

Comments to the Commission on Act 250

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September 15, 2018*

It always makes me a bit nervous when people talk about changes to Act 250. There have been many discussions about this in the past, but the basic tenets of the Act with the exception of the State Land Use Plan and aspects of the Capability and Development Plan have remained in tact. This has been for the benefit of the state of Vermont in my opinion. I will focus my comments on several parts of the Act that I think should be retained and several areas that could be improved. This is not meant to be a complete list but rather a list of priorities based on my experience. My focus will be on Criteria 9 and 10, the appeals process, and climate change issues related to land use.

I have been involved with Act 250 for over 44 years as a state agency planner (Agency of Commerce and Community Development and State Planning Office) and as an expert witness in Act 250 applications on behalf of the state, regional planning commissions, local governments, citizens groups and statewide not for profits. Most recently, I was an expert witness for the Two Rivers – Ottauquechee Regional Planning Commission in the Quechee Highlands case that went to the Vermont Supreme Court where the TRORPC won its arguments. Applications that I have been involved in include residential subdivisions, shopping mall developments, big box retail projects, mixed use developments, ski area developments, car dealerships, and downtown retail development. With some exceptions, these projects have been large scale developments with more than local impact.

What Should Be Retained:

1. *Regional review.* It has been my observation that one of the main benefits of Act 250 and one significant way it distinguishes itself from local regulatory procedures is the regional review of projects with more than local impact. Several sections of Criterion 9 (9A, 9H, 9K) and Criterion 10 enable this review. Regional review has been upheld in various court decisions. For example, in the first St. Albans Wal-Mart case, the analysis and findings and conclusions of the impact of the proposed Wal-Mart on adjacent and nearby communities in the region under 9A, 9H and 9K were upheld.¹ In another case, Quechee Highlands, the Supreme Court reversed a lower court decision and upheld the district environmental commission's denial of a large mixed

¹ For more information, see William E. Roper and Elizabeth Humstone, "Wal-Mart in Vermont: The Case Against Sprawl," *Vermont Law Review*, Summer 1998.

use interchange development because the proposal did not conform to the regional plan although it did conform to the local plan.²

We are a small state; our communities are small. In many ways our towns are interdependent. What happens in one town or city can affect another. This opportunity for assessment of the impacts of development in one community on others in the region is important and should be retained.

2. *Use of Regional Plan in Cases of Developments of Significant Regional Impact.* Act 250 and the Municipal and Regional Planning and Development Act, 24 VSA Chapter 117, make clear that a proposed development must conform to the regional plan even where there is a conflict with a local plan in cases of developments of significant regional impact. [24 VSA 4348(h)(2)]. This makes sense. Large scale developments that have the potential to impact not only regional resources, such as a river, floodplain, or significant wildlife habitat, but also other communities in the region should conform to duly adopted regional plans, not just the local plan, when subject to Act 250 review.

Regional plans are required to contain a definition of development of substantial regional impact under Chapter 117. This is fitting as each region is going to differ in terms of what would constitute an impact. A subdivision of 20 units might not be substantial in parts of Chittenden County but could be substantial in Essex County. This language should be retained. Perhaps, the Commission should review each region's language and see if the regional definitions of development of substantial regional impact should confer Act 250 jurisdiction over development.

3. *Criteria 9A, 9H, and 9K.* With a few exceptions noted below, the basic structure of these criteria should remain.

Criterion 9A enables the review of a project's growth and fiscal impacts on a community and region in comparison with the growth that would otherwise occur without the project. This requires a "with" and "without" the development, side by side, analysis of growth impacts which is a good approach and has been used in numerous cases. The fiscal impacts – determining whether or not there will be a burden on the capacity of a community to accommodate new growth - relate directly to the public good.

Criterion 9H also enables the assessment of costs of public services and facilities, but unlike 9A adds the additional requirement to examine the costs caused "directly or indirectly" by the proposed development. This is an important additional assessment as there are many developments that have indirect, secondary impacts associated with them, such as regional shopping

² Vermont Supreme Court ,IN RE: B & M Realty

facilities that spin off secondary development around them or major industries that create the demand for affordable housing due to the introduction of new jobs.

Criterion 9K examines the impact of a development on public investments enabling Act 250 to insure that a project will not overburden the capacity of existing investments or cause harm to or render useless these investments, thus protecting the public's expenditure in these investments. This criterion is now more important than ever as federal funds to support transportation, water supply, sewage disposal, housing, education, recreation, and other public purposes are declining. It is vital that we preserve what we have. The basic structure of this criterion should remain the same. However, as discussed below, consideration should be given to changing some language.

4. *Criterion 9L.* As the language in this criterion was recently amended, I think it would be premature to amend it at this time. When several more years have passed and its impact can be fairly judged, perhaps some tweaks will be necessary.

What Should be Changed:

1. *Legislative Findings of the Capability and Development Plan in Act 250:* The legislative findings that were adopted in 1973 as part of Act 250 (see attached) were important to understanding the amendments to Criterion 9 also made at that time and were intended as well to guide planning in the state. While amendments to the law later precluded their use in any Act 250 proceeding, they were important for understanding legislative intent. In addition, they were used to guide state planning decisions.³ Unfortunately, the findings were later repealed all together and they can no longer be found in the statutes. Since then, we have had state policies and goals adopted as part of Act 200 and smart growth policies incorporated in the statute governing designated growth centers (Act 183 in 2006).

The authors of Act 250, the legislators at the time, and the authors of the Capability and Development Plan had a coherent vision for Vermont that was intended to guide planning at the state, regional and local level and that insured that statewide interests were protected through a state regulatory review process. That early vision for coherent planning has been lost due to amendments to the law and other administrative changes (for example, the loss of the State Planning Office and the failure to fully implement the Growth Management Act, Act 200), and can now be found piecemeal through provisions in Chapter 117 and the Growth Centers statute (Act 183).

³ For more information on this, look at Governor Thomas Salmon's Executive Order #2 to guide public investments in the state. I was personally involved in implementing this EO by examining state public investments.

Perhaps, it is time to revisit all of this language, integrating it to the extent possible, and consider adding back into Act 250 explicit goals and policies that would guide its implementation and interpretation and would connect to the planning processes enabled and required under 24 VSA Chapters 117 and 76A. I note that the language authorizing and enabling amendments to the Capability and Development Plan is still on the books (10 VSA 6042 and 6047).

2. *Appeals Process:* In my experience, and I have been involved in a number of appeals, the change in the appeals process from the Environmental Board to the Environmental Court has not worked well for several reasons:
 - a. The lack of awareness and knowledge by the judges of the broad purposes of Act 250 and the planning culture and practices within the state of Vermont (the decision by the Environmental Court in the Quechee Highlands case that was overturned by the Supreme Court is a case in point);
 - b. the narrow, legalistic approach taken by the judges;
 - c. The lack of citizen access to the process that has become very legalistic and less transparent and accessible;
 - d. The delays in the process in order to file documents in the court and work cases into the court's schedule.

It would be preferable to return to an appeals board of informed and experienced citizens with a paid chair as in the past or to establish a professional board like the Public Utility Commission.

3. *Amendments to Language in Parts of Criterion 9:*
 - a. Definition of Growth: what is included in the term growth in Criterion 9A – seasonal population? daytime population? employment growth? retail sales growth? While it has been upheld that economic growth can be included in 9A (Supreme Court: In Wal-Mart), this term still seems to puzzle applicants and other parties. It would be helpful to clarify the term. As the Supreme Court has said that the Legislature clearly intended the term to include economic growth, that should be made clear. What is included in population growth should as well. Clearly, in resort areas (ski and shoreline especially), seasonal population growth is as important as year round growth in measuring impacts. In communities that are employment centers, population should include daytime population as well as resident population.
 - b. List of potential public costs in Criterion 9A: While the list of costs to be measured under 9A does include the clause “and other factors relating to the public health, safety and welfare,” some costs are important enough to make explicit. They include affordable housing, recreation and open space, energy consumption, and transportation (not just “highway access and maintenance,” but all modes of transportation).

- c. Weighing costs and benefits under 9H. As part of the balancing of costs and benefits in 9H, the criterion calls for a consideration of benefits such as “increased employment opportunities or the provision of needed and balanced housing accessible to existing or planned employment centers.” New jobs and housing are important public goals but Act 250 is also concerned with where they are located. That clause seems to imply that it doesn’t matter where the “employment opportunity” is located in order to be counted as a benefit. Whereas, needed and balanced housing is considered a benefit IF accessible to existing and planned employment centers. Shouldn’t the new jobs be located in those centers as well? Consider the Husky case in Milton. While there were plenty of vacant industrial spaces available for Husky in the region, the CEO wanted to locate the facility on some agricultural land in Milton – not in an existing or planned center – requiring extension of utilities to the site and upgrade of roads in the area as well as the loss of primary agricultural soils.
- d. List of Public Investments in 9K: In the first St Albans Wal-Mart case one of the investments analyzed was the expenditure of public funds to support St. Albans City’s downtown area through, for example, building improvements, streetscape improvements, transportation upgrades, and investments in public buildings. The concern was that with the loss of retail activity in the downtown due to the big box store in an outlying area, the public investment would be jeopardized. Other public investments that are not mentioned are transportation facilities besides highways, such as public transportation and bicycle and pedestrian routes. With the advent of the Vermont Housing and Conservation Trust Fund since the adoption of Act 250 there has been a significant increase in state investment in affordable housing. This resource should be recognized in 9K as well. ⁴

- 4. *Addressing Climate Change:* One of the major changes that has occurred since the passage of Act 250 is global warming. How this issue impacts Vermont and what Act 250 changes are needed to address it is a central concern. Two of the major sources of CO² emissions are transportation and commercial, industrial, and residential development,⁵ issues Act 250 directly deals with. Among many other actions that are needed to address these aspects of climate change, the Commission on Act 250 should:
 - a. Reexamine Criterion 5 to address accessibility through alternative modes of transportation and reduce the use of single occupancy vehicles;

⁴ I refer you to cases involving Stratton Mountain and Okemo ski resorts in which affordable housing for ski area workers was an issue.

⁵ <https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions>

- b. Reinforce the Vermont state land use policy of “compact settlements separated by rural countryside” by emphasizing and encouraging infill development in existing settlements and additional development in appropriate locations contiguous to these developments to reduce vehicle trips and reduce energy consumption by large lot single use developments;⁶ and
- c. Reexamine the current energy conservation and efficiency standards implemented through the law.

If the Commission has any questions about these comments, please feel free to be in touch with me at bhumstone@gmail.com , 802-734-7352.

⁶ I attended the Commission on Act 250’s public meeting in Burlington, VT on 9/12/2018. At our table the highest priority chosen of the 5 priority issues was “Settlement Patterns.” The group concluded that the other issues (ecosystem protection, economic development, scenic beauty and agricultural land) could be addressed if Settlement Patterns were addressed. I refer back to my earlier comments on the Capability and Development Plan.

Sec. 6. Statement of intent

(a) This act constitutes the capability and development plan provided for in section 6042 of Title 10, and is adopted by the general assembly for the purposes set forth in that section and in section 4302 of Title 24.

(b) This act is not intended and shall not be construed to limit in any way the freedom of any person to sell or otherwise dispose of his land unless by so doing he will create a subdivision as defined by section 6001(18) of Title 10.

Sec. 7. Legislative findings

(a) In order to provide general and uniform policies on land use and development to municipal, regional, and state governmental agencies, for their guidance and consideration, and to provide the basis for the Vermont land use plan to be adopted under section 6043 of Title 10, the general assembly hereby finds and declares as follows:

PLANNING FOR LAND USE AND ECONOMIC DEVELOPMENT

(1) THE CAPABILITY OF THE LAND

The capability of land to support development or subdivision provides a foundation for judgment of whether a proposal of development or subdivision is consistent with policies designed to make reasonable use of the state's resources and to minimize waste or destruction of irreplaceable values. Accordingly, such information regarding the physical characteristics of land as is found in the interim land capability and development plan adopted under section 6041 of Title 10, and as may hereafter be adopted as a rule of the environmental board, shall be considered a part of this capability and development plan.

(2) UTILIZATION OF NATURAL RESOURCES

Products of the land and the stone and minerals under the land, as well as the beauty of our landscape are principal natural resources of the state. Preservation of the agricultural and forest productivity of the land, and the economic viability of agricultural units, conservation of the recreational opportunity afforded by the state's hills, forests, streams and lakes, wise use of the state's non-renewable earth and mineral reserves, and protection of the beauty of the landscape are matters of public good. Uses which

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pected population increase and economic growth, unless a community, through duly adopted plans, makes the determination that it desires and has the ability to accommodate more rapid growth.

(D) Consistent with all other policies and criteria set forth in this act, development as defined in section 6001 of this chapter in areas which are not natural resources as referred to in paragraph (9) of this section should be permitted at reasonable population densities and reasonable rates of growth, with emphasis on cluster planning and new community planning designed to economize on the costs of roads, utilities and land usage.

(5) SEASONAL HOME DEVELOPMENT

Seasonal homes not only are convertible to permanent homes but are often so converted and may require increased municipal and public services. There should, therefore, be imposed such conditions upon a seasonal home development or subdivision as should be imposed upon a permanent residential development or subdivision.

(6) GENERAL POLICIES FOR ECONOMIC DEVELOPMENT

(A) In order to achieve a strong economy that provides satisfying and rewarding job and investment opportunities and sufficient income to meet the needs and aspirations of the citizens of Vermont, economic development should be pursued selectively so as to provide maximum economic benefit with minimal environmental impact.

(B) Any effort which directly or indirectly accelerates economic growth should be consistent with local, regional and state objectives.

(C) One of the long-range benefits to the community of commercial and industrial development should be to provide stable employment opportunities at all economic levels, particularly for Vermont's unemployed and underemployed.

(7) SPECIFIC AREAS FOR RESOURCE DEVELOPMENT

The flow of cash into Vermont to pay for goods manufactured in the state, grown in the state, or mined and quarried in the state, and to pay for services offered in the state to out-of-staters is of primary importance to the state's economy. Enterprises adding the greatest value by conversion of native raw materials or the products of the land are particularly beneficial to the public interest.

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threaten or significantly inhibit these resources should be permitted only when the public interest is clearly benefited thereby.

(3) PUBLIC AND PRIVATE CAPITAL INVESTMENT

(A) A balance of public and private capital investment determines the economic well-being of a town or region. An area of industrial, recreational, or residential growth requires highways, schools, utilities, and services the cost of which is borne in large part by others. A settled area, with a full complement of public services, needs continuing private capital investment to create a tax base to pay for the services. Increased demands for and costs of public services, such as schools, road maintenance, and fire and police protection must be considered in relation to available tax revenues and reasonable public and private capital investment. The location and rate of development must be considered, so that the revenue and capital resources of the town, region or state are not diverted from necessary and reasonably anticipated increased governmental services. Accordingly, conditions may be imposed upon the rate and location of development in order to control its impact upon the community.

(B) Consideration must be given to the consequences of growth and development for the region and the state as well as for the community in which it takes place. An activity or project that imposes burdens or deprivations on other communities or the state as a whole cannot be justified on the basis of local benefit alone.

(4) PLANNING FOR GROWTH

(A) Strip development along highways and scattered residential development not related to community centers, cause increased cost of government, congestion of highways, the loss of prime agricultural lands, overtaxing of town roads and services and economic or social decline in the traditional community center.

(B) Provision should be made for the renovation of village and town centers for commercial and industrial development, where feasible, and location of residential and other development off the main highways near the village center on land which is other than primary agricultural soil.

(C) Planning at all levels should provide for the development and allocation of lands and resources of existing cities, towns, and villages generally in proportion to their existing sizes as related to distribution state-wide and a projection of the reasonably ex-

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(8) PLANNING FOR HOUSING

(A) Opportunity for decent housing is a basic need of all Vermont's citizens. A decent home in a suitable living environment is a necessary element for protecting the health, safety, and general welfare of the public. The housing requirement for Vermont's expanding resident population, particularly for those citizens of low or moderate income, must be met by the construction of new housing units and the rehabilitation of existing substandard dwellings. It is in the public interest that new or rehabilitated housing should be: safe and sanitary; available in adequate supply to meet the requirements of all Vermont's residents; located conveniently to employment and commercial centers; and, coordinated with the provision of necessary public facilities and utilities and consistent with municipal and regional plans.

(B) Sites for multi-family and manufactured housing should be readily available in locations not inferior to those generally used for single-family conventional dwellings.

(C) There should be a reasonable diversity of housing types and choice between rental and ownership for all citizens in a variety of locations suitable for residential development and convenient to employment and commercial centers.

RESOURCE USE AND CONSERVATION**(9) NATURAL RESOURCES SPECIFICALLY PROVIDED FOR**

Those natural resources referred to in section 6086(a) (1) (A) "Headwaters", (B) "Waste disposal", (C) "Water conservation", (D) "Floodplains", (E) "Watercourses", and (F) "Shorelines", and section 6086(a) (8) (A) "Wildlife habitat and endangered species", and section 6086(a) (9) (B) "Primary agricultural soils", (C) "Forests and secondary agricultural soils", (D) "Earth resources", (E) "Extraction of earth resources", and (K) "Development affecting public investments" should be planned for development and use under the principles of environmental conservation set forth in those sections.

(10) RECREATIONAL RESOURCES

(A) The use and development of land and waters should occur in such a way as not to significantly diminish the value and availability of outdoor recreational activities to the people of Vermont, including hunting, fishing, hiking, canoeing and boating,

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skiing, horseback riding, snowmobiling, and other outdoor recreational activities.

(B) The effects of development and subdivision on availability of and access to lands which provide opportunities for outdoor recreation should be considered, and such availability or access should be provided for where feasible.

(11) SPECIAL AREAS

Lands that include or are adjacent to sites or areas of historical, educational, cultural, scientific, architectural or archeological value, including those designated by the rules of the environmental board, should only be developed in a manner that will not significantly reduce that value of the site or area. Sites or areas which are in danger of destruction should be placed in whatever form of public or private ownership that would best maintain and utilize their value to the public.

(12) SCENIC RESOURCES

The use and development of lands and waters should not significantly detract from recognized scenic resources including river corridors, scenic highways and roads, and scenic views. Accordingly conditions may be imposed on development in order to control unreasonable or unnecessary adverse effects upon scenic resources.

(13) CONSERVATION OF ENERGY

Energy conversion and utilization depletes a limited resource, and produces wastes harmful to the environment, while facilitating our economy and satisfying human needs essential to life. Energy conservation should be actively encouraged and wasteful practices discouraged.

(14) TAXATION OF LAND

Land should be appraised and assessed for tax purposes on the use of the land consistent with this act and any other state or local law or regulation affecting current or prospective use of land.

GOVERNMENT FACILITIES AND PUBLIC UTILITIES

(15) PLANNING FOR GROWTH

The development and provision of governmental and public utility facilities and services should be based upon a projection of reasonably expected population increase and economic growth, and

should recognize the limits of the state's human, financial, and natural resources.

(16) PUBLIC FACILITIES OR SERVICES ADJOINING AGRICULTURAL OR FORESTRY LANDS

The construction, expansion or provision of public facilities and services should not significantly reduce the resource value of adjoining agricultural or forestry lands unless there is no feasible and prudent alternative, and the facility or service has been planned to minimize its effect on the adjoining lands.

(17) PLANNING FOR TRANSPORTATION AND UTILITY CORRIDORS

The development and expansion of governmental and public utility facilities and services should occur within highway or public utility rights-of-way corridors in order to reduce adverse physical and visual impact on the landscape and achieve greater efficiency in the expenditure of public funds.

(18) TRANSPORTATION SYSTEMS

Safe, convenient and economical transportation is essential to the people and economy of Vermont and should be planned so as to conform to and further the purposes of this act. Highway, air, rail and other means of transportation should be mutually supportive, balanced and integrated. The transportation system should provide convenience and service which are commensurate with need and should respect the integrity of the natural environment. New construction or major reconstruction of roads and highways should provide paths, tracks or areas solely for use by pedestrian or other non-motorized means of transportation when economically feasible and in the public interest.

(19) PLANNING FOR WASTE DISPOSAL

Development which is responsible for unique or large amounts of waste should be permitted only if it can be demonstrated that available methods will allow the environment to satisfactorily assimilate the waste and that the public can finance the disposal method without assuming an unreasonable economic burden.

Sec. 8. 10 V.S.A. § 6001 is amended to read:

§ 6001. Definitions

When used in this chapter:

- (1) "Board" means the environmental board.