

What's Next for Act 250?

Core Recommendations to Strengthen the Environment, Communities, and the Act 250 Process

Vermont Natural Resources Council

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The Vermont Natural Resources Council has been committed to the key goals of Act 250 -- safeguarding our farms and forests from sprawl, protecting our natural resources, and helping our towns balance growth with community health and safety -- since before Act 250 was even created. Today, we see the Act 47 Commission's work as an important opportunity to make progress on all of these key objectives, as well as on addressing issues that were not at the forefront nearly 50 years ago, like climate change.

We offer the following proposals for the Commission's consideration.

REEVALUATE AND UPDATE JURISDICTION AND CRITERIA BASED ON LOCATION & IMPACTS

Why?

Today, whether Act 250 applies to a project, and how the criteria apply, is not based on where your project is located (with the exception of development above an elevation of 2,500 feet). When applying Act 250, no consideration is given to whether you are in an area that has been designated for development or a greenfield, in a sensitive natural area, or in an already developed area. Moreover, research shows that a significant majority of land subdivision does not even trigger Act 250 jurisdiction, a gap that leads to forest fragmentation; development in areas prone to flooding and erosion; loss of wildlife habitat, primary agricultural soils, and important natural areas; and sprawl. Using the location of a project to determine whether and which criteria apply, and updating the criteria themselves as needed, would help promote development in priority, smart growth locations while ensuring an appropriate level of review to shape how development occurs in outlying areas.

How?

- Create an approach to jurisdiction that prioritizes compact areas while also ensuring more careful review of important natural resources in outlying areas. Compact areas include designated downtowns, neighborhoods, and growth centers that meet a higher standard for designation through a rigorous and accountable designation process. Important natural resources in outlying areas include forest blocks, wildlife connectivity areas, wildlife habitat, natural areas, primary agricultural soils, and floodplains. As gateways to communities, interchange areas also merit additional consideration.
- Require Act 250 to review, or lower the threshold that triggers review, in high priority natural resource areas. At the same time, allow for a more limited Act 250 review in areas deemed eligible under a revised state designation process.

- Require that development outside of compact areas be designed to address impacts to important natural areas and working lands.
- Update select state designation programs (downtowns, growth centers, new town centers, and neighborhood development areas) so that environmental issues are evaluated in the designation process. This would make it possible to identify areas where development is most suitable, and where less Act 250 review may, therefore, be appropriate. As part of these updates, create an appeal process for all designation decisions in order to create accountability for designation decisions.
- Update Criterion 9B, Primary Agricultural Soils, to clarify that areas deemed to have “appropriate circumstances,” which allows primary agricultural soils to be impacted if an applicant provides for off site mitigation, must be in clearly-defined smart growth, and not sprawl, locations.
- Require Act 250 review, and context-sensitive design, around highway interchanges in order to ensure that roadway functions, aesthetics, and state investments in these important areas are not undermined by development.

ADDRESS FOREST FRAGMENTATION

Why?

Vermont’s intact forest blocks and habitat connectivity areas are being fragmented by rural sprawl (residential and second home development, as well as commercial development), and subdivisions that do not trigger Act 250 review. The increasing subdivision of forestland outside of Act 250 review is well documented in recent VNRC reports, which show that large undeveloped forest parcels are shrinking at a troubling rate (vtforesttrends.vnrc.org.reports). This pattern of development in forests reduces working lands (by limiting access and creating parcels too small to be managed as working forests), decreases the ecological functions of forests (ability to provide viable habitat, maintain water quality and mitigate floods, sequester carbon, etc.), and decreases their ability to provide hunting and recreational opportunities as more land becomes posted.

How?

- As suggested in H.233, which passed the House last session, improve Criterion 8 to review whether a project has been designed to either avoid or minimize the fragmentation of forest blocks and wildlife connectivity areas through proactive site design. Forest blocks and wildlife connectivity areas could be delineated on a map and potentially even limited to the highest priority examples (for example, as delineated on the ANR forest block maps). Another option is to provide a definition for forest blocks and connectivity areas without mapping these features (similar to the approach for necessary wildlife habitat under Criterion 8(A)).
- If it is not feasible to avoid or minimize the fragmentation of forest blocks and connectivity areas through proactive site design, require mitigation, as with impacts to primary agricultural soils.

- Reinststate the review of secondary impacts of utility lines to consider the impacts of development that connects to utility line extensions in priority forest blocks and connectivity areas.
- As stated above, consider resource-based jurisdiction that heightens Act 250 review in priority forest blocks and connectivity areas. This could be done by either automatically reviewing, or in the alternative, reviewing the creation of a smaller number of lots in these areas, versus the current jurisdictional triggers that result in very few subdivision proposals in forest blocks being reviewed.

EMBED PLANNING GOALS TO PROMOTE SMART GROWTH AND MINIMIZE COMMUNITY IMPACTS

Why?

The land use plan and state capability and development plan originally envisioned by Act 250 contained principles (in the form of legislative findings) and maps to show how uses related to each other (within and across municipal boundaries). This helped to promote a settlement pattern that supported downtowns and villages and minimized sprawl. However, without those plans, Act 250 reviews projects in a piecemeal way, leading to incremental sprawl that undermines farmland, forestland, and existing community centers. Embedding this and our state’s planning goals into Act 250, and strengthening regional and municipal plans, would help achieve the desired settlement pattern. It would provide guidance and more certainty to applicants on where and how Vermont should grow, while building from local and regional visions.

How?

- Link planning goals of 24 VSA §4302, the statutory smart growth principles (24 VSA §2791(13)), and findings from the state capability and development plan to the Act 250 criteria.
- Update capability and development plan maps to identify state interests and use them in coordinated project review.
- Require review of regional plans for conformance with planning goals and planning statute; set up a review body that includes RPC peers and others, as well as an appeal process.
- Require that municipal plans receive approval from Regional Planning Commissions before they can be used in Act 250. Establish a process for municipalities and community members to appeal regional decisions about plan review.
- Update Criterion 9K, effects of development on public investment, to further define “public investment” so that it includes the numerous programs established since Act 250’s inception (i.e., designation programs, certain tax credits, local tax stabilization, Vermont Housing and Conservation Board, etc.), and ensure that the public investment in designated growth areas is protected.
- Make explicit the need to reference maps in Criterion 10 review.

INTEGRATE CLIMATE CHANGE

Why?

When Act 250 was first created, climate change was not on people’s radars. Now, it is one of the most pressing environmental issues of our time, with myriad potential negative and costly impacts – to public health, natural resources, public and private investments in infrastructure, and more. Updating Act 250 to reflect this change will help to guide development in a manner that avoids exacerbating the problem and, instead, make our communities and people more resilient. Updates must be made to *mitigate* climate change (e.g., reduce the greenhouse gases that cause climate change) and to *adapt* to the effects of climate change (for example, how to better prepare for more frequent and severe storm events, drought, the migration of people to Vermont as coastal areas are affected by climate change, etc.). It is critical to ensure that this Act 250 update opportunity identifies and incorporates the best ways to respond to the reality of climate change.

How?

- Exactly how Act 250 can be updated to help Vermont mitigate and adapt to climate change requires greater analysis and consideration. To that end, we recommend the creation of an Agency of Natural Resources-led, “Lean”-like effort to identify current tools, programs and regulatory structures intended to mitigate and adapt to climate, and opportunities go further. Through this effort ANR should bring together diverse stakeholders to explore and make recommendations around how to update Act 250 vis-a-vis climate change. Those recommendations should focus on both mitigation and adaptation strategies.
- While this process is taking place, there are updates to existing criteria that could be made in order to better respond to a warming world. These include numerous *mitigation* strategies, for example:
 - Update Criterion 1, Undue Water and Air Pollution. At minimum, this criterion should specifically add greenhouse gas emissions (GHG) among the items considered in application review and the revived professional Environmental Board should be required to provide guidance on steps that applicants can take to address the impact of a project on GHG emissions..
 - Update Criterion 5, Transportation. Updates to this criterion should ensure that it better supports and expands transportation choices -- rather than simply accommodating more single occupancy vehicles. For example, Criterion 5A could be updated to explicitly consider the congestion and safety impacts of development on bicycle, pedestrian, and transit infrastructure in addition to highways, waterways, railways, airports and airways. This goes beyond the review of connectivity and transportation demand management in Criterion 5B.

- Update Criterion 8 as mentioned above to better maintain the integrity of forests, since forests play such an important role in storing and sequestering carbon.
- Revise Criterion 9F, from Energy Conservation to “Energy Efficiency and Conservation” to build on the success Act 250 has historically had ensuring that projects are energy efficient and conserve energy, while taking into account the programs Vermont has implemented to address these issues since the Act was enacted.
- There are also *adaptation* strategies that could be undertaken. As noted herein, increasing protections for Vermont’s natural resources (e.g. forest and wildlife habitat); strengthening protections for Vermont’s communities and settlement patterns; and requiring ANR to recommend updates to the natural resources criteria (e.g. floodways and headwaters) will help Vermont adapt to the challenges climate change will pose over the next 50 years and beyond.

MODERNIZE CRITERIA BASED ON THE LATEST SCIENTIFIC INFORMATION

Why?

Because science has changed significantly in certain areas since Act 250 was enacted in 1970, applicable Act 250 criteria should be updated to reflect the latest scientific information. For example, the technical definitions and criteria that address rivers, streams, headwaters, floodways, shorelines and wetlands should be reviewed to ensure that they are consistent with the current state of the science and reflect modern approaches to protecting these resources. ANR and experts on these issues outside of state government should be tasked by the Commission with providing recommendations for modernizing these criteria.

How?

- Update Criterion 8A to place the burden on the applicant to demonstrate that a development or subdivision will not destroy or significantly imperil necessary wildlife habitat or an endangered species. Today, a party opposing the application must prove that a development or subdivision will destroy or significantly imperil necessary wildlife habitat or an endangered species. Placing the burden on a concerned party is unfair since mapping and data related to significant wildlife habitat has improved and is readily available to applicants through online ANR mapping tools. Since the applicant has control over the property and understands the nature of the proposed project, the applicant should have the initial burden.
- The technical definitions and criteria related to resources such as rivers, streams, headwaters, floodways, etc. were created 50 years ago and may not reflect the current state of science. ANR should be required to evaluate these criteria and make recommendations to the Legislature regarding changes that should be made as part of modernizing Act 250.

SUPPORT DISTRICT COMMISSIONERS, DISTRICT COORDINATORS, AND THE DISTRICT COMMISSION PROCESS

Why?

The District Commission process is the heart of Act 250. It was designed so decision makers from the region where a project is located decide on projects in manner that provides due process, while allowing citizens to address questions or concerns about a project without having to be represented by an attorney. District Commissions have, by and large, functioned as intended. However, as the complexity of the issues facing Act 250 projects have grown, along with a growing body of Act 250 case law, the volunteer District Commissioners have been tested. As Act 250 is modernized, Vermont must evaluate the job we are asking the Commissioners to do, and the resources they – and the District Coordinators who support them – are given to do it.

How?

- Require that District Commissioners have training or expertise in issues related to Act 250 such as environmental science, engineering, law, land use, or economics.
- Pay District Commissioners for service beyond a per diem. Consider making the Chair a part time job in recognition of the additional work a Chair must do.
- Better staff the District Commissions with enough District Coordinator support, administrative support, and legal support.
- Keep the District Commission process open and accessible to the public.

REDUCE EXPENSE AND DELAY OF APPEALS WHILE IMPROVING PUBLIC ACCESS AND CONSISTENCY OF DECISIONS

Why?

A core component of Act 250 when it was enacted was the creation of the Environmental Board, which heard appeals of Act 250 permits and administered Act 250. From water quality, to wildlife habitat, to aesthetics, to the growth criteria of Act 250, the Board issued decisions that set forth an analytical framework for addressing these complex issues that shaped growth in Vermont and provided certainty to applicants. In 2004, the Board was eliminated as part of what was called “permit reform.” The appellate function of the Board was replaced by expanding the role of the Environmental Court, and its administrative function was replaced by the Natural Resources Board (NRB).

The impact this change had on Act 250 was profound, and negative, for the following reasons: Court decisions provide less guidance on how to address complex Act 250 issues. Court processes are inherently more difficult for Vermonters to navigate without legal and technical experts than administrative processes. There is no evidence we have seen indicating that appeals in Environmental Court are less expensive and are resolved more quickly than appeals before the former Environmental Board. Instead, anecdotal evidence indicates the opposite, and with the NRB’s appellate function eliminated, there has been less direction provided to the

District Commissions on how to address questions that arise about Act 250. Act 250 decisions benefit from the deliberation of multiple people with different backgrounds - e.g. science, planning, law etc. - as opposed to decisions made by a single judge. The original framers of Act 250 had it right when it created a diverse board of Vermonters with varied backgrounds to evaluate the impact of a project under Act 250.

How?

- Establish a professional board to hear Act 250 appeals and administer Act 250. This would restore the substantive decision making of the former Environmental Board, but do it in a more efficient, streamlined fashion than the 9-member citizen Environmental Board currently does. This could be a 3-7 member Board with members from legal and other professional backgrounds, bringing a much broader perspective to Act 250 appeals than one judge.
- There could be hearing officers to hear smaller Act 250 disputes to reduce costs and move less complex appeals more quickly through the process. The Discovery and motion practice could be more targeted and focused, streamlined in an administrative tribunal with a hearing officer to reduce costs and the time it takes to process appeals. The professional Board would also oversee the District Commissions, restoring strong administration of the Act 250 program, providing clear guidance to District Commissions and applicants on how to address Act 250 criteria and creating greater consistency in Act 250 decision across districts.

KEY COMPANION POLICIES AND CONSIDERATIONS

Why?

While Act 250 is the focus of this discussion, it does not work in isolation – and, in fact, has the potential to work better for everyone if supported by state, regional, and local planning that is coordinated, and by well-supported policies and programs. Recognizing this, and intentionally reconnecting Act 250 with bigger picture coordination and efforts, is necessary if we want to achieve a more successful application for the law – successful for our environment and communities, but also for the applicants who want to invest in Vermont.

How?

- Coordinate interagency review of Act 250 applications, to include utilization of the capability and development plan maps in order to guide public investments, to evaluate the impacts of projects on existing state investments, and to guide state planning decisions.
- Better coordinate state agency planning between agencies and with Regional Planning Commissions.
- Evaluate and update municipal and regional planning statutes to ensure that the scope and focus of local and regional planning meets current and anticipated needs and circumstances.