

CHAPTER IV: INNOVATIVE LAND USE CONTROLS (RSA 674:21)

RSA 674:21 provides municipalities with a wide range of options to use in their efforts to shape land development in ways that reflect the vision of their master plans, and to deal more effectively with growth-related issues.

The use of “innovative zoning” techniques enables municipalities to adopt land use controls that allow for greater flexibility and creativity within a zoning ordinance. These controls can be used to implement more sustainable development planning principles and practices. RSA 674:21 contains a laundry-list of possible options for zoning. The list is not exhaustive and leaves the door open for municipalities to develop innovative land use controls that are not listed – note that the language states: “Innovative land use controls may include, but are not limited to....”

A community has the option to make an innovative land use control a mandatory requirement when supported by the master plan (RSA 674:21, II). These ordinances must also contain within them the standards to guide the person or board that administers the ordinance.

If the administration of the ordinance is not vested with the planning board, any proposal submitted under this section must be reviewed by the planning board prior to final consideration by the administrator.

Below are brief descriptions of some of the innovative land use controls that are included in the statute and ideas for other land use controls that municipalities may consider. Included here are short and simple explanations of each innovative technique. Other publications and sources should be consulted for a more in-depth explanation of each land use control.

TIMING AND PHASED DEVELOPMENT

The Innovative Land Use Controls statute was amended in 2015 to define “phased development,” a term that has been included in the statute for many years. The new definition is in RSA 674:21, IV(c). It applies to development phases of projects that are not intended for use in the context of growth management or a temporary growth moratorium ordinance. In the innovative land use control context, phased development means:

“...a development, usually for large-scale projects, in which construction of public or private improvements proceeds in stages on a schedule over a period of years established in the subdivision or site plan approved by the planning board. In a phased development, the issuance of building permits in each phase is solely dependent on the completion of the prior phase and satisfaction of other conditions on the schedule approved by the planning board. Phased development does not include a general limit on the issuance of building permits or the granting of subdivision or site plan approval in the municipality, which may be accomplished only by a growth management ordinance under RSA 674:22 or a temporary moratorium or limitation under RSA 674:23.”

When the timing or phasing of development is necessary to allow municipalities to work with developers to ensure that growth occurs at a reasonable rate and that community services can adequately provide for the needs of new residents, phased development must be contained within a zoning ordinance enacted under RSA 674:22 (Growth Management; Timing of Development).

INTENSITY AND USE INCENTIVE

The traditional approach to regulating density is to assign a density, typically the same as the minimum

lot size for a single-family home, to each zoning district. Innovative approaches such as lot size averaging or density based on a scoring of the attributes of the land enable more effective implementation of a municipality's master plan.

TRANSFER OF DENSITY RIGHTS

The transfer of density rights attempts to establish within a municipality a mechanism for trading the density of allowed development between zones designated for low density to areas of high density. The technique extracts a portion of the additional land value created when an area is 'up-zoned' (for example, in establishing a mixed-use village zone, new redevelopment zone, or transit-oriented development zone) as a development fee paid into a municipal conservation fund which is, in turn, used to purchase some or all of the development rights of land located in designated conservation areas. It is less cumbersome to administer and track than conventional transfer of development rights because direct linkage of land in sending and receiving zones is not necessary.

PLANNED UNIT DEVELOPMENT

Planned unit developments (PUD) are good options for municipalities to use to promote the efficient use of land and utilities by providing a pattern of development different from a "conventional" one in which there is a division of separate lots for each structure. This type of regulation can be used for residential, commercial, or industrial developments. The developments are designed so that the developer has flexibility in placing units and accessory buildings, roadways and other utilities while allowing the site to have usable open space and preserve important natural features. The site development is based upon a comprehensive, integrated and detailed plan rather than the specific constraints applicable to piecemeal lot-by-lot development under conventional zoning. A PUD should improve the quality of new development by encouraging aesthetically attractive features and promoting quality site and architectural design.

OPEN SPACE, CLUSTER, AND CONSERVATION SUBDIVISION

Open space, cluster and conservation-style subdivisions can be an important tool in promoting land and open space conservation while fostering more efficient use of land for development. This type of development preserves a large amount of undeveloped land in exchange for developing more intensely on a smaller area. A number of recent models have been developed over the past several years that attempt to make this form of development more attractive. In addition, some municipalities are now mandating this form of development in areas with critical habitat or other high natural resource value.

PERFORMANCE STANDARDS

Performance standards recognize that traditional zoning and the segregation of uses does not always work, giving rise to special exceptions and rezoning. Performance standards allow land to be developed not on the basis of rigid zoning standards, but on the physical characteristics and operations of the proposed uses. Land development under performance standards is then based on certain characteristics of development evaluated against predetermined criteria and standards. Performance standards can include traffic generation, noise, lighting levels, stormwater runoff, loss of wildlife or vegetation, or even architectural style.

ENVIRONMENTAL CHARACTERISTICS ZONING

Environmental characteristics zoning allows municipalities to protect natural resources or features

based on scientific evidence and community input. Types of resources that can be protected include aquifers, wetlands, floodplains, wildlife habitat, groundwater, and other environmental characteristics.

INCLUSIONARY ZONING

Inclusionary housing programs are a means of encouraging or requiring private developers to provide housing for various types of households based on income. Inclusionary housing functions by granting zoning exemptions and density bonuses to developers that permit building at a higher density if a portion of the proposed development is reserved for elderly, handicapped, or targeted lower-income households. Inclusionary housing provisions are only applicable in municipalities willing to use density bonuses as a housing development incentive for a recognized community need. In New Hampshire, inclusionary housing programs are voluntary. Depending on the zoning ordinance, developers interested in applying for a density bonus apply either to the zoning board of adjustment or to the planning board. A municipality does not fulfill its obligation to provide a reasonable opportunity for affordable housing through the adoption of a voluntary inclusionary zoning ordinance that relies on incentives that will make workforce housing developments economically unviable.

ACCESSORY DWELLING UNIT STANDARDS

Accessory Dwelling Units (ADU) can address a number of housing needs within a community. ADUs are one way that a municipality can provide for more affordable and diverse housing. ADUs can provide flexibility in household arrangements to accommodate family members or nonrelated people in a permitted single-family dwelling, while maintaining aesthetics and residential use compatible with homes in a neighborhood. On June 1, 2017, new ADU state laws took effect requiring all municipalities to allow internal or attached ADUs in all zoning districts where single-family dwellings are permitted. The new ADU requirements can be found in RSA 674:71 through RSA 674:73. The new laws give municipalities several options in how they regulate ADUs, so it is strongly recommended that planning boards amend their municipality's current ADU regulations. If ADUs are not currently addressed in the zoning ordinance, adoption of a new ADU process is recommended.

IMPACT FEES

Impact Fees are regulated by RSA 674:21, V. These fees can be charged to cover the costs of capital improvements that are necessitated by new developments. Impact fees may only be charged for water treatment and distribution facilities; wastewater treatment and disposal facilities; sanitary sewers; storm water, drainage and flood control facilities; municipal road systems and rights-of-way; municipal office facilities; public school facilities; the municipality's proportional share of the capital facilities of a cooperative or regional school district of which the municipality is a member; public safety facilities; solid waste collection, transfer, recycling, processing and disposal facilities; public library facilities; and public recreational facilities not including public open space. All impact fees shall be assessed at the time of planning board approval of a subdivision or site plan or, when no planning board approval is required, the issuance of a building permit or other appropriate permission to proceed with development. The maximum time that an impact fee can remain unexpended is 6 years. RSA 674:21, V was amended in 2012 to create two new provisions: (1) a reporting requirement and (2) an amnesty provision for the prior collection of impact fees for improvements to state highways.

VILLAGE PLAN ALTERNATIVE SUBDIVISION

RSA 674:21, I(n), Village Plan Alternative Subdivision, enables towns to adopt this zoning and regulatory technique to encourage the preservation of open space and the efficient use of land and public and private infrastructure.

There are three key features of the village plan alternative:

1. The entire density permitted by existing land use regulations must be located within 20 percent or less of the entire parcel available for development. The remaining 80 percent is to be used for conservation, recreation, or agricultural uses.
2. The applicant must grant an easement to the municipality that restricts development and specifies that the restrictions are enforceable by the municipality. The village plan alternative must also comply with existing subdivision regulations relating to emergency access, fire prevention, and public health and safety, including setback requirements for wells, septic systems or wetlands requirements imposed by the Department of Environmental Services; however, lot size, frontage and setback requirements, as well as density regulations, shall not apply.
3. An application made under the village plan alternative ordinance must be given expedited review. See RSA 674:21, VI for more details.

INTEGRATED LAND DEVELOPMENT PERMIT

In 2013, RSA 674:21 (Innovative Land Use Controls) was amended to add an “integrated land development permit option” to allow a project to proceed, in whole or in part, as permitted by the NH Department of Environmental Services (DES) under RSA 489.

An applicant for approvals or permits under two or more DES permit programs may apply for an integrated land development permit in lieu of all individual permits such as wetlands, shoreland and alteration of terrain permits. Municipalities may participate in the process with the consent of the applicant and/or at the invitation of DES.

RSA 674:21, VII also authorizes a municipality to adopt an innovative land use control ordinance allowing the planning board to approve a project that does not fully conform to the local zoning ordinance if it has been approved by DES under the integrated land development program.

In 2014, the legislature delayed implementation of the DES integrated land development permit program until July 1, 2017. This has been suspended for the biennium ending June 30, 2019.

OTHER INNOVATIVE LAND USE CONTROLS

Economic growth and development can present opportunities for New Hampshire but if managed poorly can place additional burdens on communities and their natural resources. Innovative land use techniques, used as a whole or individually, can help municipalities grow in a way that is more consistent with their vision while protecting their natural resources and community character. While the following are not specifically identified in RSA 674:21, the use of innovative land use controls is unlimited.

RIDGELINE AND STEEP SLOPE DEVELOPMENT

Preserving rural character is a top priority for most small towns in New Hampshire and undeveloped hillsides are an essential component of a town’s local identity. The steep slopes ordinance can identify regulatory and voluntary approaches that control or manage development on steep slopes. A national, regional, and local literature review should be conducted. Typical issues such as ridge-line visibility, aesthetics, and erosion and flooding that would potentially damage water quality may be explored, as well as any other related issues.

HABITAT PROTECTION

This technique ties together current “best practice” voluntary and regulatory measures to promote land stewardship for habitat protection. The approach relies on the science-based identification of critical habitat based on wildlife and co-occurrence mapping, as well as regional and local wildlife studies. Regulatory measures that focus on the landscape level as well as the site level can be included. At the site level, these regulatory measures include recommended best practices for low-impact site design, including drainage, tree protection, and protection of riparian areas. Regulatory measures at the landscape level include development density and location factors that consider migratory needs, habitat linkage coordination, and cooperation with regional efforts to protect habitat.

INFILL DEVELOPMENT

Infill development is development that takes place within existing communities, making maximum use of the existing infrastructure instead of building on previously undeveloped land.

AGRICULTURAL INCENTIVE ZONING

Preserving rural character is a top priority for most small towns in New Hampshire, and the zoning statutes specifically state that “agricultural activities are a beneficial and worthwhile feature of the New Hampshire landscape and shall not be unreasonably limited by use of municipal planning and zoning powers...”

MINIMUM IMPACT DEVELOPMENT (SITE SCALE)

Minimum impact development is a community planning approach that balances “smart growth” principles, land and resource conservation, indoor environmental quality, and energy efficiency in order to minimize pollution, promote social capital, protect open spaces, and maintain connectivity between natural resources. At the site scale, minimum impact development design principles include incorporating a mix of uses, providing opportunities for mobility through and around the site, promoting social interaction through the location of social infrastructure such as benches or common dining areas, protecting existing resources such as trees or stone walls by drawing lot lines after key resources are identified, minimizing impervious surfaces, retaining natural vegetation wherever possible, and requiring non-invasive plantings where existing vegetation cannot be retained. Emphasis is placed on maximum on-site storm water infiltration and prevention of storm water runoff.

ENERGY-EFFICIENT DEVELOPMENT

Energy-efficient development incorporates site design techniques to take advantage of sun exposure, differences in microclimate and landscaping, as well as planning techniques that can be used in designing housing, deciding on density levels, integrating different land uses, and designing transportation and circulation systems. Energy-efficient planning techniques can be implemented through the use of traditional police power controls such as site plan regulations, zoning ordinances, and building codes.

TRANSIT-ORIENTED DEVELOPMENT

Transit-oriented development (TOD) encourages a mixture of residential, commercial, and employment opportunities within identified areas that have access to transit centers. TOD promotes development that supports transit by ensuring access to transit and attempts to limit conflicts between vehicles and pedestrians and transit operations. TOD allows for more intense and efficient use of land at increased densities for the mutual reinforcement of public investments and private

development. Uses are regulated for a more intense built-up environment, oriented to pedestrian amenities, creating a more pleasant pedestrian environment without excluding the automobile. TOD is usually restricted to areas within walking distance to the transit station and can be new construction or redevelopment.

LIVABLE/WALKABLE DEVELOPMENT DESIGN

Designing communities as livable/walkable places means creating a balance among the economic, human, environmental, and social health of a community. Such development considers community planning and zoning practices at a human scale through the implementation of tools such as traffic calming devices, street and intersection design, bicycle and pedestrian facility design, ADA requirements, and community beautification programs. Livable/walkable development practices protect natural resources by reducing the use of personal automobiles, support business by enabling people to access services locally, promote social capital by encouraging casual interaction, enhance personal physical fitness through increased activity, and diminish crime and other social problems by increasing the number of people on local streets.

OTHER PLANNING AND DEVELOPMENT TECHNIQUES

ACCESS MANAGEMENT

Access management is the practice of coordinating the location, number, spacing and design of access points to minimize site access conflicts and maximize the traffic capacity of a roadway. Uncoordinated growth along major travel corridors can result in strip development and a proliferation of access points. In most instances, each individual development along a corridor has its own access driveway. Numerous access points along the corridor create conflicts between turning and through traffic that cause delays and accidents. Historically, transportation and access management plans concentrated primarily on the movement of vehicles. Current planning efforts focus on all modes of transportation including vehicles, public transit, bicycles and pedestrians.

DARK SKIES LIGHTING ORDINANCE

The purpose of a Dark Skies Lighting Ordinance is to lessen the impact of light pollution, to reduce the effects of unnatural lighting on the environment, and to reduce energy usage pursuant to RSA 9-E:3. There are a number of existing examples of these lighting ordinances throughout the country.

GROWTH BOUNDARIES

Urban growth boundaries mark the separation between rural and urban lands by designating growth areas for development and creating economic incentive for development to take place within designated urban service areas. They are often related to or are a precursor to other sustainable development techniques such as brownfields development, infill development and transfer of density rights.

GROWTH MANAGEMENT

According to RSA 674:22, municipalities may regulate and control the timing of subdivision development with approval of the legislative body. Such ordinances may be considered only after a master plan and a capital improvements program have been adopted by the planning board and should be based on a growth management process intended to assess and balance community and regional development needs.

The growth management ordinance may only be adopted where there is a clearly demonstrated and documented need to regulate the timing or rate of development in order to allow municipal services to keep pace with growth. Therefore, the first step that should be taken by the planning board or governing body should be to prepare a study of the municipality's current and projected growth rates and its need for additional municipal services to accommodate such growth. The growth management ordinance should outline how the municipality will establish the needed community services. This community services development plan should be prepared by the capital improvements program committee, if one has been established. Growth management ordinances must include a termination date and may not restrict growth any more than necessary for the municipality to catch up and make a good faith effort to provide the needed municipal services. The ordinance and community services development plan must be evaluated by the planning board at least once a year to confirm reasonable progress and report to the legislative body in the municipality's annual report.

Alternately, in unusual or under emergency circumstances, municipalities may adopt interim or temporary growth moratoriums (RSA 674:23). Such moratoriums may apply to the issuance of building permits or subdivision or site plan approvals for a period of no more than one year. A moratorium may be adopted by the legislative body so that the municipality may temporarily suspend development to allow time for the planning board to amend and update the zoning ordinance, master plan, or capital improvements plan in order to meet growth-induced community needs. The temporary growth ordinance must include a statement about the circumstances creating the need, the board's findings, the ordinance's term (maximum 1 year), the types of development the ordinance applies to, a description of the area and the course of action to alleviate the circumstances. The municipality may wish to exempt or create a special exception or conditional use permit to allow development that may have minimal or no impact on the circumstances.

Municipalities that adopted growth management ordinances before July 11, 2008 were given until June 1, 2010 to amend their ordinances to conform to changes in the growth management statutes. If a municipality adopted an interim growth management ordinance under RSA 674:23 prior to July 11, 2009, that ordinance shall remain in effect until one year after its passage or until the municipality's next annual meeting.

WORKFORCE HOUSING

RSA 674:58-61 codifies the holdings of *Britton v. Chester*, a case decided by the New Hampshire Supreme Court in 1991. It requires all municipalities' land use ordinances to provide "reasonable opportunity" for the development of workforce housing, including rental housing. Key here is a set of definitions and standards to assess "reasonable opportunity." The municipality is enabled to choose how to provide a "reasonable opportunity" for workforce housing and where it may be permitted. The statute requires that workforce housing be allowed within a majority of the land areas where residential uses are permitted and also allow rental multi-family housing, although this does not have to be allowed in a majority of residential zones.

Municipalities may require workforce housing applicants to record restrictive covenants that ensure the continued or long-term affordability of the proposed units. The local land use board may adopt regulations specifying the term for such covenants and may also include means of monitoring to ensure compliance.

Applicants proposing to develop workforce housing that are denied, or have conditions placed upon approval that jeopardize the development's affordability, may appeal and be heard either by the superior court, housing appeals board, or a court-appointed referee within six months. For additional

information about the workforce housing law, see the Affordable/Elderly/Workforce Housing subject heading in the on-line NH OPD Resource Library.

Additionally, pursuant to RSA 673:4-c, municipalities are enabled to create local housing commissions. This local land use board serves as an advocate for housing issues and housing affordability. Local housing commissions have the power to administer an affordable housing revolving fund that could be used to facilitate affordable housing transactions.

Beginning July 1, 2023, incentives established for housing for older persons shall be deemed applicable to workforce housing developments. If a municipality allows an increased density, reduced lot size, expedited approval, or other dimensional or procedural incentive under this section for the development of housing for older persons, as defined and regulated pursuant to RSA 354-A:15, VIII, it may allow the same incentive for the development of workforce housing as defined in RSA 674:58, IV.

For municipalities that fail to make any adjustments to incentives for housing for older persons before July 1, 2023, those same incentives will automatically apply to developments of workforce housing under RSA 674:58, IV.