April 26, 2023

To: House Committee on Environment and Energy
Representative Amy Sheldon, Chair

Re: **S.100 – Potential Unintended Consequences**

Dear Representative Sheldon and Committee Members,

I am writing to you generally in support of S. 100, with some noted concerns (attached) – as an accredited, professional planner with more than thirty years of experience working with municipalities, regional planning commissions, state agencies and legislative committees in Vermont and northern New England; and with a particular interest and some acknowledged expertise in land use law and development regulation, especially as this relates to affordable housing development. Over the years, under contract with DHCD and local municipalities, I've drafted numerous statutory amendments, housing plans and studies, development regulations, and related technical guidance. Some directly relevant experience:

- Staffed, under contract with DHCD, the last Vermont legislative committee appointed in 2001 to comprehensively address housing and permit reform under Chapter 117 – the Act 62 "Municipal Planning Review Commission" – to include associated research, the preparation of the Commission's report to the legislature, and subsequent statutory amendments to Chapter 117 specific to inclusionary zoning, the equal treatment of housing and accessory dwelling units, subdivision regulations, and incentive based zoning, including planned unit development.
- Under subsequent contracts with DHCD, drafted several guidance documents specific to Chapter 117, including *the Zoning Administrator's Handbook*, and the *Vermont Land Use Planning Implementation Manual* – including sections on federal and state housing programs and statutes and local housing regulation.
- Served for more than 16 years as the VT Planners Association's elected legislative liaison and registered lobbyist, which included the preparation of position statements, draft legislation, and participation on several state agency and legislative working groups, including most recently as VPA's advisor to the Act 250 Commission.
- Also served as a former technical advisor to the Vermont Law School's Land Use Law Clinic regarding the specifics of Vermont planning statutes, as applicable to local development regulation.
- For ten years served as the Chair of (and de facto staff to) the Bolton Development Review Board, followed by a stint on our Selectboard.

The attached notes, by section, represent more of a technical than policy-based review that focuses on regulatory sections of S.100 (Draft No.1.1), reflecting my experiences working with and under evolving versions of the Vermont Planning and Development Act (24 VSA Ch. 117).

Please note that my main concerns, from a policy and equity standpoint, are limited to the proposed elimination of statutory protections pertaining to standing and public involvement in appeals (Section 6; § 4465) and more significantly in the review of proposed subdivisions (Sections 7, 8; §§ 4418, 4463) – particularly as this may apply to the review of development exempted from Act 250 or, as proposed by some, the delegation of Act 250 review to a municipality.

I sincerely apologize for such a lengthy submission at such a late date, but I appreciate your consideration in bill mark-up as time allows. And thank you for all your good work and ongoing efforts in this area – very much needed and appreciated.

Sincerely,

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Some Relevant Background Info

As you're aware, Vermont's current planning statutes (24 VSA Ch. 117) have long offered basic protections under local regulations for single- and two-family dwellings, including exemptions from site plan review; and other housing types that must be accommodated – including mobile homes and manufactured housing, mobile home parks, multifamily dwellings, group homes, and accessory dwelling units. We have also long had a "builders remedy" in statute allowing for housing-related challenges to local bylaws and decisions – handled either through the Attorney General (Title 24) or more recently, specific to protected classes, the Vermont Human Rights Commission (Title 9).

Vermont is also one of the first states to require that ADUs be allowed by right (as a permitted use) in association with single family dwellings; and to allow for locally adopted mandatory inclusionary zoning, as long as offsets, such as density bonuses, fee waivers, or parking reductions are also provided to help cover the cost of required housing units – and to thereby also avoid regulatory takings claims.

Municipalities, however, have generally relied on more accepted and nuanced, incentive-based regulations provided for in statute – and density bonuses in particular – to encourage, if not require, more affordable housing development. This is consistent with how density bonuses are commonly applied nationwide. Until 2003, Vermont statutes for planned residential development allowed for density bonuses of up to 50% for affordable housing projects, in association with the flexibility to vary lot sizes, building heights, and other dimensional and lot coverage requirements necessary to accommodate the increase in density.

This cap however – which was subsequently found to be insufficient to generate much affordable housing – was repealed in 2003, under previous permit reform amendments. Today Vermont municipalities have the ability to offer much higher density bonuses for affordable and mixed use housing –and other types of public amenities, such as public parks and rec paths – in association with different types of planned unit development – e.g., to include forms of "traditional neighborhood" and "mixed use" or "village" development, as well as clustering or "conservation subdivisions" more common in rural communities – which intentionally separate density from lot size. These regulations however, in allowing for more flexibility, typically require a more deliberative review process, subject to court appeals.

Several more urban (or urbanizing) Vermont communities have instead adopted "form-based codes" that regulate building form, rather than the density of development – for example that define lot sizes, setbacks, frontage, and parking requirements by allowed building, housing, or street types. These types of regulations generally provide for more administrative review and approval by qualified staff, but are also more complicated and expensive to develop, and

generally allow for much less flexibility in how they're applied. Administrative reviews are also subject to local, and potential court appeals.

Unfortunately, past permit reform efforts in Vermont – and elsewhere in the country – have not led to enough housing construction to meet current and anticipated needs, indicating that regulations are not the only – or most significant – barrier to housing development. In addition to increases in the overall costs of housing development (land, labor, materials), one of the major limitations in Vermont has been, until very recently, the lack of public investment in supporting infrastructure, including new and expanded municipal water and wastewater systems – and a concomitant reliance on the private sector to instead provide or extend this infrastructure, often in the absence of locally defined and mapped service areas.

Nimbyism in the form of permit appeals also sometimes contributes to expensive delays that add to housing costs, but when drafting regulations to counter this, we're also required to ensure that constitutional equal treatment and due process protections are upheld, as applicable to property owners, developers, those most impacted or benefitted by proposed development, and the community at large. Further narrowing the scope of current protections in statute, including the elimination of required public hearings in favor of administrative review, has to be carefully considered in relation to constitutional considerations, and the fact that local appeals now end up in court, rather than before administrative review boards.

It's currently acknowledged within the planning profession that zoning reform efforts now underway are not the silver bullet needed to address national or state housing crises; but statutory and regulatory reform measures tailored to the specifics of each state or municipality – and particularly those intended to allow for or require "missing middle" housing types – are necessary to more equitably promote and allow for much needed housing, through new "smart growth" development, infill development, and redevelopment. State funding, and recent DHCD guidance in support of "bylaw modernization" provide a great starting point for related efforts in Vermont, that have yet to be fully realized. S.100, as proposed, is certainly in keeping with this intent. The devil – in the form of unintended consequences – as always, may lie in some of the details.

Technical Notes re S.100 (Draft No. 1.1) – Sections 1–10 (24 CSA Ch, 117)

Sec. 1 Housing, Parking Limits (1.0 to 1.5/ unit) [§4414(4)]

- ***It would be very helpful to specifically enable municipalities to set maximum (v. minimum) parking space requirements for all types of development. Having this in statute would help avoid threats of legal challenge as a form of regulatory takings***. Locally defined maximums can also be adjusted downward (or upward) in response to local conditions and, over time, to reflect changes in local vehicle ownership, development patterns, and access to transit and other forms of transportation.

- ***Creating statutory limits on the number of allowed spaces per dwelling unit, as applicable to any type of residential development, however, does not provide the flexibility needed to address local conditions*** **(site conditions, housing types, densities, availability of transit).** ***More critically, it may undermine existing incentive-based zoning intended to promote affordable housing development.***

  Allowing for reductions in the number of required parking spaces is often used in incentive-based zoning to promote affordable housing and, where inclusionary zoning is mandatory, to help offset the cost of providing affordable units, as referenced under 24 VSA §4414(7) [Inclusionary Zoning] – again, in part to avoid regulatory takings claims.

- As guidance, recommending a maximum of 1.0 units/housing unit, for single- and two- unit dwellings in areas well-served by transit, and for accessory dwellings, makes sense. However, a state mandated maximum of 1.0 unit per dwelling, for any type of residential development, does not reflect, and clearly is not flexible enough to address local conditions (housing types, densities, availability of transit, etc.).

  Based on overall population density and distribution Vermont is one of the most rural states in the country. Many households, particularly in rural communities without transit, require two cars for work, errands, appointments, etc. According to the latest US Census estimates (ACS 5-yr) in Vermont, nearly 60% of occupied households have access to two or more vehicles:

Occupied Housing Units with No Vehicles Available:	6.5%
Occupied Housing Units with One Vehicle Available:	34.5%
Occupied Housing Units with Two Vehicles Available:	40.8%
Occupied Housing Units with Three or more Vehicles Available:	18.1%

Given a majority of two+ car households, allowing for up to two parking spaces per unit (a long-standing ITE standard) is generally necessary for single and two-unit dwellings located outside of more urban downtowns and village centers and transit areas – though typically this can be accommodated on driveways serving these units. Setting this as a maximum, locally, often makes sense in this context.

- The common ITE standard for a multiunit dwelling of 1.5 spaces/dwelling is intended to accommodate household, guest, and service vehicle parking – while also recognizing that this generally represents a more compact form of residential development, occupied by smaller households with ready access to other forms of transportation, including transit, taxi, and other car-or ride-sharing services. Again, setting this as a maximum, rather than minimum within this context, as applied locally, also makes sense.

- ***Under local regulations, residential development (including household, guest, and service parking) is typically served by shared onsite parking, or on-street parking, accessible <u>in the immediate vicinity</u> of the dwelling (e.g., as allocated/counted along lot street frontage)***.

  With regard to allowing for "1.5 spaces per dwelling unit…if located more than one-quarter of a mile away from public parking…": A quarter mile radius (1,320 FT), while often used to define neighborhood walkability (a pedestrian shed), is not generally considered a reasonable walking distance between a residential parking space serving an individual household/dwelling, and the entrance to the dwelling (especially under relevant ADA standards). This also assumes that any public parking located within a quarter mile of the development will be readily available year-round for private or individual household use. Rounding up, as proposed may also not always meet this need.

- ***While the reported intent, though not specifically stated in the current draft, is to allow a housing developer to request additional parking as needed, this appears to be precluded by the limit placed on the number of allowed parking spaces (one per dwelling unit) under associated deed restrictions, as proposed under Section 22, as generally applicable to private development*** – i.e., "*Deed restrictions or covenants added after July 1, 2023 shall not be valid if they require a minimum dwelling unit size on the property or more than one parking space per dwelling unit*."

Section 2. Required Provisions, Prohibited Effects [§ 4412]

- (D) Allowing duplexes (two-family dwellings) in districts that allow for year-round residential development, subject to the same requirements and conditions as single family dwellings, is

consistent with existing statutory protections for two-family dwellings, including existing exemptions from site plan review under § 4416.

- This does not however, appear to apply to the conversion of an existing single- to a two-family dwelling within many existing single-family residential developments, as also limited by deed restrictions and HOA agreements.

- See note below under Section 4 (definitions) regarding use/definition of "duplex" versus two-family – or preferably a "two-unit" dwelling.

- Allowing for multiunit dwellings of four or fewer units within residential zoning districts served by *locally delineated and mapped municipal water and wastewater service areas* is consistent with the current more general statutory requirement to provide for multifamily units, while also recognizing that not all areas within a defined service area may be suitable for housing development – as differentiated through local zoning district designations.

- 4412(E) currently excludes ADUs only within flood and fluvial hazard areas – technically ADUs should be excluded, as are other forms of development, within any hazard (or undevelopable) area regulated under a local bylaw, consistent with § 4424 (e.g., to also include other areas subject to periodic flooding, wetlands, landslides, etc.).

- (E) ***Presumably the "conversion of an existing, detached nonresidential building to habitable space for an accessory dwelling" applies more specifically to an accessory structure located on the property, though this is not stated as such***. It is also not clear what the "criteria" or standards of review are, as referred to in this context. As stated, this appears to allow for the conversion of any type of nonresidential building on the property – regardless of size or location – into an accessory dwelling, subject to the same standards as the principal dwelling, rather than standards otherwise applicable to an accessory dwelling (per statute), or an accessory structure on the property.

- Note: Vermont's ADU provisions under § 4412 – unlike typical ADU provisions – effectively sets a minimum size of 900 SF, and caps the size of an ADU at 30% of the total habitable area of the principal dwelling (as scalable) – which in some communities has been an issue as applicable to both smaller ADUs (<900 SF) and larger single-family dwellings (e.g., > 5,000 SF). In this context, 900 SF and 30% may both be excessive, versus more simply setting a statutory upper limit on ADU floor area. Minimum habitable floor areas are more commonly addressed under building rather than zoning codes.

- (H) While the proposed addition of (H) – intended to protect the residential use of private hotels by the state, or those receiving public assistance for temporary housing – may be

necessary and appropriate, ***but it should be clarified that the definition of "hotel" under 32 V.S.A applies only to this specific use, and not to hotels more generally regulated as a type of lodging facility, or the conversion of a hotel into a more permanent residential use***.

- (12) ***As with parking, clearly allowing municipalities in statute to more generally define minimum (v. maximum) residential density requirements could help deter both NIMBY and regulatory takings challenges.***

  A proposed statutory minimum density standard of four (v. five) dwelling units per acre – a typical minimum density required for "walkability"– within any residential zoning district served by locally delineated and mapped municipal water and wastewater service areas – would be more consistent with both current state designation requirements, and proposed language above pertaining to multiunit dwellings of four or fewer dwelling units.

  This also appears to apply to gross density, but note that for regulatory purposes, "density" in this context is often calculated as a "net" density – especially at more urban densities (e.g., 4+ units per acre). This is based on the "buildable" area, or a "builder's acre" (generally 40,000 SF), rather than the total land area, and typically excludes rights-of-way (as also excluded in the definition of "lot"), and often also hazard areas and required civic space. In this context lot sizes below an acre are also generally defined in square feet rather than acreage (e.g., 10,000 SF v. ¼ acre).

- ***It's important to note too that density is often regulated separately from lot size requirements*** – e.g., under planned unit development regulations that offer more flexibility in development layout and design (e.g., clustering), and under form-based codes that define lot size (and in effect density) by building type. For this reason, any statutory minimums should be defined in terms of density, and not lot size per se.

- (13) ***Proposed 40% density increase tied to building height. As a statutory mandate intended to apply to all multifamily, mixed use (undefined), and affordable housing development – and not specifically to affordable housing – this statutory increase in allowed density may undermine existing, common density incentives (bonuses), as well as required density offsets under mandatory inclusionary zoning, that are specific to affordable housing.***

  Also, in specifying that the increase in density may be accommodated only through an increase in building height (an additional floor) – does not necessarily provide the flexibility needed to physically accommodate additional, if limited density (e.g., number of units per

floor), or to fit into the local development context – including the ability to provide emergency response (e.g., ladder trucks needed to serve upper floors).

Currently, for affordable housing, increases in density can also be accommodated through reductions in lot size and setback requirements, increases in lot coverage or floor area ratios (e.g., under PUD or statutory waiver provisions) or through additional housing types. This can also be more generally accomplished under local regulations that apply specifically to affordable housing development, as already defined in statute as a protected type of development or use.

A statutory provision that requires an increase in density of up to 40% as applied to housing in any multifamily, mixed use, or affordable housing development – to be accommodated only by additional building height (an additional floor) – may also result in updating local regulations to more generally reduce both district density and building height requirements as needed to accommodate this statutory allowance.

- (***15)(A) "Area served by municipal water and sewer infrastructure": Proposed language under this section is overly complicated and convoluted—especially, under equal treatment of housing provisions, as applied only in association with certain protected forms of housing development in areas served by municipal water and wastewater***.

  It might be easier under this section, and more consistent in statute, to simply require proposed types and densities of housing and mixed use development within residential and mixed use zoning districts that are served by [existing and planned] municipal water and wastewater infrastructure systems with the capacity available to support proposed development. Presumably much of what's otherwise listed can be considered in defining zoning district boundaries, infrastructure service areas and allocation ordinances, and minimum [net] densities of development.

Section 3 Limitations on Municipal Bylaws – Emergency Shelters [§ 4413]

- The addition of emergency shelters to the list of protected uses – though as defined, also included under other listed use categories – clearly highlights this use as deserving of special (and more limited) consideration under local regulations, especially in response to common NIMBY challenges.

- At some point this list should also be expanded to also address other types of group living arrangements – such as boarding houses, and smaller treatment and detention facilities that

don't readily qualify as "institutional" uses – or as "group homes" protected as single-family dwellings under the federal Fair Housing Act and § 4412(G).

Section 4 Definitions [§ 4303]

- ***For purposes of local planning and development regulation, statutory definitions control. As such, it's important to ensure that terms are consistently defined and applied throughout related statutes (e.g., Ch. 117 and Act 250).***

  Currently, the following housing "types" are referenced, but not necessarily defined under Chapter 117:

  - Affordable Housing (§ 4303 – as defined)
  - Affordable Housing Development (§ 4303 – as defined)
  - Single-family dwelling (§§ 4412, 4416)
  - Two-family dwelling (as also exempted from site plan review under § 4416)
  - Multiunit or Multifamily dwelling (§ 4412) often understood, from context, to include three or more dwelling units
  - Accessory dwelling unit (§ 4412 – as defined)
  - Mobile home (§ 4412)
  - Modular housing (§ 4412)
  - Prefabricated housing (§ 4412)
  - Group Home (§ 4412 – as representing a type of single family dwelling)

- Currently only "affordable housing," "affordable housing development," "accessory dwelling unit" and "group home" are specifically defined or described in statute. "Dwelling unit" (or "housing unit" under Act 250) is not defined. This has provided some flexibility in more specifically defining and regulating different housing types – including missing middle housing– especially as applicable under form-based codes (e.g., detached house, duplex, triplex, quad, townhouse/rowhouse).

- The proposed definition of "multiunit or multifamily dwelling" under § 4303, to include three or more dwelling units is consistent with current understanding and applications under local regulations. This clarification is helpful.

- ***Adding the new term and definition for "duplex" (v. two-family dwelling) may lead to some confusion in interpretation and application***. For example, a duplex may be regulated locally either as two attached but separate single-family dwellings, on separate lots, or two attached or stacked dwelling units within a single structure on a single lot. As proposed, a "duplex" is essentially the same as a two-family dwelling.

There are no similar, proposed definitions for triplex, quadplex, etc. – or townhouse/ rowhouse (often defined and regulated either as a row of attached single family dwellings occupying separate lots, or a multiunit structure on a single lot.)

- ***For purposes of statutory definition, suggest simply defining "dwelling unit" under § 4303 as applicable to "single-unit," "two-unit," and "multiunit" (3+unit) dwellings, as referenced throughout – to avoid confusion, and to continue to provide some flexibility in how these are further defined and regulated locally.***

- Note: It's now also considered best practice to no longer refer to "family" housing, given legal and equity issues associated with defining associated family and nonfamily household occupancy requirements under local zoning and building codes.

Section 5 Bylaw Adoption, Report [§ 4441]

- ***Adding a second reporting requirement to DHCD following bylaw adoption appears to have no functional purpose – especially following adoption, once bylaws are in effect. An independent review of housing provisions in proposed bylaws – by the RPC or DHCD – may be more effective and useful in identifying potentially exclusionary zoning standards and practices prior to adoption.***

  As noted, municipalities are currently required to prepare a report for distribution to DHCD, the RPC, and for public review and hearing, prior to the adoption of a bylaw or bylaw amendment. This could include the additional consideration of conformance with sections 4412 and 4413, and associated development review procedures. Note too that § 4414 is generally intended to be enabling, not mandatory. Any mandates under this section apply only as specific to an elected regulatory option (e.g., the inclusion of parking requirements).

- Currently, however, reports, drafts and final bylaws are simply filed away for future reference – there is no requirement for any type of independent, RPC or DHCD technical review in advance of adoption – a review that could identify and address deficiencies and inconsistencies with statutory housing requirements – and other potential exclusionary zoning practices – prior to bylaw adoption.

- Municipalities are also now required to provide a copy of bylaws as adopted to DHCD for filing – which could provide the information needed to maintain an updated zoning atlas.

Section 6 Appeals, Interested Persons (Standing) [§ 4465]

- ***This section, which applies to both local administrative appeals and appeals to court, necessarily involves and may detrimentally narrow public access and input in the review of local development, including associated rights (standing, equal treatment, due process) and equity considerations.***

  While the intent is to address frivolous or NIMBY appeals, this is not limited to just housing development. Proposed changes further limit group appeals to those with a common, particularized interest – for any appeal regardless of the type of review, the type or location of a proposed development, or associated findings and conditions of approval.

- ***It would also eliminate "character of the area" as a consideration on appeal, regardless of the level of review, or type of development.*** For example this language might have served to exclude several former "Citizen for Responsible Growth" appeals of poorly sited commercial and big box strip development. "Character of the area" would still be eliminated as a consideration for the appeal of a residential development within a designated area subject to conditional use review under § 4471 [per Section 9 amendments].

- ***From an equity standpoint , the current language may also be too limiting***, in allowing only for group appeals by current voters and property owners within a municipality. This excludes any nonresidents who also may be directly impacted by or may benefit from a particular project – e.g., that hope to reside in a proposed affordable housing project; and also potential "YIMBY" appeals in support of needed housing development.

  Preserving statutory standing to appeal locally is something to also consider with regard to proposed Act 250 exemptions, or the local delegation of Act 250 review, given that Act 250 projects typically have impacts beyond municipal borders.

Sections 7, 8 – Subdivision Review [§§ 4463, 4418]

- ***As proposed, this would repeal any requirement for a deliberative, publicly accessible subdivision review process, regardless of the type or scale of subdivision proposed.*** How land is subdivided – how blocks, lots, streets, public parks, and other civic spaces are laid out, and land is set aside to be conserved – fundamentally determines the pattern of community development over time. Currently the public interest in how a particular subdivision may affect local residents and the community at large is accomplished on a project by project basis, as protected by the statutory requirement to hold a public hearing as part of the local subdivision review process.

  It's my understanding that the initial intent in amending this section was to allow for the administrative review of small or "minor" subdivisions, as defined by the municipality, subject

to existing statutory provisions governing administrative review under § 4464(c). As drafted, however, this language goes much further – to essentially allow for the administrative review and approval of any proposed subdivision, regardless of magnitude or size, without public hearing if/as specified in the bylaws. It removes the existing statutory protection related to the public's interest in determining how a community incrementally grows and develops.

This should also be a consideration regarding the local review of proposed Act 250 exemptions, or the delegation of Act 250 review to municipalities.

Section 9 – Appeals – Character of the Area [§ 4471]

- ***As noted above under Section 6, with regard to group (e.g. NIMBY) appeals, "character of the area" effectively would no longer be a consideration for any type of development, in any location – under the above section this is not limited to residential development within designated areas.***

  That said, as proposed, this section would continue to more specifically limit appeals for housing projects within designated areas based on "character of the area" (as specifically defined by zoning district or applicable plan policies) – but only for projects subject to conditional use review. It does not include appeals under similar "character" criteria incorporated under site plan, subdivision, or planned unit development review.

Section 10 – "By Right" Limits on Conditions of Approval [§ 4464(b)]

- Note that "by right" in zoning parlance typically refers to development that's allowed subject only to administrative review and approval, such as a "permitted" use – and not to uses that require more deliberative review or decisions issued by a municipal panel (DRB, PC, ZBA). Rather, the intent of this section is to limit the types of conditions that an AMP can impose on a residential or mixed use development that includes housing of any type – not just affordable housing.

- In practice, the types of limitations listed could be especially difficult to apply for sites that have significant environmental or legal development constraints, for mixed use projects that include a vertical mix of housing and residential uses, and for planned residential or mixed use development (PUD) projects that by design allow for more flexibility in how they are laid out and developed, as provided for under § 4417.

- ***It may be better (and easier) to simply state that any conditions of approval must be found by the AO or AMP to be consistent with required equal treatment of housing provisions under § 4412 – as also subject to appeal or more direct legal challenge under §§ 4412 and 4453.***