

Look Before You Leap: Understanding Conditional Use Permits

View

 Edit

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All New Hampshire municipalities are familiar with land use regulation. Even the smallest towns face questions of growth, development, compatibility of uses, conservation of resources, and the need for infrastructure. Municipalities have a number of well-worn tools at their disposal to address these questions, including the master plan, subdivision and site plan review, special exceptions, and variances, to name a few. One option that local officials may know less about, however, is the "conditional use permit," sometimes called a special use permit. These permits are useful but can be a bit confusing, and that confusion may lead a municipality astray. What are conditional use permits, exactly, and how is a municipality supposed to use them?

Q. What is a conditional use permit?

A. A conditional use permit is a tool used by municipalities to implement "innovative land use controls" adopted pursuant to [RSA 674:21](#).

Land use activities can be divided into three categories: (1) "permitted" uses that are allowed in certain areas without the need for a special permit (such as a single-family home in a residential zone); (2) prohibited uses that are not allowed in certain areas; and (3) the middle ground of uses that might be beneficial but can create problems if not controlled properly. Examples of middle ground uses might include construction in wetlands or wetland buffer zones, location of telecommunications facilities, or clustered residential developments. Conditional use permits address this middle ground of uses. By placing certain conditions on them and requiring a separate permit approval process, the municipality can allow property to be used in ways that will benefit the community while still controlling the potential risks.

Q. What authority do municipalities have to require conditional use permits?

A. As part of the grant of zoning power, the State has given municipalities the power to adopt innovative land use controls for the purpose of promoting the health, safety, or the general welfare of the community. [RSA 674:16, I and II](#). Innovative land use controls may be required when they are supported by the municipality's master plan. [RSA 674:21, II](#).

Innovative land use controls may include, but are not limited to:

- • timing incentives;
- • phased development;
- • intensity and use incentive;

January 2006

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- • transfer of density and development rights;
- • planned unit development;
- • cluster development;
- • impact zoning;
- • performance standards;
- • flexible and discretionary zoning;
- • environmental characteristics zoning;
-
- inclusionary zoning;
- • accessory dwelling unit standards;
- • impact fees; and
- • village plan alternative subdivisions.

The statute specifically authorizes municipalities to administer these controls by granting conditional or special use permits. **RSA 674:21, II**. Questions may arise, however, because the statute does not define what these permits are or describe how they should work.

Q. When may a municipality require a conditional use permit?

A. In order to adopt an ordinance that requires conditional use permits, the municipality must have a master plan and a planning board. If those two things exist, a conditional use permit may be used to implement any of the innovative land use control methods in RSA 672:21, and, based on the way the statute is written, for any other issue that is addressed in the master plan. **RSA 674:21, II**. It is clear that this may be done either as part of the enactment of a comprehensive zoning ordinance or as an amendment to the zoning ordinance. It also appears acceptable for a town with or without comprehensive zoning to adopt a stand-alone ordinance addressing a specific innovative land use control method, such as wetlands regulation, as long as it is enacted according to the statutory requirements discussed further below.

Conditional use permits might be used appropriately in connection with:

- • construction or filling in wetlands, wetland buffers, or aquifer protection districts;
- • the location, construction or modification of telecommunications facilities in certain areas;
- • the development of planned unit or cluster developments; and
- • the location and configuration of certain commercial signs in specific zones.

This is by no means an exhaustive list; municipalities can use conditional use permits to address any aspect of an innovative land use control that is addressed in the master plan and falls within the zoning power.

It may be of more critical importance, however, to understand when a conditional use permit may *not* be used.

Q. What about subdivision or site plan review regulations?

A. Subdivision and site plan review regulations may address the implementation of conditional use permits, but the original requirement for the permit must come from the zoning ordinance.

The power to require conditional use permits was granted to municipalities as part of the zoning power and must be exercised through a zoning ordinance. **RSA 674:21, III**. Although "home rule" remains a popular ideal, the reality is that municipalities only have those powers that the legislature grants to them. Since the power to require a conditional use permit was only granted with respect to zoning powers, municipalities cannot require such a permit in connection with anything except zoning and zoning-related ordinances.

However, subdivision and site plan review necessarily involve the planning board's administration of the standards and requirements set forth in the zoning ordinance, and administration of conditional use permits is often delegated to the planning board. Therefore, it would be proper for site plan or subdivision regulations to address the board's application and approval process for these permits.

Q. Can a conditional use permit be required under a police power ordinance?

A. No. As explained above, municipalities were only granted the authority to require conditional use permits in connection with zoning. The authority to enact so-called "police power" ordinances (such as traffic control, tattoo parlor or noise ordinances) comes from a different statute, **RSA 31:39**. That statute does not give municipalities the power to include a conditional use permit requirement in those ordinances. Similarly, the statutes that grant municipalities the power to regulate certain specific activities including open-air movie theaters (**RSA 31:41**), motor vehicle race tracks (**RSA 31:41-a**), and hazardous embankments (**RSA 31:41-b**) do not authorize conditional use permits. This means that a municipality cannot require conditional use permits in connection with these ordinances because the legislature has not included that in its grant of power.

Q. How are innovative land use controls and conditional use permitting requirements enacted and administered?

A. These requirements are enacted the same way a zoning ordinance is enacted. They may appear as part of a comprehensive zoning ordinance, as an amendment to a zoning ordinance, or as a stand-alone ordinance that exercises zoning powers (for example, a wetlands or telecommunications ordinance).

As noted above, a municipality's authority to require a conditional use permit comes from **RSA 674:16** (the general grant of zoning power) and **RSA 674:21** (allowing the use of innovative land use controls and conditional use permits). Both of those statutes require ordinances to be enacted under the zoning ordinance enactment procedures of **RSA 675:2-5**. While the exact procedure may vary based on whether the municipality is a city or a town and what form of government it uses, all zoning ordinances require at least one public hearing, noticed and conducted according to **RSA 675:7**, and a vote by the local legislative body (city/town council, mayor/council or board of aldermen, or town meeting). This is one area where details count; a zoning ordinance that is not adopted using all of the required procedures can be declared void and unenforceable.

An innovative land use control ordinance should designate which person or board will administer it, and must include the standards to guide the administrator in doing so. The administrator can be the planning board, board of selectmen, zoning board of adjustment or any other person or board that the ordinance designates. If the planning board is not the administrator, it must still review and comment in writing upon all proposals, and the administrator shall either incorporate the planning board's comments into its decision or set forth its findings and decisions on the planning board's comments. [RSA 674:21, II](#).

There is one significant difference between innovative land use controls and other zoning powers. Ordinarily, when a planning board issues a decision that involves interpretation of a zoning ordinance, the decision should be appealed to the municipality's zoning board of adjustment. However, if the planning board is given the responsibility of administering an innovative land use control, the board's decisions on applications for conditional use permits should be appealed directly to the superior court instead of first going to the ZBA. [RSA 676:5, III](#).

Q. What is the difference between a conditional use permit and a special exception?

A. The main difference is which board will administer the approval. Both conditional use permits and special exceptions are zoning tools used to allow the development of beneficial uses that may cause problems if not controlled properly. Each must be authorized in the zoning ordinance along with the conditions and standards that the administering board must find before issuing the approval. However, conditional use permits can be administered by any person or board the town selects. [RSA 674:21, II](#). The planning board is often the board of choice for this task; in that case, the conditional use permitting process can be combined with site plan review for a more streamlined approval process. Special exceptions, on the other hand, must be issued by the zoning board of adjustment. [RSA 674:33, IV](#). This means that a developer seeking a special exception ordinarily must proceed in front of two boards, one for subdivision/site plan review and another for the special exception. This may be a more cumbersome process for developers but may also provide an additional layer of review and public comment, which can be a good idea for uses or situations that are controversial or complex.

Given the choice between conditional use permits and special exceptions, therefore, a municipality may wish to consider: (1) what use or subject matter the approval will address, (2) which board or official is best suited to review and decide on an application regarding that use or subject matter, and (3) whether or not they wish multiple boards to review different aspects of the same proposal.

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