

**SECTION XXVIII RESIDENTIAL OPEN SPACE – CLUSTER DEVELOPMENT BY
CONDITIONAL USE PERMIT (Added March 2003)**

This ordinance is adopted by the Town of Newton at the 2003 Town Meeting, in accordance with the authority as granted in New Hampshire Revised Statutes Annotated 674:16 and 674:21, procedurally under the guidance of 675:1, II and in accordance with RSA 12-K.

- I. Purpose – The intent of this ordinance is to provide a flexible method of residential development that is consistent with principles of sound planning and wise land use that are not specifically permitted in the current zoning ordinance. All developments seeking a conditional use permit shall be administered by the Planning Board to insure that Open Space - Cluster development opportunities do not adversely impact neighboring properties, or the citizens and Town of Newton. The Planning Board shall consider the following purposes and balance them accordingly during review of individual applications:
 - A. Maintain and Preserve rural character of the Town of Newton by allowing an alternative residential development option which preserves large areas of open space, provides for visual buffers from existing roads and residential development, and permits farming opportunities on parcels of open space.
 - B. Preserve large, contiguous parcels of open space throughout the town and particularly as found in the Newton Master Plan, land determined to be of significant importance for protection and preservation.
 - C. Provide for a diversity of housing types, opportunities, and architectural styles.
 - D. Encourage road design that will contribute to and enhance a rural atmosphere and maintain minimal safety design.
 - E. Provide for connected corridors of open land throughout town for preservation of habitat, environmental resources, and public enjoyment.
 - F. As part of an alternative for residential development, to require the clustering of homes in a manner that includes proximity in physical location while minimizing confusion over issues of property ownership.
- II. Conditional Use Permits. All Open Space-Cluster developments shall obtain a conditional use permit from the Planning Board. The conditional use permit shall clearly set forth all conditions of approval and shall clearly list all plans, drawings and other submittals that are part of the approval. Everything shown or otherwise indicated on a plan or submittal that is listed on the conditional use permit shall be considered to be a condition of approval. Construction shall not deviate from the stated conditions without approval of the modification by the Planning Board.
- III. Application Procedure. Applications for conditional use permits for an Open Space - Cluster development shall be made in accordance with the procedures set forth in the relevant sections of the Subdivision Regulations of the Newton Planning Board.
- IV. Approval of Applications. Prior to issuance of a building permit, the applicant shall acquire a conditional use permit as well as any other necessary Planning Board approval. A conditional use permit shall be issued only if an Open Space-Cluster development complies with all of the requirements of this section. The Planning Board may condition its approval on reasonable conditions necessary to accomplish the objectives of this section or of the Newton Master Plan, Zoning Ordinance, or any other federal, state, town resolution, regulation, or law, including but not limited to; a reasonable reduction in allowed density, a reasonable increase in required frontage, setbacks, or any other

requirement if necessary to accomplish said objectives. The conditional use permit is meant to provide flexibility, minimize adverse impacts, and allow the Board to participate jointly with the applicant to prepare a development that is consistent with this ordinance, regulations, and the Master Plan for the Town of Newton.

- V. General. The Open Space-Cluster development provisions of this ordinance provide applicants with an alternative development approach intended to promote flexibility and innovation in land planning. Within this context, the ordinances that are established are intended to be a minimum consideration of allowable impacts. Each tract of land possesses different, unique development characteristics and limitations, and the Open Space-Cluster development use allowed on any particular tract will be a function of innovative land planning and subdivision design interacting with the special characteristics and limitations of the site.

The following definitions specifically apply to this Section of the Zoning Ordinance:

- a) Common Area: Any parcel or area of land and/or area of water set aside as a result of a cluster plan. The common area is designed for the benefit and enjoyment of the residents of a cluster development. These areas may contain accessory structures and improvements necessary and appropriate for the educational, recreational, cultural, social or other non-commercial / nonresidential / non-industrial uses, plus any utility services utilized by the owners of the common area.
 - b) Conservation Land: Land given to a public body dedicated to conservation of forests, park land, etc., or to a private conservation trust, with the intent of preserving in its original ecological condition, safeguarding water supplies, or diminishing flood danger.
 - c) Mandatory Home Association: A private non-profit corporation, association or other non-profit legal entity established by the developer for the benefit and enjoyment of the residents of the Cluster Development. Membership in said association shall be mandatory for property owners and made a required covenant in any deed issued or passed. It shall provide voting and use rights in the common area when applicable and may charge dues to cover expenses, which may include tax liabilities of the common area, recreational or utility facilities. Articles of Association or Incorporation must be acceptable to the Planning Board and by the Town Counsel and any other municipal, county, state agency, body, commission or department required by law to approve of the same.
 - d) Open Space Easement: Land whose development rights have been legally restricted, either by deed or by public purchase of those rights. The easement may be so worded as to permit or restrict public access, to allow or disallow recreational development, and similar provisions. Easements are tied to the title of the land, regardless of its subsequent ownership.
 - e) Public Open Land: Land purchased by or given to the Town of Newton for parks, playgrounds, or an undeveloped open space, generally with the intention of making it accessible for public use.
 - f) Yield Plan: A conventional layout of roadways and lots in accordance with the dimensional requirements of underlying zoning district.
- VI. Lot Size and Frontage - The minimum lot size for an Open Space-Cluster development is 20 acres. The minimum frontage for the development shall be a contiguous 150 feet and of sufficient length to provide safe access for a right-of-way of at least 50 feet. At least one access shall be within the minimum frontage. The minimum frontage and access shall be within the Town of Newton. Frontage lands on roads existing at the time of application shall be preserved as buffers to the maximum extent possible in addition to all required setbacks. After the passage of this ordinance, any parcel that subdivides

more than 50% of the frontage away from the parent parcel shall not be eligible for an Open Space - Cluster development for a period of 4 years from the date of the subdivision approval.

VII. Baseline Density – Development density shall be determined by one of the following two methods to be chosen by the applicant:

a) Zoning Formula – The following formula shall be used to determine the baseline density:

$$\begin{array}{r} \text{Total Parcel Area} \\ - \text{Unbuildable land} \\ \hline \text{Area Remaining} \\ \times .9 \text{ (subtract 10\% for roadways)} \\ \hline \text{Net Area} \end{array}$$

Net area divided by lot size for zoning district = Baseline Density

Example #1: 100 acres total
- 26 acres Unbuildable land

$$\begin{array}{r} 74 \text{ acres (buildable)} \\ \times .9 \text{ (street factor)} \\ \hline \end{array}$$

66.6 acres net

66.6 divided by 2 acres = 33.3 (rounded down to 33 units)

Example #2: 20 acres total
- 3 acres Unbuildable land

$$\begin{array}{r} 17 \text{ acres (buildable)} \\ \times .9 \text{ (street factor)} \\ \hline \end{array}$$

15.3 acres net

15.3 divided by 2 acres = 7.65 (rounded down to 8 units)

For the purposes of this formula “Unbuildable land” shall consist of the following types of land:

- 1) Wetlands as defined elsewhere in this ordinance, or if not so defined, as found in state law.
- 2) Slopes exceeding a grade of 25%, or soils subject to slumping.
- 3) Floodways and floodway fringe within the 100-year floodplain as shown on official FEMA maps.

b) Yield Plan - The yield shall be reviewed and approved by the Planning Board in accordance with the following:

- 1) The yield plan shall incorporate soils information sufficient to determine estimated lot sizes by soil type.

- 2) The yield plan shall incorporate roads and rights-of-way that provide for a layout that corresponds with existing state and federal laws, town ordinances, and subdivision regulations, including but not limited to minimization of wetland crossings, road length requirements, right-of-way widths, and safe sight distance for entrances.
- 3) The yield plan is meant to be conceptual in nature but must be realistic and not show potential house sites or streets in areas that would not ordinarily be legally permitted in a conventional layout.
- 4) In addition to the above, the yield plan shall include, basic topography, wetlands, floodplains, steep slopes (greater than 25%), soils subject to slumping, and contiguous non-wet areas, and other areas of land where it is not feasible to accommodate building sites and individual septic systems.
- 5) In order to show that the yield plan is reasonably achievable, 20% of the lots, randomly distributed throughout the yield plan, shall indicate one test pit which complies with all local, state, and federal requirements, including but not limited to, depth to estimated seasonal high water table, setbacks to lot lines and structures, and wetland setbacks. These lots shall be selected by the applicant, however, the Planning Board, at its discretion, may seek additional lots for testing if doubts arise.
- 6) The yield plan shall comply with conventional subdivision standards and shall not require a variance or waiver from the existing ordinances or regulations in order to achieve the layout supporting the proposed density.

VIII. Density Bonus - The minimum density bonus, regardless of percentage achieved, shall be one lot. If required criteria are met, the Newton Planning Board may award the development an additional density bonus. The total density bonus awarded to a particular development authorized under this section for innovative protection bonuses shall not exceed 35% of the baseline density. The density bonus shall be applied to the number of lots achievable under the baseline density. Where a final number is greater than .5, the density number may be rounded up to the next whole number. In no event shall the total density bonus awarded exceed the soil based carrying capacity for the entire parcel.

IX. Development Yield – The total yield for residential Open Space-Cluster development shall be determined by baseline density plus all density bonuses. The resulting number multiplied by a factor of four (4) shall indicate the number of bedrooms allowed. In no event shall the total density exceed the soil based carrying capacity for the entire parcel.

X. Standards for approval - All standards below must be met or impacts mitigated to the satisfaction of the Planning Board prior to the granting of a Conditional Use Permit.

- a) The permit is in compliance with this ordinance and is in the public interest.
- b) There will be no greater diminution of neighboring property values than would be created under any other use or development permitted in the underlying zone.
- c) That there are no existing violations of the Newton zoning ordinance on the subject property.
- d) That the character of the area shall not be adversely affected. This determination, to be made by the Planning Board, shall be made by considering the following aspects of the surrounding area.

- 1) Consistency of architecture, except for single-family detached development, determined through analysis of the following:
 - Roof pitches;
 - Siding types;
 - Architectural styles of residential structures;
 - Proportional aspects of facades, building locations on lots;

- 2) Transportation, determined through analysis of the following:
 - Access for safety vehicles onto the site, within the site, and to individual houses;
 - Capacity of nearby and affected intersections, and transportation corridors;
 - Cost for municipality to maintain roadways.
 - Layout, width, and construction of roadways on the site.

- 3) Protection of natural resources, determined through analysis of the following:
 - Protection of environmentally sensitive areas, including but not limited to, wetlands, shoreland buffers, wildlife corridors, significant groundwater resources, etc.;
 - Maintenance of viewsheds and other visually appealing aspects of the site;

- 4) Protection of cultural resources, determined through analysis of the following:
 - Establishment of new and protecting existing trailways for travel;
 - Protection of historic buildings or significant historical landscapes;
 - Establishment, protection and promotion for agricultural uses of the site.

- e) That granting the permit will not result in undue municipal expense.

- f) That the proposed development will be constructed in a manner compatible with the spirit and intent of the Newton Master Plan and Zoning Ordinance.

- g) That the capacity of existing or planned community facilities and services (including streets and highways) will not be adversely impacted. Mitigation of these impacts by the developer can be properly considered in granting of a conditional use permit.

XI. Other Regulations Applicable. The Planning Board may adopt sections of the Subdivision Regulations not pre-empted by this ordinance which shall apply to the Open Space - Cluster Development, including the right to waive such regulations. Where not specifically pre-empted by the provisions of this ordinance the requirement that is more restrictive shall apply. The Planning Board shall determine if pre-emption is intended by the provisions of this ordinance, and/or what requirement that is to apply, is more restrictive.

All units shall be built in accordance with applicable federal, state and local building codes.

XII. Minimum Open Space Requirements

The minimum percentage of land that shall be designated as open-space shall be as specified below:

a) A minimum of forty percent (40%) of the total tract area, after deducting the following kinds of Unbuildable:

- 1) Wetlands as defined elsewhere in this ordinance, or if not so defined, as found in state law.
- 2) Slopes exceeding a grade of 25%, or soils subject to slumping.
- 3) Land under permanent easement prohibiting future development (including easements for drainage, access and utilities).
- 4) Floodways, and floodway fringe within the 100-year floodplain as shown on official FEMA maps.

b) A minimum of 25% of the total required open space land must be useable uplands and reasonably available for recreational purposes, provided however, that no more than 50% shall be utilized for such purpose in order to preserve a reasonable proportion of natural area on the site.

c) No portion of public utility easements, of any kind, may be considered part of the minimum required open space.

d) Open Space Layout. Open space land shall be designated as undivided parcels to facilitate easement monitoring, enforcement, maintenance, and to promote appropriate management by a single entity according to approved land management standards.

e) As part of the application an open space plan shall be submitted showing clear delineation of parcels of open space land that is not to be developed. The open space plan shall be recorded at the Registry of Deeds and shall indicate that development is restricted from the open space in perpetuity.

f) The minimum required open space land shall be placed in undivided preserves that equal or exceed 3 acres. All parcels between 3 and ten acres shall have a length to width ratio equal to or less than 4:1; except such areas specifically designated and constructed as village greens, ball fields, upland buffers to wetlands, water bodies or water courses, or trail links. Areas less in size or dimensional requirements may be considered common land left open, but shall not be included in the minimum required open space calculation.

g) Open space shall be directly accessible to the largest practicable number of lots within the development.

- h) Safe and convenient pedestrian access to open space shall be provided from all lots not adjoining the open space
- i) Such land shall be preserved in perpetuity through deed restriction or conservation easement, and designated on the approved and recorded plat. Such restriction shall be reviewed by Town Counsel and approved by the Planning Board.
- j) The open space and/or common area within a cluster development shall be owned by and bound by one or more of the following:
 - 1) Mandatory Homeowners Association, which may use it for common recreational facilities or may designate it as Open Space, or may grant a public body an Open Space Easement.
 - 2) A public body which shall use it as Conservation Land or Public Open Land.
 - 3) Such designation must be made prior to approval of the subdivision application by the Planning Board; such lands shall be held in such type of legal entity as the Planning Board deems appropriate.

XIII. Density Bonus

- a) Where the proposed Open Space Cluster plan shows 50% or more of the total parcel as open space protected as such in perpetuity, the development may be awarded a density bonus of up to 10%.
- b) Public Access Bonus - Where the public is granted access to the open space, the development may be awarded a density bonus of up to 10%. The nature of public access required to trigger this bonus is pedestrian traffic. The instrument granting access, acceptable to the Planning Board, may reasonably restrict the use of motorized vehicles.
- c) Agricultural Lands and Use Bonus - Where the development protects agriculturally valuable lands and provides permission for their use as such in perpetuity, the development may be awarded a density bonus of up to 10%. The Planning Board shall, on a case-by-case basis, determine the bonus percentage by considering the size of the project and the number of acres of farmland preserved. The open space portion preserved for agricultural use must amount to a minimum of 50% of the minimum required open space. The instrument granting use, acceptable to the Planning Board, may reasonably restrict the type or intensity of farming to occur to prevent nuisances.
- d) Additional Protection Bonus - Where the development is able to protect unique characteristics, including and limited to the following:
 - 1) Viewsheds, which are lands or corridors of land that contribute to the visual landscape of the town, including items such as open fields containing stonewalls, mature stands of trees, visible water bodies and their natural buffers.
 - 2) Historically significant buildings and landscapes, identified as such in the Master Plan, that include buildings and associated uses that are maintained and visually separated from the developed portion of the cluster development.

- 3) Structures or landscapes not identified as such through the Master Plan may be determined by sufficient evidence presented to the Planning Board during review of the cluster development. Such evidence may include Heritage Commission comment, listing or eligibility for listing on the National Register of Historic Landmarks, or other qualified statements of historic value.
- 4) Valuable wildlife and environmental areas that are otherwise buildable land, proven as such through an environmental resource inventory by a qualified wildlife biologist specializing in either flora or fauna. Reports by a wetlands or soil scientist shall not satisfy this criteria.
- 5) Linking open space parcels or trail corridors through the site with existing trails or open space networks. The beginning of such a network or trailway may be considered as linking where reasonable opportunity is present for establishing through corridors into neighboring parcels and provided that Conservation Commission comment is in favor of this location.

If the development protects one or more of the above it may be awarded a density bonus of up to 10%. The development must provide for the protection of these resources in perpetuity and trail corridor protection must allow for reasonable public access.

- (e) Density bonus for frontage lots. Where a development is proposed such that a potential lot with the required legal frontage, on a roadway existing at the time of application within the Town of Newton, for the underlying zone has been preserved in a natural condition, the Open Space-Cluster development shall receive an additional bonus of one (1) lot.

XIV. General Requirements

- A. Uses – Only residential uses shall be permitted in the Cluster - Open Space Developments.
 1. Single-family detached homes are permitted.
 2. Multi-family units shall be permitted up to a unit count of 4 per building or structure. These are units that are structural joined and share walls with no yard between units.
- B. Frontage – The following frontage requirements shall apply.
 3. Each single-family lot or unit shall have 50' of frontage on interior roadways.
 4. Duplex units, sharing a common wall shall have 75' of frontage.
 5. Multi-family unit structures, sharing a common wall shall have 100' of frontage for three (3) unit structures and 125' of frontage for four (4) unit structures
- C. Setbacks – The following setbacks shall apply to all residential structures within the development.

6. Setbacks from exterior property lines of the entire parcel shall be 50' for single-family detached units, with an additional 15' per unit for multi-unit structures (e.g. 4 unit attached = 110').
7. 30' setback from the edge of pavement for roadways within, and part of, the development.
8. 35' structural separation for all single family unit structures within the development
9. 50' structural setback for multi-family units from all other structures.
10. 10' structural setback from all lot lines.

- D. All developments shall contain some form of lot delineation or lines that designate a reasonable amount of land attributable to each particular structure.
- E. Utilities – All utilities serving the development shall be underground.
- F. Parking – Off-street parking shall be provided for two (2) cars per unit plus a minimum of a one-car garage for each unit.
- G. Sidewalks – The Planning Board may require sidewalks if deemed appropriate for the proposed development.

XV. Legal Review

The legal review of the proposed development shall be conducted under the conditions delineated herein:

- a) Any condominium agreements, deed restrictions, organizational provisions for a Homeowner's Association, or any legal entities providing for ownership of individual dwelling units and a sharing of certain utilities, open space, common areas, and auxiliary facilities and structures, must be approved in writing by the Planning Board and by Town Counsel and any other municipal, county, or state agency, body, commission or department required by law to assure the same.
- b) The developer will submit a suitable legal instrument which to the satisfaction of the Board and/or Town Counsel will assure that such open space and/or common land will continue to be used for conservation, park or recreation, and shall not be disposed of by sale or otherwise except to any organization established for the purpose of owning and maintaining such open space.
- c) Such developer shall also provide for adequate maintenance of such area set aside for conservation, park, or recreation. Such developer shall provide for the insertion in all deeds, in a form approved by the Planning Board and/or the Town Counsel any and all safeguards and conditions suitable to carry out the purposes of these regulations.
- d) Such legal instruments shall also provide that the Town of Newton, its agents, servants, and employees, may, without liability, enter upon such land held for conservation, park or recreation and remove, or cause to be removed, any object, or condition which may be deemed to be a nuisance or in the nature of a nuisance.

XVI. Expiration – Any Conditional Use Permit shall expire if active and substantial development or building has not begun on the site by the owner or the owner's successor

in interest in accordance with the approved plat within 12 months after the date of approval.

As part of its approval of a plat or plan, the Planning Board may, with due regard to the scope and details of a particular project, specify the threshold level of work which shall constitute "active and substantial development or building" for purposes of fulfilling this paragraph. In such cases, a new application for a Conditional Use Permit must be completed.

- XVII. Strict adherence to these provisions shall not be construed as establishing a legal right to a conditional use permit for a cluster development. Those who wish to pursue their @development rights@ to a certain use or development of land should consider developing their land with the permitted, conventional subdivision approaches, or through the variance procedure as provided for by New Hampshire law.
- XVIII. Conditions – The Planning Board may impose higher standards than allowed by this Section when they determine that because of special site and land conditions, an adverse impact would be created by allowing development to be built to the standards delineated in this Section.

Dwelling units approved under this ordinance shall be subject to any applicable impact fees per the Newton Zoning Ordinance.