

To: Honorable Senator Wendy Harrison, Windham District

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RE: Technical Memo on Proposed Delegation of Act 250

Date: February 22, 2023

Overview

The purpose of this memo is to provide information as requested on a possible process for delegation of Act 250 review to municipalities where state and local development review are substantially similar. This process would require municipalities to demonstrate that-- through adopted regulations, policies, and plans-- local regulations are functionally equivalent to the ten criteria (including sub-criteria) outlined in Act 250 (10 V.S.A. Chapter 151), and that capacity exists to perform development review and permitting at the local level.

Other forms of municipal delegation exist in statute, including Lake Shoreland Protection Standards ([10 V.S.A. § 1448](#)), Potable Water Supply and Wastewater Systems ([10 V.S.A. § 1976](#)), Building Codes/Fire Safety Standards ([20 V.S.A. § 2736](#)), local Act 250 review of municipal impacts ([24 V.S.A. § 4420](#)), and acceptance of permits or approvals by state agencies or municipalities for identified criteria ([10 V.S.A. § 6086\(d\)](#)) in Act 250 permitting. This memo outlines a mechanism to expand upon current Act 250 delegation by authorizing a process for municipal review and permitting for all criteria, town-wide, which is most closely related to the current shoreland delegation process.

Municipal Delegation as a Response to Jurisdictional Challenges

Planning as a foundation for development review

As originally envisioned, the Land Use and Development Law, or Act 250, would have relied on a Statewide Capability and Development Plan to guide decision-making through the permitting process at the District Commissions ([10 V.S.A. § 6042](#)). However, this plan did not come to fruition and for the last 40 years there has been no statewide land use plan providing the foundation for Act 250's review.

As such, **current jurisdictional thresholds¹ provide a proxy for developments of regional significance or impacts on resources of statewide interest.** These thresholds apply to both the most urban and rural places within the state. However, a new ten-unit development in downtown Winooski has very different land consumption and infrastructure impacts than a ten-lot subdivision in a rural municipality or a ten-acre commercial development. Similarly, the current Act 250 thresholds present substantial discrepancies even within urban areas: a ten unit residential development in an urban

¹ Throughout this memo, "jurisdiction" or "jurisdictional thresholds" refer to the [location or circumstances](#) that require a development project to be reviewed through Act 250, and "the criteria" refers to the [ten standards](#) outlined in statute that are used in an Act250 project review.

area will have a much lesser impact than a 9-acre commercial project, which would currently be exempt. As a result, for decades both proponents and opponents of the law have documented ways in which Act 250's jurisdiction has not been effective at preventing certain development impacts-- such as sprawl and natural resource fragmentation-- nor at effectively directing growth into areas planned for it.

A municipality must have a municipal development plan that is in conformance with the 14 state planning goals (24 V.S.A § 4302) in order to adopt or amend municipal zoning regulations, establish local impact fees, and for the plan to have standing in Act 250 or Section 248 (Public Utility Commission) proceedings. These plans include current and future land use maps; information on future population projections; and policies regarding development impacts that should be planned for and mitigated. These municipal development plans are reviewed and approved by the Regional Planning Commissions to ensure consistency, and effectively act as a local capability and development plan.

In the 50 years since Act 250's adoption, **many municipalities have successfully utilized this planning framework to adopt increasingly specific bylaws and other ordinances to implement municipal plans.** The state's economic development and planning programs recognize and reward this planning. For example, growth center designations require municipalities to commit to meeting minimum standards through zoning and other land development controls that advance the statewide goal of dense mixed-use centers.

Over the years, **some local regulations have evolved to be more finely tuned to development thresholds that will impact municipal or regional systems' capacity to support growth.** For example, in Burlington, the City's major impact criteria evaluate many of the same development impacts in Act 250's criteria-- these standards apply to developments of as few as five units in areas planned for the lowest-density development, but are only applicable to developments of fifty units or more in downtown. In other municipalities, thresholds may be based on specific impacts, such as traffic.

Due to statewide applicability, **not all of Act 250's criteria include clear tests for when a particular criteria will be relevant or how developments demonstrate that a potential impact has been minimized,** which can vary significantly based on context and in some cases rely on decisions of the courts. Some local zoning bylaws provide more specific standards-- such as Winooski's Form Based Code. This code includes specific guidelines and parameters for the siting, design, and overall context for how a building interacts with both the individual building site and the adjacent streetspace. A number of other communities throughout the state have also adopted form-based codes to provide detailed and prescriptive standards to guide new developments with sensitivity to an area's existing character. Another example includes Burlington's natural resource overlay zones, which apply specific development regulations to the natural areas and resources that were inventoried and mapped in the city's open space plan.

Leveraging municipal resources to reduce permitting redundancy

Despite this evolution at the municipal level, **Act 250 jurisdiction and its limited exemptions have not evolved to recognize the capacity of local review processes, which has created significant redundancy in some communities.** Today, full exemption from Act 250 jurisdiction is possible only for priority housing projects of varying sizes within state-designated downtowns, neighborhood

development areas, and growth centers. This creates a process where two identical developments-- but for the fact that one incorporates 20% of its housing units at an affordable rate-- can have substantially different review processes. While this is an important incentive for the creation of more affordable homes in the state's designated areas, the local impacts, including review and permitting, from these developments are the same and have the opportunity to be treated as such.

A more robust local delegation process can eliminate duplicative development review, which can speed housing development without compromising Act 250's jurisdiction and criteria. For decades, there have been tensions between Act 250's regulatory structure and certain statewide goals-- including the increasingly urgent need to speed housing production statewide. Significant reforms to this law take time, and there are many important perspectives on how to do so. New delegation authority does not replace the need or ability to consider these reforms, but provides a time-sensitive solution in areas equipped to manage development review at the local level.

Burlington, South Burlington, and Winooski have professional staff and development review boards which develop local bylaws; apply these bylaws and other codes; review development plans; and coordinate with local, regional, and state agencies to identify appropriate mitigations where needed. Within these three cities, Zoning Administrative Officers are unaware of a situation in the past 5 to 10 years in which a development that was approved at the local level was subsequently denied by Act 250, or for which Act 250 conditions resulted in the need for substantial modifications to the local permit.

As noted above, the state has recognized local capacity and expertise by creating processes through which **other state permits can be administered or replaced by municipalities with functionally equivalent local regulations and the professional capacity to administer.** A similar process for Act 250 delegation could recognize where local regulations have the necessary foundation to review and permit projects within the context of local and statewide goals together. These procedures can identify areas where municipal regulations may not adequately address certain critical statewide resources, and provide a route for local regulations to be amended or for the expertise of certain state agencies to continue to apply to certain aspects of a local development review. It is possible to engage the important and valuable expertise of these agencies for targeted issues without a duplicative development review framework for all other aspects of a project.

A more robust delegation of Act 250 review would provide a direct impact on new development, particularly for housing. These impacts include reduced review times; reduced permitting and professional service fees; and more predictability in development review and permitting processes. This could also enable the Natural Resources Board (NRB) to leverage the capacity and resources of municipalities in support of meeting statewide housing needs. For example, local delegation offers the opportunity for direct enforcement of regulations including potential violations after a project has been completed and can also reduce the number of projects that require review by the District Commissions in areas with functionally equivalent regulations, increasing access to resources for project review in municipalities that have fewer local technical resources.

An Expanded Process for Local Act 250 Delegation

Delegation based on functional equivalency

Statute currently provides for partial local delegation of Act 250, limited to a review on municipal impacts ([24 V.S.A. § 4420](#)). This enables municipal review of Act 250's criteria 6, 7, and 10 only. Once established, this requires municipal review of these criteria for all projects that meet Act 250's current jurisdictional thresholds. All other criteria continue to be reviewed by the District Commissions, or by state agencies where enabled by [10 V.S.A. § 6086\(d\)](#)--therefore, both state and local review remains. Just 12 municipalities have local delegation, including communities such as Brattleboro, Vergennes, Middlebury, Morristown and Hardwick.

Amendments to 24 V.S.A. § 4420 may be a logical place to authorize another tier of local delegation that exempts Act 250 jurisdiction where municipal regulations and review processes are functionally equivalent to Act 250's development thresholds and criteria. In the case of municipal delegation for Lake Shoreland Protection Standards, the City of Burlington entered into a delegation agreement with the Secretary of the Agency of Natural Resources (ANR) to issue and enforce local permits in lieu of state permits after demonstrating adopted ordinances were functionally equivalent to shoreland protection standards in statute, and that the City had adequate resources to administer and enforce its ordinances. This review and agreement identified two key areas of the City's ordinances that were required to be amended in order to obtain full municipal delegation of this process. This agreement requires the City to take on the cost of administering this review, but enables municipal assessment and retention of permit fees to do so, and requires routine reporting to ANR regarding local permits issued.

The intent is not for municipalities to issue Act 250 permits, but rather ensure the outcomes of the local review and permitting process are functionally equivalent or better. Act 250 delegation similar to the shoreland delegation would enable a municipality to demonstrate, through a series of benchmarks, that local zoning bylaws, other enforceable local ordinances, permitting requirements, and locally adopted plans provide a substantially similar or greater level of consideration to development projects. This process would expand upon the three criteria currently enabled by 24 V.S.A. § 4420 to enable municipal review of most, if not all, of Act 250's criteria. For example, an analysis of Winooski's local development regulations relative to Act 250 criteria has been provided to the Senate Committee on Economic Development, Housing, and General Affairs; similar analyses have been prepared for Burlington and South Burlington and can be provided if helpful.

Statutory framework vs. rulemaking

Changes to statute would only need to accommodate a process for expanded authority for local delegation of Act 250 review, the minimum benchmarks that must be demonstrated for such delegation, and an exemption from Act 250 jurisdiction in such circumstances. Similar to the legislation that created Act 250, the statutory language provides the basis for the 10 criteria ([10 V.S.A. § 6086](#)), but what is expected to be demonstrated by an applicant is set out through NRB and other agencies' rulemaking processes. A more robust local delegation could be formalized through a similar rulemaking process which includes local planning professionals, regional planning commissions, the NRB, and district commissions.

Local delegation would not eliminate the need for certain state permits such as wetland permits, erosion & sedimentation control permits, or similar statewide requirements where applicable. Rather than relying on the Act 250 review process as the clearinghouse for ensuring applicable state permits are issued, the rulemaking process could establish processes for ensuring these reviews take place-- this is particularly relevant since Act 250 is not currently applicable to all projects that may require such permits. Additionally, the statutory framework can make it clear that a community with delegated authority may consult state agencies' expertise on specific topics (such as reviewing particular wildlife habitats, prime agricultural soils, or intermunicipal impacts on state highways if applicable).

Finally, like other delegation processes, routine reporting is an appropriate mechanism to ensure delegated municipalities' bylaws and administrative capacity maintain agreed upon standards. Consistent reviews at set intervals would also ensure a municipality is reviewing and updating local regulations and processes consistent with any applicable changes to Act 250 statutes.