
Governor Pete Wilson

The Planner's Training Series:
THE CONDITIONAL
USE PERMIT



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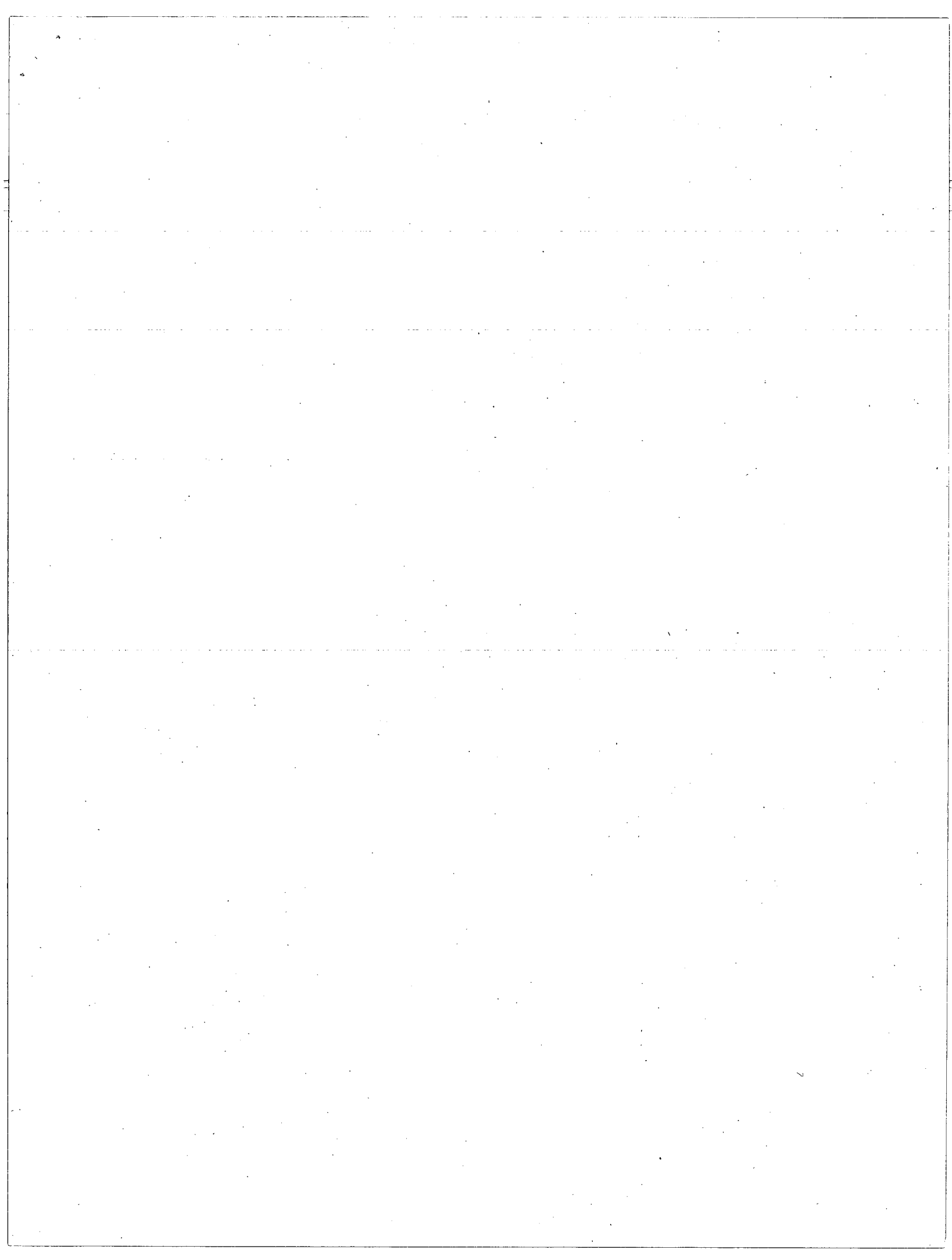
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The Planner's Training Series

This publication is one in a series prepared by the Office of Planning and Research (OPR) on topics of general interest to planners. As with the rest of this series, its primary purpose is to provide both a reference for experienced planners and training materials for new planners, planning commissioners, and zoning board members. Citations are made to pertinent sections of the California statutes and to court decisions in order to provide the reader the opportunity to do additional research on their own. Unless otherwise noted, all statutory references are to the California Government Code.

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The CONDITIONAL USE PERMIT

WHAT IS A CONDITIONAL USE PERMIT?

A CONDITIONAL USE PERMIT (CUP) allows a city or county to consider special uses which may be essential or desirable to a particular community, but which are not allowed as a matter of right within a zoning district, through a public hearing process. A conditional use permit can provide flexibility within a zoning ordinance. Another traditional purpose of the conditional use permit is to enable a municipality to control certain uses which could have detrimental effects on the community (*Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal.App.3d 1176).

Consideration of a CUP is a discretionary act. A CUP application tendered by a project proponent is considered at a public hearing and, if approved, is generally subject to a number of pertinent conditions of approval. Depending on local ordinance requirements, hearings are typically held by a board of zoning, the planning commission, or a zoning administrator. The owners of property near the site are sent advance notice of the date, time, and place of the hearing.

Examples of common uses allowed with a conditional use permit can be found in any city or county zoning ordinance. For example, Santa Rosa's zoning ordinance lists uses which may be permitted within single-family residential districts with a conditional use permit. These uses include churches, public or private schools, public building or utility structures, parking lots, temporary subdivision sales offices, and community care and health care facilities. Chico's zoning ordinance lists various uses permitted with a use permit issued by either a planning director or planning commission. These uses include temporary amusement attractions, the placement of a building or structure on a lot or parcel which has been moved from another lot or parcel, public buildings and facilities, parking or access located off-site from the site being served, private recreation centers, and planned developments. Each city or county may include in their zoning ordinance a wide variety of uses which they will permit with a conditional use permit.

ENABLING LEGISLATION

The rules under which counties and general law cities may issue a conditional use permit are provided by state and case law. Charter cities are not subject to state zoning law, except in special circumstances, but

may still use its provisions (Section 65803). The following is a brief examination of the authority and rules under which local governments act in issuing use permits.

Constitutional Authority:

Local governments have the authority to enact local planning and land use regulations to protect the public health, safety, and welfare of their residents through their police power. The "police power" provides the right to adopt and enforce zoning regulations, as long as they do not conflict with state laws. The police power is the basis for charter city zoning powers. (California Constitution, Article XI, Section 7)

Statutory Authority:

California code reiterates the Constitutional police powers of cities and counties to enact zoning regulations, but has little to say about CUPs in particular.

"The legislative body of any county or city may, pursuant to this chapter, adopt ordinances that do any of the following:

"Regulate the use of buildings, structures, and land as between industry, business, residences, open space, including agriculture, recreation, enjoyment of scenic beauty, use of natural resources, and other purposes...."

(Section 65850(a))

"The board of zoning adjustment or zoning administrator shall hear and decide applications for conditional uses or other permits when the zoning ordinance provides therefor and establishes criteria for determining those matters ..."

"The board of zoning adjustment or zoning administrator may also exercise any other powers granted by local ordinance and may adopt all rules and procedures

necessary or convenient for the conduct of the board's or administrator's business."

(Section 65901(a))

Case Law:

California case law has established a number of fundamental principles relating to conditional use permits. In addition to the basic uses permitted within a zoning district, a city or county zoning ordinance can provide other specified uses which may be permitted after consideration and resolution by an administrative agency that the proposed use is in the best interest of public convenience and necessity and will not be contrary to the public health, morals, or welfare (*Upton v. Gray* (1969) 269 Cal.App.2d 352).

Local governments must have a complete and valid general plan before they can issue conditional use permits (*Resource Defense Fund v. County of Santa Cruz* (1982) 133 Cal.App.3d 800 and *Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal.App.3d 1176).

The authority to consider conditional use permits, delegated to planning commissions or other administrative bodies by elected officials, must include standards of guidance. These standards of guidance are provided to insure that the delegation of discretion to an administrative agency is not unbridled and, thus, not invalid. The doctrine of the need of an ascertainable standard to guide an administrative body applies where the legislative body of a city attempts to delegate its law-making functions (*Stoddard v. Edelman* (1970) 4 Cal.App.3d 544).

PROCEDURE

The approval of a conditional use permit is an administrative, quasi-judicial act. It is not a change of zone, but rather a project-specific change in the uses allowed on a specific property. Conditional use permits do not involve the establishment of new codes, regulations, or policies. Instead, a conditional use permit applies the provisions of the zoning ordinance and its standards to the specific set of circumstances which characterize the proposed land use. Cities and counties have the authority to establish either a board of zoning adjustment or a zoning administrator to hear and decide applications for conditional uses. Local ordinance can establish specific procedures under which a delegated board of appeals will hear and determine appeals from the decisions of the board of zoning

adjustment or the zoning administrator (Section 65903). In most jurisdictions, appeals are heard by the next highest body, eventually reaching the city council or county board of supervisors for a final decision.

Public Hearing:

Section 65905 requires a public hearing to be held on an application for a conditional use permit. At a minimum, advance public notice, an opportunity to be heard, and a fair hearing are constitutional due process rights as explained in *Horn v. County of Ventura* (1979) 24 C.3d 605.

The Government Code establishes minimum requirements for public notice for counties and general law cities. Charter cities may adopt similar provisions. The notice of a public hearing must include: the date, time, and place of the hearing; the identity of the hearing body or officer (commonly the delegated board of zoning adjustment or the zoning administrator); a description of the proposal and the conditional use permit process; and the location of the property involved (Section 65094). Notice must be mailed to all property owners within 300 feet of the proposal's site boundary at least 10 days prior to the public hearing. The names and addresses of owners are those listed on the most current county equalized assessment roll. This requirement includes the owners of property which lie outside the city limits or county line (*Scott v. Indian Wells* (1972) 6 C.3d 541). Notice must also be published once in a newspaper of general circulation at least 10 days before the hearing.

Section 65030 recognizes the importance of public participation in public hearings and expresses a clear legislative intent that local agencies insure public participation at every level of the conditional use permit process. The purposes of the public hearing is for the zoning board or zoning administrator to hear and consider the opinions of the proponent and nearby property owners prior to making their decision to either approve or deny the conditional use permit. As a quasi-judicial act, the approval of a conditional use permit requires the board or administrator to adopt written findings to support their action. Whether the proposal has been approved or denied, the decision can be appealed to a higher body, usually the board of appeals, the planning commission, or city council, in accordance with the city or county zoning ordinance. The appeals body may reverse or affirm, wholly or partly, or may modify the decision, and may make such decision as should be made, and its action is final (Section 65903).

Section 65903 delegates to local legislative bodies the authority to establish procedures for an appeal but not the power to restrict the right of appeal. Thus, a county zoning ordinance cannot attempt to restrict the right of appeal to solely the applicant and exclude the general public, especially adjacent property owners (*Concerned Citizens of Murphys v. Jackson* (1977) 72 Cal.App.3d 1021).

In order to encourage concurrent processing for the purpose of expediting zone changes and general plan amendments, Section 65862 provides that planning agencies may simultaneously process a consolidated application which may include a use permit, rezoning, and general plan amendment if all three applications encompass the same property.

California Environmental Quality Act:

Conditional use permits are subject to the California Environmental Quality Act (CEQA, Public Resources Code Section 21000, et seq.). Prior to the public hearing on the proposed conditional use permit, the city or county must evaluate the proposal to determine whether or not it may have any significant adverse effects on the environment. If the proposal is not exempt from environmental review, the city or county is required to prepare either a negative declaration indicating that the conditional use permit will have no significant effect, or an Environmental Impact Report (EIR) which describes the potential negative impacts of the proposal and the means to avoid or lessen those impacts. See the bibliography for a reference which can provide more information about the California Environmental Quality Act.

Permit Streamlining Act:

The Permit Streamlining Act (Section 65920, et seq.) establishes time limits within which the review and approval or denial of a conditional use permit proposal must occur. For instance, if an EIR was certified for a conditional use permit, the application must be acted upon within one hundred eighty days from the date of certification (Section 65950(a)(1)). A proposal for which a negative declaration was adopted or a CEQA exemption used must be acted upon within sixty days of that action (Section 65950(a)(2)(3)). A conditional use permit cannot be disapproved solely to comply with these deadlines.

The Permit Streamlining Act provides that failure to meet its deadlines will result in automatic approval of the conditional use permit (Section 65956(b)). However, the permit can only be deemed approved if public

notice and an opportunity to be heard had been provided either by the agency or by the applicant.

The Permit Streamlining Act does not apply to administrative appeals within a state or local agency (Section 65922). Therefore, if a permit is appealed to a higher body there is no strict time frame within which the appeal must be heard.

**LIMITATIONS ON
CONDITIONAL USE PERMITS**

As a rule, conditional use permits do not authorize uses that the zoning ordinance does not authorize, nor uses not expressly authorized by the permit. The conditional use permit includes conditions which limit the applicant's authority to use the property. Under certain conditions, however, local governments may incorporate provisions from federal laws and broaden the range of uses permitted (*Sports Arena Properties, Inc. v. City of San Diego* (1985) 40 C.3d 808).

It is often the case that local agencies follow a general set of standards in considering a conditional use permit. These standards are generally acceptable since it is a near impossibility to devise standards to cover all possible situations in which a use permit can be issued (*Tustin Heights Association v. Board of Supervisors* (1959) 170 Cal.App.2d 619). There are several cases in which these standards have been upheld.

General Welfare Standard:

"The establishment, maintenance or conducting of the use for which a use permit is sought will not, under the particular case, be detrimental to the public welfare or injurious to property or improvements in the neighborhood" (*Hawkins v. County of Marin* (1976) 54 Cal.App.3d 586).

Nuisance Standard:

"Any use found to be objectionable or incompatible with the character of the city and its environs due to noise, dust, odors or other undesirable characteristics may be prohibited" (*Snow v. City of Garden Grove* (1961) Cal.App.2d 496).

General Plan Consistency Standard:

"Although use permits are not explicitly made subject to a general plan meeting the requirement of state law, that condition is necessarily to be implied from the hierarchical relationship of land use laws.

Thus, use permits are struck from the mold of the zoning law, the zoning law must comply with the adopted general plan, and the adopted general plan must conform with state law; the validity of the permit process derives from compliance with this hierarchy of planning laws (*Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal.App.3d 1176).

Zoning Consistency Standard:

"To obtain a use permit, the applicant must generally show that the contemplated use is compatible with the policies in terms of the zoning ordinances, and that such use would be essential or desirable to the public convenience or welfare, and will not impair the integrity and character of the zoned district or be detrimental to the public health, safety, morals or welfare" (*O'Hagen v. Board of Zoning Adjustment* (1971) 19 Cal.App.3d 151).

In addition to the general standards discussed, there also exist other limitations on conditional use permits. Conditional use permits run with the land not the applicant (*Cohn v. County Board of Supervisors* (1955) 135 Cal.App.2d 180). That is, where conditional use permits are concerned, all related property and personal rights are freely transferable, unless expressly prohibited by law (*Anza Parking Corporation v. City of Burlingame* (1988) 195 Cal.App.3d 855). Inversely, a conditional use permit may not lawfully limit the permittee from transferring it with the land since such a condition is beyond the power of the zoning authority (*Anza*, supra).

The conditions which are imposed on a conditional use permit must be expressly attached to the permit and cannot be implied. For example, if a conditional use permit contains language that restricts a building's height to five stories and requires the developer to submit and obtain planning commission approval of a landscaping plan, among other things, the permit itself does not imply a height limitation on trees within the development (*Pacifica Homeowners' Association v. Wesley Palms Retirement Community* (1986) 178 Cal.App.3d 1147).

**OTHER TYPES OF
CONDITIONAL USE PERMITS**

State law also allows conditional use permits for "granny" units, second dwelling units, and mobile-home parks. If a local zoning ordinance does not

provide for these cases, the ability to apply for conditional use permits allowing these uses is provided for by state law. In all cases, public notice and hearing must be provided as discussed earlier.

"Granny" Units (Section 65852.1) -

"... any city, including a charter city, county, or city and county may issue a zoning variance, special use permit, or conditional use permit for a dwelling unit to be constructed, or which is attached to or detached from, a primary residence on a parcel zoned for a single-family residence, if the dwelling unit is intended for the sole occupancy of one adult or two adult persons who are 62 years of age or over, and the area of floor space of the attached dwelling unit does not exceed 30 percent of the existing living area or the area of the floor space of the detached dwelling unit does not exceed 1,200 square feet."

Prior to approval of a conditional use permit under Section 65852.1, the city or county must find that the resident or residents meet the age criteria, and that the floor area of the proposed unit does not exceed that allowed by the statute. In accordance with the special circumstances provided in Section 65803, Section 65852.1 applies to charter cities, as well as general law cities.

Second Dwelling Units (Section 65852.2) -

"Notwithstanding Section 65901, every local agency shall grant a special use or a conditional use permit for the creation of a second unit if the second unit complies with all of the following:

"(A) The unit is not intended for sale and may be rented.

"(B) The lot is zoned for single-family or multi-family use.

"(C) The lot contains an existing single-family dwelling.

"(D) The second unit is either attached to the existing dwelling and located within the living area of the existing dwelling or detached from the existing dwelling and located on the same lot as the existing dwelling.

"(E) The increased floor area of an attached second unit shall not exceed 30 percent of the existing living area.

"(F) The total area of floor space for a detached second unit shall not exceed 1,200 square feet.

"(G) Requirements relating to height, setback, lot coverage, architectural review, site plan review, fees, charges, and other zoning requirements generally ap-

plicable to residential construction in the zone in which the property is located.

“(H) Local building code requirements which apply to detached dwellings, as appropriate.

“(I) Approval by the local health officer where a private sewage disposal system is being used, if required.”

Section 65852.2 also provides that any local agency may, by ordinance, allow second units in single-family and multifamily residential zones. Thus, a Section 65852.2 conditional use permit is only required for second units when a local agency has not adopted an ordinance governing second units.

Mobilehome Parks (Section 65852.7) -

“A mobilehome park, as defined in Section 18214 of the Health and Safety Code, shall be deemed a permitted land use on all land planned and zoned for residential land use as designated by the applicable general plan; provided, however, that a city, county, or a city and county may require a use permit.”

If a local government denies the renewal of a conditional use permit allowing a mobilehome park, the government must take specified required steps to mitigate the adverse impacts of the mobilehome park closure, pursuant to Section 65863.7.

FINDINGS

Written “findings of fact” are required in order to support the decision of the hearing body to approve or deny a conditional use permit (*Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 C.3d 506). Findings are the legal footprints left by local decision-makers to show how the decision-making process progressed from the initial facts to the decision.

Findings are important. They “bridge the analytical gap between the raw evidence and ultimate decision” (*Topanga*, supra). If the decision is challenged, a court will examine the evidence supporting the findings to determine whether the hearing body abused its discretion when acting on a conditional use permit. Such an abuse of discretion is to be found when: (1) the agency did not proceed in a manner prescribed by law; (2) the agency’s decision is not supported by findings; and (3) the agency’s findings are not supported by evidence in the administrative record.

Topanga cites several purposes for making findings, among which include: (1) providing a framework

for making principled decisions, thus enhancing the integrity of the administrative process; (2) helping make analysis orderly and reducing the likelihood that the agency will randomly leap from evidence to conclusion; and (3) serving a public relations function by helping to persuade the parties that administrative decision-making is careful, reasoned, and equitable. Findings should also justify any conditions which impose fees or other exactions.

For a detailed discussion of findings requirements, see OPR’s publication entitled *Bridging the Gap*.

CONDITIONS OF APPROVAL

Section 65901 empowers local decision-making bodies to take action on use permit proposals when zoning ordinances make provisions and set criteria for them. The hearing body may also modify a conditional use permit’s terms by imposing new or revised conditions, if the ordinance, interim ordinance, or original conditional use permit so provides (*Garavatti v. Fairfax Planning Commission* (1971) 22 Cal.App.3d 145).

Just as there are limitations in approving a conditional use permit, there are also limitations in establishing conditions of approval. Four general rules of thumb in applying conditions of approval include: (1) the jurisdiction must be acting within its police powers; (2) the condition must substantially further a legitimate public purpose; (3) the condition must further the same public purpose for which it was imposed; and (4) the property owner may not be required to carry a disproportionate load in furthering the public purpose (*California Land-Use and Planning Law*, 9th edition).

Section 65909 provides that dedications of land, as conditions of approval, must be “reasonably related” to the use of the property for which the conditional use permit is requested. There must also be a “rough proportionality” between the extent of the condition and the particular demand or impact of the project (*Dolan v. City of Tigard* (1994) 129 L.Ed2nd 304). In addition, a performance bond cannot be required for the installation of public improvements that are not reasonably related to the property use. Limitations on impact fees are described in the Mitigation Fee Act (Section 66000, et seq.).

If a condition applied to a conditional use permit is not linked to some legitimate public need or burden the project creates, the condition imposed could be deemed a taking of property in violation of the U.S. Constitution’s Fifth and Fourteenth Amendments

**CONDITIONAL USE
PERMIT CHECKLIST**

If a conditional use permit is to be approved, all of the following questions must be answered affirmatively.

1. Is the public hearing notice complete in its description of the project?
 Yes No
2. Has the public hearing notice been issued in accordance with all procedures?
 Yes No
3. Is the proposed use, with proposed conditions of approval, suitable for the site?
 Yes No
4. If any conditions of approval call for dedications of land, are they reasonably related to the use and its impacts?
 Yes No
5. If significant environmental effects have been identified as a result of the proposed conditional use permit, have conditions been required, or has the project been redesigned, to mitigate those effects?
 Yes No
6. Have findings been adopted to support the agency's decision, based upon substantial evidence in the record?
 Yes No
7. Are the required environmental findings being adopted?
 Yes No

(*Nollan v. California Coastal Commission* (1987) 97 L.Ed2nd 677). Where a regulatory taking has been found to occur, the courts will overturn the agency's action and may require the agency to pay the applicant compensation for the taking (*Dolan, supra*).

EXAMPLES

The following court cases illustrate when it may be proper to grant a conditional use permit and when it may not be. These cases are illustrations only and should not be used as the sole basis for granting or denying a conditional use permit.

**Cases Upholding Conditional Use
Permit Approvals**

General Welfare Standard

The general welfare standard is sufficient in granting a conditional use permit. The issuance of a conditional use permit for a low-cost rental housing for the elderly in a residential area was upheld on grounds that the proposed use would not be "detrimental to the public welfare or injurious to property or improvements in the neighborhood" (*Hawkins v. County of Marin* (1976) 54 Cal.App.3d 586).

General Plan Consistency

The absence of a valid general plan does not preclude all development activity. Section 65361 establishes the general plan extension procedure whereby local governments can proceed with development pending completion of a valid general plan. This procedure also applied to the case where a county approved minor land subdivisions without a required general plan (*Resources Defense Fund v. County of Santa Cruz* (1982) 133 Cal.App.3d 800).

Procedure/Public Notice

A conditional use permit cannot be revoked without sufficient cause. Further, prior to revocation, notice and hearing must be provided for. Thus, in the case where an applicant was given notice that the hearing would concern the expiration of the conditional use permit rather than the revocation of the permit, attempt to revoke the permit was nullified (*Community Development Commission of Mendocino County v. City of Fort Bragg* (1988) 204 Cal.App.3d 1124).

**Cases Overturning Conditional Use
Permit Approvals**

General Welfare Standard

A county zoning ordinance requiring a church in a residential zone to obtain a conditional use permit prior to allowing it to use the land was found not to abridge the constitutional right of freedom of religious wor-

THE CONDITIONAL USE PERMIT

ship. The court held that a county zoning ordinance which provides a use permit to be granted if the use will not be detrimental to the health, safety, peace, morals, comfort, and general welfare of persons or property in the neighborhood, or to the general welfare of the county, is not unconstitutional by reason of vagueness or uncertainty (*Matthews v. Board of Supervisors of Stanislaus County* (1962) 203 Cal.App.2d 800).

Nuisance Standard

The approval of a conditional use permit for the storage of houses was overturned on grounds that any use may be prohibited if found to be objectionable or

incompatible with the character of the city and its environs due to noise, dust, odors or other undesirable characteristics (*Snow v. City of Garden Grove* (1961) 188 Cal.App.2d 496).

General Plan Consistency

The issuance of a conditional use permit to a construction company for production of sand and gravel was overturned on grounds that that the general plan elements which bear on the permit are inadequate and the permit is inconsistent with pertinent provisions of an adequate general plan (*Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal.App.3d 1176).

BIBLIOGRAPHY

For more information about conditional use permits, we recommend the following references.

Bridging the Gap: Using Findings in Local Land Use Decisions, by Robert Cervantes, second edition (Governor's Office of Planning and Research), 1989. This booklet explains the principles of findings in detail.

California Permit Handbook, (California Office of Permit Assistance), 1996-97. This handbook is a guide to the State environmental permit process and provides guidance for complying with the State's environmental quality and permit streamlining statutes, regulations, and policies.

California Zoning Practice, by Donald Hagman, et al., April 1996 Supplement by John K. Chapin (Continuing Education of the Bar, Berkeley, CA), 1969. This text reviews state zoning law in detail.

CEQA Deskbook: A Step-by-Step Guide on How to Comply with the California Environmental Quality Act, by Ronald E. Bass, et al., 1996 edition (Solano Press, Point Arena, CA). A guide to understanding the environmental review process and identifying key steps, requirements, and decision points necessary to comply with CEQA.

Curtin's California Land Use and Planning Law, by Daniel J. Curtin Jr., 1997 edition (Solano Press, Point Arena, CA), revised annually. A look at the planning, zoning, subdivision, and environmental quality laws, including conditional use permits, as interpreted by numerous court cases.

Longtin's California Land Use, 2nd edition, by James Longtin, 1996 Supplement (Local Government Publications, Malibu, CA), 1988. This reference text on planning and land use law contains an excellent discussion of the conditional use permit process and legal considerations.

