

# Reexamining Your Zoning Ordinance – Innovative Land Use Controls



2012 LGC Municipal  
Lecture 3



Presented by

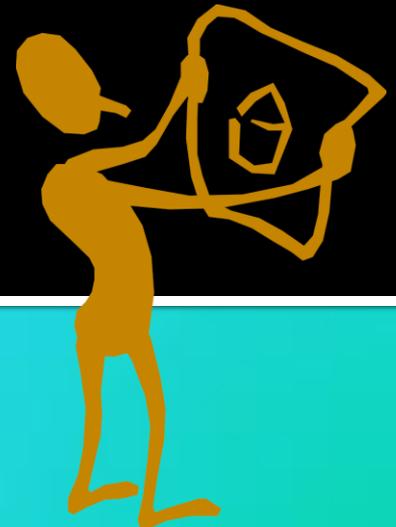
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- Address zoning on a larger scale
- Uniformity
- Implement the goals of the Master Plan
- Meet the needs of a growing community
- Accommodate and manage future development
- Create small, self-sustaining mixed-use neighborhoods



## Utility of Innovative Land Use Controls

# The City of Dover

**Why did Dover implement innovative land use controls?**



# *Clare v. Town of Hudson*, 160 N.H. 378 (2010)

## Facts

- \$89,153 impact fee exacted from developer
- Intersection improvements
- Part of Town-wide repaving
- Paving company invoiced Town only \$75,437.05 for intersection work
- Yet Town paid the company all of the \$89,153



Credit: NH Supreme Court

## Updates in the Law

*Clare v. Town of Hudson, 160 N.H. 378 (2010)*  
*continued*

Facts



- Town did spend a total of \$116,582.59 on intersection improvements
- Town claimed all of the \$89,153 was used for the intersection
- Clare disagreed and filed suit



Updates in the Law

# *Clare v. Town of Hudson*, 160 N.H. 378 (2010)

## Decision

- Impact Fee statute RSA 674:21, V
- “[T]he Town was not authorized to pay the full \$89,153 from the Bush Hill Road account to [the paving company], when only \$75,437.05 was actually attributable to the work for which the impact fee was collected.”



Updates in the Law

# Senate Bill 291 – Amendment to RSA 674:21

Effective July 28, 2012

Two additions

- 1) Reporting Requirement
- 2) State Highway Provision



Updates in the Law

# Senate Bill 291 – Amendment to RSA 674:21

## 1) Reporting Requirement

Report all impact fee expenditures on an annual basis

Within 60 days following the end of the fiscal year

Containing:

- List of expenditures of impact fee revenue
- Capital improvement project
- Dates fees were assessed
- Dates fees collected



Updates in the Law

# Senate Bill 291 – Amendment to RSA 674:21

## 2) State Highway Provision

- Use of revenue from fees *already collected* for improvements to state highways
- Still cannot assess impact fees for improvements to state highways
  - Improvements to state highways must be related to impacts caused by the development



Updates in the Law

# Senate Bill 291 – Amendment to RSA 674:21

## 2) State Highway Provision

Types of allowed improvements:

- Traffic signals & signs
- Turning lanes
- Additional travel lanes
- Guard rails



Updates in the Law

# Refunding Expired Impact Fees

Developer cannot be located or the developer and property owner both claim the refund:

- Petition for Bill of Interpleader in Superior Court
- Name all known parties
- Deposit disputed amounts with the Court
- May recover filing fee and expenses

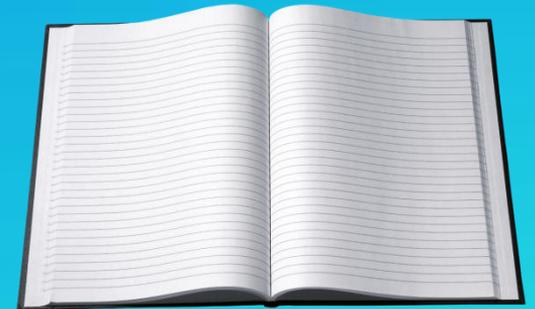


Updates in the Law

# Administering Innovative Land Use Controls

## Authority

- RSA 674:16 – authority to adopt zoning ordinance generally
- RSA 674:21 – authority to specifically adopt innovative land use controls
  - Provides a non-exhaustive list of types of controls



# Administering Innovative Land Use Controls

## Non-exhaustive list of types of controls

- a. Timing incentives
- b. Phased Development
- c. Intensity and use incentive
- d. Transfer of density & development rights
- e. Planned unit development
- f. Cluster development
- g. Impact zoning
- h. Performance standards
- i. Flexible and discretionary zoning
- j. Inclusionary zoning
- k. Accessory dwelling unit standards
- l. Impact fees
- m. Village Plan Alternative subdivision

# Administering Innovative Land Use Controls

## Conditional Use Permits

- Similar to special exceptions
- However, may be issued by any board – so long as the zoning ordinance gives authority
- Restricted to zoning matters
- Ordinance must
  - Clearly explain what is covered by CUPs
  - Detail the requisite process for applicants
  - Guidelines for grant or denial

# Administering Innovative Land Use Controls

## Planning Board

- Required to comment on applicant's proposal under CUP, regardless of the board reviewing the application
- Administer CUPs as part of site plan & subdivision review process
  - Efficient, cost effective
  - Single process before one board
- PB decisions on CUPs appealed to the Superior Court, not the ZBA

# Administering Innovative Land Use Controls

## Conditional Use Permits

How does the City of Dover use  
conditional use permits?

Administered by the Planning Board

# Legality & Constitutionality of Innovative Land use Controls

## Generally

- Burden on party challenging the ordinance
- Presumption of validity
- Courts do not generally interfere with a municipality's adoption of zoning ordinance provisions
- However, to avoid challenges or to increase chances of prevailing if challenged – have clear, definite, certain terms that can be understood by the average person & have reasons/support for the ordinance change

# Legality & Constitutionality of Innovative Land use Controls

## Constitutional Challenges Generally

### Equal Protection

- Concerns discrimination
- Test:
  - Ordinance must be substantially related
  - To an important governmental objective
- Often brought with substantive due process claims

# Legality & Constitutionality of Innovative Land use Controls

## Constitutional Challenges Generally

### Due Process

- Procedural due process
  - Ordinance must contain sufficient “notice reasonably calculated” to alert affected parties of the process and what is required. *Kelsey v. Town of Hanover*, 157 N.H. 632 (2008).
  - Avoid vague terms
- Substantive due process
  - “questions the fundamental fairness of an ordinance” *Dow v. Town of Effingham*, 148 N.H. 121 (2002)
  - Looks at whether the restriction on property rights is “rationally related” to “legitimate goals” of the municipality. *Boulders at Strafford v. Town of Strafford*, 153 N.H. 633 (2006)

# Legality & Constitutionality of Innovative Land use Controls

## Constitutional Challenges Generally

### Taking/Inverse Condemnation

- Eminent domain and just compensation
- Inverse condemnation can occur by stripping property value through excessive regulation
  - “substantially deprives the owner of the economically viable use of his land” *Huard v. Town of Pelham*, 159 N.H. 567 (2009)
  - “substantial reduction in the value of the property” *Id.*

# Performance Zoning

- **City of Dover**

- **Mixed Use Overlay District**

- **Specific Challenges**

- Takings – generally rejected by courts
- Make sure such zoning has a defined need and purpose
- The restrictions and allowances in the zone must help to satisfy the defined purpose(s)

**Specific Types of Innovative  
Land Use Controls**

# Phased Development & Zoning

- **What is it?**
  - Controls timing of development – usually from rural to urban
- **Designate these growth areas through zoning districts**
  - Incorporate provisions for timing of growth
- **General Requirements to withstand a challenge**
  - Evidence of change in the neighborhood warranting zoning change – “substantial change”
  - Cannot single out a single parcel
  - In-line with the Master Plan

Specific Types of Innovative  
Land Use Controls

# Transfer of Development Rights

- City of Dover

- Specific Challenges

- Takings – not a taking *per se* but if a taking has occurred, the value of TDRs can be use to offset municipality's liability for a taking
- Equal Protection & substantive due process
  - Generally rejected by courts so long as TDR program gives equal treatment to all properties within the program

Specific Types of Innovative  
Land Use Controls

# Environmental Characteristics Zoning

*A type of Impact Zoning*

- **City of Dover**

- Wetland Protection District
- Riverfront Residential Overlay District

- **Specific Challenges**

- Substantive due process & equal protection
  - Show legitimate municipal interest in protection of an area
  - Show the zoning is “rationally related” to this interest

Specific Types of Innovative  
Land Use Controls

# Planned Unit Developments

## •What is it?

- Incorporate all types of development in one area, with specific allowances and restrictions for that area
- Residential, commercial, office, industrial
- Create a “self-contained” community to live, work and shop

## •How does it work?

- Amend ordinance to create a PUD district (also requires amending the zoning map) or amend the ordinance to allow PUDs in certain districts already existing

## •Specific Challenges

- Equal Protection
- Takings

Specific Types of Innovative  
Land Use Controls

# Planned Unit Development



BUCKWALTER  
PLACE

BLUFFTON, SC



- MIXED USE
- RETAIL
- RESIDENTIAL
- HOSPITALITY
- PARKING GARAGE
- MUNICIPAL
- TECHNOLOGY



Credit: Buckwalter Commercial, LLC, Bluffton, SC

## Reimbursement Districts

### •What is it?

- Initial developer performs all upgrades and improvements beyond what is necessary for its development
- Create a zoning district encompassing the improvements
- Future developers within the district contribute their “fair share” of the improvement costs
- Contribution amount is transferred to the original developer – up to a maximum amount or capped by a timeframe

### •What is the benefit?

- Allows the improvements to be done all at once
- Encourages future development of an area

### •Specific Challenges

- Future developer can only be required to contribute its “fair share” of improvement costs necessitated by its development. *Land Vest Prop. V. Town of Plainfield*, 117 N.H. 817 (1977).

Specific Types of Innovative  
Land Use Controls

# Improvement District



Photo credit: Hawaii  
Community Development  
Authority

# Floating Zones

(A type of Flexible & Discretionary Zoning)

## •What is it?

- A zoning district is established and defined but its location within the municipality and on the zoning map is not set
- The zone is set and “fixed” upon application by a landowner or developer

## •Specific Challenges

- NH does not specifically allow floating zones but has not been challenged in any reported decision in NH
- Difficult to defend – implicitly allows preferential treatment of a single property or group of properties – spot zoning concerns

Specific Types of Innovative  
Land Use Controls

# Contract and Conditional Zoning

(A type of Flexible & Discretionary Zoning)

## •What is it?

- Contract Zoning: agreement between municipality and developer which determines the zoning requirements - binds the municipality
- Conditional Zoning: involves rezoning request - developer agrees to be bound by certain restrictions as a condition of approval

## •Specific Challenges

- Contract zoning is not permissible in NH – severely restricts municipality's police power
- Conditional Zoning is valid in NH but it is a fine distinction from contract zoning- *City of Portsmouth v. Schlesinger*, 57 F.3d 12 (1995)

Specific Types of Innovative  
Land Use Controls

# Open Space Subdivisions

City of Dover

Using this technique

Lessons learned

Specific Types of Innovative  
Land Use Controls

# Open Space Subdivision



Figure 7A-2. Site A: Yield Plan



Figure 7A-9. Site A: Drawing in the Lot Lines

Illustration credit: Randall J. Arendt,  
Conservation Design for Subdivisions: A  
Practical Guide to Creating Open Space  
Networks, Island Press, 1996

## Flexible Uses

City of Dover

Using this technique

Lessons learned

Specific Types of Innovative  
Land Use Controls

## Form Based Code

### City of Dover – Zoning for the Downtown

Using this technique  
Lessons learned

Specific Types of Innovative  
Land Use Controls

# Accessory Dwelling Units

City of Dover

Using this technique

Lessons learned

Specific Types of Innovative  
Land Use Controls

# Spot Zoning

- What is it?

- Occurs when a single parcel or group of parcels is segregated for preferential treatment or unequal adverse treatment

- What is not spot zoning?

- A small area is rezoned which results in a direct benefit to the landowner provided there is either a public need for the rezoning or a compelling reason

- Rezoning that is “part of a well-considered and comprehensive plan calculated to serve the general welfare of the community.” *Mayor & Council of Rockville v. Rylyns Enters.*, 814 A.2d 469 (Md. 2002).

# Questions?



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