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David W. Owens

UNC SCHOOL OF GOVERNMENT

The University *of* North Carolina *at* Chapel Hill
Institute of Government
Master of Public Administration Program

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One of the principal purposes of zoning is to prevent the harm that comes when incompatible land uses are located too close to each other. For example, a fast food restaurant or an industrial facility would generally be zoned out of a residential neighborhood. But what about a small day care facility or home business proposed to be located in a single-family residential neighborhood? If done properly, it might fit in well and be an asset to the neighborhood and community. But it could be a substantial problem for the neighbors if it is not carefully located and designed. The special use permit is zoning's answer to this dilemma. It creates the flexibility of allowing these potentially acceptable land uses but does so in a way that requires a careful review to assure that the use fits within city or county policies.

Most zoning ordinances allow some uses in a zoning district that are permitted only if a detailed, careful review of the application concludes that specified standards are met. These "special uses" are deemed to warrant careful review either because they are potentially appropriate anywhere within the zoning district, but only if carefully designed to meet the standards, or because they are potentially harmful wherever they are located unless carefully designed. Therefore the zoning ordinance designates them as special uses and sets out standards for them that require application of some degree of judgment and discretion. Often many of the most sensitive types of development proposed in a community are placed in the special use category.

This report first summarizes the law in North Carolina regarding special use permits, including the statutory requirements for special use permits and a summary of the case law regarding special use permits. The report then summarizes the results of a detailed survey of all North Carolina cities and counties regarding how special use permits are administered.

The Law of Special Use Permits

Definition and Authority

Zoning ordinances regulate the types of land uses allowed in each zoning district. Most ordinances place each type of land use into one of three categories. First, some uses are automatically permitted in a particular zoning district. These permitted uses are often referred to as "uses by right" and are subject to objective standards set forth in the zoning ordinance. Applications for approval of these uses are a routine matter handled by the zoning staff. Second, uses may be prohibited in a particular district. Prohibited uses are often not listed in the ordinance. Rather, the ordinance simply provides that if the use is not listed as permitted in a particular district, it is prohibited. Third, a smaller group of uses are in the "maybe" category. They are allowed anywhere in the affected zoning district, but only if specified standards and conditions are met. These uses are the "special uses" that are the subject of this report.

The authority to apply specialized review to particularly sensitive land uses has always been a part of zoning law in the United States. The original Standard State Zoning Enabling Act (and the original 1923 North Carolina zoning enabling act) used the term "special exception" for these permits and assigned decision making about them to the board of adjustment.[1] Virtually every state in the country authorizes use of this tool. While zoning ordinances made sparing use of this authorization in the early decades of zoning practice, since the early 1960s use of special exceptions has been increasingly common.

1. "A special exception within the meaning of a zoning ordinance is one which is expressly permitted in a given zone upon proof that certain facts and conditions detailed in the ordinance exist. It is granted by the board, after a public hearing, upon a finding that the specified conditions have been satisfied." *In re* Application of Ellis, 277 N.C. 419, 425, 178 S.E.2d 77, 80–81 (1971).

Contemporary zoning ordinances usually term the land uses designated for specialized review *special uses* or *conditional uses* rather than special exceptions. Some ordinances also retain the term "special exceptions" as well. These terms are interchangeable and have the same legal consequence.[2] There is no legal significance to the term used in the ordinance to label these permits; the term used in an individual zoning ordinance is a matter of local choice. Some zoning ordinances even use multiple terms for these permits, as they may assign decision making for one class of these permits to one board and another class to a different board and use different names to distinguish the two. For example, a city may send those types of projects considered particularly sensitive to the city council and all of the others to the board of adjustment. They then label those going to the city council as "special use permits" and those going to the board of adjustment as "conditional use permits" to help staff and applicants identify the decision-making route to be followed. However the legal standards discussed in this report are the same for both sets of permits. Throughout this report, the terms "special use" and "special use permit" will be used and are intended to include conditional use permits and special exceptions.

It is important to distinguish special use permits from variances.[3] Variances are used when the strict terms of the ordinance cannot be met. An applicant must establish "practical difficulties" or "unnecessary hardship" to qualify for a variance. On the other hand, special use permits do not require a showing of hardship. Rather, they are used to conduct a detailed review of individual applications to determine whether the ordinance's standards have been met.

The decision on a special use permit is quasi-judicial[4] and is thus subject to procedural due process requirements regardless of which board makes the decision. There is, however, one important variable that depends on which board is taking action. The statutes provide that the usual four-fifths vote required of action by the board of adjustment does not apply to governing boards or planning boards when they are deciding special use permits.[5]

The court approved the special use permit concept in North Carolina in *Jackson v. Guilford County Board of Adjustment*.[6] The ordinance involved allowed mobile home parks as a special exception in an agricultural zoning district. The key question addressed by the court was whether assignment of special use permit decision making to the board of adjustment constitutes an unlawful delegation of legislative authority. Justice Lake wrote that it was not, because the governing board makes the legislative policy decision when it determines whether the use will be allowed in a certain zoning district and under what conditions:

> When a statute, or ordinance, provides that a type of structure may not be erected in a specified area, except that such structure may be erected therein when certain conditions exist, one has a right, under the statute or ordinance, to erect such structure upon a showing that the specified conditions exist. The legislative body may confer upon an administrative officer, or board, the authority to determine whether the specified conditions do, in fact, exist and may require a permit from such officer, or board, to be issued when he or it so determines, as a further condition precedent to the right to erect such structure in such area. Such permit is not one for a variance or departure from the statute or ordinance, but is the recognition of a right established by the statute or ordinance itself. Consequently, the delegation to such officer, or board, of authority to make such determination as to the existence of the specified conditions is not a delegation of the legislative power to make law.[7]

A zoning ordinance may require a special use permit for changes in land uses as well as for the establishment of new uses. For example, the court in *Forsyth County v. York*[8] upheld a zoning provision that required a special use permit for the conversion of a nonconforming use to another use, provided the board of adjustment found the new use to be less intensive or of essentially the same character as the prior use.

A special use permit is not a personal right but is tied to the specific parcel of property for which it is issued. These permits, like variances and other zoning approvals, run with the land.

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2. The North Carolina statutes were amended in 1967 to explicitly allow use of special and conditional use permits. 1967 N.C. Sess. Laws ch. 1208. The provision was further amended in 2005. This provision, now codified as Sections 153A-340 and 160A-381 of the North Carolina General Statutes (hereinafter G.S.), provides:

> The [zoning] regulations may also provide that the board of adjustment, the planning board, 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.

3. G.S. 153A-345(c) and 160A-388(c) provide that the board of adjustment (and any board acting as a board of adjustment)

> may permit special exceptions to the zoning regulations in specified classes of cases or situations as provided in subsection (d) of this section [providing for variances], not including variances in permitted uses, and that the board may use special and conditional use permits, all to be in accordance with the principles, conditions, safeguards, and procedures specified in the ordinance.

For more information on zoning variances, see David Owens and Adam Bruggemann, A Survey of Experience with Zoning Variances (School of Government Special Series No. 18, Feb. 2004).

4. While the standards for the permit involve application of a degree of judgment and discretion, the applicant is entitled to the permit upon establishing that the standards will be met. This creates a property right in the permit that is different from the entirely discretionary decision on a rezoning, thus making decisions on special and conditional use permits quasi-judicial.

5. G.S. 153A-340(c) and 160A-381(c). This change was made in 1981 for city councils and boards of county commissioners. The statute was further amended in 2005 to make the simple majority vote applicable to planning boards. This statute also explicitly states that all special and conditional use permit decisions are quasi-judicial.

6. 275 N.C. 155, 166 S.E.2d 78 (1969).

7. *Id.* at 165, 166, 166 S.E.2d at 85.

8. 19 N.C. App. 361, 198 S.E.2d 770, *review denied*, 284 N.C. 253, 200 S.E.2d 653 (1974).

Adequate Guiding Standards

Since decisions on special use permits involve applying legislatively established standards to individual applications, it is essential that the zoning ordinance itself include adequate guiding standards for quasi-judicial decisions. If there are no standards or if the standard provided is so general as to leave the board unbridled discretion in its decision, the courts will invalidate the ordinance provisions as an unlawful delegation of legislative authority.

An ordinance that has decision standards for special use permits that are so general as to offer little practical guidance for individual permit decisions is invalid. *Jackson v. Guilford County Board of Adjustment*[9] sets the basic rule:

> Delegation to an administrative officer, or board, of authority to issue or refuse a permit for the erection of a specified type of structure in a given area, dependent upon whether such officer, or board, considers such structure in such area, under prevailing conditions, conducive to or adverse to the public interest or welfare is a different matter. Such delegation makes the determinative factor the opinion of such officer, or board, as to whether such structure in such area, under prevailing conditions, would be desirable or undesirable, beneficial to the community or harmful to it. This is a delegation of the power to make a different rule of law, case by case. This power may not be conferred by the legislative body upon an administrative officer or board. . . . So much of . . . this ordinance as requires the Board of Adjustment to deny a permit . . . unless it finds "that the granting of the special exception will not adversely affect the public interest" is, therefore, beyond the authority of the Board of Commissioners to enact and so is invalid.[10]

In re Application of Ellis answered the question of whether this same restriction also applies to the governing board.[11] In response to the adverse ruling in the *Jackson* case, the Guilford County Board of Commissioners adopted a resolution moving special use permit decision making from the board of adjustment to the governing board. The commissioners subsequently denied the applicant's request for a special use permit for a mobile home park under the "public interest" standard, making no findings of fact and stating no reasons for their decision. On appeal the court ruled that a governing board has no more discretionary power for individual special use permits than does a board of adjustment:

> Like the board of adjustment, the commissioners cannot deny applicants a permit in their unguided discretion or, stated differently, refuse it solely because, in their view, a mobile-home park would "adversely affect the public interest." The commissioners must also proceed under standards, rules, and regulations, uniformly applicable to all who apply for permits.[12]

A series of cases have held various standards to be so general as to offer inadequate guidance to decision makers. The court held a requirement that a conditional use be consistent with the "purpose and intent" of the zoning ordinance to be an insufficient standard and thus is an unlawful delegation of authority.[13] The court ruled that it was improper for the Nags Head governing board to deny a special use permit for a planned unit development on the grounds that it was inconsistent with the goals and objectives of the land use plan, even though the ordinance specifically listed the plan as one of the factors in determining the suitability of a special use permit.[14] The court held that it was improper to deny a special use permit for an adult bookstore on the grounds that it would be incompatible with the character and use of surrounding buildings.[15] Its inclusion as a special use by the ordinance is conclusive on the policy question of general use compatibility.

Even so, it is permissible to use relatively general standards for decisions. In a key decision, *Kenan v. Board of Adjustment*,[16] the court of appeals approved the use of four fairly general standards for special use permits. Most North Carolina zoning ordinances now incorporate these same standards. These four standards are that the use

1. Does not materially endanger the public health or safety;
2. Meets all required conditions and specifications;
3. Would not substantially injure the value of adjoining property or be a public necessity,[17] and
4. Will be in harmony with the area in which it is located and be in general conformity with the comprehensive plan.

9. 275 N.C. 155, 166 S.E.2d 78 (1969). *See also* Town of Spruce Pine v. Avery County, 346 N.C. 787, 488 S.E.2d 144 (1997); Adams v. North Carolina Dep't of Natural and Economic Res., 295 N.C. 683, 249 S.E.2d 402 (1979); City of Roanoke Rapids v. Peedin, 124 N.C. App. 578, 478 S.E.2d 528 (1996).

10. *Id*. at 165–67, 166 S.E.2d at 85–87 (1969). *See also* Howard v. City of Kinston, 148 N.C. App. 238, 246, 558 S.E.2d 221, 227 (2002).

11. 277 N.C. 419, 178 S.E.2d 77 (1971).

12. *Id*. at 425, 178 S.E.2d at 81.

13. Keiger v. Board of Adjustment, 278 N.C. 17, 23, 178 S.E.2d 616, 620 (1971). *See also* Northwestern Financial Group, Inc. v. County of Gaston, 329 N.C. 180, 190, 405 S.E.2d 138, 144 (1991) (holding approvals under mobile home park ordinance may not be based on general concern about hazards to public welfare).

14. Woodhouse v. Board of Comm'rs, 299 N.C. 211, 261 S.E.2d 882 (1980).

15. Harts Book Stores v. City of Raleigh, 53 N.C. App. 753, 281 S.E.2d 761 (1981).

16. 13 N.C. App. 688, 187 S.E.2d 496, *cert. denied*, 281 N.C. 314, 188 S.E.2d 897 (1972).

17. While there is no case law on this point in North Carolina, the implication is that there must be a showing either that the permit will not substantially harm neighboring property values or that, if it does, there is a public necessity for siting the use as proposed. This would customarily arise with a utility use, such as an electrical substation or sewage lift station. Some ordinances require a separate showing that a special use is reasonably necessary for the public convenience or welfare. *See* SBA, Inc. v. City of Asheville, 141 N.C. App. 19, 539 S.E.2d 18 (2000); Kenneth H. Young, Anderson's American Law of Zoning § 21.12 (4th ed. 1996). That, however, is a background standard for approvability, not an alternative to excuse adverse property value impacts.

Some zoning ordinances also add more detailed specific standards for particular uses and often apply those in combination with these general standards.

The standards to be applied in particular quasi-judicial decisions must be clearly identified as such by the ordinance. Only those standards specifically listed as applicable may be applied when making special use permit decisions. Additional standards may not be developed on an ad hoc basis. *C.C. & J. Enterprises, Inc. v. City of Asheville*[18] illustrates this. The city council denied a special use permit for a proposed twenty-four-unit apartment complex after finding the application met all of the technical requirements and development standards in the ordinance, basing the denial on a general concern about impacts on health and safety (citing street conditions, topography, access, flooding potential, and proposed density). The court held that since the ordinance did not in fact list promotion of the public health, safety, and welfare as a standard for special use permit decisions (though it would have been permissible to do so), it was inappropriate for the city council to use it as a standard in reviewing the application. A general statement of intent that "adequate standards will be maintained pertaining to the public health, safety, welfare, and convenience" is not a permit standard and may not be used in decision making. Similarly, only the standards actually in the ordinance may be used as the basis for imposition of conditions on a special use permit that is issued.[19]

In making its decision, the board must clearly state whether each of the applicable standards has or has not been met. A board may vote on each standard separately or may vote on a single motion that specifies which standards have been met (so long as the board's conclusions as to each standard are clearly discernible).[20]

Burden of Production and Persuasion

With special use permits, the general rule is that the applicant has the burden of presenting sufficient evidence that an application meets the standards of the ordinance.[21] Most zoning ordinances require applications for special use permits to be on forms that are designed to solicit the basic information necessary to assess compliance with the standards. A board has no jurisdiction to consider an incomplete application.[22]

If the applicant presents uncontroverted competent, substantial, and material evidence that the standards have been met, there is a *prima facie* entitlement to the permit and it must be issued.[23] On the other hand, when an applicant fails to produce sufficient evidence for the board to make the requisite findings, the permit must be denied.[24] Once an applicant makes the requisite showing that the standards have been met, the burden shifts to those who oppose permit issuance to present countervailing substantial, competent, and material evidence that the standards would not be met. Where there is substantial evidence on both sides, the board makes its determination as to which is correct, and, absent other problems, that determination is accepted by the courts.[25]

This burden on the applicant certainly applies to specific standards in the ordinance but may not apply to the more general standards. In *Woodhouse v. Board of Commissioners*,[26] the court noted that with general standards (such as that the project must not harm the public health, safety and welfare) the burden rests with a challenger who contends the standards would not be met. More recent cases emphasize that while opponents have a burden of producing some contrary evidence on these general standards, the ordinance can place the burden of proof when there is conflicting evidence on the applicant. For example, an ordinance may state that a permit shall only be issued upon the applicant's establishing that the proposed project *will not harm* the public safety or neighboring property values.[27] By contrast, if the ordinance says the permit *shall be issued* unless the board finds a standard is violated, the permit must be issued in the absence of evidence that a standard is violated.[28]

18. 132 N.C. App. 550, 512 S.E.2d 766 (1999). *See also* Knight v. Town of Knightdale, 164 N.C. App. 766, 596 S.E.2d 881 (2004) (site plan approvals); Nazziola v. Landcraft Properties, Inc., 143 N.C. App. 564, 545 S.E.2d 801 (2001) (subdivision approval).

19. The authority to impose appropriate conditions and safeguards "cannot be used to justify unbridled discretion" in framing permit conditions. Hewett v. County of Brunswick, 155 N.C. App. 138, 146, 573 S.E.2d 688, 694 (2002). Any condition imposed must be related to the standards for decision in the ordinance.

20. Richardson v. Union County Bd. of Adjustment, 136 N.C. App. 134, 523 S.E.2d 432 (1999).

21. Humble Oil & Refining Co. v. Board of Aldermen, 284 N.C. 458, 468, 202 S.E.2d 129, 136 (1974).

22. Wade v. Town of Ayden, 125 N.C. App. 650, 482 S.E.2d 44 (1997). *See also* Richardson v. Union County Bd. of Adjustment, 136 N.C. App. 134, 523 S.E.2d 432 (1999).

23. Howard v. City of Kinston, 148 N.C. App. 238, 246, 558 S.E.2d 221, 227 (2002); SBA, Inc. v. City of Asheville, 141 N.C. App. 19, 27, 539 S.E.2d 18, 22 (2000); Clark v. City of Asheboro, 136 N.C. App. 114, 119–20, 524 S.E.2d 46, 50 (1999); Triple E Assoc. v. Town of Matthews, 105 N.C. App. 354, 413 S.E.2d 305, *review denied*, 332 N.C. 150, 419 S.E.2d 578 (1992); Harts Book Stores, Inc. v. City of Raleigh, 53 N.C. App. 753, 281 S.E.2d 761 (1981). The same rule of entitlement upon showing all standards have been met applies to subdivision plat approvals. *See, e.g.*, William Brewster Co., Inc v. Town of Huntersville, 161 N.C. App. 132, 588 S.E.2d 16 (2003).

24. Signorelli v. Town of Highlands, 93 N.C. App. 704, 379 S.E.2d 55 (1989); Charlotte Yacht Club, Inc. v. County of Mecklenburg, 64 N.C. App. 477, 307 S.E.2d 595 (1983).

25. AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Bd. of Adjustment, 172 F.3d 307 (4th Cir. 1999).

26. 299 N.C. 211, 261 S.E.2d 882 (1980).

27. *See, e.g.*, Mann Media, Inc. v. Randolph County Planning Bd., 356 N.C. 1, 565 S.E.2d 9 (2002); Butler v. City Council of the City of Clinton, 160 N.C. App. 68, 72, 584 S.E.2d 103, 106 (2003). *See also* Harding v. Board. of Adjustment, 170 N.C. App. 392, 612 S.E.2d 431 (2005); SBA, Inc. v. City of Asheville, 141 N.C. App. 19, 539 S.E.2d 18 (2000).

28. *See, e.g.*, Coleman v. Town of Hillsborough, 173 N.C. App. 560, 619 S.E.2d 555 (2005).

Adequacy of Evidence

The question of the quality of evidence necessary to support findings relative to the general standards for special use permits is evolving. More recent cases emphasize the need for a stronger foundation and greater detail in the evidence presented. A brief review of the holdings relative to the most typical general standards follows.

Endangering the Public Health or Safety

Several cases have upheld special use permit denials based on public health and safety impacts. In some instances this resulted from the applicant's failure to establish there would not be harm to public health and safety. In *Mann Media, Inc. v. Randolph County Planning Board*,[29] an application for a special use permit to construct a 1,500-foot telecommunications tower was denied on several grounds, including that the applicant had not met the burden of showing "that the use will not materially endanger the public health or safety if located where proposed and developed according to the plan as submitted and approved." At issue was the impact of ice falling from the supporting wires for the tower. The court held that the evidence presented by tower opponents (ice in a cooler and anecdotal hearsay) was not competent to establish a public safety hazard. However, the ordinance placed the burden of establishing that the use would not pose a safety hazard on the applicant. Here the applicant testified that while he believed ice on the wires would not pose a safety problem, he could not state with certainty that falling ice in a storm would not pose a risk to the permanent structures located in close proximity to the towers. The court upheld the denial, concluding the board's finding that the applicant failed to establish that a lack of hazards was "neither whimsical, nor patently in bad faith, and it is not indicative of a lack of any course of reasoning or exercise of judgment."[30] In *Butler v. City Council of the City of Clinton*,[31] the court upheld denial of a special use permit for a crematory. The ordinance required a finding that the use "will not be detrimental to or endanger the public health, safety, morals, or general welfare." Neighboring residents testified about concerns of learning disabilities and cancer caused by the emissions and the psychological effects on children in the neighborhood. A doctor testified about potential health impacts of mercury and dioxin emissions. The court held in a whole-record review that this was sufficient evidence to support a finding that the use could endanger the public welfare. In *Wolbarst v. Board of Adjustment of City of Durham*,[32] the petitioner requested a special use permit to replace an existing 4-foot-high fence in the front yard with a 6-foot-high chain link fence so that his dog could roam in the front yard as well as in the backyard (where there was already a six-foot-high fence). The court upheld a denial based on the project being inconsistent with the public health, safety, and welfare based on testimony from neighbors on the negative visual impacts of the fence and allowing the dogs so close to passers-by. In *Signorelli v. Town of Highlands*,[33] the court held that although the applicant had submitted sufficient information to establish a prima facie entitlement to a special use permit for a game room in a donut shop, the lack of specificity in the application as to hours of operation, number of machines, and methods of supervision justified the board of adjustment's finding that it was unable to conclude that the use would not endanger the public health or safety.

Other cases have overturned denials because there was inadequate evidence to show a likely detriment to public health and safety. In *Sun Suites Holdings, LLC v. Town of Garner*,[34] the court invalidated a town council's denial of a special use permit for an extended-stay hotel on the grounds that the project would materially endanger public safety. The court held that a whole-record review established that this finding was not supported by substantial evidence. General expressions of a fear of potential increases in crime in the vicinity of any hotel are insufficient to establish a threat to public safety. Similarly, a recitation of crime statistics with reference to another extended-stay hotel in the town, without any foundation as to how those statistics related to the subject project, was held inadequate to support a denial. In *Clark v. City of Asheboro*,[35] which involved a special use permit for a proposed manufactured-home park, the applicants presented detailed evidence at the hearing to support the application. Six neighbors appeared and presented testimony in opposition. The court held that the permit was improperly denied, as the evidence in opposition was characterized as being generalized fears that park residents would be low-income residents who would constitute a danger to the neighborhood, concerns unsupported by competent evidence. Similarly, in *Cox v. Hancock*,[36] the court upheld issuance of a special use permit for an apartment building where the applicant presented testimony on traffic control, positive impacts on surrounding property values, stormwater drainage, and compatibility with the surrounding neighborhood and the neighbors had only generalized objections.

29. 356 N.C. 1, 565 S.E.2d 9 (2002). By contrast, in *Ward v. Inscoe*, 166 N.C. App. 586, 603 S.E.2d 393 (2004), the court held that the applicant's presentation of evidence on landscaping buffers, removal of undergrowth, consideration of traffic counts provided by the state Department of Transportation, modification of existing streets, installation of a traffic light, improvements to storm drainage, and relocation of a fire hydrant adequately supported a finding that the proposed bank would not hinder public safety.

30. *Id*. at 17, 565 S.E.2d at 20.

31. 160 N.C. App. 68, 72, 584 S.E.2d 103, 106 (2003).

32. 116 N.C. App. 638, 448 S.E.2d 858 (1994), *review denied*, 338 N.C. 671, 453 S.E.2d 186 (1995).

33. 93 N.C. App. 704, 379 S.E.2d 55 (1989).

34. 139 N.C. App. 269, 533 S.E.2d 525, *review denied*, 353 N.C. 280 546 S.E.2d 397 (2000).

35. 136 N.C. App. 114, 524 S.E.2d 46 (1999).

36. 160 N.C. 473, 586 S.E.2d 500 (2003).

Injury to Value of Adjoining Property

In *Mann Media, Inc. v. Randolph County Planning Board*,[37] the court in dicta noted that a rigorous standard is necessary to establish a foundation for opinion testimony regarding property value impacts. The applicant's witness on property value impacts was a professional appraiser; the objecting neighbors presented testimony from a contractor and a real estate agent. The court noted all three witnesses offered only speculative opinions about values without supporting facts or examples and that cannot be the foundation of a finding of adverse impacts. Similarly, in *Humane Society of Moore County, Inc. v. Town of Southern Pines*,[38] the court held that testimony by an appraiser as to the property value impacts of a proposed animal shelter was based on speculative opinions rather than facts and could not be the basis of a finding on value impacts. In *Sun Suites Holdings, LLC v. Town of Garner*,[39] speculative comments by a neighbor and a real estate agent about impacts on property values were held to be insubstantial evidence on the impacts of the project on property value.

The fact that evidence of property value impacts is available and not presented can seriously undermine the case of the party with the burden of establishing (or contesting) that fact. In *SBA, Inc. v. City of Asheville*,[40] the plaintiff appealed the city council's denial of a special use permit for a telecommunications tower. The Asheville ordinance required a conclusion that the project would not substantially injure the value of adjoining or abutting property. The plaintiff presented a property value impact study to demonstrate compliance with this standard, but the city staff expressed concern that the study addressed other towers and neighborhoods, not the neighborhood in question. The court was particularly concerned with the plaintiff's failure to address the property value impacts of an existing telecommunication tower a short distance from the proposed site that potentially affected the same neighborhoods. The court thus held that the plaintiff "simply did not meet their burden of demonstrating the absence of harm" to neighboring property values.[41]

Harmony with the Area

Several older cases state that inclusion of a particular use as a special or conditional use establishes a presumption that the use is compatible with the surrounding area. In *Woodhouse v. Board of Commissioners* the court noted that "inclusion of the particular use in the ordinance as one which is permitted under certain conditions, is equivalent to a legislative finding that the prescribed use is one which is in harmony with the other uses permitted in the district."[42] Similarly in *Harts Book Stores v. City of Raleigh*[43] the court held that it was improper to deny a special use permit for an adult bookstore on the grounds that it would be incompatible with surrounding buildings since its inclusion as a special use by the ordinance is conclusive on the policy question of use compatibility.

However, it is more accurate to say that inclusion of a use as a permissible special use within a zoning district establishes a prima facie showing of harmony with the properties in that district (rather than a conclusive finding of harmony), and the burden is on the challengers to rebut the presumption of harmony at the particular site proposed.[44]

A number of cases uphold special use permit denials based on neighborhood incompatibility. In *Hopkins v. Nash County*[45] the court upheld the denial of a special use permit for a land clearing and inert debris landfill. The evidence presented by neighbors who objected to the landfill was that the area was previously agricultural in nature, was the site of a long-standing crossroads community, and was now primarily single-family residential in nature and that the thirty to forty trucks per day that would use the landfill would bring disruptive traffic, noise, and dust into the residential area. The court held this to be sufficient evidence to rebut the presumption of harmony with the surrounding area. In *SBA, Inc. v. City of Asheville*[46] the court upheld the denial of a special use permit for a 175-foot telecommunications tower. There was uncontroverted evidence that the tower would be four times taller than existing buildings in the neighborhood. Twelve witnesses testified that the tower would be an eyesore. The court held that the applicant's own evidence, a computer-generated photograph superimposing the tower, corroborated the proposed tower's visibility and predominance over existing buildings and showed that it would be "in sharp contrast" to its surroundings. The court held this to be sufficient to establish that this particular tower would not be compatible with the neighborhood. In *Vulcan Material Co. v. Guilford County Board of Commissioners*,[47] the board of county commissioners denied a special use permit for a proposed rock quarry on the grounds that there was insufficient credible evidence to find that the use would be compatible with the surrounding land uses. The court held that it was sufficient that the record showed all uses within two miles of the quarry to be residential. In *Petersilie v. Boone Board of Adjustment*,[48] the court upheld the denial of a special use permit for an apartment building in a neighborhood of single-family homes. The court ruled that although the applicant submitted sufficient evidence to support the issuance of the permit, there had also been

37. 356 N.C. 1, 565 S.E.2d 9 (2002). By contrast, the court in *Leftwich v. Gaines*, 134 N.C. App. 502, 511, 521 S.E.2d 717, 724–25 (1999), *review denied*, 351 N.C. 357, 541 S.E.2d 714 (2000), a case for damages resulting from the improper actions of a zoning official, the court allowed testimony from a plaintiff with experience in real estate matters to be used as a foundation for setting property values in the context of assessing damages.

38. 161 N.C. App. 625 589 S.E.2d 162 (2003).

39. 139 N.C. App. 269, 533 S.E.2d 525, *review denied*, 353 N.C. 280, 546 S.E.2d 397 (2000).

40. 141 N.C. App. 19, 539 S.E.2d 18 (2000).

41. *Id*. at 27, 539 S.E.2d at 23.

42. 299 N.C. 211, 216, 261 S.E.2d 882, 886 (1980).

43. 53 N.C. App. 753, 281 S.E.2d 761 (1981).

44. In *Mann Media, Inc. v. Randolph County Planning Board*, 356 N.C. 1, 565 S.E.2d 9 (2002), the court noted in dicta that inclusion of a use as a special or conditional use in a particular district establishes a prima facie case that the use is in harmony with the general zoning plan, but that presumption may be rebutted in the hearing. *Id*. at 19, 565 S.E.2d at 20.

45. 149 N.C. App. 446, 560 S.E.2d 592 (2002).

46. 141 N.C. App. 19, 539 S.E.2d 18 (2000).

47. 115 N.C. App. 319, 444 S.E.2d 639, *review denied*, 337 N.C. 807, 449 S.E.2d 758 (1994).

48. 94 N.C. App. 764, 381 S.E.2d 349 (1989).

competent evidence before the board of adjustment regarding problems of noise, traffic congestion, crime, vandalism, and effects on property values to justify the denial of the permit.

On the other hand, in *Humane Society of Moore County, Inc. v. Town of Southern Pines*,[49] the court overturned the denial of a special use permit for an animal shelter. Noting that inclusion of the use as a possible conditional use in the district creates a prima facie finding of compatibility, the court found inadequate evidence in the record to rebut the presumption. The court found testimony of landscape architects as to noise and odor impacts to be speculative. The court noted that witnesses had also either ignored the fact that an airport, mini-storage warehouses, and another animal hospital were already located in the area or had conceded that the proposed use was in harmony with them. In *Ward v. Inscoe*,[50] involving a special use permit for a bank with four drive-through windows, the court found that presentation of evidence regarding the mix of existing uses in the area, along with conditions imposed relative to street parking, lighting, tree protection, and vegetative buffers, sufficiently supported a finding that the project would not substantially injure adjoining properties. In *MCC Outdoor, LLC v. Town of Franklinton*,[51] the court held that the fact neighbors could see a billboard from their property was insufficient to support a finding the signs would be incompatible with the neighborhood given the presence of other businesses and signs and an active rail line in the immediate area.

Conformity with the Comprehensive Plan

In *Vulcan Material Co. v. Guilford County Board of Commissioners*,[52] the board of county commissioners denied a special use permit for a proposed rock quarry on the grounds that there was insufficient credible evidence to find that the use would be in conformity with the land use plan. The court of appeals held it sufficient that the record showed that the land use plan reserved the area for residential use.

Public Need

An ordinance may include a requirement that the applicant establish that the special use is "reasonably necessary" for the public health or welfare. In *SBA, Inc. v. City of Asheville*,[53] the plaintiff appealed the city council's denial of a special use permit for a 175-foot telecommunication tower. The court held that lack of evidence presented by the applicant regarding the feasibility of alternate sites or stealth technology (and the fact that significant coverage gaps would remain even with this tower) supported a conclusion that it had not been established that the telecommunication tower proposed was reasonably necessary at the proposed site.

Traffic Impacts

Several cases illustrate the evidence needed to support a finding that a proposed special use permit would create adverse traffic impacts. In *Howard v. City of Kinston*,[54] the court upheld a finding that significant adverse impacts on traffic would endanger public health and safety. The findings were based on testimony from city planning staff that specified trip generation projections and from a neighbor who testified as to the number of children in the area and past experience in this particular area with the safety of walkers and cyclists. In *Ghidorzi Construction, Inc. v. Town of Chapel Hill*,[55] the court ruled that the council's denial of a special use permit for a ninety-one-unit development on a 15.2-acre tract because of effects on traffic safety was supported by substantial, material, and competent evidence, given the traffic studies and reports submitted by the petitioner and the town staff. The town council was not required to consider possible future road improvements in making its judgment. In *In re Goforth Properties, Inc.*,[56] the court held that evidence in the record regarding increased traffic counts and their effects on traffic safety at a nearby intersection and for nearby schools and fire stations constituted competent, material, and substantial evidence to support the council's finding that the proposed development would not maintain public health and safety.

By contrast, in *Triple E Associates v. Town of Matthews*,[57] the court held that the board may not rely on speculative traffic projections to make a finding regarding traffic congestion. The court reached a similar conclusion in a case involving preliminary plat approval, holding that speculative comments about the impact of traffic on children playing in the street was an inadequate basis for plat denial.[58]

Survey of Special Use Permit Experience in North Carolina

Survey

The Institute of Government conducted a survey of North Carolina cities and counties to determine how they have actually used the special use permit authority.[59] The survey was mailed in

49. 161 N.C. App. 625, 589 S.E.2d 162 (2003).

50. 166 N.C. App. 586, 603 S.E.2d 393 (2004).

51. 169 N.C. App. 809, 610 S.E.2d 794 (2005).

52. 115 N.C. App. 319, 444 S.E.2d 639, *review denied*, 337 N.C. 807, 449 S.E.2d 758 (1994).

53. 141 N.C. App. 19, 539 S.E.2d 18 (2000).

54. 148 N.C. App. 238, 558 S.E.2d 221 (2002).

55. 80 N.C. App. 438, 342 S.E.2d 545, *review denied*, 317 N.C. 703, 347 S.E.2d 41 (1986).

56. 76 N.C. App. 231, 332 S.E.2d 503, *review denied*, 315 N.C. 183, 337 S.E.2d 857 (1985).

57. 105 N.C. App. 354, 413 S.E.2d 305, *review denied*, 332 N.C. 150, 419 S.E.2d 578 (1992).

58. Guilford Financial Services, LLC v. City of Brevard, 356 N.C. 655, 576 S.E.2d 325 (2003) (*per curiam, adopting dissent in* 150 N.C. App. 1, 563 S.E.2d 27 (2002).

59. Nathan Branscombe and Adam Levine, students in the Master of Public Administration Program at the University of North Carolina at Chapel Hill, coded all of the survey data and performed much of the initial statistical analysis of the data. Previous reports have addressed other information gathered in this same survey. See David W. Owens

October 2004 to all 548 incorporated cities and all 100 counties in the state. A second copy was mailed in November 2004 to all jurisdictions that had not responded to the initial mailing. E-mail reminders were sent in January 2005 to non-responding jurisdictions for which electronic contact information was available. A copy of the portion of the survey instrument related to special use permits is set out in Appendix 1.

The response rate was high and represents a strong cross-section of cities and counties in the state. In all, 407 of the 648 jurisdictions in the state responded, a 63 percent response rate (Table 1). Fifty-seven percent of the cities and 95 percent of the counties responded. The combined 2003 population of all responding jurisdictions totaled 7,612,972, some 90 percent of the state's total population (Table 2). A list of responding jurisdictions is set out in Appendix 2. Response from counties and from jurisdictions with larger populations was particularly strong. It should be noted that while the response rate from municipalities with populations under 500 was not strong, previous studies indicate that these very small towns are far less likely to have zoning ordinances.[60]

Table 1 Survey Response by Jurisdiction Population

Population	*No.*	*No. responding*	*Response rate (%)*
Municipalities	***548***	***315***	***57***
< 1,000	**231**	**92**	**40**
1,000–9,999	**249**	**160**	**64**
10,000–24,999	**43**	**36**	**84**
≥ 25,000	**25**	**24**	**96**
Counties	***100***	***95***	***95***
< 10,000	**11**	**9**	**82**
≥ 10,000	**89**	**86**	**97**
All jurisdictions	**648**	**410**	**63**

Table 2 Population of Responding Jurisdictions

Jurisdiction	*Total population*	*Population of responding jurisdictions*	*Percentage of population represented by responding jurisdictions*
Counties (unincorporated areas)	*4,019,839*	*3,755,257*	*93*
Municipalities	*4,398,251*	*3,857,715*	*88*
Total	**8,418,090**	**7,612,972**	**90**

Zoning is widely used by the responding jurisdictions: 89 percent of the municipalities and 77 percent of the counties have adopted zoning ordinances.

The data reported below is based on the number of jurisdictions responding to each survey question.[61] Since all respondents did not answer every question, when the number of respondents is not indicated within the table, the number of those actually responding to a particular query is noted (shown as n = x). Percentages are rounded to the nearest whole number.

Organization and Administration

Subject Matter

Special use permits are widely used by North Carolina cities and counties. Of the responding jurisdictions with zoning, 93 percent use special use permits. This high rate of use is consistent for cities and counties and for jurisdictions of all population sizes.

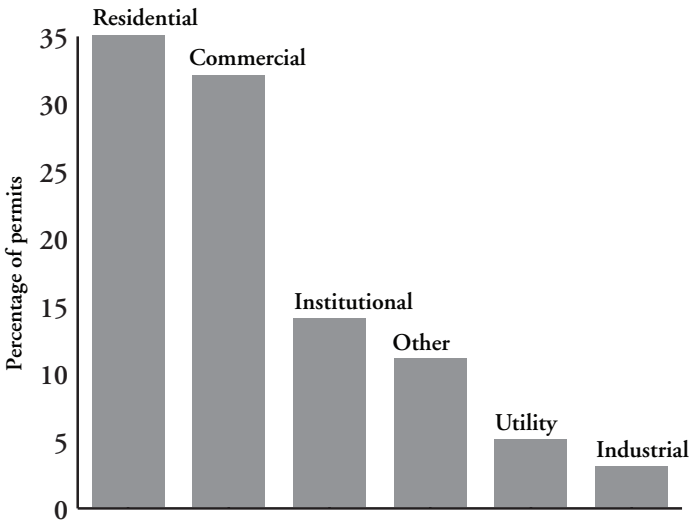
Special use permit requirements are most commonly applied to residential and commercial projects. As shown in Figure 1, two-thirds of the jurisdictions reported that these two types of uses were their most frequently requested special use permits. Within these two categories, respondents cited multifamily housing, manufactured housing, home businesses, and used car sales as the most frequently considered special use permits. Within the institutional use classification, the most commonly requested special use permits were for day care centers and places of worship; for utilities the most common requests were for telecommunication towers. Somewhat surprisingly, only 3 percent of the jurisdictions reported that industrial uses were their most frequently requested special use permits.

and Nathan Branscome, An Inventory of Local Government Land Use Ordinances in North Carolina (School of Government, Special Series No. 21, May 2006); David W. Owens, The North Carolina Experience with Municipal Extraterritorial Planning Jurisdiction (School of Government, Special Series No. 20, Jan. 2006).

60. A 2002–03 survey of North Carolina cities and counties indicated 46 percent of cities with populations under 500 had a zoning ordinance, while 97 percent of those with populations over 1,000 had zoning. David Owens and Adam Bruggemann, A Survey of Experience with Zoning Variances 9 (School of Government, Special Series No. 18, Feb. 2004).

61. The tables and charts reported below are based on data compilation performed by Nathan Branscome.

Figure 1 Most Commonly Requested Special Use Permits



Note: *n* = 245

There is some modest movement toward making more projects subject to special use permit review. While a majority of cities and counties—54 percent—reported that there is not a trend toward making more types of land uses subject to a special use permit, 32 percent reported that there was a trend to having more special uses identified, and only 14 percent reported moving toward less use of the special use permit.

Decision-Making Body

The North Carolina statutes allow final decisions on special use permits to be made by the planning board, the board of adjustment, or a governing board (the city council or county board of commissioners). Cities and counties also have the option of assigning these decisions to multiple boards or use; by, for example, having some types of special uses decided by the board of adjustment and other types decided by the governing board. Table 3 shows how responding jurisdictions assign special use permit decision-making authority.

In most responding jurisdictions with special use permits—69 percent—the primary decision-making body for special use permits is the governing board. The assignment of this responsibility to the governing board is particularly common for more populous cities: 85 percent of the cities with populations of 10,000 or more assign special use permit decisions to the city council.

A majority of jurisdictions—53 percent—also assign at least some special use permit decisions to the board of adjustment. This is slightly more common for counties than cities (60 percent of counties as opposed to 50 percent of cities). Somewhat unexpectedly, this is also more common for small cities than for more populous ones. One might expect the high volume of cases would lead more populous cities to delegate this authority to a board other than the city council. However, 55 percent of the cities with populations between 1,000 and 10,000 assign some special use permit decisions to the board of adjustment, while only 35 percent of the cities with populations of 10,000 or more do so.

It is relatively uncommon for the planning board to be given any final decision-making power for special use permits, as only 4 percent of the jurisdictions do so. However, somewhat surprisingly given the strict quasi-judicial procedural requirements in North Carolina, a substantial majority of jurisdictions—67 percent—assign the planning board an advisory review of special use permits.

Most jurisdictions report that administration of special use permit requirements is not a major portion of the workload of the board that makes most special use permit decisions. Half of the jurisdictions report that this occupies less than a quarter of the board's workload (Table 4). There was little variation in this response based on the population of the jurisdiction, with the exception that this was even more the case for municipalities with small populations: 76 percent of the cities with populations under 1,000 reported that the principal board spent under 25 percent of its time on special use permits. This modest impact on workload is related to the fact that in many instances the board involved is the city council or county board of commissioners.

Table 3 Boards Making Advisory and Final Decisions

	Planning board		*Board of adjustment*		*Governing board*	
Population	*Advisory (%)*	*Final decision (%)*	*Advisory (%)*	*Final decision (%)*	*Advisory (%)*	*Final decision (%)*
Municipalities (n = 255)	***71***	***2***	***7***	***50***	***2***	***71***
≤ 999 (*n* = 53)	60	2	13	40	4	66
1,000–9,999 (*n* = 142)	74	3	7	55	1	66
10,000–24,999 (*n* = 37)	86	0	0	0	3	87
≥ 25,000 (*n* = 23)	57	4	0	44	0	83
Counties (n = 73)	***52***	***10***	***6***	***60***	***1***	***62***
≤ 9,999 (*n* = 4)	100	0	0	50	0	25
≥ 10,000 (*n* = 69)	49	10	6	61	1	61
All Jurisdictions (*n* = 328)	**67**	**4**	**6**	**53**	**2**	**69**

Table 4 Proportion of Board Workload in Past Twelve Months Occupied by Special Use Permits

Proportion of board's workload (%)	*No. of jurisdictions*	*Percentage*
< 25	140	50
25–49	66	24
50–75	35	13
76–89	0	0
> 90	38	14

Administration

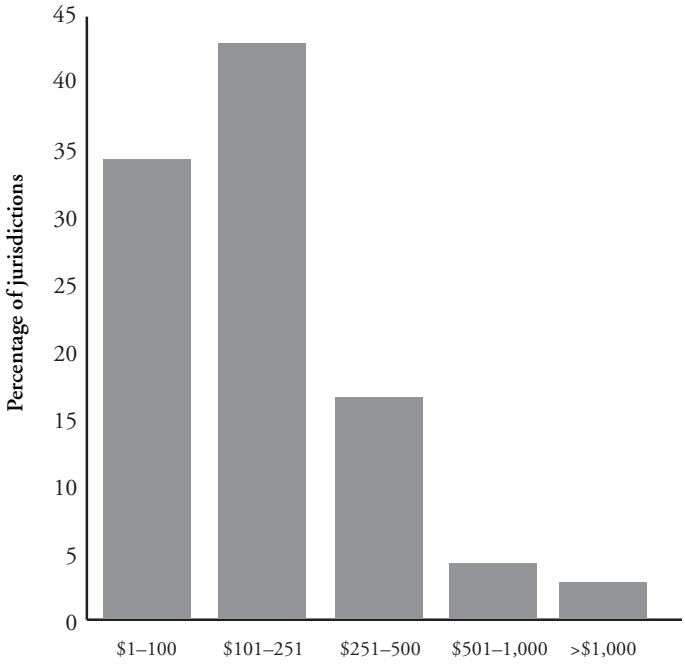
While most of the responding jurisdictions report that the boards deciding special and conditional use permits have considerable experience, only a minority of these boards have received any training in quasi-judicial decision-making.

Only one third of the jurisdictions have provided board training in quasi-judicial procedures within the past twelve months. County boards were slightly more likely to have undertaken training than city boards (42 percent for counties, 33 percent for cities). If a jurisdiction has a second board handling some of the special use permits, that second board is even less likely to have received training within the past year, as only 21 percent of all jurisdictions reported training for the second board. When training has been provided, the most popular means of doing so is a live session conducted either by in-house city and county staff and attorneys (54 percent) or with outside presenters (46 percent). Other means of training were also used, but less frequently: 30 percent provided books and other written material for training, and 18 percent used video tape, teleconferences, or other remote training.

On the other hand, many of the board members are experienced. A solid majority of the board members making special use permit decisions—56 percent—have more than three years of board experience. Only 17 percent of the board members have less than a year of experience.

Almost all of the responding jurisdictions—92 percent—charge a fee for processing a special use permit application. Most charge less than $250. Figure 2 shows the distribution of fees charged. Less-populous jurisdictions were more likely to have lower application fees: 68 percent of cities with populations under 1,000 charged $100 or less, while only 10 percent of cities with populations over 25,000 did so. On the other hand, 29 percent of cities with populations over 25,000 charged $500 or more for an application, but only 3 percent of cities with populations under 1,000 did so.

Figure 2 Fees Charged, by Percentage of Jurisdictions



Note: *n* = 293

Nearly all local governments provide some staff assistance to applicants for special use permits. Eighty-nine percent of the responding jurisdictions reported that they not only provide application forms, but they also typically provide some other assistance to an applicant. The most common form of assistance is provision of information about permit standards, how to complete the application, and procedures for permit review. This information is provided by almost all jurisdictions (96 percent). A substantial majority—73 percent—also provide information on alternatives to a special use permit that could be considered by the applicant. A majority also provide some advice on the likelihood of success of the application. These responses are summarized in Table 5.

In virtually all North Carolina jurisdictions, the board making special use permit decisions is provided legal assistance. The city or county attorney usually provides this legal support. This is the arrangement used by 91 percent of the responding jurisdictions. Five percent of the jurisdictions always have separate counsel for special use permit cases, and 3 percent sometimes have outside counsel. Only 2 percent of the jurisdictions reported that they do not have a lawyer assist the board with special use permit cases.

Table 5 Staff Assistance to Applicants

Staff assistance provided	*No. of jurisdictions*	*Percentage*
Information about permit standards, forms, and/or procedures	261	96
Information on alternatives to a special or conditional use permit	199	73
Advice or information about the likelihood of success	167	61

For a substantial number of the jurisdictions, however, legal assistance on special use hearings is provided only on an "as needed" basis and may well not include the attorney's presence at the evidentiary hearing on the permit application. Nearly a third of the jurisdictions report that the attorney for the board rarely or never attends the hearing.[62] Just over half of the jurisdictions report that the board's attorney is always or almost always in attendance at the hearing. Table 6 summarizes responses on board attorney attendance at the hearing.

Table 6 Frequency Attorney Who Represents the Decision-Making Board Attends the Hearing

Frequency	*No. of jurisdictions*	*Percentage*
Never	30	10
Rarely	63	21
Occasionally	26	9
Frequently	17	6
Almost always	47	16
Always	112	38
Varies	1	>1

Decision-Making Process

Standards Used

Most jurisdictions in North Carolina use some variation of the general standards for special use permits approved in *Kenan v. Board of Adjustment*.[63] Three standards are almost universally used—each by 90 percent of the responding jurisdictions. The standards require that the permitted activity (1) meet all ordinance requirements, (2) be harmonious or compatible with the surrounding neighborhood, and (3) not materially endanger public heath or safety. Almost as many jurisdictions (84 percent) require that the use not substantially injure adjoining property values or be a public necessity. A strong majority of jurisdictions (69 percent) also require conformance with the comprehensive plan.

Most jurisdictions use only these general standards to guide special use permit decisions. A substantial minority—36 percent—also add specific standards for particular types of special uses. These results are set out in Table 7.

Table 7 Standards Included in Ordinances for Special Use Permits

Standard	*No. of jurisdictions*	*Percentage*
Meet all required conditions and specifications	300	92
Be in harmony with the area, or compatible with neighborhood	295	90
Not materially endanger public health or safety	292	89
Not substantially injure the value of adjoining property or be a public necessity	275	84
Be in general conformity with comprehensive plan	227	69
Additional specific standards for particular types of special use permits	118	36

62. Board attorneys attend the evidentiary hearing for special use permits more often than is the case for variance hearings, where half of the jurisdictions reported the board's attorney rarely or never attended. The fact that special use permit decisions are often made by governing boards most likely explains this difference.

63. 13 N.C. App. 688, 187 S.E.2d 496, *cert. denied*, 281 N.C. 314, 188 S.E.2d 897 (1972). See the discussion of this case and the standards above at p. 3.

Hearing Length

The typical hearing for a special use permit in North Carolina lasts anywhere from fifteen minutes to an hour. As shown in Table 8, 78 percent of the responding jurisdictions reported this was the standard length of their special use permit hearings. This has about the same distribution of hearing lengths as previously found for variance hearings.

Table 8 Length of Time the Board Spends on a Typical Hearing

Length of time	*No. of jurisdictions*	*Percentage*
< 15 minutes	20	7
15–30 minutes	115	39
31–60 minutes	113	39
> 60 minutes	45	15

There was no significant difference in the time it takes to conduct a special use permit hearing based on the population of the jurisdiction. One exception is that the least-populous cities, those with populations under 1,000, were somewhat more likely to have longer hearings. As shown in Table 9, 24 percent of the jurisdictions with populations under 1,000 reported that the typical hearing ran an hour or longer, while this was the case in only 13 percent of the cities with populations over 25,000. This same pattern of longer hearings in low-population municipalities was reported earlier for variance cases.

Presentation of Information

Since special use permit decisions are quasi-judicial, there must be substantial, competent, and material evidence in the record to support the board's findings as to whether the permit standards are met or not.[64] Substantial evidence is that which a reasonable person would regard as sufficient support for a specific result.[65]

This evidence is presented to the board in an evidentiary hearing. Witnesses testify under oath and are subject to cross-examination. In addition, written materials (typically applications and staff reports) are usually part of the record and are submitted to the board. Other documentary evidence may be submitted as exhibits.

While the legal burden of production is on the applicant to present sufficient evidence to show that special use permit standards have been met, the city and county staff often play a critical role in presenting background information to the board regarding each application. Eighty percent of the responding jurisdictions reported that the staff makes a presentation at the evidentiary hearing to the decision-making board.

For the most part, the staff presentation consists of factual information about the application and the ordinance. Ninety-five percent provided factual information about the special use permit application and 85 percent provided information about the ordinance (generally regarding the permit standards to be met). A majority also provided photographic evidence (pictures or video) of the site. Interestingly, while these responses are remarkably similar to the information reported to be supplied by staff regarding variance petitions, city and county staffs are substantially more likely to make a recommendation regarding the decisions on special use permits. Sixty percent of the jurisdictions reported that the staff presents a recommended decision on special use permits, while in our 2002–03 survey just under 40 percent did so for variances. These results are shown in Table 10.

Table 9 Average Length of Municipal Special Use Hearing (percentage of cities of each population size reporting)

	Population of city			
Length of hearing	*< 1,000 (n = 38)*	*1,000–9,999 (n = 126)*	*10,000–24,999 (n = 35)*	*≥ 25,000 (n = 23)*
< 15 minutes	8	6	6	9
15–30 minutes	32	41	46	48
31–60 minutes	37	51	34	30
> 60 minutes	24	14	14	13

64. Jarrell v. Board of Adjustment, 258 N.C. 476, 128 S.E.2d 879 (1963); Tate Terrace Realty Investors, Inc. v. Currituck County, 127 N.C. App. 212, 488 S.E.2d 845, *review denied*, 347 N.C. 409, 496 S.E.2d 394 (1997); Baker v. Town of Rose Hill, 126 N.C. App. 338, 485 S.E.2d 78 (1997); Brummer v. Board of Adjustment, 81 N.C. App. 307, 343 S.E.2d 603, *review denied*, 318 N.C. 413, 349 S.E.2d 590 (1986); Jennewein v. City Council of Wilmington, 62 N.C. App. 89, 302 S.E.2d 7, *review denied*, 309 N.C.461, 307 S.E.2d 365 (1983); Long v. Winston-Salem Bd. of Adjustment, 22 N.C. App. 191, 205 S.E.2d 807 (1974).

65. *See, e.g.*, Robertson v. Zoning Bd. of Adjustment, 167 N.C. App. 531, 605 S.E.2d 723 (2004), *review denied*, 359 N.C. 322, 611 S.E.2d 417 (2005); C G & T Corp. v. Board of Adjustment, 105 N.C. App. 32, 40, 411 S.E.2d 655, 660 (1992).

Table 10 Information Provided by Staff to Decision-Making Board

Type of information	*No. of jurisdictions*	*Percentage for special use permits*	*Percentage for variances*
Factual information on the application	248	95	98
Information/analysis of ordinance provision involved	223	85	85
Recommendation on decision	158	60	39
Video/photographs of site	147	56	57

Those persons with standing at a quasi-judicial hearing have the right to call witnesses to present evidence to the board. While the applicant or the applicant's agent is almost always present to present the application and answer questions about it, other witnesses may be called by the applicant or the neighbors. This is a fairly common occurrence in North Carolina special use permit hearings. Over a third of the jurisdictions—36 percent—reported that such witnesses are called frequently or more often, while only a quarter of the jurisdictions reported this rarely or never happens. Table 11 reports the data on appearance of witnesses other than the applicant and staff.

Table 11 Frequency a Person Other than the Applicant Appears as a Witness

Frequency	*No. of jurisdictions*	*Percentage*
Never	14	5
Rarely	60	21
Occasionally	113	39
Frequently	57	20
Almost always	30	10
Always	19	6

Given the importance of securing sufficient evidence to support findings that the standards for a special use permit have or have not been met, the survey asked a series of questions about how specialized information is presented to the decision-making board. We asked about the appearance of expert witnesses, the submission of documentary evidence, and the particular types of evidence submitted regarding impacts on property values and neighborhood compatibility.

Key factual findings cannot be based upon the unsupported allegations and opinions of nonexpert witnesses, even if the witnesses are neighboring property owners. Therefore the applicants or opponents may call expert witnesses to offer opinions on impacts on property value, neighborhood compatibility, or traffic. For the most part the appearance of expert witnesses is still relatively uncommon in North Carolina special use permit hearings. Fifty-five percent of the jurisdictions report that expert witnesses either never or only rarely appear. However, 16 percent of the jurisdictions report that experts appear frequently or more often. This is a marked increase in the frequency of expert testimony compared to the 2002–03 survey of zoning variance experience, to which only 8 percent of the jurisdictions reported that experts appeared frequently or more often. These results are summarized in Table 12.

Table 12 Frequency an Expert Witness Appears

Frequency	*No. of jurisdictions*	*Percentage for special use permits*	*Percentage for variance petitions*
Never	36	12	23
Rarely	126	43	46
Occasionally	85	29	23
Frequently	31	11	7
Almost always	10	3	1
Always	6	2	0

As a general rule, the person asserting a particular fact should be physically present before the board to testify on that matter. Purported statements by those who are not present and letters from those who are concerned but not present, as well as petitions and affidavits from those not in attendance are all hearsay evidence. While hearsay evidence can be presented, a board may well accord it considerabl y less weight. Critical factual findings must not be based solely on hearsay evidence.[66]

The court in several cases has upheld the admission and consideration of letters from persons not testifying at the hearing. In particular letters from government officials that provide unbiased information that is within the specialized professional knowledge of that official or that is based on records or information kept by the official's agency in the normal course of business are generally admitted. For example, a letter from a state agency may be considered even though the author of the letter is not present if the recipient of the letter is present and

66. Jarrell v. Board of Adjustment, 258 N.C. 476, 481, 128 S.E.2d 879, 883 (1963).

testifies under oath and subject to cross-examination.[67] The court has also allowed consideration of technical reports on noise impacts from a civil engineer who presented test results from another consultant.[68]

It remains uncommon, however, for boards to receive documentary evidence from experts or governmental officials who are not present at the hearing to testify about that document. Seventy percent of the jurisdictions report that this never or only rarely occurs. Table 13 sets out this information.

Table 13 Written Evidence from Expert Witness or Government Official Not Present at Hearing

Frequency	*From expert an expert (%)*	*From a government official (%)*
Never	20	26
Rarely	50	43
Occasionally	22	18
Frequently	6	8
Almost always	1	3
Always	3	2

Note: n = 291

When special use permits are contentious, they often involve disputes as to the effect of the project on the character of the neighborhood and on neighboring property values. Responding jurisdictions confirmed that these are the most difficult standards for decision-making boards to apply. When asked if there was any one standard that posed more difficulty than others for their boards, nearly a third identified property value impacts and a quarter identified neighborhood compatibility. These responses are summarized in Table 14.

Table 14 Most Difficult Standards to Apply

Standard	*No. of jurisdictions*	*Percentage*
Not substantially injure the value of adjoining property or be a public necessity	64	30
Be in harmony with the area or compatible with the neighborhood	54	25
Meet all required conditions and specifications	36	17
Be in general conformity with the comprehensive plan	30	14
Not materially endanger public health or safety	23	11
Other specific standards	10	5

Given the importance and difficulty of application for these two standards, the survey explored what evidence is typically presented to address property values and neighborhood compatibility. For the most part, the evidence on both of these issues that is most often presented is lay testimony from the applicant and the neighbors. A majority of responding jurisdictions report receipt of evidence on property value from the neighbors (64 percent) and the owner or developer (59 percent). A substantial number of local governments also typically get testimony on property value impacts from real estate professionals. Thirty-nine percent reported testimony on this issue from real estate appraisers and nearly a quarter from real estate agents. Table 15 sets out the responses to this query. When the issue is whether a proposed project is compatible with the surrounding neighborhood, nearly two-thirds of the responding jurisdictions report that evidence on consistency with the adopted plans is typically presented in addition to applicant and neighbor testimony. A substantial number—41 percent—also report testimony from professional planners on this point. These results are set out in Table 16.

67. Whiteco Outdoor Advertising v. Johnston County Bd. of Adjustment, 132 N.C. App. 465, 513 S.E.2d 70 (1999); Tate Terrace Realty Investors, Inc. v. Currituck County, 127 N.C. App. 212, 488 S.E.2d 845 (1997), *review denied*, 347 N.C. 409, 496 S.E.2d 394 (1997) (allowing consideration of written comment from school superintendent about impacts of proposed project on school capacity).

68. Harding v. Board of Adjustment, 170 N.C. App. 392, 612 S.E.2d 431 (2005). Those subsequently complaining had an opportunity to cross-examine the witness and to offer rebuttal testimony. They also made no objection to the testimony at the hearing.

Table 15 Evidence Typically Presented to Establish Property Value Impacts

Type of evidence	*No. of jurisdictions*	*Percentage*
Testimony from neighbors	154	64
Testimony from owner or developer of the property	143	59
Evidence from a real estate appraiser	93	39
Evidence from a real estate agent	58	24
No specific evidence	54	22

Table 16 Evidence Typically Presented to Address Neighborhood Compatibility

Type of evidence	*No. of jurisdictions*	*Percentage*
Testimony from neighbors	197	74
Testimony from owner or developer of the property	182	68
Information on consistency with adopted plans	170	64
Testimony from a professional planner	110	41
No specific evidence	23	9

Given the legal complexities involved with presentation of competent, material, and relevant evidence to boards making special use permit decisions, one would expect that the applicant and opponents would frequently have legal representation at special use permit hearings. This is not the case. Half of the jurisdictions report that attorneys rarely or never appear at these hearings on behalf of applicants or opponents and another third report that this only occasionally happens. Only 4 percent report that attorneys always or almost always appear for the parties in these hearings. The results are set out in Table 17. These responses were related to population size—the more populous a jurisdiction, the more likely it is for attorneys to appear on behalf of parties to these hearings.

Table 17 Appearance of Attorney for an Applicant or Opponent

Frequency	*No. of jurisdictions*	*Percentage*
Never	35	12
Rarely	112	39
Occasionally	100	34
Frequently	32	11
Almost Always	8	3
Always	4	1

North Carolina cities and counties do report that special use permit proceedings are becoming more formal and legalistic over time. Over half of the responding jurisdictions—52 percent—report a trend to more formal hearings over the past five years, compared to only 6 percent noting a trend to less formality. Thirty percent noted no changes in the formality of the proceedings.

Preparation of Findings

A board making a quasi-judicial decision must explicitly set forth what it determines to be the essential facts upon which its decision is based. The findings of fact that are adopted must be sufficiently detailed to inform the parties and a reviewing court as to what induced the decision. A conclusory statement that a standard has or has not been met is insufficient.

The most common means used to prepare the findings is to include them in the minutes of the board making the decision. Fifty-two percent of the jurisdictions responding indicate that the initial draft of the written findings of fact regarding a variance decision is prepared as part of the minutes of the board meeting. The other two means of producing the findings that are used by a substantial number of jurisdictions are preparation of draft findings by the staff, either prior to the hearing (40 percent) or after the hearing (28 percent). Table 18 sets out the full range of options reported. (The number of options employed add to more than the total number of respondents and the percentages add to more than 100 percent because jurisdictions sometimes use alternate methods and were given the option of checking all options they had employed in the past year.)

Table 18 Preparation of First Draft of Findings

Method	*No. of jurisdictions*	*Percentage*
Initial findings are prepared as part of the minutes of the meeting	151	52
Drafts are proposed prior to or at the hearing by staff	116	40
Initial findings are written after the decision by the zoning staff	82	28
Drafts are proposed prior to or at the hearing by applicants or opponents	41	14
Initial findings are written after the decision by a board member	30	10
Initial findings are written after the decision by the board's attorney	21	7
Drafts are proposed prior to or at the hearing by the board's attorney	9	3

Length of Process

North Carolina cities and counties report that virtually all special use permit applications are decided within ninety days. Eighty percent of the responding jurisdictions report the decision is reached for typical permit applications within sixty days. Only 1 percent of the jurisdictions report a longer time for determining a typical application. These decision-making periods are slightly longer than was reported in 2002–03 for variance decisions, when half of the jurisdictions reported making the typical decision in less than thirty days. These results are shown in Table 19. There was not a substantial difference in permit processing times based on the population size of the jurisdiction, with one exception: 9 percent of cities with populations over 25,000 reported that the time for deciding a typical special use permit was ninety days or more.

Table 19 Typical Time Period from Application to Decision

Time period	*No. of jurisdictions*	*Special use permit percentage*	*Variance percentage*
< 30 days	73	25	52
31 to 60 days	158	55	45
61 to 90 days	55	19	3
> 90 days	4	1	0

Decisions Made and Factors Influencing Decisions

Outcomes

Most special use permit applications in North Carolina are approved. Responding jurisdictions reported that in the most recent twelve-month period for which they had complete records, there were 2,207 special use permit applications. Of these, 1,907 were granted. This is an 86 percent approval rate. By way of comparison, North Carolina cities and counties reported a similar volume of variance petitions in 2002–03, but a somewhat lower approval rate—72 percent of 1,806 petitions approved.

There was no difference in the approval rate between cities and counties, nor was there any significant variation based on the population of the jurisdiction. Cities with smaller populations did have substantially more applications per capita than their more populous counterparts did. The special use permit application rate was 3.07 per thousand citizens for cities with populations under 1,000, 1.12 per thousand for cities with populations between 1,000 and 9,999, and 0.4 per thousand for cities with populations over 10,000.

For the most part, the type of land use involved does not have a significant impact on the outcome of the decision. As shown in Table 20, the distribution of types of special use permit most frequently approved and most frequently denied closely tracks the frequency of applications. There are several notable exceptions to this general rule. Industrial and commercial land uses are more likely than other land uses to be denied. Three percent of the jurisdictions report that industrial uses are their most common applications and, 8 percent report that industrial uses are their most common denial. Landfill permits were cited as the most common of the industrial denials. For commercial uses, 32 percent of the jurisdictions reported that these were their most common applications, while 40 percent reported that they were their most common denials. The commercial uses most frequently noted for denial were junk and salvage yards, dog kennels, and home businesses.

Table 20 Special Use Permit Decisions by Land Use Type

Type	*Most commonly requested permits (%)*	*Most commonly approved permits (%)*	*Most commonly denied permits (%)*
Residential	35	36	32
Commercial	32	33	40
Institutional	14	11	7
Other	11	11	11
Utility	5	4	3
Industrial	3	3	8

Note: *n* = 245

It is very common for individual conditions to be imposed on special use permits. A substantial majority—62 percent—of the jurisdictions reported that conditions are frequently or more often imposed on individual special use permits. Only 10 percent of the jurisdictions report that this is never or only rarely done. Table 21 sets out the responses on this point.

Table 21 Frequency Conditions Are Imposed

Frequency	*No. of jurisdictions*	*Percentage*
Never	10	3
Rarely	21	7
Occasionally	82	28
Frequently	77	27
Almost always	67	24
Always	32	11

This raises the question of how records of the permits and conditions are maintained. The most common method is the maintenance of files on each permit by the city or county. A minority of jurisdictions also records the permit in the chain of title or enters the information in a geographic information system. Table 22 sets out the responses on this point.

Table 22 Maintenance of Records on Special Use Permits

Type of records	*No. of jurisdictions*	*Percentage*
Permit files are maintained by city/ county	280	92
Details are entered into board minutes	240	79
Permit is recorded in chain of title (Register of Deeds)	54	18
Information on permit is entered into GIS	47	14

Merits of the Application

Most city and county boards in North Carolina base decisions on special use permit applications on the standards for decision set out in the ordinance, at least in the view of the staff administering the ordinances. Two-thirds of the jurisdictions report the decision is either always or almost always based on these standards. Table 23 provides the details for this response.

Table 23 Perceived Adherence of Decisions to Ordinance Standards

Frequency	*No. of jurisdictions*	*Percentage*
Never	0	0
Rarely	8	3
Occasionally	35	12
Frequently	54	18
Almost always	131	44
Always	72	24

Note: *n* = 300

There was only modest variability in this response based on the population of the jurisdiction. As Table 24 indicates, there was a modest decrease in the perceived adherence to the ordinance standards in mid-sized cities. Just over half the cities with populations in the 10,000 to 24,000 range reported that the board always or almost always adhered to ordinance standards, compared to over 70 percent of the smallest and largest cities reporting that level of adherence.

Table 24 PerceivedAdherence of Decisions to Ordinance Standards by Municipal Population

	Population of municipality			
	≤ 999	*1,000–9,999*	*10,000–24,999*	*≥ 25,000*
Never	0%	0%	0%	0%
Rarely	8%	2%	3%	0%
Occasionally	5%	13%	17%	4%
Frequently	15%	16%	28%	22%
Almost always	39%	46%	33%	57%
Always	33%	21%	19%	17%

Note: *n* = 228

The jurisdictions also report general adherence to the standards in the ordinance when boards impose conditions on permit approvals. When asked if specific conditions are based on the standards in the ordinance, over two-thirds of the responding jurisdictions report this is always or almost always done. Table 25 sets out the responses to this query.

Table 25 Adherence of Permit Condition to Ordinance Standards

Frequency	*No. of jurisdictions*	*Percentage*
Never	4	1
Rarely	14	5
Occasionally	48	17
Frequently	56	19
Almost always	115	40
Always	53	18

To the extent there is a trend in North Carolina, most jurisdictions report that boards deciding special use permits over the past five years have more strictly applied the standards for decisions set out in the ordinance. Forty-two percent of the jurisdictions reported a trend toward more-strict application while only 3 percent were trending toward less-strict application. Forty-one percent noted no changes over the past five years, and 14 percent said trends have gone both ways at different times.

When a special use permit is denied, the most common basis for denial is that the project would be incompatible with the surrounding neighborhood. A third of those responding to this question indicated that their jurisdiction had not denied a special use permit. Where there had been a denial, half reported that neighborhood incompatibility was more likely than any other standard to be the basis of the denial. The second most common basis for denial was a failure of the project to meet all of the ordinance's required conditions and specifications. Somewhat surprisingly, property value impacts, public safety, and plan compliance only occasionally led to permit denials. Only 8 percent of the jurisdictions reported that property value impacts were most likely to cause a denial; another 8 percent reported denials for endangering public health and safety, and a mere 3 percent noted plan inconsistency as the most likely basis for denial. These results are set out in Table 26.

Table 26 Do Conditions Imposed Adhere to Ordinance Standards?

Standard	*Percentage*
Be in harmony with the area or compatible with neighborhood	51
Meet all required conditions and specifications	23
Not substantially injure the value of adjoining property or be a public necessity	8
Not materially endanger public health or safety	8
Other specific standards	8
Be in general conformity with the comprehensive plan	3

Note: *n* = 281

Other Factors

The survey asked zoning administrators and planners about a variety of factors beyond compliance with the standards in the ordinance that might influence the outcome of special use permit decisions. The appearance of neighbors to support or oppose an application was reported to be a significant factor, the presence of an attorney to assist the applicant or opponent was less of a factor, and the identity of the applicant and opponents was deemed not to be significant.

Seventy-nine percent of the jurisdictions reported that having neighbors present to support an application increased the likelihood the permit would be issued. This response was consistent for cities and counties of all population sizes. Similarly, 78 percent of the jurisdictions reported that neighbors appearing to oppose a project reduced the chances a special use permit would be approved. Again, this was consistent for cities and counties of all population sizes.

The presence of an attorney to represent either the applicant or an opponent was deemed to be a significant factor, but much less so than the presence of neighbors. While 59 percent of the jurisdictions reported this had no effect on the outcome of the permit decision, a substantial minority—39 percent—reported having an attorney increased the chances of success for the represented party.

The value of having an attorney was considered more important in more populous cities. Fifty-two percent of cities with populations over 25,000 reported that having an attorney increased the likelihood of success for the represented party; only 30 percent of the jurisdictions with populations under 1,000 reported this to be the case.

While the parties to these hearings sometimes complain that the staff recommendation has a disproportionate impact on outcomes, survey respondents did not report this to be the case. The responding jurisdictions report that staff recommendations on special use permits were not particularly influential. Fifty-one percent of the jurisdictions report that the decision-making board rarely or never follows staff recommendations on special use permit applications. Another 32 percent report that the board only occasionally fails to follow staff recommendations. This is generally seen to be the case regardless of whether staff recommends approval or denial of the special use permit. Half of the jurisdictions reported that whether the board followed a staff recommendation was unrelated to whether the staff was recommending approval or denial. However, 44 percent did report that the board was more likely to deny a permit based on the staff recommendation; only 6 percent reported approval was more likely if staff recommended such.

The overwhelming majority of responding jurisdictions reported that the identity of the applicant and neighbors usually has no impact on the outcome of special use permit applications. Fifty-nine percent of the jurisdictions say this rarely or never is a factor in the outcome, and another 30 percent say it arises only occasionally. These results are set out in Table 27. By virtually the same margins, responding jurisdictions reported that sympathy for the personal circumstances of the applicant or the opponents usually has no impact on special use permit decisions. These results are substantially similar to the response on favoritism in variance decisions, though there was modestly less favoritism reported with variances.

Table 27 Does Favoritism for Applicant or Opponents Influence Permit Decision?

Frequency	*No. of jurisdictions*	*Percentage*
Never	70	24
Rarely	104	35
Occasionally	89	30
Frequently	27	9
Almost always	4	1
Always	0	0

Note: $n = 294$

Judicial Appeals

Very few special use permit decisions are appealed to the courts. Ninety percent of the jurisdictions reported that none of their special use permit decisions were appealed in the past year. The actual number of cases appealed was also very small. Of the thirty jurisdictions reporting a judicial appeal, twenty-five had only a single case appealed. The jurisdictions reported only thirty-six individual appeals in the past year. Given a reported 2,207 applications decided in this period, this is a judicial appeal rate of only 1.6 percent. By comparison, these jurisdictions in 2002–03 reported a 2.5 percent appeal rate for their variance decisions.

The jurisdictions reported twelve cases reaching a final superior court resolution in the past year. The board's decision on the special use permit was upheld by the court in a substantial majority of the cases—the trial court upheld the decision in nine cases (64 percent), reversed the board in three (21 percent), and remanded the matter for further board consideration in two cases (14 percent).

Appendix A
Survey Instrument

[Note: The portion of the survey regarding special use permits that was sent to municipalities is set out below. Questions 1 through 10 dealt with other aspects of development regulation. The same questions were sent to counties, with appropriate adjustments in terminology (e.g., "county boards of commissioners" rather than "city council").

For the purposes of this survey, please consider the terms "special use permit," "conditional use permit, " and "special exceptions" to mean the same thing.

11. Does your zoning or development ordinance require a special or conditional use permit or special exception for any land uses?

____ No. Thank you. You may skip the remainder of the survey.
____ Yes

12. Local governments have flexibility in assigning decision-making responsibility for special and conditional use permits. Please indicate how this is done in your jurisdiction.

Type of board	**Makes advisory recommendation**	**Makes final decision on either SUP or CUP**
Planning board		
Board of adjustment		
City council		
Other board: _____		
Other board: _____		

13. Has the board that makes **final decisions** on special or conditional use permits received any training on zoning law or how to conduct quasi-judicial cases in the past twelve months? [If more than one board makes final decisions on special or conditional use permits in your jurisdiction, please answer for each board separately for questions 13-16.]

_____(board) _____(board)
___ Yes ____ Yes
___ No ____ No

14. How many of the members of the board have served:

_____ (board) _____ (board)
___ less than one year ___ less than one year
___ one to three years ___ one to three years
___ more than three years ___ more than three years

15. If they did receive such training on legal/quasi-judicial procedures, what type of training did they have? (check all that apply)

_____ (board)
___ Live training from an outside source (IOG, COG, others)
___ Live training from city/county staff or attorneys
___ Video tape, teleconference, or other remote training
___ Books and written materials provided
___ Other. Please specify: _____

_____ (board)
___ Live training from an outside source (IOG, COG, others)
___ Live training from city/county staff or attorneys
___ Video tape, teleconference, or other remote training
___ Books and written materials provided
___ Other. Please specify: _____

16. Is a fee currently charged for a special or conditional use permit application?
___ No
___ Yes. The amount of the fee is $_____

17. What standards are included in your ordinance that special and conditional use permits have to meet in order to be approved? (check all that apply)
- ___ Not materially endanger the public health or safety
- ___ Meet all required conditions and specifications
- ___ Not substantially injure the value of adjoining property or be a public necessity
- ___ Be in harmony with the area in which it is located or compatible with surrounding neighborhood
- ___ Be in general conformity with the comprehensive plan
- ___ Other general standards (please specify)
  _____
  _____
- ___ Additional specific standards for particular types of special or conditional use permits

For the following questions about special and conditional use permits, please use the most recent 12 month period that is convenient for you or for which you have readily available information (you can use the past calendar year, fiscal year, or most recent 12 months). If you do not have precise numbers readily available, please make your best estimate where possible. The period you considered in completing this information was: _____ to _____.

18. How many special and conditional use permits applications were filed? ____

19. How many of these were approved? ____

20. What were the three most common land uses for which special and conditional uses permits were **requested** in your jurisdiction in this 12-month period?
1. _____ Most common
2. _____ Second most common
3. _____ Third most common

21. Of those special and conditional use permits requested in this period, what were the three most common land uses for which the permit application was **approved**?
1. _____ Most common
2. _____ Second most common
3. _____ Third most common

22. Of those special and conditional use permits requested in this period, what were the three most common land uses for which the permit application was **denied**?
1. _____ Most common
2. _____ Second most common
3. _____ Third most common

23. Is there a trend in your jurisdiction towards requiring more or fewer types of land uses to receive special or conditional use permits?
- ___ More
- ___ Fewer
- ___ No trend

24. Does the staff (either routinely or upon request) provide information other than required forms to persons considering filing for a special or conditional use permit?
- ___ No
- ___ Yes. If yes, what type of information is provided (check all that apply):
  - ___ Information about permit standards, forms, and/or procedures
  - ___ Advice or information about their likelihood of success
  - ___ Information on alternatives to a special or conditional use permit
  - ___ Other. Please specify: _____

25. What is the typical amount of time the decision-making board spends on an individual special or conditional use permit (including hearing evidence, debate, and making a decision)?
- ___ Less than 15 minutes
- ___ 15 to 30 minutes
- ___ 31 to 60 minutes
- ___ More than 60 minutes

26. Does the city staff (including other staff working for the city, such as COG staff or private consultant) make a presentation to the decision-making board regarding special or conditional use permits?
- ___ No
- ___ Yes. If yes, does the presentation include: (Check all that apply)
  - ___ Factual information regarding the application
  - ___ Information/analysis of ordinance provisions involved
  - ___ Video or photographs of site
  - ___ Recommendation regarding decision
  - ___ Other. Please specify: _____

27. If staff recommendations are made on special or conditional use permits, how often is the board's decision consistent with that recommendation?
- ___ Never
- ___ Rarely
- ___ Occasionally
- ___ Frequently
- ___ Almost Always
- ___ Always

28. If staff recommendations are made on special or conditional use permits, is the board more likely to agree with a recommendation to grant it than they are a recommendation to deny it?
___ Yes
___ No
___ No difference based on recommendations to grant or to deny

29. How often does a person other than the applicant and or city/county staff members appear as a witness in an individual special or conditional use case?
___ Never
___ Rarely
___ Occasionally
___ Frequently
___ Almost Always
___ Always

30. How often does an expert witness -- such as a real estate appraiser, traffic engineer, or other professional – testify in person in an individual special or conditional use permit case?
___ Never
___ Rarely
___ Occasionally
___ Frequently
___ Almost Always
___ Always

31. How often is written material from an expert – such as a real estate appraiser, traffic engineer, or other professional – submitted for the hearing record without the expert attending the hearing in person?
___ Never
___ Rarely
___ Occasionally
___ Frequently
___ Almost Always
___ Always

32. How often is written material from a governmental official – such as public works or transportation staff, school officials, or a state or federal agency – submitted for the hearing record without the official attending the hearing in person?
___ Never
___ Rarely
___ Occasionally
___ Frequently
___ Almost Always
___ Always

33. If impact on property values is a standard for a special or conditional use permit, what evidence is typically presented to the board to establish those impacts? (check all that apply)
___ Evidence from a real estate appraiser
___ Evidence from a real estate agent
___ Testimony from owner or developer of the property
___ Testimony from neighbors
___ No specific evidence
___ Other (please specify) _____

34. If compatibility with the surrounding neighborhood is a standard for a special or conditional use permit, what evidence is typically presented to the board to address compatibility? (check all that apply)
___ Information of consistency with adopted plans
___ Testimony from a professional planner
___ Testimony from owner or developer of the property
___ Testimony from neighbors
___ No specific evidence
___ Other (please specify) _____

35. How often do attorneys appear on behalf of the applicant [or] an opponent to a special or conditional use permit?
___ Never
___ Rarely
___ Occasionally
___ Frequently
___ Almost Always
___ Always

36. Who provides legal representation for the board that makes special or conditional use permit decisions?
___ City attorney
___ Separate attorney always represents board
___ Separate attorney represents the board for some cases

37. How often does the attorney who represents the board (either the city attorney or separate attorney who represents the board) attend special or conditional use permit hearings?
___ Never
___ Rarely
___ Occasionally
___ Frequently
___ Almost Always
___ Always

38. How often are project specific conditions imposed on special or conditional use permits that are issued?
___ Never
___ Rarely
___ Occasionally
___ Frequently
___ Almost Always
___ Always

39. How does your jurisdiction maintain records on special and conditional use permits that are issued?

___ Permit is recorded in chain of title (with Register of Deeds)
___ Information on permit is entered into GIS system
___ Permit files are maintained by city
___ Details on permit are entered into board minutes
___ Other (please specify) _____

40. How is the first draft of the written findings of fact regarding a special or conditional use permit decision prepared? (check more than one if applicable)

___ Drafts are proposed prior to or at the hearing by the applicant or opponents
___ Drafts are proposed prior to or at the hearing by the staff
___ Drafts are proposed prior to the hearing by the board's attorney
___ Initial findings are written after the decision by the zoning staff
___ Initial findings are written after the decision by the board's attorney
___ Initial findings are written after the decision by a board member
___ Initial findings are prepared as part of the minutes of the meeting
___ Other. Please specify: _____

41. What is the typical period from the time a completed special or conditional use permit application is filed to the time a decision is made?

___ Less than 30 days
___ 31 to 60 days
___ 61 to 90 days
___ More than 90 days

42. What proportion of the total workload of the board that makes final decisions is taken up by work on special or conditional use permit applications?

_____ (board)	_____ (board)
___ less than 25%	___ less than 25%
___ 25–49%	___ 25–49%
___ 50–74 %	___ 50–74%
___ 75% or more	___ 75% or more

43. Were any of the special or conditional use permit decisions made by your board during this 12-month period appealed to superior court?

___ No
___ Yes. If so, how many? ___

44. Have there been any superior court decisions during this 12-month period on special or conditional use permit decisions that were appealed to court?

___ No
___ Yes. If yes, how many court decisions:
___ Upheld the board's decision
___ Reversed the board's decision
___ Remanded the case for further board action.

The following questions ask for your subjective evaluation. Responses to subjective questions and evaluations will not be reported in a way that identifies individual respondents. Please give us your reactions and experience in your current jurisdiction relative to these observations that are sometimes made about special and conditional use permits.

45. Do you feel that special or conditional use permit decisions in your jurisdiction are primarily based on the legal standards for the permits set out in the ordinance?

___ Never
___ Rarely
___ Occasionally
___ Frequently
___ Almost Always
___ Always

46. Is there a particular special or conditional use permit standard that is more difficult than the others for your board to understand and apply? (check only one)

___ Not materially endanger the public health or safety
___ Meet all required conditions and specifications
___ Not substantially injure the value of adjoining property or be a public necessity
___ Be in harmony with the area in which it is located or compatible with surrounding neighborhood
___ Be in general conformity with the comprehensive plan
___ Other _____
_____(please specify)

47. Are the specific conditions imposed on individual permits tied to compliance with the standards for approval set out in the ordinance?

___ Never
___ Rarely
___ Occasionally
___ Frequently
___ Almost Always
___ Always

48. For those special and conditional use permits that are **denied** by your board, is there a particular standard that is more likely than others to be the basis for the denial? (check only one)

___ Not materially endanger the public health or safety
___ Meet all required conditions and specifications
___ Not substantially injure the value of adjoining property or be a public necessity
___ Be in harmony with the area in which it is located or compatible with surrounding neighborhood
___ Be in general conformity with the comprehensive plan
___ Other _____
_____(please specify)

49. Do you think the appearance of an attorney at the hearing to represent the applicant or opponent affects the outcome of the decision?

___ Reduces chances for success for represented party
___ Has no effect on outcome
___ Increases chances for success for represented party

50. Do you think the appearance of neighbors at the hearing to **support** the application affects the outcome of the decision?

___ Reduces chances of approval
___ Has no effect on outcome
___ Increases chances of approval

51. Do you think the appearance of neighbors at the hearing to **oppose** the application affects the outcome of the decision?

___ Reduces chances of approval
___ Has no effect on outcome
___ Increases chances of approval

52. Observers have made these criticisms of the special and conditional use process in the past. In your experience, how often do the following factors come into play in these decisions in your jurisdiction?

a. Favoritism based on the identity of the applicant or opponent.
___ Never
___ Rarely
___ Occasionally
___ Frequently
___ Almost Always
___ Always

b. Sympathy for the personal circumstances of the applicant leading to granting applications that do not meet the legal standards.
___ Never
___ Rarely
___ Occasionally
___ Frequently
___ Almost Always
___ Always

c. Sympathy for opponents leading to denial of applications that meet the legal standards.
___ Never
___ Rarely
___ Occasionally
___ Frequently
___ Almost Always
___ Always

53. Have you noticed an overall trend in the past five years as to how your board addresses special and conditional use permit applications?

___ More strictly applying standards
___ Less strictly applying standards
___ Sometimes more strict, sometimes less
___ No trend

54. In general, over the past five years have special and conditional use permit proceedings in your jurisdiction become:

___ More formal and legalistic
___ Less formal and legalistic
___ Sometimes more formal, sometimes less
___ No change

If you would like to add any additional comments about special and conditional use permits or the process for handling them in your jurisdiction, please do so in the space below.

We would also appreciate your sending us a copy of special and conditional use permit forms, informational handouts you use regarding special and conditional use permits, statements about the process that are read at the beginning of hearings, or other material you have that may be relevant to this study. These materials may be posted on our website as examples others can consider.

Thanks again for your assistance with this study.

Appendix B
List of Jurisdictions Responding to the Survey

Municipalities
Aberdeen
Albemarle
Alliance
Angier
Ansonville
Apex
Archdale
Asheboro
Asheville
Askewville
Atkinson
Atlantic Beach
Autryville
Badin
Bald Head Island
Banner Elk
Beaufort
Beech Mountain
Belwood
Bermuda Run
Bessemer City
Bethania
Beulaville
Biltmore Forest
Blowing Rock
Bogue
Boiling Spring Lakes
Bolivia
Boone
Brevard
Broadway
Brookford
Burlington
Burnsville
Cajah Mountain
Carolina Beach
Carolina Shores
Carrboro
Carthage
Cary
Catawba
Centerville
Chadbourn
Chapel Hill
Charlotte
Cherryville
Chimney Rock
China Grove
Claremont
Clayton
Clemmons
Cleveland
Clinton
Coats
Columbia
Columbus
Como
Concord
Connelly Springs
Conover
Conway
Cornelius
Cove City
Cramerton
Creswell
Dallas
Dillsboro
Dover
Drexel
Duck
Durham
East Laurinburg
Eden
Edenton
Elizabeth City
Elizabethtown
Elkin
Elk Park
Elm City
Elon
Eureka
Fairmont
Fairview
Faison
Faith
Farmville
Fayetteville
Flat Rock
Fletcher
Forest City
Four Oaks
Foxfire Village
Franklin
Franklinton
Fuquay-Varina
Gamewell
Garner
Gastonia
Gibson
Glen Alpine
Goldsboro
Graham
Green Level
Greensboro
Greenville
Grifton
Halifax
Hamlet
Harrellsville
Harrisburg
Havelock
Henderson
Hendersonville
Hertford
Hickory
High Point
Highlands
Hildebran
Hillsborough
Hoffman
Holly Springs
Hope Mills
Huntersville
Indian Trail
Jackson
Jacksonville
Jamesville
Jefferson
Kannapolis
Kernersville
Kill Devil Hills
King
Kings Mountain
Kinston
Kitty Hawk
Knightdale
La Grange
Lake Park
Landis
Lasker
Lattimore
Laurel Park
Laurinburg
Leland
Lenoir
Lewisville
Lexington
Liberty
Lincolnton
Linden
Locust
Lowell
Lucama
Lumber Bridge
Lumberton
Macclesfield
Madison
Maggie Valley
Maiden
Manteo
Marion
Mars Hill
Matthews
Maxton
Mebane
Midland
Mills River
Minnesott Beach
Mint Hill
Mocksville
Monroe
Mooresville
Morehead City

Morganton
Morrisville
Morven
Mount Airy
Mount Gilead
Mount Holly
Mount Olive
Murfreesburo
Murphy
Nags Head
New Bern
Newton
North Topsail Beach
North Wilkesboro
Northwest
Norwood
Oak Island
Ocean Isle Beach
Oriental
Oxford
Pantego
Patterson Springs
Peachland
Pikeville
Pinehurst
Pine Knoll Shores
Pine Level
Pinetops
Pittsboro
Pleasant Garden
Polkton
Polkville
Pollocksville
Princeton
Princeville
Raleigh
Ramseur
Randleman
Ranlo
Raynham
Red Cross
Red Springs
Reidsville
Rhodhiss
River Bend
Roanoke Rapids
Robbins
Rockingham
Rockwell
Rocky Mount
Rolesville
Roper
Rose Hill
Rowland
Roxobel
Rural Hall
Ruth
Rutherfordton
Salemburg
Salisbury
Saluda
Sanford
Scotland Neck
Sedalia
Selma
Seven Devils
Seven Springs
Shallotte
Sharpsburg
Shelby
Siler City
Simpson
Smithfield
Snow Hill
Southern Pines
Southern Shores
Southport
Sparta
Spring Hope
Spring Lake
Spruce Pine
St. James
Stallings
Stanley
Star
Statesville
Stoneville
Stovall
Sugar Mountain
Summerfield
Sunset Beach
Surf City
Swansboro
Swepsonville
Sylva
Tar Heel
Tarboro
Taylorsville
Taylortown
Teachey
Thomasville
Tobaccoville
Topsail Beach
Trent Woods
Trenton
Trinity
Troutman
Tryon
Unionville
Valdese
Vandemere
Varnamtown
Waco
Wade
Wadesboro
Wagram
Wake Forest
Walkertown
Wallburg
Walnut Creek
Warsaw
Washington
Washington Park
Waynesville
Weaverville
Webster
Weldon
Wendell
Wentworth
Wesley Chapel
West Jefferson
Whispering Pines
White Lake
Whiteville
Whitsett
Wilkesboro
Williamston
Wilmington
Wilson
Windsor
Winfall
Winston-Salem
Winterville
Winton
Woodfin
Woodland
Yadkinville
Youngsville
Zebulon

Counties

Alexander
Alleghany
Anson
Ashe
Avery
Beaufort
Bertie
Bladen
Brunswick
Buncombe
Burke
Cabarrus
Caldwell
Camden
Carteret
Caswell
Catawba
Chatham
Cherokee
Chowan
Cleveland
Columbus
Craven
Cumberland
Currituck
Dare
Davidson
Davie
Duplin
Durham
Edgecombe
Forsyth
Franklin
Gaston
Gates
Graham
Granville
Greene
Guilford
Halifax
Harnett
Haywood
Henderson
Hertford
Hoke
Iredell
Jackson
Johnston
Jones
Lee
Lenoir
Lincoln
Macon
Madison
Martin
Mecklenburg
Mitchell
Montgomery
Moore
Nash
New Hanover
Northampton
Onslow
Orange
Pamlico
Pasquotank
Pender
Perquimans
Person
Pitt
Polk
Randolph
Richmond
Robeson
Rockingham
Rowan
Rutherford
Sampson
Scotland
Stanly
Stokes
Surry
Transylvania
Tyrrell
Union
Vance
Wake
Warren
Washington
Watauga
Wayne
Wilkes
Wilson
Yadkin
Yancey

About the Author

David W. Owens is Professor of Public Law and Government at the School of Government, University of North Carolina at Chapel Hill, where he teaches and advises state and local officials on land use planning and regulation.

Visit the School's North Carolina Planning website at www.ncplan.unc.edu for information about School short courses, other publications, and developments on North Carolina legislation and litigation; summaries of key legal issues related to planning and development; and links to other planning websites.

School of Government Publications of Interest

Introduction to Zoning

David W. Owens

Third edition, Spring 2007

This new edition provides a clear, understandable explanation of zoning law for citizen board members and the public and serves as both an introduction for citizens new to these issues and a refresher for those who have been involved with zoning for some time. Each chapter deals with a distinct aspect of zoning, such as where a city can apply its ordinances, the process that must be followed in rezoning property, or how an ordinance is enforced. Although North Carolina ordinances and cases are cited, this book is useful to anyone interested in zoning law. It contains an index and appendixes that include zoning statutes and references on North Carolina land use law.

Land Use Law in North Carolina

David W. Owens

2006

This legal reference work is intended for those interested in law related to development regulation in North Carolina. It builds and expands on the material originally covered in two editions of *Legislative Zoning Decisions: Legal Aspects*, and addresses various aspects of local government jurisdiction for development regulation, procedures for adopting and amending ordinances, spot zoning, contract zoning, vested rights, nonconformities, and constitutional limits on regulatory authority. New topics covered include quasi-judicial procedures, special and conditional use permits, variances, ordinance administration, and enforcement.

Inventory of Local Government Land Use Ordinances in North Carolina

David W. Owens and Nathan Branscome

Special Series No. 21, May 2006

This report summarizes the responses of North Carolina cities and counties to a survey asking about their adoption of ordinances related to land use. Each local government was asked whether it had adopted zoning, subdivision regulations, housing codes, and a variety of other related regulations. In addition to the summary, the appendix includes two large charts showing the status of ordinance adoption for each county and city that responded to the survey.

North Carolina Experience with Municipal Extraterritorial Planning Jurisdiction

David W. Owens

Special Series No. 20, January 2006

North Carolina statutes allow cities to conduct planning and to apply zoning, subdivision, and other development regulations to areas adjacent to city limits. This publication first examines the law related to the extension of municipal jurisdiction and reviews the authority for this power and the process required to exercise it. Based on a comprehensive survey of North Carolina cities and counties, it then discusses how cities have exercised this power.

Survey of Experience with Zoning Variances

Adam Brueggemann and David W. Owens

Special Series No. 18, February 2004

This publication summarizes and analyzes the responses to a survey of North Carolina cities and counties to determine how they have used the zoning variance power. It also reviews administrative aspects of variance practice, including which local boards make these decisions, the experience and training of board members, the workloads of board members, and fees charged.

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