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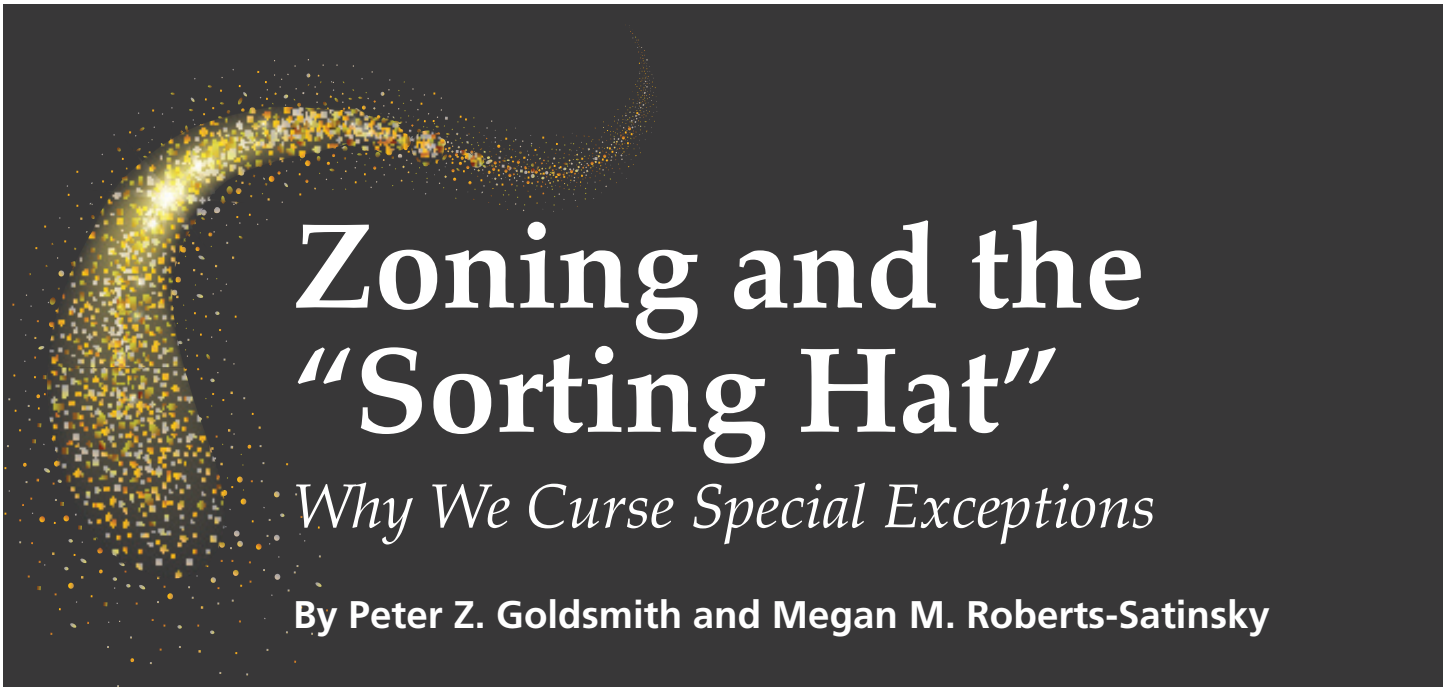

Zoning and the "Sorting Hat"

Why We Curse Special Exceptions

By Peter Z. Goldsmith and Megan M. Roberts-Satinsky

"[A] *special exception*, while not exactly twice removed from what is permissible, as the term implies, is nevertheless a conditional allowance." *Costco Wholesale Corp. v. Montgomery Cnty.*, No. 2450, Sept. Term, 2015, 2018 WL 1747920, at *1 (Md. Ct. Spec. App. Apr. 11, 2018).

Every so often, a local newspaper will publish a headline along the lines of: DEVELOPER AWARDED SPECIAL ZONING EXCEPTION TO DEVELOP COMMERCIAL PROPERTY IN RESIDENTIAL DISTRICT. The headline reflects the misunderstanding that a special exception is an exception to a zoning code or, perhaps, tantamount to a re-zoning. See John J. Delaney et al., Handling the Land Use Case 19 (3d ed. 2012) ("The decision to grant or deny a special exception, unlike the decision in a zoning case, does not involve a change in the basic law underlying the parcel of land in question. The zoning applicable to the parcel as indicated on the zoning map remains the same."). Nonetheless, a failure to understand special exceptions in the world of land use and zoning is understandable. Local jurisdictions have inconsistent statutory criteria for approving special exceptions. The Maryland Code provides a definition of special exception that may be internally contradictory. Finally, the interaction of common law standards with statutory criteria has created a hodgepodge of special exception approval standards throughout Maryland.

Because most readers of the *Maryland Bar Journal* are presumably unfamiliar with land use law, it is necessary to establish some basic land use, zoning, and planning principles. Generally, land use authority is delegated to a local jurisdiction (county or municipality) that, in enacting a comprehensive zoning ordinance, "divides an area geographically into particular use districts, specifying certain uses for each district." *People's Counsel for Baltimore County v. Loyola College*, 406 Md. 54, 70 (2008). In so doing, the local jurisdiction typically establishes single-use districts such as residential, commercial or industrial zones, named Euclidean zones after the seminal case of *Village of Euclid, Ohio v. Ambler Realty, Co.*, 272 U.S. 365 (1926). The local government may also establish mixed-use zones which permit a combination of uses such as various intensities of commercial and residential uses. Additionally, local jurisdictions may establish "floating zones," which are a more flexible zoning "device" than Euclidean zoning. *Mayor & Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514, 539 n.15 (2002). Within each of these zoning districts, the local jurisdiction will determine what uses are "permitted" and which are "prohibited." "A permitted use in a given zone is permitted as of right within the zone, without regard to any potential or actual adverse effect that the use will have on neighboring properties." *Loyola*, 406 Md. at 71. A prohibited use, on the other hand, is not allowed in the zone. For example, a permitted use in a low-density residential zone would be a single-family dwelling, but a prohibited use in that zone would be a cement manufacturing plant.

"The special exception," the Court of Appeals has explained, "adds flexibility to a comprehensive legislative zoning scheme by serving as a 'middle ground' between permitted uses and prohibited uses in a particular zone." *Id*. Where a permitted use is allowed "as of right" and a prohibited use is never allowed, a "special exception, by contrast, is merely deemed

prima facie compatible in a given zone" and "requires a case-by-case evaluation by an administrative zoning body or officer according to legislatively-defined standards." *Id.* An example of this "middle ground," which has appeared in more than one reported appellate decision, is a special exception to allow a funeral home in a residential district. *Schultz v. Pritts*, 291 Md. 1 (1981); *Clarksville Residents Against Mortuary Defense Fund, Inc. v. Donaldson Properties*, 453 Md. 516 (2017); *Anderson v. Sawyer*, 23 Md. App. 612 (1974).

Special exceptions require an additional level of scrutiny and typically require a hearing. John J. Delaney et al., Handling the Land Use Case 19 (3d ed. 2012) ("Qualifying for a special exception usually requires a public hearing before an administrative board, such as a board of appeals, board of zoning adjustment or a hearing examiner."). Logic dictates that this added layer of review is necessary because, presumably, uses requiring a special exception such as landfills, sand and gravel operations, gas stations, and auto and truck recycling facilities, will potentially have adverse effects such as noise, traffic, congestion, environmental concerns, smells, etc. *See e.g.*, Anne Arundel Cnty. Code § 18-6-103.

Uses that require special exception approval are not a homogeneous group and their purported adverse impacts may not be easily identifiable. Local governments also designate special exception uses with less obvious or arguably nonexistent inherent adverse effects. Funeral homes, for example, may cause "vague and generalized fear," such as worries about the structure being an eyesore or attracting bugs, but may, in fact, have minimal tangible impacts like a slight increase in traffic. *See Anderson*, 23 Md. App. at 623–24. Solar energy generating facilities are special exception uses in certain zoning districts, but beyond any viewshed impacts, they generate no noise, traffic, dust or odor. See Anne Arundel Cnty. Code 18-6-103.

On the other end of the spectrum from uses like rubble landfills (with obvious inherent adverse effects), are uses that are designated as special exception uses even though they arguably have the same impact as permitted uses in the zoning district. For example, residential uses such as workforce housing, housing for the elderly of moderate means, or duplex dwelling units would have similar adverse impacts to other permitted residential uses but are, nevertheless, treated as special exception uses in certain residential zoning districts in Anne Arundel County. Anne Arundel Cnty. Code § 18-4-106. Further demonstrating the lack of uniformity is that jurisdictions do not treat the same use similarly (*e.g.*, a fast-food restaurant is a permitted use in Anne Arundel County but it is a special exception use in the City of Annapolis). *Compare* Anne Arundel Cnty. Code § 18-5-101 with City of Annapolis Code § 21.48.030.

The inconsistent nomenclature used by Maryland counties and municipalities tends to increase confusion. While the Court of Appeals has said that the "terms 'special exception,' 'conditional use,' and 'special use permit' are understood to be interchangeable," *Montgomery Cnty. v. Butler*, 417 Md. 271, 275 n.1 (2010), that is not true in all jurisdictions. In particular, in Anne Arundel County, a conditional use is a permitted use with conditions, but does not require a hearing. *Compare* Anne Arundel Cnty. Code 18-10-101 *et seq.* with Anne Arundel County Code § 18-11-101 *et seq.* In some counties, the term conditional use is synonymous with the term special exception. See Howard County Zoning Regulations § 131.0 *et seq.*

At the state level, the Land Use Article of the Maryland Code provides a definition of "special exception" that applies to most jurisdictions in the state (but not those governed by the Regional District Act), and defines that term as "a grant of a specific use that: (1) would not be appropriate generally or without restriction; and (2) shall be based on a finding that: (i) the requirements of zoning law governing the special exception on the subject property are satisfied; and (ii) the use on the subject property is consistent with the plan and is compatible with the existing neighborhood." Md. Code (2012, 2017 Supp.), Land Use, 1-101(p). This definition—which is arguably internally inconsistent, as it is a use that may "not be appropriate generally" and yet must also be consistent with the local jurisdiction's general development plan—does not incorporate any standards established by the common law.

The modern landmark decision guiding special exception approvals is *Schultz v. Pritts,* 291 Md. 1 (1981). In *Schultz*, the Court of Appeals said that special exception uses are presumptively compatible with the permitted uses in that district. *Id.* at 21. The conclusion in *Schultz*, which is regularly quoted in case law, is that "there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone." *Id*. at 22. Admittedly, the principles of this test can be difficult to distill, even for the seasoned land use practitioner. To the public, the words can be meaningless.

The practical challenge of applying the *Schultz* test was evident in *People's Counsel for Baltimore County v. Loyola College*, 406 Md. 54 (2008), where a college proposed to develop a spiritual retreat center (a special exception use), in a residential zone. *Id*. at 58. The Baltimore County Board of Appeals granted the college's special exception application over citizen opposition. *Id*. at 59. On appeal, the question was whether *Schultz* required the Board to compare the potential adverse effects of the proposed use at the subject property to the potential adverse effects at other, similarly zoned properties (*i.e.*, whether a spiritual retreat center might have less impact somewhere else). *Id*. at 66. The opponents argued that "*Schultz* compels a districtwide comparative geographic analysis of effects in each special exception." *Id* at 94. The college, on the other hand, countered that special exception case law did not require a "multiple site analysis" and only an evaluation of the impacts at the proposed development site, alone, is required. *Id*. at 105– 07. The Court of Appeals concluded that no "comparative, multiple site impact analysis" was required. Additionally, the Court reaffirmed the presumption of compatibility of special exception uses:

> inherent effects [of a special exception use] notwithstanding, the legislative determination necessarily is that the uses conceptually are compatible in the particular zone with otherwise permitted uses and with surrounding zones and uses already in place, provided that, at a given location, adduced evidence does not convince the body to whom the power to grant or deny individual application is given that actual incompatibility would occur.

Id. at 106.

An issue arises when *Schultz* is considered in conjunction with local requirements that must be proven at a special exception

hearing. Typically, a local jurisdiction adopts findings that a zoning body must make before a special exception is granted. For example, Anne Arundel County requires the following findings be made, and these findings explicitly include the *Schultz* test:

a. Requirements. A special exception use may be granted only if the Administrative Hearing Officer makes each of the following affirmative findings:
   1. The use will not be detrimental to the public health, safety, or welfare;
   2. The location, nature, and height of each building, wall, and fence, the nature and extent of landscaping on the site, and the location, size, nature, and intensity of each phase of the use and its access roads will be compatible with the appropriate and orderly development of the district in which it is located;
   3. Operations related to the use will be no more objectionable with regard to noise, fumes, vibration, or light to nearby properties than operations in other uses allowed under this article;
   4. ***The use at the location proposed will not have any adverse effects above and beyond those inherently associated with the use irrespective of its location within the zoning district;***
   5. The proposed use will not conflict with an existing or programmed public facility, public service, school, or road;
   6. The proposed use has the written recommendations and comments of the Health Department and the Office of Planning and Zoning;
   7. The proposed use is consistent with the County General Development Plan;
   8. The applicant has presented sufficient evidence of public need for the use;
   9. The applicant has presented sufficient evidence that the use will meet and be able to maintain adherence to the criteria for the specific use;
   10. The application will conform to the critical area criteria for sites located in the critical area; and
   11. The administrative site plan demonstrates the applicant's ability to comply with the requirements of the Landscape Manual.

Anne Arundel Cnty. Code 18-16-304 (emphasis added).

Montgomery County has modified the *Schultz* test. The Montgomery County Zoning Ordinance explicitly requires its hearing examiner to consider *both* inherent effects (*e.g.*, noise associated with deliveries at a senior living facility) *and* non-inherent effects (*e.g.*, noise from a late-night dance club at a senior living facility in a residential neighborhood):

g. will not cause undue harm to the neighborhood as a result of a non-inherent adverse effect alone or the combination of an inherent and a non-inherent adverse effect in any of the following categories:
   i. the use, peaceful enjoyment, economic value or development potential of abutting and confronting properties or the general neighborhood;
   ii. traffic, noise, odors, dust, illumination, or a lack of parking; or
   iii. the health, safety, or welfare of neighboring residents, visitors, or employees.

Montgomery Cnty. Zoning Ordinance, Article 59-7.3.1(E)(1)(g) (emphasis added).

In *Montgomery County v. Butler*, 417 Md. 271 (2010), the Court of Appeals approved Montgomery County's legislative departure from the *Schultz* presumption of compatibility. The Court of Appeals said: "In reviewing a decision of a zoning board approving or denying an application for a special exception, the emphasis must be first and foremost on identifying the relevant and prevailing zoning ordinance. Only then, after determining whether the zoning ordinance is silent on the matters to which *Schultz* and its progeny speak, may the *Schultz* line of cases become pertinent and controlling." *Butler*, 417 Md. at 306.

In Allegany County, no special exception criteria whatsoever have been adopted and the common law tests and the land use article presumably control.

Without action by the state to establish more uniform special exception standards, practitioners must be aware of differences that exist among each county and municipality, which may include conflicting statutory and common law standards. Practitioners must determine whether their respective jurisdictions have adopted, rejected or are silent with respect to the *Schultz* test. Finally, the adverse effects of special exception uses, if any, must be analyzed based on the specific and actual area of the proposed development site, as opposed to hypothetical alternatives or a geographical comparative analysis.

Because zoning is predominantly a function of local government, it is unlikely that there will be more uniform standards governing special exceptions in the future. Judge Harrell, now recently retired from the Court of Appeals, captured in an apt analogy why uses end up requiring special exception approval and why there is no guarantee as to how land uses in Maryland's jurisdictions will be classified:

> The local legislature, when it determines to adopt or amend the text of a zoning ordinance with regard to designating various uses as allowed only by special exception in various zones, considers in a generic sense that certain adverse effects, at least in type, potentially associated with (inherent to, if you will) these uses are likely to occur wherever in the particular zone they may be located. In that sense, the local legislature puts on its "Sorting Hat" and separates permitted uses, special exceptions, and all other uses. That is why the uses are designated special exception uses, not permitted uses.

Loyola, 406 Md. at 106; *see also id*. at 106 n. 33 ("In the Harry Potter series of books, the "Sorting Hat" is a magical artifact that is used to determine in which house (Gryffindor, Hufflepuff, Ravenclaw or Slytherin) first-year students at Hogwarts School of Wizardry and Witchcraft are to be assigned. After being placed on a student's head, the Sorting Hat measures the inherent qualities of the student and assigns him or her to the appropriate house.").

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