Orange County Planning & Inspections Department
131 W. Margaret Lane, Suite 200, Hillsborough, NC 27278
919-245-2575 or planningapps@orangecountync.gov

Special Use Permit Fact Sheet

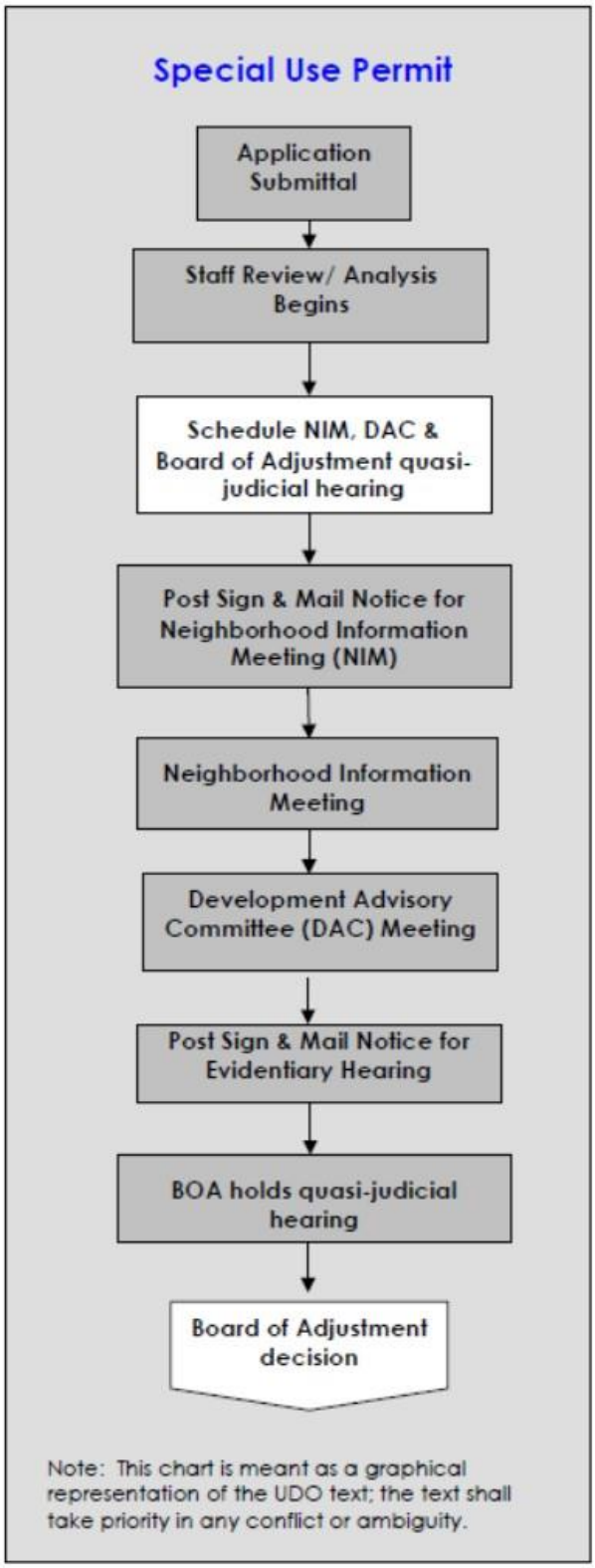
The purpose of this fact sheet is to provide a breakdown of Orange County's Special Use Permit submittal and review process. The information contained herein provides an explanation on the nature of the:

- Review proceedings,
- Presentation of evidence,
- Burden of proof,
- What constitutes testimony,
- Who can present evidence, and
- Your rights with respect to challenging a decision to either approve or reject a SUP application.

1. **What is a Special Use Permit?**
   A Special Use Permit (SUP) is a permit allowing for the establishment of certain uses, in certain districts, considered by the County as being worthy of additional scrutiny based on their proposed location. Such uses typically require special review for design, location, and impact on surrounding properties.

2. **What is considered a 'Special Use'?**
   A SUP is required for those specific land uses identified within the Orange County Unified Development Ordinance (UDO) Table of Permitted Uses contained within Section 5.2. These land uses are identified in the table with an 'S'. Some uses may be permissible in certain districts without restriction (referred to as "uses by right"), but require the SUP in districts where their impact calls for special consideration. Applicants are entitled to be granted a SUP if they can show that specific standards would be met.

3. **When are such applications reviewed?**
   Review of a SUP application occurs during a previously scheduled evidentiary hearing held by the Board of Adjustment. The review of an application is a carried out in a quasi-judicial process. The typical cadence associated with the review of a SUP is broken down in Section 2.7 of the UDO and can be summarized using the following flow chart.



4. **What does quasi-judicial process mean?**
   Quasi-judicial decisions arise in a variety of local government settings. During a quasi-judicial hearing, the Board of Adjustment acts much like a panel of judges. The Board hears factual evidence and sworn testimony presented at the evidentiary hearing and then makes a determination on whether the permit can be issued based on the competent, substantial, and material evidence presented. Put differently a quasi-judicial decision is one that requires the board hearing the matter to find facts and make decisions by applying those facts to the standards in the Unified Development Ordinance.

5. **Who may speak or present evidence at the evidentiary hearing?**
   Both individual applicants and those individuals supporting, or opposed to, the application are encouraged to attend. Individuals may represent themselves or be represented by an attorney and they may have expert witnesses testify for them.

   The cost for attorneys or expert witnesses is borne by the individual seeking counsel or expert testimony, not the County. The County will not pay for, or reimburse, expenses incurred by an individual in their quest to support or oppose a SUP application.

   While not required by State or County regulations, all parties with an interest in a SUP application are strongly advised to have an attorney represent them. Engineers, architects, real estate agents, planners and other non-attorneys may only appear as expert witnesses; they may not represent an applicant or those opposed to an application.

   Only those individuals with standing may speak or present evidence.

6. **What are the responsibilities of the applicant?**
   The applicant bears the ultimate responsibility for producing and submitting competent, substantial, and material evidence 'proving' the proposal complies with applicable County regulations. If they fail to submit evidence demonstrating compliance, the request is denied. If, however, the applicant proves they comply, and there is insufficient evidence submitted to the board hearing the case demonstrating they do not comply, the applicant is entitled to have the application approved.

7. **What standards must be met by the applicant?**
   All applicants must show compliance with the General Standards for all SUPs, as detailed within Section 5.3.2 of the UDO, and any specific development standards associated within the proposed use.

   The General Standards, as contained in Section 5.3.2, read as follows:

   (a) The use will maintain or promote the public health, safety and general welfare, if located where proposed and developed and operated according to the plan as submitted;

   (b) The use will maintain or enhance the value of contiguous property (unless the use is a public necessity, in which case the use need not maintain or enhance the value of contiguous property); and

   (c) The location and character of the use, if developed according to the plan submitted, will be in harmony with the area in which it is to be located and the use is in compliance with the plan for the physical development of the County as embodied in these regulations or in the Comprehensive Plan or portion thereof, adopted by the Board of County Commissioners

8. **How are decisions made?**
   The Board makes their decision solely on the competent, material and substantial evidence presented at the hearing, both for and against an application.
   Members cannot consider information obtained through independent research or undisclosed ex parte communications, meaning members cannot have private discussions with individuals who support or object to a specific application.

9. **What exactly is ex-parte communication and why is it not allowed?**
   Persons affected by a decision have the legal right to hear all of the information presented to the Board, specifically they have a right to know all of the "facts" being considered.

   Therefore members of the Board of Adjustment are not allowed to discuss the case or gather evidence outside of the hearing (what the courts term ex parte communication). Only facts presented to the full board at the hearing may be considered.

   This is an important point to remember when such applications are being reviewed. Members of the Board of Adjustment are prohibited from discussing the matter or receiving comment on a proposal.

   These members are not trying to be rude or unsympathetic to your concerns. They are prohibited from engaging in the conversation in the first place as they are required to guarantee an impartial hearing where the 'facts' are weighed as they are presented as to whether or not an application should be granted.

10. **You previously indicated decisions are based on evidence. Does this mean those presenting evidence at a SUP hearing have to be under oath?**
    In a word, yes. All testimony, including from County staff, offered during the public hearing where a SUP is reviewed must be under oath.

    All persons wishing to speak will be given a reasonable time in which to be heard, however groups are encouraged to select a spokesperson to speak for the group in order to avoid repetitive testimony.

11. **Can people just speak to offer their opinion on the application?**
    Inflammatory, irrelevant, repetitive and incompetent testimony and hearsay is not permitted. The Chair of the Board of Adjustment has the right to limit and restrict such comments during the evidentiary hearing. For more information please refer to Section 2.7.7 (D) of the UDO.

12. **What constitutes 'competent, substantial, and material evidence' allowing for the approval or a denial of a SUP?**
    Breaking down what constitutes evidence can best be summarized as follows:

    i. Competent evidence: legally admissible under the rules of evidence unless admitted without objection, or appears to be sufficiently trustworthy and is admitted under such circumstances that it is reasonable for the decision-making body to rely upon it. Evidence that can be subjected to cross-examination, inspection, explanation and rebuttal (i.e. expert testimony).

       For example a realtor who has professional experience and accreditation can offer an opinion if a specific project will or will not impact the value of adjacent property. An individual with no background in the field cannot offer a 'competent' opinion on the

subject. In this case it would not be considered as 'competent' evidence and would be inadmissible.

ii. Substantial evidence: evidence that which a 'reasonable mind' would regard as sufficiently supporting a specific result.

Would this persuade the average person to make a certain conclusion? Does it do more than speculate?

iii. Material evidence: evidence that is relevant to the issue being considered.

For example if a board is reviewing an application for a kennel (i.e. a place where dogs/cats are housed and cared for a period of time) an individual who is opposed may submit documentation denoting noise complaints from other kennels throughout Orange County. This could be construed as 'material evidence'.

Documentation denoting animals have died in kennels throughout the county and, as a result, this specific application should be denied is not relevant to the case at hand as it has no specific relationship to what is being proposed. This would be deemed immaterial evidence and would not be admissible.

As a general rule, anyone with knowledgeable information (i.e. relevant) to the case may provide factual information, but only experts may provide opinion testimony.

Even expert testimony must be competent (i.e. the expert has qualifications relevant to the issue) and material before the decision-making board can rely on it.

Hearsay evidence is testimony that the witness does not know of his or her own personal knowledge, including that which someone else told the witness and the use or introduction of signed petitions and letters.

The Board may only hear testimony that focuses on the applicable standards and criteria established in the UDO. Unless they are a qualified expert, witnesses are not competent to testify about the impact of a proposed land use on the value of nearby property, the danger to public safety resulting from increases in traffic or other matters that require special training or expertise like the level of noise that will be generated.

13. What does it mean when you say only those individuals with standing can provide testimony?

Individuals asserting they have standing to present evidence/testimony on a request are required to submit evidence to the Board of Adjustment supporting this claim, including:

a. A person with legal interest in the subject parcel including:
    a. Property owner;
    b. An individual who has an ownership or leasehold interest;
    c. An individual who has an option or contract to purchase the subject property; or
    d. An interest created by an easement, restriction, or covenant.

b. A person who will suffer special damages as the result of a decision;
NOTE: Individuals are required to substantiate what special damages they will suffer for the Board to consider if they have standing. This typically includes proximity to the subject parcel, action on the proposal could result in economic damages such as a decrease in property values, or action on the proposal could

result in direct adverse impacts on their property.

Individual asserting standing are required to do more than simply state that they live in the vicinity of the subject property and allege action on a proposal will harm property values. The party asserting standing must allege secondary impacts providing documentation of same.

c. An association organized to promote the interests of a particular area, such as a homeowners association, so long as at least one member of the group would have standing as an individual and the association was not created in response to the development/application being acted upon by the Board of Adjustment.

As previously indicated, standing is a legal question to be determined by the Board of Adjustment. Staff does not have the discretion to make this determination.

14. Does the fact I received a notice from the County of the date/time of the evidentiary hearing denote I have standing?

Put simply, no. Consistent with the UDO, staff is required to send written notice, via first class mail, to property owners within 1,000 ft. of a parcel subject to an SUP application informing them of the date/time of the evidentiary hearing. The notice is not an indication of standing.

15. Can conditions be imposed on a SUP?

Generally, the Board of Adjustment may attach conditions to the approval of an SUP as it relates to compliance with applicable standards. For example, a condition may require the applicant to increase the size of a required setback or land use buffer in order to ensure the project complies with that specific standard as detailed within the UDO. The Board cannot, however, impose conditions addressing an issue not related to an existing standard such as establishing hours of operation, color of buildings, etc.

Conditions cannot require the applicant to take action with regard to a piece of property that is not a part of the application being considered, and conditions cannot require the alteration of a special use permit previously issued to a third party.

16. Is there a record of the proceedings?

Complete records must be kept of the hearings. Detailed minutes must be kept noting the identity of witnesses and giving a complete summary of their testimony. Any exhibits presented are retained by the board and become a part of the file on that case. An audio recording of the hearing is also made.

17. How are parties notified of the decision?

The Board of Adjustment is required to make a formal decision on the application (i.e. approve or deny) in writing based on the determination of facts and their application to the specific standards for the particular use and the general standards contained in the UDO. This includes providing specific details on the board's conclusions on each applicable standard for a given SUP. Even if the application is denied, there is an obligation to make a detailed finding identifying the evidence utilized to deny the application.

The written decision must be signed and becomes effective upon filing with the Planning Department. A copy of the written decision must be delivered to the applicant, property owner, and others as required by State law.

18. Are decisions on SUP applications subject to further review?

Yes. Decisions of Board of Adjustment are subject to by the Superior Court. Appeal applications must be filed within 30 days with the court from the date the decision is made available. Please refer to Section 2.12.5 (A) of the UDO for additional information.