

Situation and Operations of Conditional Use Permit Systems in U.S. Cities - A Study on Special or Exceptional Permit System under the North American Zoning Control -

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The Japanese national zoning system (i.e. use permit schedule) under the Building Standard Law consists only of "as-of-right" confirmation uses and "prohibited" uses, and is said to be loose but rigid, whereas in North America, there exists a flexible system called "Conditional Use Permit" or "Special Use Permit", where plans for specified use are reviewed and judged according to predetermined criteria. Under an assumption that such systems will provide some suggestions suited to Japan, this study aims to investigate the situation and operation of the systems. Taking 17 cities across the U.S. as examples, through interviews with local officials on the operation of their systems and through web-based investigations of codes and cases, the study clarifies and examines the general status of conditional or special use permit systems, such as 1)types, 2)review procedure and body, 3)judgment process and decision criteria, 4)number of reviews and typical cases, and 5)designation of use and zoning districts.

Keywords: Conditional or Special Use Permit, Exceptional Permit System, Zoning, Land Use Control, United States

0. Background and Purpose of Research

The Japanese building control system, which inheres both "Laxity", allowing free development without detailed regulations and within a loose framework, and "Rigidity", prohibiting even a slight excess of prior fixed standards, is consequently said to be weak in accomplishing city planning goals and unable to cope with the establishment of new type of unexpected uses. One possible direction of problem solving would be introduction of more detailed and strict regulations with use of "special or exceptional permit systems" dealing individually with and permitting cases beyond or unexpected under this framework. Such approach could be seen in a proposal of 1970 amendment of the Building Standard Law¹⁾ as an establishment of "uses which can be permitted under certain regional or other circumstances" category, and recent suggestions to introduce rules to judge individual development and building proposals through consultation and adjustment²⁾.

Although "special or exceptional permit systems" such as provisos inhere in the present system, they are irregular cases under the lax regulation, and rigid and inflexible principled application according to codes and standards. Taking similar North American land use control systems, information of such cases as, Variance measures and Special Permit systems of New York City³⁾, examination procedure of Conditional Use Permit and Variance system of City of San Francisco⁴⁾, and system and operation of Variance¹⁾ in City of Toronto⁵⁾, are introduced. Considering the present Japanese system, Conditional Use Permit which in advance specifies the subject use category is a referral. However, they do not provide us with precise information and actual operation of the system. Concerning overseas literature taking American planning systems⁶⁾⁷⁾⁸⁾, although they afford us with precise explanation of institution and systems including individual dispute and court cases, they lack information of situation and operations of systems in actual individual cities.

Therefore, the aim of this study is, taking conditional use permit systems in United States as a subject, by clarifying the designation of the system, technical judgment criteria, and precise actual operations in several cities, to obtain informative knowledge for considering

desirable building control systems in Japan.

1. Selection of System and Cities Under Study

(1) System Under Study

The Conditional Use Permit (CUP) System discussed in this paper refers to a system which, in addition to "Permitted as of Right Uses" and "Prohibited Uses", also stipulates "Uses Treated as Exceptional" among restrictions on use by Zoning District under Zoning Codes, provides for individual reviews of the content of plans for these "Uses", and when it has been determined that the said contents of plans satisfy specified criteria, allows approval of the said "Uses" with conditions attached. Depending on the city, it is called a Conditional Use Permit, Special Use Permit, Conditional Use Exception or other name, and there are cases of multiple type with different names.

(2) Selection of Cities under Study

To broadly survey cities with a CUP system, we selected a total of 17 cities. From four regions under the United States Census (West, Mid-west, North-east, South), we selected relatively large cities operating the system under study at 2 or 3 locations separated by a specified distance in each region, then added a few cities which operate the CUP system located near one of these relatively large cities in the same state²⁾. To make the selections, we referred to the results of interviews we conducted concerning the overall state of special or exceptional permit systems with experts on United States city planning systems³⁾.

(3) Survey Method

We divided the cities under study into four groups and visited them in succession, in September 2007, in March and in November, 2008, and in March 2009, conducting interviews with responsible officials in the City Hall of each city and receiving related documents. In addition, we obtained information such as zoning regulations, explanatory documents, and review cases using the internet. In these ways, we i) defined the system, and obtained information concerning ii) review procedures and review body, iii) review method and review criteria, iv) number of reviews and typical cases, and v) state of designation of uses and zoning districts under study, and comparatively studied the situation in each city.

2. Composition of the Conditional Use Permit (CUP) System

Table 1 summarizes information concerning the composition of the system, number of reviews, and actual state of its operation in the cities under study based on analysis of the contents of the interviews and of the documents received, confirmed and supplemented by the internet.

(1) Types of the System Under Study

If we had focused on the names of systems, there would be several types in the six cities, but we divided them into two types: one type with impact range and degree of significance which are relatively important (major) and which involve relatively thorough reviews, and another type with relatively narrow degree of impact and in which simple reviews are sufficient (minor). In this survey, our interviews were concentrated on the former type.

In Milwaukee and in Portland, there is another type called "Limited Use", with uses permitted if conditions set separately for each use are satisfied, and others are reviewed as cases of Special Use (Conditional Use). In Chicago and other cities, the same approach is adopted without establishing types.

(2) Review Criteria

We inventoried the contents of regulations for review criteria of Conditional Use Permit Systems stipulated in the bylaws of each city. Most cities stipulate general purpose review criteria which are applied regardless of zoning districts or use type, but many cities separately stipulate individual review criterion to supplement these. Individual review criteria include regulations applied to specified Zoning Districts and regulations for detailed development standards applied to specified uses. Typical examples of the latter are care facilities, parking facilities, liquor stores, cell phone antennae etc. And in Portland and Denver, detailed development review criteria for each use are stipulated without stipulating general purpose review criteria.

While general purpose review criteria are rough qualitative regulations, the contents of individual review criteria include various items: those concerning the operation or administration of the use (example: business hours, etc.), handling of traffic, form and size of buildings, etc. And there are cases of regulations combining both development standards based on detailed specifications (example: ensuring a specified distance from sex trade shops) and qualitative and performance based (criteria).

And in order to inventory conditions in each city, to criteria for seven fields presented as typical examples in documents⁶⁾ prepared with reference to documents⁶⁾⁷⁾⁸⁾, "Compatibility" is added to organize the range covered by the review criteria in Table 1. General purpose review criteria are categorized by the symbols ○(case of explicit regulations)/△(case of related contents), and individual review criteria are similarly categorized by the symbols ●/▲. It can be surmised that in particular, there are many cases of "Overall Planning", "problems with traffic, parking, population density, and the environment", "harmful impacts on health, safety, and welfare", and "compatibility with neighborhood characteristics."

(3) Flow of Procedures Plus Review Organizations

and Methods

The flow of general procedures and reviews are: i) preliminary consultations, ii) application, iii) distribution of information to local landowners, concerned groups, and concerned organizations, iv) submission of analysis and reports on staff, all performed by applicants, plus v) public hearings, vi) judgments, and vii) decisions and appeals, done by review organizations⁴⁾.

Review organizations are, in some cases, a collegial body such as a committee (10 cities), or in other cases, an individual administrator (2 cities), and in some cities, important reviews are conducted by the former and minor reviews by the latter (5 cities). In Tampa there is also a type reviewed by the City Council, and in San Jose, Atlanta, and Orlando, the City Council approves decisions made by a collegial body. In some cases, the explanation of the plan, the public hearing, and decision are done at a single meeting, while in other cases, at separate meetings.

Collegial bodies are, in some cases, operated by a Planning Commission, which discusses overall city planning, and in other cases, by a Board of Adjustment etc., which reviews variances¹⁾ etc. In the cities of New York and Pittsburgh, in principle, major reviews are done by the former, while minor reviews are carried out by the latter⁵⁾. And although in many cases, they consist of 5 to 10 members appointed by the Mayor or by City Council with a city planning professional as the Chairman, few are ordinary members, and more than half are residents groups or other non-specialists (specialists refers to attorneys, architects, civil engineers, etc.). They meet several times a month, and their meetings range from short two-hour meetings to those lasting from noon until late at night.

Almost all reviews by individuals are the chief of the Zoning Administration Division conducting the review as Zoning Administrator, and in some extremely minor cases, no public hearing is held. If an applicant who is dissatisfied with a decision appeals, the judgment is made by the above-mentioned Review Committee. In Portland, an independent administrator (legal expert) called a Hearing Officer conducts reviews including major reviews⁶⁾.

To provide staff reports for use as reference material for reviews, responsible staff who are city planning professionals survey the contents of applications and findings concerning review criteria, and submit the results to the review organization. This is done in one of 3 ways: a) an applicant's agent (land use appraiser, etc.) performs certification based on documents which satisfy review criteria without preparing this report, b) only findings are obtained without giving a permission granted or not granted advisory⁷⁾, and c) a permission granted or not granted advisory is given based on the findings, with c) the procedure generally followed. In the b) and c) cases, the staff in charge provide advice concerning the contents of the plan. And the findings include the reasons why application contents succeed or fail to satisfy the criteria and other regulation contents. Contents concerning "compatibility with neighborhood characteristics" in particular include a wide range of matters: compatibility with size and design of buildings, environment in which the use is implemented, nature of the neighborhood, etc.

Conditions in cases where permission is given⁽⁸⁾, are attached concerning the layout of building lots, size of buildings, architectural planning, operation (number of people, time) etc. according to the above criteria.

Normally, nearby residents and other concerned persons can participate in and air their views at review meetings. Plus, various methods of hearing the views of concerned persons as part of fact-finding are established: reflecting outlines of views collected from around the application site at public hearings in staff reports, by nearby neighborhood planning units submitting their views (Atlanta etc.), or by city council members of the said small electoral districts holding meetings to relay views (Milwaukee etc.).

(4) Number of Reviews and Typical Cases

The number varies according to the way uses covered by the system are set and the size etc. of each city, but in many cities, more than 500 applications are handled each year. In cities where reviews are categorized as reviews by collegial bodies and as reviews by an administrator, the former perform few reviews, but they review major applications, and the latter review frequent but minor cases with reference to the judgments of the former. However, in Boston and Milwaukee, many reviews are handled only by collegial bodies. The latter are for applications for renewals following the expiration of permit validity after 3 to 5 years⁽⁹⁾, and to save time, cases with few points of contention (permission or refusal of permission) are dealt with as packaged consent agenda cases and cases which encounter objections are returned for individual reviews⁽¹⁰⁾.

Typical requested uses seen in recent years include drive through facilities, cell phone antennae, large churches, and so on.

3. Relationship of Uses Designated by the System with Zoning Districts

(1) Methods of Organizing the Use - Zoning District Relationship

In order to reveal the relationship of the use of buildings which is the object of the system with Zoning Districts designated by the system in the cities under study, zoning bylaws were placed on a table showing usage restrictions in individual districts and organized for 12 cities where the designations are clear. To compare a number of cities where different uses and Zoning Districts are stipulated, on Table 2, only types corresponding to the basic zoning-residential, commercial, and industrial-are handled⁽¹¹⁾, individual uses which are covered by the system under these types are abstracted⁽¹²⁾, and uses are categorized and organized with reference to the Land-Based Classification Standards (LBCS)⁽¹³⁾ of the American Planning Association (APA).

The symbols on the Table are defined in the Legend⁽¹⁴⁾, but to interpret their meaning, the black square (■) indicates a use that cannot be constructed without an individual review. Black triangles (▲▼) define uses which are designated in many districts, while white triangles (△▽) define uses designated only in some districts. Triangles pointing upwards (▲△) indicate uses which are basically prohibited, but can be permitted as exceptional cases, while triangles pointing downwards

(▼▽) indicate cases where special detailed use or detailed restrictions for the district have been added.

(2) State of Designations by Type of Use

a) Residential uses: Group homes, housing including nursing services, and other assisted living facilities are designated in many residential and commercial zones. In residential zones, there are many △, and they are permitted as special cases only in some high density districts. In commercial zones, most indications are black symbols and individual reviews are required in many districts. Ordinary residences are also numerous, and in residential zones, apartments and combined live-work units etc. are permitted in some districts, with apartments subject to individual reviews in commercial use zones. Turning to lodging facilities, B&B (Bed and Breakfast) are individually approved in residential districts, while in commercial and industrial districts, hotels etc. are classified and judged according to their size.

b) Commercial uses: Commercial use is rare in residential districts, and retail stores operated as a neighborhood convenience are treated as exceptions. Many designations are made in commercial and industrial zones: retail stores which are designated separately according to business type and scale and include liquor stores and adult retail stores, etc., and also many eating and drinking establishments designated based on differences between fast food shops and others providing alcoholic beverages. These uses are indicated by many △ in commercial zones, and although mainly permitted as exceptions in districts where few problems occur, in industrial zones, they are mainly indicated by triangles pointing downward, and in light industry districts they are permitted, but in heavy industry districts, they are subject to individual judgments. Parking facilities are designated in all the basic zones, and it appears that there are many black symbols and most require reviews.

c) Industrial uses: Designations are made as exceptions in residential zones, but these are manufacturing activities in mixed districts where universities are permitted and temporary concrete batch plants. In commercial zones, warehouses and wholesalers which are associated with distribution facilities are designated limited to districts where a high activity level is allowed. In industrial zones, manufacturing plants and processing plants which recycle auto scrap and metal are designated classified by size and types of material each handles.

d) Infrastructure uses: Concerning transportation, transit facilities, drive-through, and similar thoroughfares are designated in all basic zonings. Regarding communication and information, most are communication use antennas. Under utilities, electrical transmission and water treatment plants are seen. Many of these are indicated by the symbol ■, and individual judgments are made in cases where installation is necessary. And under waste category, recycling facilities under all basic zones are designated, and in industrial zones, individual uses are stipulated in detail according to the degree of danger of each.

e) Leisure and recreational use: Concerning entertainment facilities, in limited districts, stadiums and other large facilities are designated, mainly in commercial and industrial zones, while theaters, billiard halls,

Greensboro City, where designations are fewest in number, residential uses are, as shown by the term, residential zone, limited to districts within zoning of the same type as the use. And even when uses not designated are examined, they are, instead of being permitted in districts of different types, conditional permission with the use refined. And in San Francisco, overall, designations are limited to the same type. Residential use only is in basic zoning, but conditions such as the distance to the nearest residential zone district and differences etc. in density are entered, and locations are limited to specified spatial ranges. In Saint Paul, there are many white triangles, the districts are limited, and permission is given if approximately 26% of the total number of designated elements satisfy the criteria. Operation is limited in this way based on the city's intention to minimize conditional permits accompanied by a public hearing procedure.

b) **Limitation of cases based on selective use of review types:** Milwaukee gives the most designations, but Limited Use accounts for half of the total number of designated elements, while cases corresponding to Special Use are fewer. According to the interviews, Special Use, in which the judgment criteria are clarified by a review, is changed to Limited Use. Similarly, in San Jose with multiple uses, residential use is designated under upper level zoning which adjoins the same zoning as the said use, as shown by the terms residential use and residential zone, those which are not in opposition to district characteristics are assumed to be Special, which involves minor procedures, etc. In Pittsburgh, Conditional, which involves complex procedures, is no more than 20% of total designations. In industrial zonings, designations are permissive overall, with many designations given as Administrative Exceptions-with clear permission criteria and simple procedures-and with approval of non-designated similar uses etc.

c) **Acceptance and implementation of mixed use:** Minneapolis gives designations under corresponding + adjacent upper level zoning in a form similar to that in San Jose, but similar uses not designated are, overall, construction permits, and there is a tendency to permit mixing of uses. According to the interviews, designated uses are relatively broadly set so judgments are made carefully, and designations are probably made including uses which originally could be permitted. Broad designations are also made in Portland, with commercial use designated widely in residential and industrial zoning. Designations in residential zonings are made only in three high density districts among a total of 12 districts, but in industrial zones, commercial uses can be located in all districts if those accepted are included. Conditional permits are used frequently in this form in order to promote mixed use.

4. Summing up and Considerations

(1) State and Operation of the Systems in the U.S.

The structure of the system varies from city to city, but viewed overall, its characteristics include: i) systems and procedures applied selectively according to degree of impact, ii) review criteria generally stipulated universally and qualitatively regardless of use and zoning district, but cases where review criteria by use etc. are stipulated

individually, and iii) major roles-making judgments or issuing advisories, etc. in minor cases-are played by specialist administrators and iv) reviews are performed by collegial bodies consisting mainly of non-specialists, and this process provides opportunities to reflect the views of residents, etc. It probably can be assumed that reviews of individual cases incorporate procedures which guarantee both iii) specialization and iv) democratization, that judgment criteria are qualitative in form as in ii) to permit them to be shared by the different groups, both specialists and residents, and that conditions for the objects reviewed are limited as in i) in order that close investigations from a specialist's perspective and democratic debates are performed appropriately. Regarding qualitative criteria in ii), there is a danger of them being used arbitrarily in collegial bodies in iv), but presumably judgments which are flexible and appropriate can be made by giving admonishments from more specialized perspective based on iii) and by accumulating experience and past achievements of reviews of cases limited under i).

Regarding the relationship between uses and zoning districts for which conditional permits are given, a) assisted living facilities, parking facilities, general infrastructure uses, and medical treatment or nursing facilities are designated in many districts, and b) by zoning type in residential zones, boarding houses and community facilities, in commercial zones, auto related business and warehouses, and in industrial zones, processing plants and "waste" categories, are often designated. Regarding a), all are socially necessary, but may be disfavored because of the surroundings, and individual reviews are considered. Concerning b), these conform with the purpose of the zoning, and because problems and disharmony etc. with the surroundings can be caused by their concentration, they are approved only when conditions are satisfied. Regarding characteristics of individual cities, while there are cities where the uses and districts designated are narrow and cases are limited as the types of reviews are applied selectively, there are also cities where designations of a broad range of uses in a wide range of districts are made, and where conditional permits are used frequently. This situation can be summed up by stating that in the former case, mixing of uses is restricted, while in the latter case, the mixing of uses is accepted and implemented.

Future research challenges are analyses of the relationship between the state of use of such conditional use permit (CUP) systems and city policy goals, of specific state of application cases in each city, and the state of application of review criteria etc.

(2) Reference Items Applicable to Japan

Based on the results of the above survey and study activities, we considered items which can be referred to in order to introduce conditional use permit (CUP) systems in Japan.

This system will probably be applied as a method of dealing gradually and systematically with regions where land use is changing: reducing the occurrence of disputes concerning construction resulting from present lax usage regulations in, for example, a case where an Urban full-service hot spring resort is to be located in an exclusively residential district as a type of the conventional category of public bathhouse, or smoothing

friction between newly built condominium apartment buildings and existing plants in quasi-industrial districts. But, the results of this research have suggested that the following two points must be studied in order to introduce this system. The first is building an environment permitting judgments without arbitrary action and misuse. Other useful reference points are: preparing individual review criteria instead of only general purpose review criteria, shifting to review types involving little individual discretion, having specialists prepare reports to support logical reviews which refer to these review criteria, limits on designated uses and districts to those considered necessary. It is also important to prepare more specific and more detailed city master plans so that they can be the grounds for judgment criteria. The second is support for the same system in regional societies. Another useful reference point is resident participation in the operation of the system, resident participation in reviews, publicizing reviews, holding numerous meetings, and having neighborhood organizations submit their views.

Other points which must be considered as background issues are the fact that in the U.S. zoning bylaws differ between cities so the range over which consistency between different judgments should be achieved is narrow, renovations and changes of use etc. are the broad objects of regulations so that regulation of use is highly effective, zoning permits also partly encompass the field of business approvals, and Planning Commissions do not supplement administrative judgments, but make independent decisions.

Postscript

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Notes

- (1) Variance: Means of approving a narrow exemption from a zoning regulation
- (2) The survey was actually carried out in more cities, but cities in which the system under study differed partially from the system under study, and cities where the system is almost never used, etc. were omitted from the analysis.
- (3) The Director of Research of the American Planning Association (APA) was interviewed to collect information about states and cities with characteristic systems.
- (4) The period from application to conclusion of review varies according to city and case, from two months at the shortest to more than six months at the longest.
- (5) In New York City, we heard the comment that many exceptions are established in light of the historical background, and the actual situation varied.
- (6) According to the interview results, this is done to avoid influence from politicians, but it is possible to appeal to the City Council.
- (7) Conditional cases are also recorded when the review organization decides to permit the variance.
- (8) In many cities, interviewees commented that because there is considerable anxiety that permission will be given without conditions in a case where a refusal of permission cannot be given, to avoid this, permissions is often given with conditions.
- (9) According to the interviews, if there is a problem, it is possible to not renew permission at the end of term, easily obtaining the understanding of those opposed.
- (10) This is a review by an administrator, but in Portland, an enactment of a Conditional Use Master Plan is requested in the case of a series of developments for universities, etc., and if permitted, the development entered is automatically permitted.
- (11) Under zoning bylaws, the zoning districts are often categorized under the broad classifications of residential, commercial, and industrial etc., the system deals only with districts positioned in these three classifications, with classifications such as neighborhood, downtown, etc. not included. And on the Usage Restriction Table, similar districts are integrated and displayed as a single item on the top of the table, and those integrated in this case are listed and aggregated as a single district.
- (12) Individual uses are utilized as usage items listed on the side of the usage restriction table. The degree of detailed segmentation of uses varies between cities, and an item presented as a single item in one city may be treated as multiple classifications in other cities, but classification is done applying items for each city as they are instead of integration or partition in comparison with other cities. However, items for which only Accessory Use is stipulated are omitted. And in Portland, usage items on the table are overall, excessive, so in a case where, referring to specific examples of uses listed in the zoning bylaws, examples of uses in classifications which are clearly different with reference to LBSC have been included, the classification work is done by dividing it into separate items.

(13) Function items displayed as Business types under the title "Standards" 10) are used, and designated individual uses are allotted to appropriate items, to organize the use classification in a form based on a medium segmentation (hundreds place of the Function No.).

(14) Concerning the symbols, in lines (table) consisting of detailed use × district, in cases where the number of elements designated under a conditional permission designation exceed half the total number of elements, and cases where, under permitted/not permitted, the number of elements permitted/not permitted in the same line exceed half the number of elements not designated with conditional permission, each is judged to be "over half". And the multiple types of conditional permissions seen in San Jose, and the classification of Limited Use etc. in Milwaukee are also aggregated uniformly without classification.

(15) In Orlando City, a table of usage restrictions which differ in the Traditional City and in the City is stipulated, and on table 2, the traditional city is aggregated, but the designated locations are basically identical in both.

Reference

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