

Conditional Use Permits from Start to Finish

This article discusses the general process of granting a conditional use permit. In some instances, this is not necessarily the only correct way to conduct the process, so please check with your township legal counsel if you have any questions about your process.

First, what is a conditional use? Zoning codes use two general classes of uses of property: permitted uses and conditional uses. Permitted uses are those that are allowed as of right in a given area, and conditional uses are those that may be allowed if and once approved by the township board of zoning appeals ("BZA"), subject to certain conditions. A use is typically categorized as a conditional use in recognition of the impact it may have upon the surrounding area.

Statutorily, township BZAs may "[g]rant conditional zoning certificates for the use of land, buildings, or other structures if such certificates for specific uses are provided for in the zoning resolution."

(R.C. §519.14(C)) So, you need to be sure that your zoning resolution provides that information, that it enumerates certain conditional uses and the process for seeking and obtaining permits (or certificates) for them. If your zoning resolution does not provide for conditional uses, then your BZA is without authority to grant them. A well-crafted zoning resolution will provide sufficiently precise standards to guide a BZA in exercising its authority, while also giving the BZA enough discretion to weigh whether or not a conditional use fits into the character of the surrounding area.

Even prior to the submission of an application for a conditional use permit, it may be useful for applicants to meet with zoning staff to talk about their objectives and make sure they are applying for the correct authorizations for their projects, and in the correct order, if applicable. For example, if an applicant needs a conditional use permit and one or more variances, it would be more efficient for everyone to know that in advance and give the applicant the opportunity, if practicable, to present all those requests to give the full context of the project. If, for some reason, the applicant declines to meet with staff in advance, you certainly cannot force them to do so or refuse to accept their application until they do.

An individual seeking a conditional use permit must complete the township's application and submit it to the township. The information and materials you ask the applicant to provide as part of the application can include: descriptions of the property and the proposed conditional

use, including any buildings or structures, a statement of the reason or purpose for the application, and any other information relevant to the conditional use being sought that would be useful to the BZA. You may institute deadlines by which applications must be submitted in order for the hearing to be scheduled for the next regular BZA meeting. Applications submitted after that date should generally be scheduled for the next BZA meeting. Keep in mind that the hearing must be scheduled within a reasonable time of submission of the application.

At least ten days prior to the hearing, the township must publish legal notice of the hearing in a newspaper of general circulation in the county, describing the date, time, and place of the hearing, and a description of the proposed conditional use. Additionally, at least ten days prior to the hearing, notice must also be mailed to "parties in interest," containing the same information as the legal notice. (R.C. §519.15)

Since the BZA is acting in a quasi-judicial capacity, it should treat a conditional use hearing like a court hearing. Be sure to swear in witnesses, including the zoning inspector or other staff person who will be testifying regarding the application, allow the cross-examination of witnesses, admit evidence, and keep an accurate and complete record of proceedings. Be very careful of swearing in everyone together at once: if the BZA swears in the entire audience at the start of the hearing, be sure that:

1. You create a record of the zoning inspector or staff person's swearing-in; and
2. Before they give testimony, ask witnesses to confirm that they were present and were sworn in earlier in the hearing. If a witness was not previously sworn in, swear him or her in individually before giving testimony.

Allow all people to testify, and don't limit the time for their testimony. In particularly contentious cases, you may want to hire a court reporter to take a full written record of the hearing in case it would need to be used in an appeal.

The zoning inspector or other staff member, as well as the applicant, should present the application information to the BZA. They, in addition to any other witnesses who provide testimony, including any audience members, must be permitted to be cross-examined. Unlike other township officials, BZA members acting in a quasi-judicial capacity must not discuss the application with each other or with the applicant outside of the hearing. The BZA can enter private deliberations during the hearing to discuss the information presented. Legal counsel can go into

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private deliberations with the BZA members. However, because the zoning inspector or other zoning staff member is a party to the proceeding, he or she cannot. Furthermore, an Ohio court has ruled that the applicant's due process rights were violated when a BZA member conducted outside research and then acted as investigator and trier of fact of the application. Don't forget ethical rules for township officials – those apply here, too.

If the BZA and/or the applicant need additional time and feel that another hearing date would be helpful, the BZA can continue the hearing. For example, during the hearing, BZA members or neighbors may raise questions that require time for the applicant to gather information and provide an answer. To allow for additional time before moving forward with any decision, the BZA, on its own or pursuant to the applicant's request of the applicant, may continue the hearing to a date, time, and place certain,

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without needing to reissue formal notice of the hearing. Of course, you could opt to publish the information of the next hearing session on the township website.

As a general rule, each application undergoes its own fact-specific review. Any conditions placed by the BZA on a conditional use must not be arbitrary or capricious. Because conditional use permits run with the land, courts have held that expiration of the conditional use permit upon change in ownership cannot be a condition imposed by the BZA. Another court invalidated a condition of requiring frequent inspections by the zoning inspector, as being in violation of the Fourth Amendment prohibition against unreasonable search and seizure. The BZA cannot place conditions on a permitted use. Ultimately, courts turn to the authority granted to the BZA in the zoning resolution. If the authority to impose a condition is not included in the zoning resolution, courts have invalidated the condition.

A BZA must base its decision upon the evidence presented, and the decisions must be in writing. How formal that decision is will be up to the BZA, but it must contain findings of fact and conclusions of law. The BZA should be especially thorough in its written decision when the proceeding has been particularly contentious and/or when you anticipate an appeal of the decision to the county court of common pleas. The decision must be rendered within a reasonable time after conclusion of the hearing. (*R.C. §519.15*) Once a decision has been rendered by the BZA, the doctrine of res judicata applies so that, generally speaking, an applicant unhappy with the decision cannot re-apply to the BZA trying to obtain a different decision on the same application.

BZA decisions, including those for conditional uses, can be appealed to the court of common pleas under R.C. Chapter 2506. In such an appeal, the court's review will be confined to the transcript of the hearing unless it appears from the transcript or an affidavit from the appellant that, generally, the transcript contains an inaccurate or incomplete record of the proceedings or that the proceedings were deficient in some way.

One of the most important things to remember is that a BZA in this context is acting in its quasi-judicial authority, in effect acting like a court. Because these BZA decisions can be appealed to the court of common pleas, it is important to consistently follow the statutory process and create a good record of the proceedings in case it needs to be used in an appeal. ■



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