

## **Housing Bill Testimony – S.237 Vermont Planners Association**

Testimony to the House Committee on General, Housing, & Military Affairs  
Alex Weinhagen, VPA Legislative Liaison, 8/27/2020  
*Based on S.237, As Passed by the Senate*



### **Background**

Thank you for hearing testimony from the Vermont Planners Association (VPA) regarding S.237.

S.237, as passed the Senate, aims to promote more housing - particularly housing in our compact, walkable areas served by sewer and water – an overarching goal that VPA strongly supports. While there are no silver bullets to Vermont’s housing challenges, many of the proposals in S.237 could make it easier to create more housing in smart growth areas that have services, transportation, and jobs. As noted below, other changes (particularly Section 2), could benefit from more vetting by the legislature.

### **VPA supports the following provisions of S.237:**

- Planning for water and sewer in municipal plans (§ 4382 (a)(4)).
- Improving language regarding Accessory Dwelling Units (§ 4412 (a)(1)(E)&(F)).
- Treating duplexes the same as single family housing within Inclusive Development Areas (§ 4412 (b)(1)(C)).
- Providing the ability to opt out of certain provisions by filing a Substantial Municipal Constraint Report, and the process for filing and reviewing of reports and progress (§ 4412 (b)(2)), as well as Section 4 of the bill.
- Funding and incentives to support municipalities that are making zoning upgrades (§ 4412 (b)(3)).
- Expanding tax credits to Neighborhood Development Areas and designations for floodproofing (Section 13 of S.237), and increasing the amount of tax credits to ensure that the same amount of money is not spread over more projects.

### **In addition, VPA strongly supports these complementary policies:**

- Act 250 exemptions in Downtowns and Neighborhood Development Areas, when balanced with forest fragmentation criteria and protections in outlying areas, as proposed in H.926.
- Retention and expansion of Municipal Planning Grant funding so municipalities can do the work to make the changes proposed in S.237 – especially if there is a statewide approach to enabling more housing, local and regional planning must provide the foundation for this work.

### **VPA concerns about S.237 and suggestions for improvement**

VPA supports this effort but has reservations about some of the language currently proposed. As such, VPA notes five issues that may create unintended consequences. See Attachment A for details and specific bill language revision suggestions.

1. *Geographic area of applicability:* Using water and sewer service areas to identify where these provisions should apply will capture more land area than intended - and may lead to residential sprawl in outlying areas. We suggest a geographic area criteria similar to NDA-eligible areas.

2. *Use of minimum lot size to achieve compact downtown/village form.* Minimum lot sizes will not achieve the desired form in communities of all scales, and as proposed could deter municipalities from developing wastewater infrastructure. Instead, we recommend using development density thresholds to provide development in ways that fit each community.
3. *Elimination of conditional use review for multi-unit dwellings:* “Character of the area,” one of the standards that is part of conditional use review, is unfortunately sometimes used to exclude multi-family housing. To address this, we support eliminating only the “character of the area” review for 3- and 4-unit dwellings within districts that allow multi-unit dwellings. We recommend that the bill retain a municipality’s ability to use conditional use review for other legitimate project impacts such as traffic, parking, fire safety, noise levels, etc.
4. *Enforceability of the proposed changes to 24 VSA §4412 under fair housing provisions:* If housing bylaws are discriminatory, Chapter 117 has a way to challenge the validity of the bylaws (24 VSA §4453). It should be made clear that any changes and additions to 24 VSA §4412 will be legally enforceable under 24 V.S.A. § 4412.
5. *Lack of clarity on the criteria and intention of the Substantial Municipal Constraints Report:* We recommend that details be developed on what the report must include, and how it will be used.

### **Municipal regulations are one piece of our housing approach**

VPA recognizes that while important factors, zoning and other regulations are hardly the only barriers to the creation of affordable housing. The Vermont-specific guide [\*Enabling Better Places: A Zoning Guide for Vermont Neighborhoods\*](#), which aims to promote more smart growth housing, notes that “bylaw reform is not a silver bullet”. Adequate infrastructure, the cost of labor and materials, and financing for housing that is affordable are all additional challenges. We hope that the legislature will continue its work on these pieces of the puzzle as well, and we thank you for your efforts.

*Enabling Better Places* was only released in July 2020 by the VT Department of Housing and Community Development and the Congress for New Urbanism, so several useful approaches (including the guide’s “principles of bylaw reform”) are not reflected in S.237’s approach.

Furthermore, any approach to housing, particularly one that represents a more uniform statewide regulatory approach, should start with good planning and collaboration with municipalities and others in the housing community. VPA supports a more coordinated statewide system of planning (through the state designation programs, for example) and permitting (for example, with Act 250 and state permits).

### **About the Vermont Planners Association**

*VPA is a non-profit advocacy and educational organization of over 150 planners and related professionals. We are dedicated to the advancement of community planning in Vermont at the local, regional, and state levels, to foster vibrant communities and a healthy environment. We are a section of the Northern New England Chapter of the American Planning Association. More information is available online at <https://nne.planning.org/sections/vermont>. Our membership is diverse, including municipal planners, regional planning commission staff, private planning consultants, state planning professionals, etc. We also work to coordinate VPA’s advocacy and education with other groups involved in planning policy such as VAPDA (VT Association of Planning & Development Agencies), VLCT, and the Agency of Commerce and Community Development.*

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#### **Attachment A – Technical Analysis and Suggested Bill Language Revisions**

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This supplementary document to VPA’s testimony on S.237 provides technical analysis of the five topics of concern, as well as specific recommended changes to improve these aspects of the bill.

- 1) **More tightly define locations within which inclusive housing provisions apply (Section 2, page 5, 4412(b)(1)(A))**
  - Overlay water or water and sewer service areas with State designation programs; specifically the following:
    - Designated Village Centers plus ¼ mile buffer
    - Downtowns plus ½ mile buffer
    - Neighborhood Development Areas
    - Growth centers
    - New town centers plus ½ mile buffer
  - With exceptions for those areas that are subject to:
    - flood hazard and fluvial erosion area bylaws adopted pursuant to 24 VSA 4424;
    - bylaws protecting known natural resource constraints identified in a duly adopted and regionally approved local plan.
  - Using the boundaries of the state designated areas, plus an appropriate buffer and consideration for natural resource constraints, focuses the proposed change in more compact centers, and helps avoid sprawl.
  - While this may seem to represent a limited amount of area, this captures:
    - All of Vermont’s designated downtowns, growth centers, and new town centers
    - 48 of the 195 designated village centers that have water and sewer service.
  - Most importantly, this approach avoids unintentionally capturing areas with infrastructure that are unsuitable for compact residential development.
    - Example: Stowe’s wastewater service area extends far beyond its designated downtown and village planning areas, as well as the ¼- and ½-mile buffer zones eligible for NDAs. As drafted, S.237 would enable development for approximately 4.5 miles outside of downtown Stowe along VT-108 (Mountain Road), including some environmentally sensitive areas lacking year-round transportation connectivity.
    - Example: Hinesburg nearly doubled the land area zoned for higher density housing in 2009 – an expanded village growth area. With that said, its water and wastewater service area still includes portions of town outside of this area, which serve historic industrial businesses (e.g., Iroquois Manufacturing) and the state’s largest high school (Champlain Valley Union High School). These areas

allow for water/wastewater connection, but are zoned for much lower residential density in order to focus dense housing closer to services in the village. Hinesburg currently has over 200 units of new housing (including affordable and senior housing) in its local development review process for the village growth area. It makes no sense to undermine this progress and redirect limited water/wastewater capacity to high density development across outlying portions of the service area.

- Retain the provision of S.237 that requires that “residential uses be served by and able to connect to a water or water/wastewater system operated by a municipality” (emphasis added). This is important to avoid a statutory assumption that privately owned and operated systems are appropriately planned and sited for permanent housing development (e.g., mountaintop resorts). “Municipality” would include fire districts operated independent of municipal government.

**2) Use minimum densities instead of minimum lot sizes to encourage creation of new housing.**

- Mandating a minimum size for the creation of new lots is not the best way to promote more housing. Instead, using a minimum residential density provides options for “missing middle” (and often more affordable) housing types, including both single-family homes or multi-family homes on a lot.
  - i) For example, in Winooski there is no minimum lot size due to the implementation of form-based code (FBC). FBC more closely regulates building and streetscape design to achieve a certain community feel and function, rather than lot size and setbacks.
  - ii) Another example is the Village of Hyde Park, where local zoning encourages the creation of housing that recreates the “house plus carriage house” form by allowing multiple buildings on a single lot, most of which are rented as full dwelling units (not just ADUs), and some are used for commercial purposes.
- Suggested bill language – Section 2, page 5, 4412(b)(1)(A):

*(A) No bylaw shall have the effect of prohibiting the creation of housing with a minimum net<sup>1</sup> density of:*

*(i) 4 dwelling units per acre within any regulatory district allowing residential uses served by and able to connect to a water system operated by a municipality; or*

*(ii) 8 dwelling units per acre within any regulatory district allowing residential uses served by and able to connect to a water and sewer system operated by a municipality.*

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<sup>1</sup> The NDA guidance (and many individual communities’ zoning bylaws) define net density to exclude areas with natural resources constraints (slopes greater than 25%; wetlands, floodways, and streams; rare and irreplaceable natural areas; etc.) to avoid overbuilding in areas that otherwise would not be appropriate for development. Net density can also include areas of setbacks, streets, parking, and recreation spaces or ancillary structures so as not to penalize developers for including these important amenities.

- Note that this change would not require landowners to develop small lots or specific densities; it just enables them to do so. However, it would prohibit municipalities from having zoning bylaws that *disallow* development at this minimum density.

### 3) **Revise language promoting Multi-Unit Dwellings**

- “Character of the area,” a common standard within conditional use review, is unfortunately sometimes used as an exclusionary zoning mechanism. As such, VPA supports eliminating “character of the area” review for 3- and 4-unit dwellings within districts that allow multi-unit dwellings. This would retain a municipality’s ability to utilize conditional use review for legitimate project impacts – e.g., access and parking management, fire safety, municipal services, historic preservation and design review.
- The following suggestion from VPA, in **bold underline**, modifies S.237, Section 2, page 2, 4412(a)(1)(D):

*(1) Equal treatment of housing and required provisions for affordable housing.*

*(D) Bylaws shall designate appropriate districts and reasonable regulations for multiunit and multifamily dwellings. No bylaw shall have the effect of excluding these multiunit or multifamily dwellings from the municipality. Within any regulatory district that allows multiunit residential dwellings, no bylaw shall ~~have the effect of prohibiting condition approval of multiunit residential dwellings of with four or fewer units as an allowed, permitted use, or of conditioning approval~~ based on the character of the area.*

### 4) **Address new inclusive development provisions under § 4453: Challenges to Housing Provisions in Bylaws**

- 24 V.S.A. § 4412 (Equal Treatment of Housing) provides the basis and criteria for legally challenging a municipal bylaw as exclusionary under § 4453 (Challenges to Housing Provisions in Bylaws). While rarely invoked, § 4453 offers the only remedy in statute (sometimes referred to as “the builders remedy”) to challenge such bylaws. § 4453 is not currently referenced at all in S.237 as passed by the Senate, possibly as an oversight.
- Any proposed amendments to § 4412(a) – e.g., with regard to multifamily dwellings – should be understood (and clearly stated) as additional criteria to legally challenge an exclusionary bylaw. References to § 4412(a) as amended should be updated in tandem under § 4453 as a housekeeping change.
- Under the current draft of the bill, § 4453 **does not necessarily apply** to proposed elements of § 4412(b) with regard to “Inclusive Development” – e.g., minimum lot size or density requirements. If the intent is that Equal Treatment of Housing does in fact apply to § 4412(b), additional changes to § 4453 would be needed.

### 5) **Include specific criteria for consideration in the Substantial Municipal Constraint report, and clarify how the report will be used.**

- It is unclear whether constraints other than water and sewer capacity would be considered seriously in this process. These include capacity and availability of:

- Stormwater
  - Transportation infrastructure (motorized and non-motorized)
  - Emergency response services
  - Schools
  - Recreation facilities
- Even for those communities with impact fees in place, housing growth could place financial strain on communities, defeating the goal of generating affordable housing. A safeguard is needed to protect these communities as they adapt to housing growth and allocate limited resources.
    - For example, Essex Town’s sewer service area includes large-lot suburban development, some of which originally didn’t connect to sewer, but for which future allocation is reserved. Mandating additional sewered density in such areas may limit remaining capacity for smart growth efforts like the Essex Town Center, while furthering a legacy of sprawled development patterns.
  - Ideally the Substantial Municipal Constraint Report would be used to identify those communities where additional technical assistance and funding should be directed, rather than a penalty for communities who face constraints. In this way, the report becomes part of advancing the overall policy of housing creation.

**Issues for future consideration**

VPA understands that the Legislature has limited time and resources under current circumstances to address the many interrelated problems that the Vermont Planners Association sees as important to the state’s success. However, we would be remiss not to mention the following pertinent topics and needs that relate to the creation of housing and community development in general.

- There is a need for better statewide and local planning for areas appropriate for growth, which could have the benefit of aligning regulatory review with the goals of a given area, and the resources that are present there.
- VPA’s rural members note that there are opportunities to improve the Neighborhood Development Area program to increase its usability for rural communities.
- The 5 year/5 mile radius jurisdictional rule within Act 250 has implications for smaller developers that should be examined.
- To meet our state’s smart growth goals, communities need funding to support water/sewer capacity increases in areas deemed appropriate for growth.
- We are interested in seeing accountability and funding of the state’s Complete Streets Policy.
- Of course, zoning and other regulations are hardly the only barriers to the creation of affordable housing. Adequate infrastructure, the cost of labor and materials, and financing for housing that is affordable are all additional challenges. We hope that the legislature will continue its work on these pieces of the puzzle, and thank you for your efforts.