings. The statute provides that a board member shall not participate in the hearing or vote if he or she has close relationships or financial interests but also if he or she is not “an impartial decision-maker.” The amendment requires that decision-makers who cannot be impartial must recuse themselves.³⁴

Prior to that statute, case law had established bias as to possible grounds for reversal. Bias was defined as follows:

Bias can refer to emotion constituting untrustworthy partiality or preconceptions about facts, policy or law, or a personal interest in the outcome.³⁵

A fixed opinion that is not susceptible to change may well constitute impermissible bias, as will undisclosed *ex parte* communications or a close familial or business relationship between board members and applicants or participants.³⁶

This section of the Act presumably changes the law insofar as a recent Court of Appeals decision³⁷ arising out of an Oxford SUP hearing where the Board of Adjustment Acting Chairman was married to the applicant’s aunt. Query: What effect will this statutory section change have where the City is itself the applicant and the SUP is heard by the City Council, as in the Raleigh case, over the SUP for the Walnut Creek Amphitheater, where the Court had held that the City Council which created, financed and promoted the project was not impermissibly biased.³⁸

The amendment also requires recusal if the board member has failed to disclose *ex parte* communications. *Ex parte* communications in a judicial proceeding or in a quasi-judicial proceeding are communications between one party and the judge when the other party is not

³³ NCGS §160A-381.

³⁴ NCGS §160A-75, 160A-381(d); NCGS §153A-44, 153A-340(g).

³⁵ *Application of City of Raleigh (Parks and Recreation Department)*, 107 N.C. App. 505, 513-14, 421 S.E.2d 179, 184 (1992) citing 10 C.J.S. *Bias* (1955 & Supp. 1989); 3 Davis, *Administrative Law Treatise* 2d §19:4 at 385 (1980).

³⁶ *County of Lancaster*, 334 N.C. at 511, 434 S.E.2d at 614.

³⁷ *Cox v. Hancock*, 160 N.C. App. 473, 586 S.E.2d 500 (2003).

present, i.e., discussion of the case outside of the formal hearing itself. The author tells his town board that the simplest way to understand this rule is that there should be no *ex parte* communications. (This advice is hard to follow. It is almost impossible for an elected official to refuse to talk to a member of the public who has no clue as to the difference between a zoning issue, which is legislative, and a SUP issue, which is quasi-judicial.) The fall-back position is that if there are *ex parte* communications, the ordinance (as did prior case law) requires that they be disclosed.

Among other express statutory changes, Senate Bills 518 and 814, Session Laws 2005 do the following:

- Allow SUP/CUPs to be referred to planning boards for decisions.
- Specifically mandate use of quasi-judicial procedures for all SUP/CUPs by all decision-making boards.
- Prohibit and define conflicts of interest for all quasi-judicial decisions.
- Provide a means for resolving a party's objection to a conflict of interest if the member does not recuse himself or herself.
- Require that site-specific conditions in any conditioned zoning districts be "limited to those needed for conformance to plan, or to address project impact."
- Specifically allow legislative conditional zoning.

³⁸ *In re Application of Raleigh*, 107 N.C. App. 505, 421 S.E.2d 179 (1992).

JUDICIAL REVIEW OF SUPS AND CUPS

Judicial review is by writ of certiorari.³⁹ The appealing party may petition the Court for a writ and obtain it *ex parte*. The writ orders the local government or its Board of Adjustment to file and serve a record within a designated period of time. The record is compiled, filed, served, and the matter is eventually calendared for hearing before the Superior Court on the record.

The standard of judicial review will be covered by another speaker. Suffice to say, it is generally a “whole record test.”⁴⁰ A possible exception to the whole record test is a circumstance as in *Dockside Discoteque*,⁴¹ although the record may not be sufficient, “the facts are undisputed (and different inferences are not permissible.)” For one example of which a court determining which standard applies, see where the Court of Appeals was asked to adopt the *Dockside Discoteque* view to overlook a scanty record.⁴² A handful of cases have said that review is *de novo* when the sole issue is an error of law.⁴³

The petition must reflect that the petitioner is “aggrieved.”⁴⁴ The petitioner must allege facts upon which the aggrievement claim is based,⁴⁵ holding that the motion must allege specifically the manner in which the value of land has been adversely affected.

Various allegations have been found inadequate to establish “special damages” as follows:

- Simply being a neighbor of the proposed development.⁴⁶
- Increased traffic.⁴⁷

An “aggrieved party” can be either the applicant whose permit was denied or the owner of nearby property which alleges “special damage,” i.e., “distinct from the rest of the community,” from the granting of a permit.⁴⁸

³⁹ NCGS §160A-381(c) for governing boards; NCGS §160A-388(e) for Board of Adjustment.

⁴⁰ *Ballas v. Town of Weaverville*, 121 N.C. App. 346, 465 S.E.2d 324 (1996).

⁴¹ *Dockside Discotech v. Bd. of Adjustment of Southern Pines*, 115 N.C. App. 303, 444 S.E.2d 451, *disc. rev. denied*, 338 N.C. 309, 451 S.E.2d 634 (1994).

⁴² *Sun Suites Holdings, LLC v. Board of Aldermen*. 139 N.C. App. 269, 533 S.E.2d 525 (2000).

⁴³ *Abernathy v. Boone Board of Adjustment*, 109 N.C. App. 459, 427 S.E.2d 875 (1993).

⁴⁴ *Lloyd v. Town of Chapel Hill*, 127 N.C. App. 347, 489 S.E.2d 898 (1997).

⁴⁵ *Kentallen, Inc. v. Town of Hillsborough*, 110 N.C. App. 767, 431 S.E.2d 231 (1993).

⁴⁶ *Concerned Citizens of Downtown Asheville v. Board of Adjustment*, 94 N.C. App. 364, 380 S.E.2d 130 (1989).

⁴⁷ *Davis v. Archdale*, 81 N.C. App. 505, 344 S.E.2d 369 (1986).

“Special damage” may be established by showing the following:

- Reduction in the value of the petitioner’s property.
- Specific health and safety concerns such as a neighbor’s “special damage” from an AIDS group homes disposal of biohazardous material and need for emergency vehicles access to the home.⁴⁹
- Perceived damage to neighborhood by demolition of home and constructing a parking lot for use by a near-by school.⁵⁰

⁴⁸ *Concerned Citizens of Downtown Asheville v. Bd. of Adjustment of the City of Asheville*, 94 N.C. App. 364, 366, 380 S.E.2d 130, 131-32 (1989), quoting *Heery v. Town of Highlands Zoning Bd. of Adjustment*, 61 N.C. App. 612, 614, 300 S.E.2d 869, 870 (1983).

⁴⁹ *Taylor Home of Charlotte, Inc. v. City of Charlotte*, 116 N.C. App. 188, 447 S.E.2d 438 (1994).

⁵⁰ *Dockside Discotheque v. Bd. of Adjustment of Southern Pines*, 115 N.C. App. 303, 307-08, 444 S.E.2d 451, 453-54, *disc. review denied*, 338 N.C. 309, 451 S.E.2d 635 (1994).

PENDING LEGISLATION

The General Assembly left some work on zoning, planing and development unfinished in 2005. Senate Bill 970 would create new statutory sections NCGS §160A-393 and NCGS §153A-349, relating to quasi-judicial proceedings, procedures for judicial review, codifying much of the quasi-judicial case law on appeal procedures, standing, intervention under Rule 24 of the North Carolina Rules of Civil Procedure, issuance of the writ of certiorari, composition of the record, adopting a statutory scope of review similar to the APA and *Coastal Ready-Mix Concrete Co. v. Board of Commissioners*,⁵¹ allowing the reviewing courts to make a *de novo* review of questions of law, defining competent evidence, and clarifying when a court should remand for further proceedings or issue or revoke the permit.

In general, a large part of the body of case law dismissed in this manuscript related to those issues is likely to become statutory law. This Bill was adopted in the Senate in 2005. It is pending in the House. It was referred on July 11, 2006 to the Local Government Committee.

⁵¹ 299 N.C. 620, 265 S.E.2d 379 (1980).