

RESILIENT LAND USE GUIDE FOR NH

ADAPTING TO CLIMATE CHANGE
& COASTAL HAZARDS

JUNE 2022



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ADOPTING THESE REGULATIONS: LEGAL AUTHORITY AND PROCESS FOR ADOPTING REGULATIONS

BACKGROUND

The State of New Hampshire adopted RSA 674:21 in 1983, authorizing innovative land use controls to deal with complex planning issues ranging from coastal flood regulations to impact fees. These land use controls are drafted and adopted with the goal of enhancing sustainable development and planning practices. RSA 674:21 provides municipalities with the authority to adopt, administer and enforce innovative land use controls. As stated in the statute, an adopted innovative land use control “may be required when supported by the master plan and shall contain within it the standards which shall guide the person or board which administers the ordinance.” RSA 674:21 gives municipalities flexibility to determine how to adopt and administer innovative land use controls. While this guide provides model ordinances and regulations that communities can base their adopted language on, zoning must be adopted according to RSA 674:18; communities must have adopted the mandatory sections of the master plan and must have an established planning board that has been granted authority by the legislative body to regulate subdivisions and site plans. This section of the guide provides an overview of the various ways communities can adopt, administer, and enforce regulations based on the desired outcome.

ADOPTION

Municipalities have the flexibility to adopt innovative land use controls as amendments to their zoning ordinance, site plan regulations or subdivision regulations. Depending on the desired outcome, communities should consider the various impacts of adopting innovative land use controls via zoning, subdivision, or site plan. Zoning ordinances are adopted by the local legislative body. The local legislative body, depending on the municipality, could be town meeting, town council/city council, or board or mayor and alderman. Subdivision and site plan regulations are adopted by the planning board. While the adoption process differs, the ability to grant relief from standards also varies between zoning ordinances and site plan or subdivision regulations (BEA, 2021).

ZONING ORDINANCE

Zoning is utilized to regulate the size, location and use of buildings and other structures for the purpose of promoting the health, safety, and general welfare of the community. A zoning ordinance may be enacted by ballot vote of a majority of the voters present and voting at the annual or special town meeting, though in the case of a properly filed protest petition that meets the requirements of state law, the majority needed to for an affirmative vote may be increased to a two-thirds vote. Municipalities that have a town council or city council will have town charter provisions that provide the procedures required for enacting and amendment zoning (BEA, 2021).



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There are three ways a zoning ordinance amendment may be initiated:

1. The planning board may propose an amendment to the zoning ordinance.
2. The governing body may propose zoning amendments.
3. 25 or more voters of the municipality can petition for a zoning amendment.

The process for adopting a zoning ordinance amendment requires:

- A. Planning board must hold a public hearing. Notice of the public hearing must be posted in two places, a locally circulated newspaper or on the municipal website at least 10 days in advance of the hearing. Additional notice requirements can be found in RSA 675:7.
- B. Planning Board must, by vote, determine the final form of the ordinance, amendment, or amendments to be presented to the voters or governing body.
- C. If the planning board makes substantive changes to the proposed amendment(s), they must hold a second public hearing.
- D. The planning board must provide the town clerk with final wording of the zoning question to be placed on ballot for vote, no later than the fifth Tuesday before the annual or special town meeting.
- E. Town Meeting vote or action as prescribed in town charter by town council or city council.
- F. Lastly, a copy of the adopted language shall be sent to the Office of Planning and Development to be kept on file.

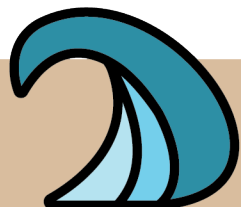
Note: An official ballot referendum town (SB 2) requires a session for voting by official ballot at a special town meeting but does not require a deliberative session for a zoning change (BEA, 2021). Town meeting communities must follow the Zoning Amendment Calendars, which can be found on [NHMA's website](#).

SITE PLAN AND SUBDIVISION REGULATIONS

Site Plan Review regulations are a tool utilized by communities to review non-residential, multi-family residential, and housing developments that are permitted uses to ensure they are constructed in a way that does not cause adverse impacts on surrounding properties and does not cause land use issues such as drainage, traffic, lighting and more. Similarly, Subdivision regulations are utilized to review proposed land subdivisions to ensure development patterns fit within the overall community and pattern of development including street networks, water lines, and other utilities and infrastructure.

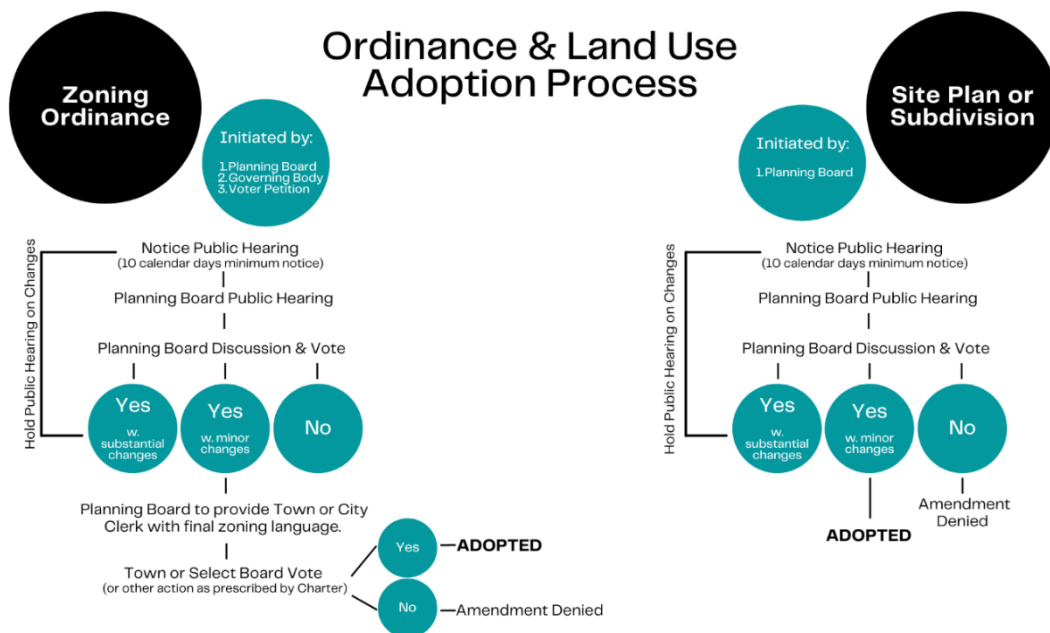
Unlike Zoning Ordinances, Site Plan Review and Subdivision regulations include waiver provisions that provide flexibility for the planning board to waive regulations when they present an undue burden on the applicant and will not have an adverse impact on abutting properties or the community. Site Plan Review and Subdivision regulations can be adopted and amended by the planning board through the following process:

- A. Planning board must hold a public hearing. Notice of the public hearing must be published in a newspaper of general circulation or on the municipality's webpage and posted in at least



two public places within the city or town. The notice must be given at least 10 calendar days prior to the hearing.

- B. Either at the close of the public hearing or at a subsequent meeting, the planning board should vote on whether or not to adopt the proposed regulations. The vote should follow a discussion of the board on the comments made at the public hearing and should identify if any changes should be made, in response to comments. If major revisions are made to the proposed amendment, the planning board should hold a second public hearing before final adoptions. A majority vote of planning board members is necessary for the adoption of the amendments.
- C. Once adopted by the planning board, the amendment must be certified (signed by a majority of members of the board) and filed with the city or town clerk. Lastly, a copy shall be sent to the Office of Strategic Initiatives.
(BEA, 2021)



ENFORCEMENT & ADMINISTRATION

When determining if an innovative land use control shall be adopted as part of a municipality's zoning ordinance versus site plan review or subdivision regulations, the enforcement and administration of the regulations should be considered. One major difference between zoning ordinances and site plan review or subdivision regulations is how relief from standards and regulations can be granted.

While the planning board cannot approve an application that violates the zoning requirements, the state empowers the zoning board of adjustment to grant variances from zoning ordinance regulations, only in cases where the variance will not be contrary to the public interest, the spirit of the ordinance is observed, substantial justice is done, the values of surrounding properties are not diminished, and literal enforcement of the provisions of the ordinance would result in unnecessary hardship (BEA, 2021).

The planning board has the option to include a provision for waivers within the subdivision regulations but is mandated to include a waiver provision for site plan regulations. The planning board may grant a waiver of a portion of its subdivision and site plan regulations if it finds, by a majority board vote, that strict conformity with the regulations would pose an unnecessary hardship to the applicant and would not be contrary to the spirit and intent of regulations. A waiver may also be approved if specific circumstances of the development or conditions of the land indicate that the waiver will properly carry out the spirit and intent of the regulations.

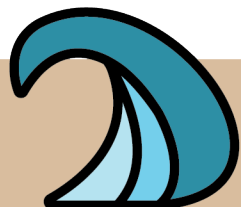
Administration of innovative land use controls can be delegated to the planning board, selectboard, zoning board of adjustment, or such other person or board as the ordinance may designate. If the administration is not delegated to the planning board, it is important to note that any proposal submitted under the innovative land use control ordinance or regulation shall be reviewed by the planning board prior to final consideration. Additionally, when administration is delegated to the planning board, the board can consider waivers, but any decisions made by the planning board may be appealed to the superior court, rather than the zoning board of adjustment (RSA 674:21).

TAKING OF RIGHTS

Within this innovative land use guide there are model regulations that enact buffer requirements and other regulations aimed at addressing (or limiting) development in potential flood-prone areas. These regulations may have direct impacts on private property. This type of restriction or regulation of private property rights presents the possibility for litigation regarding regulatory “takings.”

Certain regulations may result in a “taking”, as defined as the total or near total governmental deprivation of private property requiring payment of ‘just compensation’ to the owner, and may raise the potential for regulatory “takings” lawsuit. Private property is protected by both the U.S. Constitution and the New Hampshire Constitution and takings or even partial takings shall be avoided if possible. New Hampshire law states that a governmental regulation can be a taking, even if the land is not physically taken (Tsiamis and Riley, 2018).

According to case law, municipalities are subject to takings claims when the regulation meets the *Lucas* test (established in *Lucas v. South Carolina Coastal Council*) or the *Penn* test (established in



Penn Central Transportation Co. v. New York City). The *Lucas* test identifies “when a regulation deprives a landowner of all economically viable uses of their land.” *Lucas v. South Carolina Coastal Council* acknowledges government’s ability to prohibit “property uses that constitute a common law nuisance, even if it eliminates all economic value of the property.” Whereas the *Penn* test takes the following factors under consideration (Vermont Law, 2012):

1. Economic impact on the property owner.
2. Owner’s reasonable investment-backed expectations.
3. Character of the government actions.

For the purpose of this innovative land use guide, municipalities adopting regulations that may limit or infringe on private property rights shall take the above case law and federal and state law into consideration when enforcing and administering ordinances and regulations.

Sources:

BEA, *The Planning Board in New Hampshire: A Handbook for Local Officials*. 2021.

<https://www.nh.gov/osj/planning/resources/documents/planning-board-handbook.pdf>

