



## Conditional Uses, Special Exceptions, Variances and Waivers

*Zoning Ordinances, Subdivision Regulations and Site Plan Review Regulations establish what land development is and is not permitted in a district and the standards for new development. However, sometimes strict conformity may create a hardship on the property owner or may be contrary to the spirit and intent of the regulation. Additionally, some uses may require additional scrutiny before being allowed. To address these special instances, communities have several tools available to both the Planning and Zoning Board.*

### Conditional Use Permits

A conditional use permit (CUP) is typically granted by the **Planning Board** to allow for an innovative land use that is not permitted by right in a zoning district. Conditional uses are specified in the municipality's zoning ordinance and are uses that the municipality feels should be more critically regulated than those allowed by right. Therefore, a conditional use requires that extra criteria (specified in the ordinance) are met in order for the permit to be granted. Conditional use permits are enabled through NH RSA 674:21 and is the mechanism by which the Innovative Land Use Controls are reviewed and approved. Innovative Land Uses include but are not limited to phased development, cluster development, performance standards, environmental characteristics zoning, and inclusionary zoning.

By specifying that innovative land use conditional use permits be reviewed by the planning board, the municipality is also streamlining the review process enabling simultaneous review of the CUP and the associated subdivision or site plan review application for the proposed development. The planning board's decision on an innovative land use conditional use permit is appealed directly to the Superior Court as provided by RSA 677:15.

### Special Exceptions

Special exceptions are enabled by NH RSA 674:33, IV and are similar to a conditional use as it also allows for additional land uses, other than what is permitted by right in a zoning district, that may require additional scrutiny. The **Zoning Board** reviews and grants special exceptions for uses in a district that the municipality feels should be carefully controlled. Also, like the CUP, any uses permitted by special exception are detailed in the zoning ordinance with specific criteria that must be met before approval. Unlike a conditional use permit that may identify criteria the planning board may waive, the zoning board cannot waive special exception criteria. That said, the applicant could ask for a variance from one or more of the special exception criteria. Complaints of the Zoning Board's decision on a Special Exception are first heard by the ZBA and then may proceed to Superior Court.

### Key Differences between a Conditional Use and a Special Exception

A conditional use permit and special exception are virtually the same. Essentially, the only difference is that the Planning Board grants conditional use permits while the ZBA grants special exceptions. The municipality decides what issues call for a conditional use or special exception

based on what board (Planning Board vs. ZBA) the issue is more relevant to and whether the use is enabled under RSA 674:21, Innovative Land Uses.

If a use is not permitted by right, conditional use permit or by special exception in the zoning ordinance, the applicant may apply for a variance.

## Variances

Variances, enabled under NH RSA 674:33, I, are the regulatory “safety valve” of the Zoning Ordinance and may be granted in cases that concern a use that is not permitted or where a dimensional requirement is requested to be varied. Variances do not amend the municipality’s zoning ordinance; they are granted on a case by case basis and serve as a one-time exception to the zoning ordinance. In order to be granted a variance, one must be able to prove that the strict enforcement of the zoning ordinance would cause “undue hardship” due to a circumstance that is exclusive to the property of interest. There are specific criteria the applicant must meet in order to be granted a variance:

- The variance will not be contrary to the public interest
- The spirit of the ordinance is observed
- Substantial justice is done
- The values of the surrounding properties are not diminished
- Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship
  - Special conditions of the property that make it unique from other properties in the area where there is no fair and substantial relationship between the general public purposes of the ordinance and specific application of that provision and the proposed use is reasonable; or

- If, and only if, owing to special conditions of the property that distinguishes it from others in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

For each of the criteria, the applicant must present the specific facts and applicable case law to the ZBA.

## Waivers

A waiver is an exception to a municipality’s Subdivision or Site Plan Regulations that is granted by the Planning Board when strict conformity would cause an unnecessary burden to the applicant. Any requests for waivers must still comply with the municipality’s zoning ordinance. As established under RSA 674:36, II(n) Subdivision Regulations *may* allow for waivers, whereas Site Plan Regulations shall include waiver provisions per RSA 674:44, III(e). In either instance, the Planning Board may grant a waiver, by majority vote, if strict enforcement of the regulation poses an unnecessary hardship or with the specific circumstances carry out the spirit and intent of the subdivision or site plan regulations. Many municipalities also identify submission requirements for applicants to meet when applying for a waiver, such as requesting specific information be provided to demonstrate that the waiver criteria have been met.

## Key Differences between a Variance and a Waiver

- A variance is granted by the ZBA while a waiver is granted by the Planning Board.
- A variance only applies to the zoning ordinance while a waiver only applies to the subdivision and site plan regulations (land use regulations).
- Variances have more stringent criteria than waivers.