

"Permissive" v. "Prohibitory" Zoning Ordinances

Most zoning ordinances in New Hampshire are of the so-called 'permissive' variety.¹ That is, in the absence of a variance or special exception, such an ordinance functions generally to prohibit uses of land unless they are expressly permitted as primary uses or can be found to be accessory to a permitted use.² The rule of accessory use is in response to the impossibility of providing expressly by zoning ordinance for every possible lawful use. Even under a permissive ordinance, a given use may be allowed even if it is not explicitly allowed. Those types of uses are said to be accessory to the use that is expressly permitted.³ Most ordinances expressly provide for some accessory uses, although the common law provides for them when the ordinance is silent on the matter.⁴

Adapted from § 9.02 **Purpose of Doctrine**, New Hampshire Practice, Land Use Planning and Zoning, Third Edition, Atty. Peter Loughlin

¹ The opposite of a "permissive" ordinance is a so-called "prohibitory" ordinance which allows all uses not expressly prohibited. 4 Williams, American Land Planning, § 94.13 (1985).

² Windham v. Alford, 129 NH 24, 523, A.2d 42, (1986); Triesman v. Kamen, 126 NH 372, 493 A.2d 466 (1985); Hannigan v. City of Concord, 143 NH ___, 738 A.2d 1262 (1999).

³ Salem v. Durrett, 125 NH 29, 480 A.2d 9 (1984) (private landing strip was subordinate to principal residential use on the property, but landing strip was not customarily associated with residential uses in the town and was not an "accessory use").

⁴ Dumais v. Somersworth, 101 NH 111, 134 A.2d 700 (1957) (garage for residential use was permitted as accessory use even though not specifically mentioned in zoning ordinance.)