

ACT250 REFORM
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Thesis

Act250 reform needs to work for “The Other Vermont.” Any reform package must consider the unique needs of rural communities, and the small applicants in those communities.

Much of the current discussion regarding Act250 reform centers on expanding or reducing jurisdiction. *There would be fewer demands for exemptions if the Act250 process was more predictable and less expensive/complex for small applicants to navigate.* This is critical for rural communities, as many smaller towns and villages do not have the financial resources, administrative capacity, or infrastructure to qualify for existing or proposed exemptions.

Summary of Key Issues

- Additional opportunities to reduce duplication and conflict between Act250, other State Permits, and the local development review process.
- Additional opportunities to make the Act250 process more predictable and efficient for smaller applicants.
- Potential for significant expansion of Act250 jurisdiction in rural communities, including expansion into areas where development is appropriate, such as existing neighborhoods surrounding Village and Downtown cores.
- Proposed appeal process for Village Center Designation will undermine success of one VT’s few economic development programs specifically structured for the needs of rural communities.
- As currently structured in proposed legislation, the new “Enhanced Designation” is inaccessible to rural communities.
- Proposed legislation does not address the barriers rural communities currently face when attempting to access other Designations.
- The “Capability and Development Plan” (CDP) has the potential to improve Act250 review by creating additional predictability. However, as currently proposed, the process for developing and adopting the CDP is “top down,” and would benefit from more meaningful public engagement and review by Vermonters at the local and regional level.
- New criteria and proposed revisions to existing criteria require additional analysis before adoption into law.

Problem Statement: Act250 was developed prior to widespread planning and zoning at the local level. Act250 has been successful in ensuring rural towns are not overwhelmed by demands of infrastructure and from new development, and that major development meets basic standards. However, as local planning and zoning have become more robust, the potential for duplication or conflict with Act250 has increased.

The Legislature has attempted to address this issue by developing a definition of “existing settlement.” Decisions related to many criteria now hinge on whether or not the project is within an “existing settlement.” (See attached table). The current process for determining if a development is within an “existing settlement” creates numerous points for potential appeal for any project not located within a narrowly defined State Designated Center.

Possible Solution: In order to create a more predictable process and reduce the potential for conflicts between various levels of permitting, *appropriate areas for development should be determined as part of the planning process rather than the regulatory process.* With appropriate guidance and standards, Local and Regional Plans can be structured to define where larger scale growth and development should occur, and this planning effort can serve as the basis for review and findings under relevant criteria. A coordinated process for defining areas appropriate for development at the Local, Regional, and State level can help ensure that areas appropriate for development are consistent with State planning goals, and reduce the need for Agency-by-Agency review of some criteria. (See further discussion of Capability and Development Plan and State Review of Plans below)

Problem Statement: As currently structured, in order to begin the review process, a complete Act250 application must address both “site plan” issues – i.e. general layout -- and “detail issues” – meaning engineering specifications. Generally, most questions and concerns in the local process and from neighbors relate to site plan issues. It is much less expensive to revise a site plan BEFORE developing engineering details.

Solution: Revise the Act250 process to enable approvals conditioned on agency permits, or in absence of a permit, designer certification that technical specifications have been met. Unlike the current “Master Plan” process, these approvals would have the weight of final approval, and could not be reopened once the appeal period expired. In addition to creating more predictability for the applicant, this would enable the limited resources available for Act250 review to be targeted toward issues not addressed by other State permits. It would also enhance opportunities for public input, as it would reduce the cost of minor revisions to sites plans, and by extension the cost to applicants for responding to public comment.

Problem Statement: Act250 was initially developed to address impacts from major development prior to the creation of other State environmental permits. Many Act250 criteria, such as wastewater, water supply, stormwater, and wetlands, are now addressed by other State permitting. In some instances the Act250 process is used to reopen these permits, and may require standards exceeding those of technical permitting rules.

Possible Solution: Revise statute to clearly state that State permits satisfy all relevant criteria, and limit appeals of these criteria to clear technical deficiencies in the underlying State permit. Agency permits and designer certifications would only be appealable based on technical deficiencies, and the burden of proving a technical deficiency would fall on the person making the appeal, rather than the applicant. The “Administration bill” partially accomplishes this, but leaves the door open for reopening permits by including the clause “*the presumption... shall only apply to issues addressed as part of the terms of the permit.*”

Problem Statement: The Committee Bill calls for creation of a “Capability and Development Plan” (CDP) that will, among other things, identify “existing settlements” on a statewide basis. A functional, updated CDP could benefit all participants in the Act250 process – including applicants and municipalities -- by improving predictability, *provided that smaller settlements in rural communities are properly identified*, and that the mapping of “existing settlement” leaves room for new growth. As currently proposed, the CDP is developed through a top-down process. Executive Agencies will have authority over adoption of the CDP, without legislative oversight or robust and meaningful engagement at the local or regional level. This increases the likelihood that small settlements are overlooked, and is in conflict with Vermont’s Planning Statute, which specifically calls for a “*comprehensive, coordinated planning process*” that “*encourages citizen participation at all levels of the planning process.*”

Possible Solution: The process for adopting the “Capability and Development Plan” should be based on “bottom up” engagement, and should contain checks and balances similar to the process for adopting Municipal and Regional Plans. For discussion purposes, the Committee might consider a process similar to the adopting of Regional Plans and corresponding Regional approval of municipal plans. Such a process would require an affirmative vote of at least 60% of Regional Planning Commission Board of Directors to adopt the Capability and Development Plan, and in order for an individual RPC to grant such approval, 60% RPC Board members representing municipalities would need to vote in the affirmative.

Problem Statement: The State has also attempted to differentiate between “rural” and “developed” areas by creating several “Designations.” However, this approach has severe limitations. The Village and Downtown Designation programs are specifically limited to the civic and commercial core, *and intentionally exclude surrounding areas that may be the most logical areas for new development*, such as mixed use and residential neighborhoods surrounding the core. (Examples include Brookside Road in Westford, Railroad Street in Johnson, and Jeffersonville Heights in Jeffersonville). This is especially challenging in rural Villages with limited wastewater or water capacity in the “core.” While the Growth Center and Neighborhood Development Area (NDA) Designation programs are intended to address this issue, as currently structured, these programs are largely inaccessible to rural communities. Finally, there are areas where it is logical to concentrate new development that do not meet the narrow confines of existing Designations, especially in light of the need to create areas for new development outside of floodplains.

Both the Administration and Committee bills propose to create a new “Enhanced Designation” that would exempt most development within the designated area from Act250 review. Based on the initial Administration and Committee drafts, it appears that, like the Growth Center and Neighborhood Development Area Designations, the “Enhanced Designation” would be inaccessible to many rural communities. Notably, the Administration bill requires both public sewer and water infrastructure with excess capacity – something lacking in most communities.

Solution: Remove barriers to establishing current, *existing Designations* in rural communities, – specifically Neighborhood Development Areas and Growth Centers -- and expand the existing Act250 exemptions available within those Designations. Related to Neighborhood Development areas, revise the current definition of “priority housing” to eliminate unit caps and barriers to mixed use development, specifically enable a wider range of tools to meet density requirements, exempt in-ground wastewater system components serving Village Centers and NDAs from agricultural soil mitigation requirements, and provide parity between NDAs and “core areas” related to river corridors and floodplains. (*See discussion of River Corridors below*)

Problem Statement: Both the Administration bill and Committee bill significantly expand Act250 Jurisdiction outside of State Designations. The Administration bill refers to these areas as “*unique resource areas*” and the Committee bill refers to these areas as “*rural and working lands areas*” and “*critical resource areas*.” In theory, this expanded jurisdiction is offset by reduced jurisdiction in some Designations. However, as noted above, with the exception of the Village Center Designation, these Designations are currently inaccessible to rural communities. This will result in many smaller projects becoming subject to Act250 Jurisdiction, increasing the time and expense for creating new housing, jobs and services in areas that are appropriate for development in the majority of Vermont communities.

Solution: If Act250 Jurisdiction is expanded barriers to participation in State Designations by rural communities should also be addressed, and Local and Regional Plans should be given greater standing in *all relevant criteria*. (see attached table).

Problem Statement: Both bills also create an appeal process for Designations. The current Village Center Designation is successful largely because it is simple to navigate for rural communities with limited resources. Subjecting Village Center Designations to appeals would transform what is currently a process with few barriers to entry into one that opens communities to expensive litigation. *Please don't do this*.

Solution: If an appeal process for Designations is created, *Village Centers should be specifically exempt*. Village Centers are unique among the Designations in that they have little bearing on Act250 jurisdiction.

Problem Statement: Both bills make revisions to Act250 criteria, or create entirely new criteria, with far reaching consequences that need to be properly vetted prior to adoption. Specifically:

Criteria 10: Conformance with Local and Regional Plans (Committee Bill Only) -- The bill would create a State level review of Regional Plans for consistency with State Planning Goals and required plan elements. Under the proposed legislation, the Natural Resources Board would complete this review.

Solution: If there is general consensus on the need for State review of Regional Plans, an alternative review body should be tasked with this responsibility, as plans must address issues beyond natural resources, including transportation, public services, and economic development. The NRB as the review body also creates a potential conflict of interest, as the NRB will be both reviewing plans as an administrative function and then making determinations regarding their use in a quasi-judicial function. Finally, if Plans are subject to State review, they should also be given greater standing in the Act250 process, as discussed above.

River Corridors (Committee and Administration Bill)-- In 2014, ANR created a “procedure” that expanded the FEMA mapped floodway to include the River Corridor, and now refers to this expanded area collectively as the “Act250 Floodway.” Both bills would codify this procedure into statute. This change has potential impacts on other State programs, especially within rural villages. In general, the River Corridor is wider and more expansive than the FEMA Floodway. For example, the “River Corridor” includes nearly 60% of Johnson Village, much of Wolcott Village, and North Main Street in Cambridge Village. Both bills also propose to treat River Corridors as an area with expanded jurisdiction. Depending on how this expanded jurisdiction is structured, this could mean that even very minor redevelopment, including minor improvements to existing homes and businesses such as replacing a septic system, could require Act250 review, and may be significantly limited beyond current standards, or even prohibited.

Solution: The current ANR “procedure” includes special provisions for “infill” within Designated Centers and the “shadow area” of existing development that are structured to allow redevelopment with appropriate safeguards against flooding. While ANR staff and leadership have recognized

the importance of allowing development within Villages, once in statute, the issue will present a greater opportunity for appeal. In order to minimize the potential for such appeals, if “River Corridors” are codified into statute, the “infill” provisions must also be codified. The “infill” provisions should also be strengthened to (a) ensure infill is allowed in neighborhoods surrounding Village and Downtown Core by referencing the full “existing settlement” rather than only the Designated Core, and (b) to ensure that replacement and enlargement of onsite wastewater systems is allowed.

New Climate Change/Carbon Neutrality Criteria (Committee Bill Only) -- The proposed legislation would create a new criteria related to climate change that would require any development subject to Act250 to avoid, minimize or mitigate carbon emissions. Reducing carbon emissions is a worthy statewide goal in the light of climate change. However, it is currently unclear what an individual applicant would need to do to meet this criteria.

Solution: Vermont can achieve the greatest carbon reductions by focusing on community and regional planning that encourages mixed use, walkable development. It is worth noting that transportation is the largest contributor to carbon emissions and that Vermonters on average drive ~2,000 miles more per year than the average American. An extremely effective means to address carbon emissions in Vermont is to reduce the need for Vermonters to drive long distances for employment, goods, and services. As part of Vermont’s climate mitigation efforts, ***all Act250 criteria should be examined to remove barriers to new housing close to job centers, and to enable development of more goods and services in rural Villages.***

New Forest Fragmentation Criteria (Committee Bill Only) – The proposed legislation would create a new criteria aimed at preventing fragmentation of forests through development and subdivision.

Solution: A vibrant forest products industry that provides landowners with a stable return on investment will reduce development pressures on forest land, and is the most effective tool for preventing forest fragmentation. As such, the Act250 process should also be reviewed and revised to address the numerous challenges identified by operators of sawmills and other forest product related industries.

Energy (Committee Bill Only) -- The Energy Criteria (9F) would be revised to specifically require conformance with the “stretch code.” While this is consistent with existing Act250 practice, it has yet to be codified into statute. Meeting the stretch code has been difficult for some smaller applicants – especially small industrial users expanding in pre-existing buildings. In addition, the stretch code can prevent storefront facades with large windows open to the street, which are proven to be effective at creating an inviting, pedestrian friendly atmosphere critical to success in a Village or Downtown setting. Pedestrian friendly development patterns are critical to reducing transportation based energy use and carbon emissions.

Solution: Before the “stretch code” is formally adopted into Act250, the code should be reviewed and clarified to ensure it is compatible with other State planning goals, such as historic preservation and Village/Downtown redevelopment.

A Generalized, Partial List of Act250 Criteria with Land Use Implications

Criteria	Within “Development Area”	Outside “Development Area”	Basis of In/Out Determination
1(D) Floodways/ River Corridors; (E) Riparian Buffers; (F) Shorelines	*Infill allowed within River Corridors. *Where appropriate, buffers may be narrowed to accommodate pre-existing development.	*Generally little to no development allowed in these areas. *100-50 foot vegetated buffers required.	“Designated Centers” – Designated Downtowns and Village Centers are based on the commercial and civic core. <i>This excludes redevelopment and infill in existing neighborhoods surrounding Village and Downtowns.</i>
5 Transportation	*Design transportation infrastructure primarily for access. *Avoid wide stretches of pavement (turn lanes, etc.) that inhibit pedestrian traffic. *Longer delays of automobile traffic acceptable (LOS less than C) if necessary for safety of other modes, or to minimize impacts on built environment *Design for lower speeds	*Design transportation infrastructure primarily for mobility. *Generally designed for efficient movement of traffic (LOS C or greater). *Design for higher speeds.	Not codified in Statute. Internal Vtrans procedure MAY consider Designations or setting. However, these determinations are subject to appeal, creating potential for lengthy and expensive “dueling engineers.” Note that existing language referencing “unreasonable congestion” disadvantages ALL types of Centers.
8 Aesthetics	Development designed to be <i>visual integrated</i> with streetscape and neighboring buildings	Development <i>screened</i> from roadway and neighboring development	No formal statutory differentiation. Based on “Quechee” test.
9(b) Primary agricultural soils	Enable “mitigation flexibility/off-site mitigation” in order to achieve dense, walkable development patterns that make efficient use of infrastructure	Design development to avoid primary soils to the greatest degree possible.	Designated Downtown, Growth Center, New Town Center or Neighborhood Development Area associated with a Downtown. <i>Village Centers are treated as rural areas for purposes of this criteria.</i> Potential barrier to creating on-site wastewater capacity in rural communities. Soils suitable for on-site septic overlap with agricultural soils
9(L) Development Patterns	Encourages dense development and infill and non-automobile based connections to neighboring development	Discourages/prohibits new “strip development.”	“Existing Settlement,” which includes Designated Centers. Potential conflicts with 9(b), as trails and other bike/ped facilities are not allowed on prime agricultural soils.