



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 permit proceedings, the presentation of evidence, burden of proof, what constitutes testimony and 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, that are considered worthy of additional scrutiny in their proposed location. Such uses typically require special review for design, location, and impact on surrounding properties.

Orange County has 2 different categories of SUP, specifically:

- i. **Class A** reviewed and acted upon by the Board of County Commissioners (BOCC), with a recommendation from the Planning Board, and
- ii. **Class B** reviewed and acted upon by the Orange County Board of Adjustment.

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 uses are identified in the UDO's Table of Permitted Uses with an 'A' for Class A SUP and a 'B' for a Class B SUP. 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.

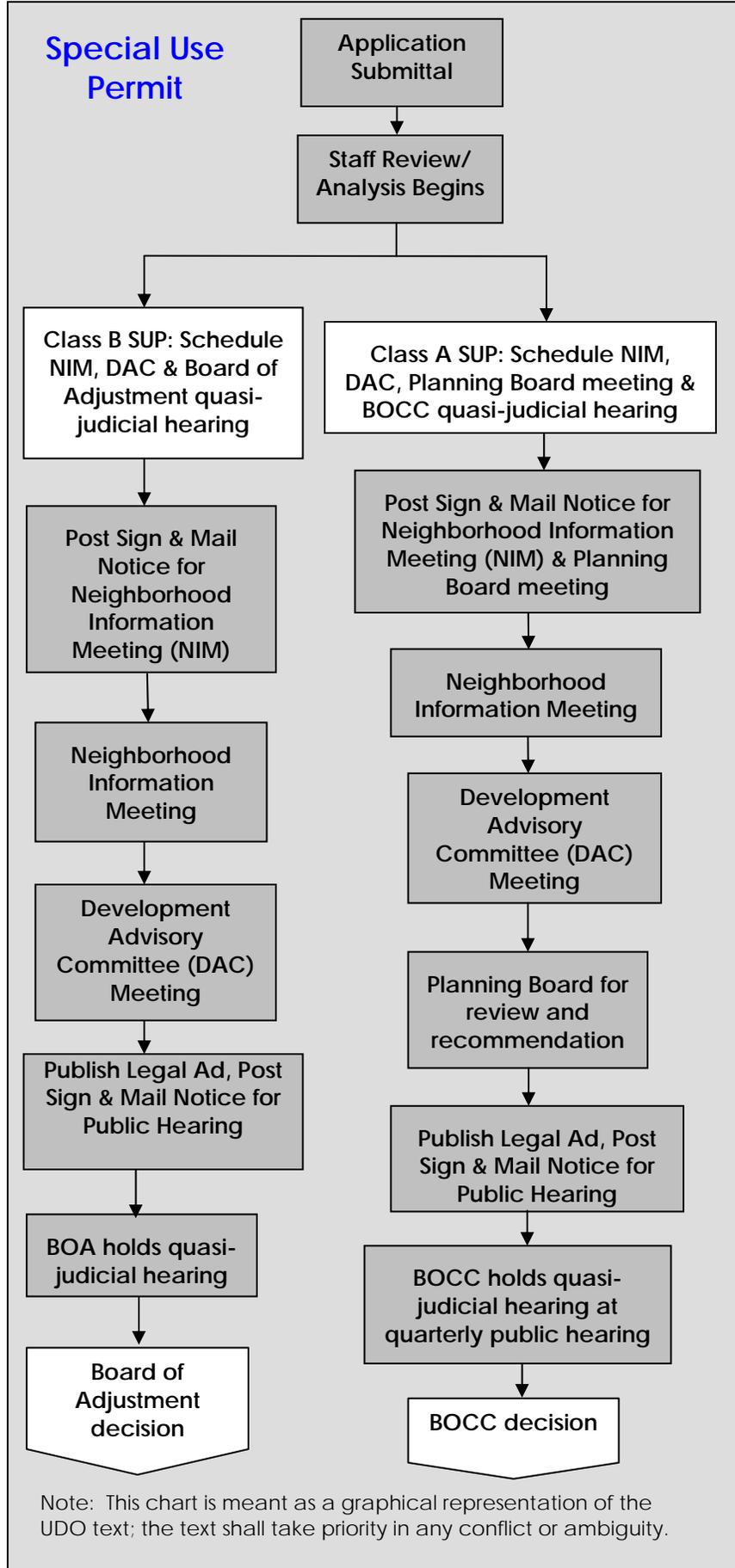
3. *When are such applications reviewed?*

Review of a SUP application occurs during a previously scheduled and advertised public hearings held by either the BOCC or the Board of Adjustment.

The review of an application is 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:

Special Use Permit



Note: This chart is meant as a graphical representation of the UDO text; the text shall take priority in any conflict or ambiguity.

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 (i.e. BOCC or Board of Adjustment) responsible for rendering a decision acts much like a panel of judges. The Board hears factual evidence and sworn testimony presented at the public 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 public 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 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 for the body reviewing the application to conclude 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?***

Members of the board rendering the decision must make 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 members of a board who will be rendering a decision on an SUP application, specifically they have a right to know all of the “facts” being considered.

Therefore members of the decision-making body 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 rendering the decision 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 and the chairman of the board hearing the matter has the right to limit and restrict such comments during the public 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. *Can conditions be imposed on a SUP?*

Generally, the board hearing the application 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 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.

14. *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.

15. *How are parties notified of the decision?*

The board rendering a decision on the application is required to make a formal decision on the application (i.e. approve or deny) in writing and shall be 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.

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

Yes. Decisions of the BOCC or Board of Adjustment on a SUP application 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 NCGS 160A-393 and Section 2.12.5 (A) of the UDO for additional information.