

Conditional Zoning in North Carolina

Erin Wynia
N.C. Coastal Resources Law, Planning and Policy Center

March 1, 2007

Conditional Zoning in North Carolina

Prepared for the N.C. Waterfront Access Study Committee

By Erin Wynia

N.C. Coastal Resources Law, Planning and Policy Center

March 1, 2007

Definition. Conditional zoning is a land-use tool that has different meanings in different states. In North Carolina, the practice is authorized by state statute and reaffirmed by court decisions. The statute permits a zoning ordinance to include “conditional districts, in which site plans and individualized development conditions are imposed.”

In practice, conditional zoning occurs “when a governmental body, without committing its own authority, secures a given property owner’s agreement to limit the use of his property to a particular use or to subject his tract to certain restrictions as a pre-condition to any rezoning.” Essentially, conditional zoning allows local governmental units to tailor development when rezoning to a more intensive land use, thus limiting the uses that would ordinarily apply if up-zoned to a general use zone.

In North Carolina, land may only be placed in a conditional zone upon petition by all landowners to be included in the rezoning. Additionally, the enabling statute limits the types of conditions that may be imposed on the new zone to (1) those that address the conformance of the development and use of the site to city or county ordinances and officially adopted plans, and (2) those that address the impacts reasonably expected to be generated from the development or use of the site. Finally, to comply with N.C. statutory provisions, the local planning board must state in writing how the rezoning to a conditional zoning district complies with the municipality’s comprehensive plan, and the deciding body must state its reasons for voting to rezone to a conditional zoning district.

Advantages. Conditional zoning arose as a device to counter the rigidity of traditional Euclidean zoning systems, which value uniformity across large zones and separation of land uses over all other considerations. Devices such as variances and special or conditional use permits have long helped local governments ameliorate the rigidity of classic zoning systems, but they only help a local government at the permitting stage, which happens late in the development review process.

Conditional zoning provides an alternative to governments that would rather increase flexibility early in the approval process, at the zoning phase. The conditions agreed to by the petitioning landowner(s) are then legally binding on both the landowner(s) and local government, providing stability for the landowners’ investment interests. Large N.C. municipalities such as Charlotte and Cary now accomplish almost all of their rezonings as acts of conditional zoning.

The practical effect of using conditional zoning is to tailor permitted land use in such a way as to accommodate both the landowner’s interests and neighboring property owners’ interests while still furthering overall public interest in having regulated land uses. Certainly, a local government concerned with loss of public access to its waterfronts could incorporate limitations on the petitioning property owners’ use of the water as a condition of the rezoning, so long as those conditions fit the statutory prescriptions listed above.

Another benefit of *conditional zoning* comes from its advantages over *conditional use district zoning*, a distinct land use practice that is a more complex method of rezoning with restrictive conditions. Conditional use district zoning involves a two-step decision-making process. The first decision a local governmental body makes in this process is to approve a rezoning to a conditional use district that already

exists in the zoning ordinance. Then, the decision-maker must decide whether to approve a landowner's application for a special use permit. While still available as a land use regulatory tool in North Carolina, the codification and judicial affirmation of the conditional zoning practice renders conditional use district zoning a cumbersome, less-favored path toward the same end.

Critique. The use of conditional zoning as a tool for preservation of traditional waterfront access presents two significant challenges that may limit its effectiveness. First, because conditional zoning applies *prospectively* to proposed development, it will do nothing to preserve structures, uses, and water access in zones not subject to proposed development. Second, the practice of conditional zoning must follow specific statutory procedures and safeguards so that a local government does not inadvertently engage in *illegal contract zoning* or *illegal spot zoning*. If a local government is found to have engaged in either of those illegal practices, the entire rezoning may be void. Therefore, this second concern deserves more elaboration.

Contract zoning is illegal in North Carolina. In the classic (illegal) setting, a landowner and government will enter into a written agreement by which both parties make promises to each other. Generally, the governmental body promises to approve a rezoning if the landowner promises certain concessions such as more parking, open space, or recreational space. Because such an agreement represents a local government bargaining away its police power, the practice is illegal and any decisions of this type are void.

Spot zoning is not per se illegal in North Carolina, as is contract zoning. Spot zoning occurs when a small tract of land is zoned differently than the surrounding areas. Many petitions for conditional zoning also count as instances of spot zoning. The N.C. Supreme Court and N.C. General Statutes allow this practice so long as the rezoning is supported by a reasonable basis. To establish reasonable basis, the local decision-maker must balance several factors, including the size of the tract, the compatibility of the rezoning with an existing comprehensive plan, the benefits and detriments resulting from the rezoning to the landowner, neighbors, and surrounding community, and the relationship between the uses envisioned under the new zoning and the uses currently allowed in adjacent tracts.

Conditional zoning may provide just the tool local governments need to limit land uses more specifically than they could otherwise achieve under general district zoning schemes. Still, the tool requires careful and deliberate decision-making to avoid challenges of illegal contract zoning or illegal spot zoning. The additional procedures attendant to conditional zoning may make the tool more effort than it is worth.

Implementation issues. Because conditional zoning is an approved land use tool in North Carolina, a local government will not have to seek further authority to begin using the tool. Yet conditional zoning occupies a "gray area" between legislative decision-making and quasi-judicial decision-making. The delicacy of this "hybrid" form of zoning thus presents challenges to local decision-makers above and beyond traditional rezoning decisions.

Traditional zoning decisions qualify as legislative decisions, and as such, review of those decisions is given high deference. To overturn a legislative decision, a court would have to find the legislative body's decision to be arbitrary and capricious. In practice, this is a high standard for challengers to successfully meet, so the decision usually survives challenge. But because conditional zoning in essence contemplates a rezoning that affects only a small number of landowners, N.C. courts recognize a more individualized, quasi-judicial aspect to the decision. Therefore, upon review, N.C. courts do not view a conditional zoning decision to be presumptively valid as they would traditional rezoning decisions. Instead, the local governmental body bears the burden of proving its action is reasonable.

For that reason, local governmental bodies contemplating a conditional zoning decision must ensure that the decision follows statutory provisions, that a thorough record of the decision is made, and that the decision does not constitute illegal contract or spot zoning as described above. There is great room for error in rezoning to a conditional zoning district, then, and local governmental decision-makers must be aware of the high potential for mistake in this type of rezoning decision.

Example. A developer owns six acres of waterfront property in the downtown district of a small coastal N.C. community. The property includes two acres that directly front the river upon which most downtown businesses also operate and two acres that border the main street of the downtown district. One neighboring property owner operates a fish house, while the other neighboring property owner operates a seafood restaurant. The developer's property includes an abandoned warehouse that used to house a boat repair business. The developer wishes to tear down the warehouse and construct six buildings of residential condominiums on the site. Buildings that face the main street would include ground-floor commercial space rather than residences. Each building would reach four stories high, allowing for a total of 80 condominiums. Additionally, the complex would include a small marina for use of condominium owners.

Because the downtown area is currently zoned general commercial, the developer petitions for a rezoning to a conditional zoning district that would allow the mixed-use residential and commercial development to be built. The developer has researched the Town's Comprehensive Plan and knows that the Plan envisions a future of mixed uses along the downtown waterfront, including both residential and commercial uses. Additionally, the developer knows that Town ordinances limit the height of downtown buildings to five stories. The developer feels the proposal adequately reflects the stated land use goals and regulations of the community.

Still, the developer recognizes that for the proposal to win approval, it must include more. Because the new residences would dramatically increase the amount of traffic in the downtown area, the developer proposes on-site parking in a ratio of two spaces per residence. An additional forty spaces are also included in the plans to accommodate traffic due to the new commercial space in the development. And in talks with neighbors, the developer learned that nearby businesses are generally excited about the increased foot traffic the condominium residents would generate. Still, neighbors expressed concerns that the development would cut off a dirt driveway and boat launch area on the east side of the property that residents have used for decades to access the river. To address this concern, the developer has agreed that if approved for the rezoning, the development would include a grant of an easement to the Town for the length of the road and the boat launch area. The developer plans to erect a fence to separate the buildings from this driveway. The fence will extend the length of the dry sand on the riverfront portion of the property as well.

Because this proposal fits with the Town Comprehensive Plan and the conditions to which the developer has agreed (the easement and parking) address the impacts of the project on the surrounding downtown district, this proposal will likely stand as a prime candidate for approval of the conditional zoning district.