

# Chapter 14

## Conditional Uses and Special Exceptions

### What is a conditional use?

A **conditional use**, also known as a **special exception** in Wisconsin case law,<sup>119</sup> is any exception expressly listed in the zoning ordinance including land uses or dimensional changes. A conditional use is not suited to all locations in a zoning district, but may be allowed in some locations if it meets specific conditions set out in the zoning ordinance and is not contradictory to the ordinance's general purpose statement.<sup>120</sup> These conditions generally relate to site suitability and compatibility with neighboring land uses due to noise, odor, traffic, and other factors. In short, conditional uses must be custom tailored to a specific location. A conditional use must be listed as such in the zoning ordinance, along with the standards and conditions which it must meet.

**Conditional uses in exclusive agricultural districts** are limited to agricultural and other uses determined to be consistent with agricultural use and which require location in the district.<sup>121</sup>

**Conditional uses and special exceptions** are similar and considered together in this chapter. They must be expressly listed in the zoning ordinance.

**Special exceptions** generally refer to any exception made to the zoning ordinance including dimensional changes.

**Conditional uses**, in some ordinances, refer only to land uses.

<sup>119</sup> *State ex rel. Skelly Oil Co. v. City of Delafield*, 58 Wis. 2d 695, 207 N.W.2d 585 (1973)

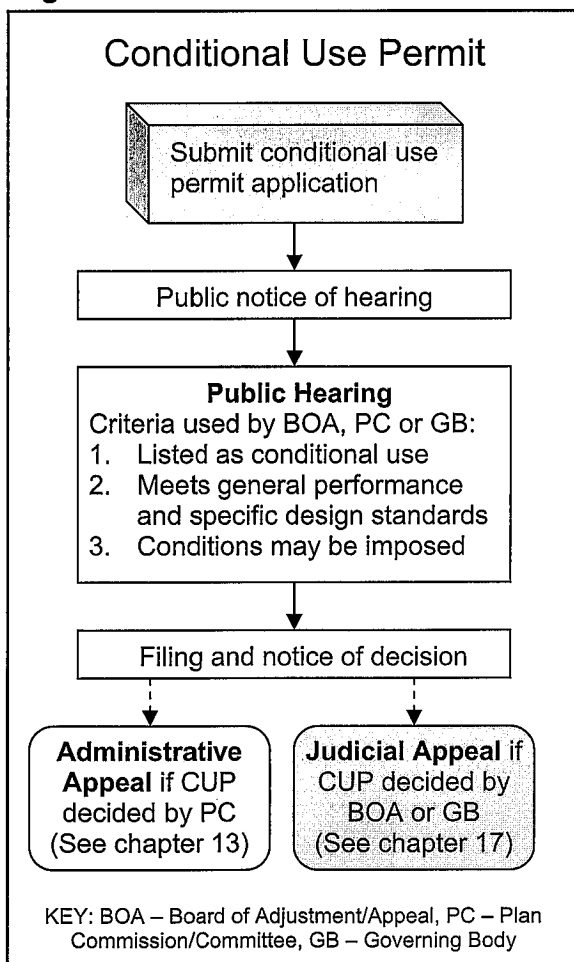
<sup>120</sup> *Kraemer & Sons v. Sauk County Bd. of Adjustment*, 183 Wis. 2d 1, 515 N.W.2d 256 (1994) referencing Wis. Stat. § 59.694(1) which is parallel to Wis. Stat. § 62.23(7)(e)1 for cities, villages, and towns with village powers.

<sup>121</sup> Wis. Stat. §§ 91.75(5) & 91.77

## How are conditional uses decided?

To allow a conditional use, a public notice and hearing are customary and may be required by ordinance (though not specifically required by state law). The application for a conditional use permit must be completed by the first time that notice is given for the final public hearing on the matter, unless the local ordinance provides otherwise.<sup>122</sup> This court ruling assures that citizens will have information necessary to evaluate a proposal and provide testimony at the hearing, and that controversial information will not be withheld until after the hearing.

Figure 22: Conditional Use Process



The decision to grant or deny a conditional use permit is discretionary. In other words, a conditional use permit may be denied if the project cannot be tailored to a site to meet the specific conditional use standards and general purposes of the ordinance.

## Who decides whether to grant conditional uses?

The local governing body determines by ordinance whether the zoning board, the governing body, or the planning commission/committee will decide conditional use permits.<sup>123</sup> Once this is specified by local ordinance, a community may not alternate assignment of conditional uses among these bodies unless the ordinance is specifically amended to provide authority to a different body.<sup>124</sup> This avoids arbitrary or politically driven assignment of conditional use permits to different decision-making bodies.

<sup>122</sup> *Weber v. Town of Saukville*, 209 Wis. 2d 214, 562 N.W.2d 412 (1997)

<sup>123</sup> Counties - Wis. Stat. § 59.694(1) & (7)(a); Cities, villages and towns with village powers - Wis. Stat. § 62.23(7)(e)1 & 7.

<sup>124</sup> *Magnolia Township v. Town of Magnolia*, 2005 WI App 119, 284 Wis. 2d 361, 701 N.W.2d 60

## What conditions may be attached to a conditional use permit?

### *Performance and design standards*

General performance standards and specific design standards for approval of conditional uses may be provided by local ordinance.<sup>125</sup> An applicant must demonstrate that the proposed project complies with each of the standards. The permit review body may impose additional conditions on development consistent with standards for approval and ordinance objectives. The review body may require an applicant to develop a project plan to accomplish specified performance standards (e.g., meet with land conservation department staff to develop an erosion control plan that contains all sediment on the site). Permit conditions that are routinely imposed for similar projects should be adopted by ordinance as minimum standards for approval of conditional uses. Incorporating standards in an ordinance allows permit applicants to anticipate and plan for design, location, and construction requirements.

**Figure 23:** Types of Development Standards

<b>Performance Standard</b>	
Example:	<i>Projects may not result in an increase in stormwater discharge which exceeds predevelopment conditions.</i>
Features:	<ul style="list-style-type: none"> <li>• The expected results are stated.</li> <li>• The project may be “custom tailored” to the site.</li> <li>• It requires more technical expertise to design and evaluate a proposal.</li> <li>• It involves more complex project monitoring and enforcement.</li> <li>• It provides an opportunity for optimal compliance/performance.</li> </ul>
<b>Design Standard</b>	
Example:	<i>Each lot shall provide 500 cubic feet of stormwater storage.</i>
Features:	<ul style="list-style-type: none"> <li>• Project specifications are stated.</li> <li>• It is easy to understand, administer, and enforce.</li> <li>• It provides little flexibility and so may result in many variance requests.</li> <li>• It may not achieve ordinance objectives in all cases.</li> </ul>

<sup>125</sup> *Kraemer & Sons v. Sauk County Bd. of Adjustment*, 183 Wis. 2d 1, 515 N.W.2d 256 (1994)

***Legal limits on conditions***

All conditions on development are generally legal and acceptable provided they meet the following tests:

- **Essential Nexus Test** - The limitation must be designed to remedy a harm to public interests or to address a need for public services likely to result from the proposed development.<sup>126</sup>
- **Rough Proportionality Test** - The limitation must be commensurate with the extent of the resulting harm or need for services.<sup>127</sup>

***Impact fees***

Recent Wisconsin legislation prevents counties from imposing **impact fees**, which include contributions of land or interests in land. Cities, villages, and towns may impose impact fees for highways; facilities for treating sewage, storm waters, and surface waters; facilities for pumping, storing, and distributing water; parks, playgrounds, and athletic fields; fire protection, emergency medical, and law enforcement facilities; and libraries. In doing so, the municipalities are required to report the revenue and expenditure totals for each impact fee imposed by a municipality in the annual municipal budget summary.<sup>128</sup> Impact fees must also meet the essential nexus and rough proportionality tests.

For example, a developer could be required by a city, village or town to dedicate ten acres to parkland if the proposed development created a corresponding demand in the community. If there were a greater need for parkland, the new development should be charged only its proportional share. Impact fees are one type of condition and cannot be used to remedy existing deficiencies. A community must be able to document that an impact fee is reasonable and that local ordinances provide rationale and formulae for computing appropriate impact fees.

**Impact Fees -**

Conditions that require a developer to dedicate land or provide public improvements (or fees in lieu of) in order for a project to be approved. They are not unique to permitting of conditional uses.

<sup>126</sup> *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L.Ed.2d 677 (U.S. 1987)

<sup>127</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L.Ed.2d 304 (U.S. 1994)

<sup>128</sup> 2005 Act 477 amended Wis. Stat. § 66.0617 and others and was published June 13, 2006. For more information see: [http://www.legis.state.wi.us/2005/data/lc\\_act/act477-sb681.pdf](http://www.legis.state.wi.us/2005/data/lc_act/act477-sb681.pdf)

**Once granted, how long does a conditional use permit last?*****Continuance of use***

Once a conditional use is granted, subsequent owners of a property are entitled to continue the conditional use subject to the limitations imposed in the original permit.<sup>129</sup> This is so because site conditions and potential conflicts with neighboring land uses, rather than the circumstances of the applicant, determine whether a conditional use can be permitted at a particular location.

***Time limits***

Conditional uses may be granted for a limited term if the zoning board or other decision-making body can provide a legally defensible reason for the time limit. Periodic permit renewal to monitor compliance with development conditions is common and acceptable.<sup>130</sup> It is often required by ordinance for specified types of uses (e.g., quarry and mineral extraction operations).

***Permit violations***

If an owner changes the use or violates permit conditions, the board may revoke a conditional use permit or modify conditions after notice and a hearing. Revoking a conditional use permit is not considered a taking without just compensation because a conditional use permit is a type of zoning designation that is not a property right.<sup>131</sup>

**Who decides appeals of conditional use decisions?**

Appeals of conditional use decisions are handled differently depending on which local governing body makes the initial decision to grant or deny a permit. Conditional use decisions heard initially by the plan commission/committee must be appealed to the zoning board. Note that zoning boards do not have the authority to remand decisions back to the planning and zoning commission/committee.<sup>132</sup> Conditional use decisions made initially by the governing body or zoning board must be appealed directly to circuit court.

<sup>129</sup> See Rohan, *Zoning and Land Use Controls*, sec. 44.01[4], p. 44-18, and Anderson, *American Law of Zoning* 3d, vol. 3, sec. 21.32, p. 754-5.

<sup>130</sup> Anderson, *American Law of Zoning*, 3d, Vol. 3, S. 21.32, pp. 754-5.

<sup>131</sup> *Rainbow Springs Golf Co. v. Town of Mukwonago*, 2005 WI App 163; 284 Wis. 2d 519; 702 N.W.2d 40

<sup>132</sup> Wis. Stat. §§ 59.694(8) & 62.23(7)(e)8

### What standards apply when the zoning board hears an appeal of a conditional use decision?

If the local ordinance authorizes the plan commission/committee to decide conditional uses, their decisions may be appealed to the zoning board<sup>133</sup> by any aggrieved person or by an officer or body of the county, city, village, or town subject to time limits specified by local ordinance or rules.<sup>134</sup>

When reviewing a conditional use permit decision, the zoning board has authority to conduct a **de novo** review of the record and substitute its judgment for that of the plan commission/committee.<sup>135</sup> Consistent with a de novo review, the zoning board may take new evidence.

**De novo** = anew; collecting new information.

We recommend that the zoning board use the following standards when reviewing conditional use permit decisions originally made by the plan commission/committee:

- **Subject matter jurisdiction.** Does the ordinance assign conditional use permit decisions to the plan commission/committee? Is the conditional use in question listed in the ordinance for this location?
- **Proper procedures.** Were proper procedures followed?
- **Proper standards.** Were the proper standards from the ordinance used?
- **Evidence.** Is there evidence in the record supporting the decision of the plan commission/committee? Is there evidence that is new and relevant to ordinance standards? If so, the zoning board may take additional evidence.

Based on the evidence before it, the zoning board decides whether to grant the conditional use permit. The zoning board may reverse, affirm or modify a plan commission/committee decision, but does not have authority to remand a decision to the plan commission/committee.<sup>136</sup>

<sup>133</sup> *League of Women Voters v. Outagamie County*, 113 Wis. 2d 313, 334 N.W.2d 887 (1983) referencing Wis. Stat. § 59.694(7) & 69 OAG 146, 1980, which clarified that “administrative official” includes the planning and zoning committee. Though this case refers to the statute for counties, Wis. Stat. § 62.23(e)7 for cities, villages and towns has parallel wording. Therefore, the author concludes that the League decision also applies to cities, villages, and towns with village powers.

<sup>134</sup> Counties - Wis. Stat. § 59.694(4); Cities, villages and towns with village powers - Wis. Stat. § 62.23(7)(e)4.

<sup>135</sup> *Osterhues v. Bd. of Adjustment for Washburn County*, 2005 WI 92, 282 Wis. 2d 228; 698 N.W.2d 701

<sup>136</sup> Wis. Stat. §§ 59.694(8) & 62.23(7)(e)8

SECTION IV

**May a conditional use decision by the zoning board or governing body be appealed to circuit court?**

Yes. If conditional uses are decided by the zoning board, they may be appealed to circuit court by any aggrieved person, taxpayer, officer, or body of the municipality within 30 days of the filing of the decision in the office of the zoning board.<sup>137</sup>

If conditional uses are decided by the governing body, they may be appealed to circuit court.<sup>138</sup> Circuit courts use the *certiorari* review standards described in *Chapter 17* to review conditional use decisions.<sup>139</sup>

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<sup>137</sup> Wis. Stat. §§ 59.694(10) & 62.23(7)(e)10

<sup>138</sup> *Town of Hudson v. Hudson Town Bd. of Adjustment*, 158 Wis. 2d 263, 461 N.W.2d 827 (Ct. App. 1990) states there is no statutory authorization for zoning board review of the town board. Though this case refers to the statute for cities, villages, and towns, the zoning board statutes regarding conditional use permit decisions and appeals for counties have parallel wording. Therefore, the author concludes that the Hudson decision also applies to counties.

<sup>139</sup> *Town of Hudson v. Hudson Town Bd. of Adjustment*, 158 Wis. 2d 263, 461 N.W.2d 827 (Ct. App. 1990)

SECTION IV