

## Does a recreational trail require an Act 250 permit?

Ellen Czajkowski, Legislative Counsel, June 4, 2020

*The summary contained in this document is for general informational purposes only. It is not intended as a comprehensive treatment of the subject matter and does not constitute legal advice or a legal opinion.*

Trails are defined in 10 V.S.A. § 442 as “land used for hiking, walking, bicycling, cross-country skiing, snowmobiling, all-terrain vehicle riding, horseback riding, and other similar activities.”<sup>1</sup> This is a wide variety of activities which means that trails can take different forms and involve different amounts of physical improvements to the land.

The terms “recreational trail” and “trail” are not defined in the Act 250 statute or rules. Therefore, analysis of whether a trail requires an Act 250 permit is the same as for other types of development. Act 250 analysis is highly fact dependent so it is difficult to determine if a trail needs an Act 250 permit without analyzing the details of the trail, but generally, the steps below can be used.

No person shall commence development (or construction of development) without an Act 250 permit.<sup>2</sup> Development is defined to include the construction of improvements for a commercial purpose on a tract of land involving 10 or more acres (a 10-acre town) or 1 or more acre in a town without permanent zoning and subdivision bylaws (a 1-acre town).<sup>3</sup> Development is also defined as the construction of improvements for a municipal, county, or State purpose on a tract of land involving 10 or more acres.<sup>4</sup> Development for a municipal, county, or State purpose does not use the 1-acre or 10-acre town distinction.

The Act 250 Rules define the phrase “construction of improvements” as any physical change to the project site, except changes made to prepare the site for the permit application (like test wells or other tests that are not permanent), construction for a home occupation, or changes that are de minimis and unlikely to cause an impact under the 10 criteria of Act 250.<sup>5</sup>

The Act 250 Rules define “commercial purpose” as “the provisions of facilities, goods, or services by a person other than for a municipal or State purpose to others in exchange for payment of a purchase price, fee, contribution, donation, or other object or service having value.”<sup>6</sup>

Chapter 20 of Title 10 of the Vermont Statutes Annotated establishes the Vermont Trails System. The chapter authorizes the Agency of Natural Resources to administer the Vermont Trails System and to establish criteria by which trails can be recognized as part of the system.<sup>7</sup> In 10 V.S.A. § 441, Vermont Trails System trails are declared to be for a public purpose. This has been interpreted to be “tantamount to a State purpose” under Act 250, so trails that are recognized as part of the Vermont Trails System are for a State purpose.<sup>8</sup>

---

<sup>1</sup> 10 V.S.A. § 442 (3).

<sup>2</sup> 10 V.S.A. § 6081(a).

<sup>3</sup> 10 V.S.A. § 6001 (3)(A)(i)-(ii).

<sup>4</sup> 10 V.S.A. § 6001 (3)(A)(v).

<sup>5</sup> Act 250 Rule 2 (C)(3).

<sup>6</sup> Act 250 Rule 2 (C)(4).

<sup>7</sup> 10 V.S.A. §§ 441-449.

<sup>8</sup> Re: Vermont Association of Snow Travelers (VAST), Declaratory Ruling #430, page 9, March 11, 2005.

Therefore, the first part of the analysis is:

- Will the trail involve physical changes to the land that are more than de minimis?
- What is the purpose of the development: is it for a commercial purpose or a public purpose (including a municipal, county, or State purpose)?
- If it is for a commercial purpose, does the town in which it is located have permanent zoning and subdivision bylaws (is it a 1-acre town or a 10-acre town)?
- If the commercial trail is in a 1-acre town, is 1 or more acre of land involved?
- If the commercial trail is in a 10-acre town, are 10 or more acres of land involved?

Under the Act 250 Rules, when the development is for commercial purposes, the “involved land” is defined as the entire tract or tracts of land to be used in the project.<sup>9</sup> For municipal, county, or State purposes, involved land only includes the portion of the tract to be physically altered and upon which construction of improvements will occur.<sup>10</sup> This generally means that when the project is for a public purpose, more land is required to reach the 10-acre threshold.

Therefore, ask:

- For a commercial trail, is the tract or tracts of land 10 acres or larger in a 10-acre town? Or 1 acre or larger in a 1-acre town?
- For a public trail, does the amount of land to be physically altered add up to 10 acres or more?

If the trail is large enough to meet either threshold, the trail may need to receive an Act 250 permit.

Once jurisdiction has been established over a trail, Rule 71 of the Act 250 Rules specifically addresses the extent of Act 250’s jurisdiction over the trail. Under Rule 71(a), if the trail requires an Act 250 permit, jurisdiction is limited to only the trail corridor and areas related to construction, operation, and maintenance of the trail, not the rest of the tract of land. The rule assumes the trail corridor is 10-foot wide, unless the District Commission decides otherwise. The permit attaches in perpetuity to only the trail corridor.

Finally, while this summary was intended to succinctly lay out the steps for determining Act 250 jurisdiction over recreational trails, it is possible that jurisdiction over trails may be established in other ways. Act 250 jurisdictional analysis is highly fact dependent, and it is important for individual projects to consider all of Act 250’s jurisdictional triggers. For example, the construction of improvements for commercial, industrial, or residential use above 2,500 feet in elevation constitutes development and require a permit, regardless of the size of the tract involved.<sup>11</sup> Also, a commercial development (that is not a trail) may require an Act 250 permit, and a trail may be proposed for the tract on which the development is located. Also, trails on land with existing Act 250 permits may require an Act 250 permit amendment.

---

<sup>9</sup> Act 250 Rule 2(C)(5)(a).

<sup>10</sup> Act 250 Rule 2(C)(5)(b).

<sup>11</sup> 10 V.S.A. § 6001 (3)(A)(v).