

ACT 250 LEGISLATION COMPARISON

FOREST FRAGMENTATION

Prepared for Senate Natural Resources & Energy by Ellen Czajkowski, Legislative Counsel, February 1, 2022

H.233

Language from H.233 of 2017 (H.904 of 2018, S.165 of 2020, etc.)

- Adds new definitions to Act 250
- Adds new jurisdictional triggers:
 - Any development more than 350ft within a high priority forest block
 - Subdivisions: 6 lots in towns w/zoning & 3 lots in towns w/no zoning if in high priority forest block
- Adds new fragmentation subcriteria to criterion 8-8(B) Forest Blocks and 8(C) Habitat connectors
- The burden of persuasion for new subcriteria on applicant
- Adds new section to Act 250 to establish a procedure for mitigation of fragmentation of forest blocks and habitat connectors
- Requires the NRB to adopt rules for the new mitigation and guidance for applicants on how to meet the new criteria
- Requires ANR's mapping to include forest blocks

S.234

- Adds the new definitions to Act 250
- Adds a new jurisdictional trigger- the Road Rule
- Amends new subcriterion to criterion 8- 8(C)
- Requires NRB to work w/ANR to create rules for 8(C)
- Requires ANR's mapping to include forest blocks

S.234 (and H.926)- Forest Block Criterion

Sec. 9. 10 V.S.A. § 6086(a)(8) is amended to read:

(8) Ecosystem protection; scenic beauty; historic sites.

(A) Aesthetics. Will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas.

~~(A)~~(B) Necessary wildlife habitat and endangered species. A permit will not be granted if it is demonstrated by any party opposing the applicant that a development or subdivision will destroy or significantly imperil necessary wildlife habitat or any endangered species; and:

(i) the economic, social, cultural, recreational, or other benefit to the public from the development or subdivision will not outweigh the economic, environmental, or recreational loss to the public from the destruction or imperilment of the habitat or species; ~~or~~

(ii) all feasible and reasonable means of preventing or lessening the destruction, diminution, or imperilment of the habitat or species have not been or will not continue to be applied; or

(iii) a reasonably acceptable alternative site is owned or controlled by the applicant ~~which~~ that would allow the development or subdivision to fulfill its intended purpose.

(C) Forest blocks and connecting habitat. Will not result in an undue adverse impact on forest blocks and connecting habitat. If a project as proposed would result in an undue adverse impact, a permit may only be granted if effects are avoided, minimized, and mitigated in accordance with rules adopted by the Board.

S.234- Rulemaking

Sec. 10. CRITERION 8(C) RULEMAKING

(a) The Natural Resources Board (Board), in consultation with the Agency of Natural Resources, shall adopt rules to implement the requirements for the administration of 10 V.S.A.

§ 6086(a)(8)(C). Rules adopted by the Board shall include:

- (1) How forest blocks and connecting habitat are further defined, including their size, location, and function, which may include:
 - (A) information that will be available to the public to determine where forest blocks and connecting habitat are located; or
 - (B) advisory mapping resources, how they will be made available, how they will be used, and how they will be updated.
- (2) Standards establishing how impacts can be avoided, minimized, or mitigated, including how fragmentation of forest blocks or connecting habitat is avoided or minimized, which may include steps to promote proactive site design of buildings, roadways and driveways, utility location, and location relative to existing features such as roads, tree lines, and fence lines.
- (3) Criteria to identify when a forest block or connecting habitat is eligible for mitigation.
- (4) Standards for how impacts to a forest block or connecting habitat may be mitigated. Standards may include:
 - (A) appropriate ratios for compensation;
 - (B) appropriate forms of compensation such as conservation easements, fee interests in land, and other forms of compensation; and
 - (C) appropriate uses of on-site and off-site mitigation.
- (b) The Board shall convene a working group to provide input to the rule prior to prefiling with the Interagency Committee on Administrative Rules. The Board shall convene the working group on or before February 1, 2023.
- (c) The Board shall file a final proposed rule with the Secretary of State and Legislative Committee on Administrative Rules on or before June 15, 2023.

H.926 as PBH- Forest Block Criterion

- (C) Will not result in an undue adverse impact on forest blocks, connecting habitat, or rare and irreplaceable natural areas. If a project as proposed would result in an undue adverse impact, a permit may only be granted if effects are avoided, minimized, and mitigated in accordance with rules adopted by the Board.

19-0040 (Predecessor to H.926)- Fragmentation Criteria

- (B) Forest blocks.
- (i) A permit will not be granted for a development or subdivision **within or partially within** a forest block unless the applicant demonstrates that:
- (I) the development or subdivision will avoid fragmentation of the forest block through the design of the project or the location of project improvements, or both;
- (II) it is not feasible to avoid **fragmentation** of the forest block and the design of the development or subdivision minimizes fragmentation of the forest block; or
- (III) it is not feasible to avoid or minimize fragmentation of the forest block and the applicant will mitigate the fragmentation in accordance with **section 6094** of this title.
- (ii) Methods for avoiding or minimizing the fragmentation of a forest block may include:
- (I) Locating buildings and other improvements and operating the project in a manner that avoids or minimizes incursion into and disturbance of the forest block, including clustering of buildings and associated improvements.
- (II) Designing roads, driveways, and utilities that serve the development or subdivision to avoid or minimize fragmentation of the forest block. Such design may be accomplished by following or sharing existing features on the land such as roads, tree lines, stone walls, and fence lines.
- (C) **Connecting habitat**.
- (i) A permit will not be granted for a development or subdivision unless the applicant demonstrates that:
- (I) the development or subdivision will avoid **fragmentation** of a connecting habitat through the design of the project or the location of project improvements, or both;
- (II) it is not feasible to avoid fragmentation of the connecting habitat and the design of the development or subdivision minimizes fragmentation of the connector; or
- (III) it is not feasible to avoid or minimize fragmentation of the connecting habitat and the applicant will mitigate the fragmentation in accordance with **section 6094** of this title.
- (ii) Methods for avoiding or minimizing the fragmentation of a connecting habitat may include:
- (I) locating buildings and other improvements at the farthest feasible location from the center of the connector;
- (II) designing the location of buildings and other improvements to leave the greatest contiguous portion of the area undisturbed in order to facilitate wildlife travel through the connector; or
- (III) when there is no feasible site for construction of buildings and other improvements outside the connector, designing the buildings and improvements to facilitate the continued viability of the connector for use by wildlife.

H.233 of 2017- As introduced- Fragmentation Criteria

- (B) Forest blocks.

- (i) A permit will not be granted for a development or subdivision to be located on or adjacent to a tract that contains a forest block unless the applicant demonstrates that:

- (I) the development or subdivision will avoid fragmentation of the forest block through the design of the project or the location of project improvements, or both;

- (II) it is not feasible to avoid fragmentation of the forest block and the design of the development or subdivision minimizes fragmentation of the forest block; or

- (III) it is not feasible to avoid or minimize fragmentation of the forest block and the applicant will mitigate the fragmentation in accordance with section 6094 of this title.

- (ii) Methods for avoiding or minimizing the fragmentation of a forest block may include:

- (I) Locating buildings and other improvements to avoid or minimize incursion into the forest block, including clustering of buildings and associated improvements.

- (II) Designing roads, driveways, and utilities to avoid or minimize fragmentation of the forest block. Such design may be accomplished by following or sharing existing features on the land such as roads, tree lines, stone walls, and fence lines.

- (C) Habitat connectivity areas.

- (i) A permit will not be granted for a development or subdivision to be located on or adjacent to a tract that contains a habitat connectivity area unless the applicant demonstrates that:

- (I) the development or subdivision will avoid fragmentation of the habitat connectivity area through the design of the project or the location of project improvements, or both;

- (II) it is not feasible to avoid fragmentation of the habitat connectivity area and the design of the development or subdivision minimizes fragmentation of the area; or

- (III) it is not feasible to avoid or minimize fragmentation of the habitat connectivity area and the applicant will mitigate the fragmentation in accordance with section 6094 of this title.

- (ii) Methods for avoiding or minimizing the fragmentation of a habitat connectivity area may include:

- (I) locating buildings and other improvements at the farthest feasible location from the center of the area;

- (II) designing the location of buildings and other improvements to leave the greatest contiguous portion of the area undisturbed, in order to facilitate wildlife travel through the area; or

- (III) when there is no feasible site for construction of buildings and other improvements outside the area, designing the buildings and improvements to facilitate the continued viability of the area for use by wildlife.

- (D) Availability of options; forest blocks; connectivity areas. Under subdivisions (B) and (C) of this subdivision (8):

- (i) The District Commission shall not issue a positive finding based on minimization of fragmentation unless it finds that avoidance of fragmentation is not feasible.

- (ii) The District Commission shall not issue a positive finding based on mitigation of fragmentation unless it finds that avoidance and minimization of fragmentation are not feasible.

STANDARDS OF REVIEW

H.233

- Avoid, minimize, mitigate fragmentation
 - Similar to Criterion 9(B)- prime ag soils
- Provides details and examples
- Allows for payment of mitigation fee under 6094

S.234

- Undue adverse impact on forest blocks, connecting habitat, rare and irreplaceable natural areas
 - Used for current criteria 8 & 8(A)
 - 8- rare and irreplaceable natural areas-
 - Adverse impact- Quechee Lakes test: is it in harmony with surroundings? Does it fit with the area?
 - Undue impact- failure to take reasonably available mitigating steps
- Requires rulemaking- does include avoid, minimize, mitigate

S.234- THE RETURN OF THE ROAD RULE

Sec. 12. 10 V.S.A. § 6001 is amended to read:

(3)(A) “Development” means each of the following:

* * *

- (xi) The construction of a road, roads, driveway, or driveways, which in combination is greater than 2,000 feet, to provide access to or within a tract or tracts of land of more than one acre owned or controlled by a person.
- (I) For the purposes of determining jurisdiction under this subdivision (xi), any tract or tracts of land that will be provided access by the road or driveway is involved land.
- (II) As used in this subdivision (xi), “road” shall include any new road or upgrade of a class 4 highway by a person other than a municipality, including a road that will be transferred to or maintained by a municipality after its construction or upgrade. For the purposes of this subdivision (II), routine maintenance of a class 4 highway or stormwater improvement required pursuant to section 1264 of this title shall not constitute an “upgrade.”
- (aa) Routine maintenance shall include replacing a culvert or ditch, applying new stone, grading, or making repairs after adverse weather.
- (bb) Routine maintenance shall not include changing the size of the road, changing the location or layout of the road, or adding pavement.
- (III) For the purpose of determining the length under this subdivision (xi), the length of all roads and driveways within the tract or tracts of land constructed within any continuous period of 10 years after October 1, 2020 shall be included.
- (IV) This subdivision (xi) shall not apply to:
- (aa) a road constructed for a municipal, county, or State purpose; a utility corridor of an electric transmission or distribution company; or a road located entirely within a designated downtown or neighborhood development area; and
- (bb) a road used primarily for farming or forestry purposes unless used for a residential purpose.

ELEMENTS OF ROAD RULE

- construction of a road or roads and any associated driveways
- to provide access to or within a tract of land of more than one acre owned or controlled by a person
- any new development or subdivision on a parcel of land that will be provided access by the road and associated driveways is land involved in the construction of the road
- length of the road & driveways in combination is greater than 2,000 ft
- “roads” shall include any new road or improvement to a Class IV road by a private person, including roads that will be transferred to or maintained by a municipality after their construction or improvement
- the length of all other roads and driveways within the tract of land constructed within any continuous period of 10 years commencing after July 1, 2020 shall be included
- Does not apply to: State or municipal road, a utility corridor of an electric transmission or distribution company, or a road used primarily for farming or forestry purposes
- But: the conversion of a road used for farming or forestry purposes that also meets the requirements of this subdivision shall constitute development

THE PRIOR ROAD RULE

- The construction of improvements for a road or roads, incidental to the sale or lease of land, to provide access to or within a tract of land of more than one acre owned or controlled by a person. In municipalities with both permanent zoning and subdivision by laws, this jurisdiction shall apply only if the tract or tracts of involved land is more than ten acres. For the purpose of determining jurisdiction, any parcel of land which will be provided access by the road is land involved in the construction of the road. This jurisdiction shall not apply unless the road is to provide access to more than five parcels or is to be more than 800 feet in length. For the purpose of determining the length of a road, the length of all other roads within the tract of land constructed within any continuous period of ten years commencing after the effective date of this rule shall be included.
- Repealed by General Assembly in 2001.

H.233 of 2017- As introduced- Jurisdictional Trigger

- (xi) The construction of improvements for commercial, industrial, or residential use if such an improvement at any point is more than 350 feet within a forest block that is classified as a highest priority interior forest block or a habitat connectivity area that is classified as a highest priority connectivity block by the Vermont Conservation Design.

H.233 of 2017- As introduced- Jurisdictional Trigger

- (19)(A) “Subdivision” means each of the following:
- (iv) A tract or tracts of land, owned or controlled by a person, located outside a designated center, if each of the following apply:
 - (I) The person has partitioned or divided for the purpose of resale within a continuous period of five years into:
 - (aa) three or more lots, in a municipality that does not have duly adopted permanent zoning and subdivision bylaws; or
 - (bb) six or more lots, in a municipality that does have duly adopted permanent zoning and subdivision bylaws.
 - (II) Each of the lots created within this period is wholly or partially within a forest block that is classified as a highest priority interior forest block or a habitat connectivity area that is classified as a highest priority connectivity block by the Vermont Conservation Design.

19-0040- Jurisdictional Trigger

- (vi) The construction of improvements for commercial, industrial, or residential use at or above the elevation of ~~2,500~~ 2,000 feet or in a critical resource area below that elevation.