Reexamining Your Zoning Ordinance – Innovative Land Use Controls

2012 LGC Municipal Lecture 3

Presented by

Keriann Roman, Esq., Drummond Woodsum
kroman@dwmlaw.com

Chris Parker, AICP, City of Dover
C.Parker@dover.nh.gov
• 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
Why did Dover implement innovative land use controls?

Credit: City of Dover, NH

**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**
**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**

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.”
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
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
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
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
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
Constitutional Challenges Generally

Due Process

- Procedural due process
  - Avoid vague terms

- Substantive due process
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)
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 used 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
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

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. Rylyn's Enters., 814 A.2d 469 (Md. 2002).
Questions?

Presented by

Keriann Roman, Esq., Drummond Woodsum
kroman@dwmlaw.com; (603) 433-3317

Chris Parker, AICP, City of Dover
C.Parker@dover.nh.gov; (603) 516-6008