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House Committee on Environment and Energy
State House
Montpelier, Vermont

Subject: H.687

Dear Chair Sheldon:

An article in Vermont Digger on February 28 quotes you that a bare minimum (likely for approval as Tier 1A and 1B areas) is to have permanent zoning and subdivision bylaws.

This letter points out that

- zoning and subdivision bylaws are not required to address any of the Act 250 criteria.
- other permits, mostly ANR, cover only about half the Act 250 criteria. And when another permit covers the same topic, statute does not require the other permit to satisfy the Act 250 criterion.
- the procedure for a municipality to transfer Act 250 permit conditions into a municipal permit fails to ensure the rights of all parties whose participation in the proceedings resulted in conditions in the permit.

Permanent zoning and subdivision bylaws are not required to address any of the Act 250 criteria.

Substituting those bylaws loses much of the benefits of Act 250. These lost benefits include:

- meaningful participation by parties with particularized interests in the development of the permit
- 4413(a)
 - Jurisdiction over state-owned or -operated institutions and facilities
 - Jurisdiction over community-owned- or- operated institutions and facilities
 - Jurisdiction over public and private schools and other educational institutions certified by the Agency of Education
 - Jurisdiction over churches and other places of worship, convents, and parish houses
 - Jurisdiction over regional solid waste management facilities
 - Jurisdiction over hazardous waste management facilities
- 4420 - Local Act 250 review of municipal impacts
- 4412 - ability to review the increased housing densities of 4412(12) and (13) for effects on any of the Act 250 criteria, including: congestion, growth, effects on municipal facilities and services.

I recently completed an analysis of how the statutes for zoning and subdivisions (subchapters 6 and 7 in chapter 117) address the Act 250 criteria and subcriteria. Those statutes do not require these bylaws to address any Act 250 criteria. The statutes make addressing most criteria and subcriteria optional. The remaining few criteria and subcriteria are not addressed by the zoning statutes at all.

I am providing a table showing this analysis as an enclosure.

And other permits are not the equal of Act 250 permits.

I showed this in 2021 when the Agency of Transportation was seeking to have some of its projects exempt from Act 250. AOT provided a matrix of all the Act 250 criteria. I testified then before Senate Natural Resources and Energy and sent the same written testimony to Senate Transportation. AOT was seeking to have the exemptions placed into the transportation bill. Quoting from my testimony on April 20, 2021 (letter dated April 19):

The Agency of Transportation has testified in the past, and at Senate Transportation this year, that all the other permits it needs to get are an adequate substitute for Act 250. The agency provides a permit

matrix to support this claim. The matrix lists the act 250 criteria and subcriteria in order. It then lists the applicable permits that AOT claims are adequate substitutes.

The matrix shows to me something different than what VTrans claims. There is no other permit that applies to almost half the criteria and subcriteria. Other permits fail to adequately apply to other criteria. One example is for the criterion on productive forest soils (criterion 9C): the only permit cited is from the Green Mountain National Forest, which does not apply to the vast majority of Vermont's forests outside the National Forest. A second example is waste disposal (criterion 1B): one of the permits cited is for an underground injection permit when the criterion specifically prohibits injection of hazardous or toxic materials into groundwater or injection wells. A third example is water conservation (criterion 1C): the criterion requires using the best available water conservation technology; the rules for the cited permit do not require that best available technology.

The procedure for a municipality to transfer Act 250 permit conditions into a municipal permit fails to ensure the rights of all parties whose participation in the proceedings resulted in conditions in the permit.

Section 30 of draft 5.1 proposes procedures for the appropriate municipal panel (DRB or other) to transfer conditions of an Act 250 permit to a municipal permit for projects in Tier 1A and 1B areas.

Section 30 must confirm

- that parties who participated in the Act 250 proceedings do have a right to be notified of any proceeding that will amend the terms of an Act 250 permit
- that those parties have the right to meaningfully participate in the proceedings to transfer conditions to a municipal permit.
- that the conditions imposed because of a party's participation must be transferred unless that party agrees, through the process of meaningful participation, that the condition does not need to be transferred.

In addition, Act 250 permits contain conditions imposed by a court order. I fail to see how a municipality has the authority to remove conditions required by a court order. Section 30 needs to confirm that the municipality must transfer all conditions derived from a court order to the municipal permit.

Please amend H.687 to do the following.

1. Require that the approval of Tier 1A or 1B status require that the permanent zoning and subdivision bylaws address the Act 250 criteria.
2. Require that party's whose participation in Act 250 resulted in permit conditions be notified of a proposal to transfer conditions. And also require that those parties have the opportunity to meaningfully participate in the proceedings to transfer conditions.
3. Require that municipalities transfer all conditions resulting from a court order to be transferred to the municipal permit

Thank you for taking the time to read these comments.

Sincerely,
Thomas Weiss

Encl. Act 250 Criteria As Covered by Zoning

cc: House Committee on Environment and Energy

Act 250 Criteria
As Covered by Zoning
Prepared March 1, 2024

Things lost:

Meaningful participation in the development of a permit by parties with particularized interests (which Act 250 has and zoning lacks)

4413(a)

- Jurisdiction over state-owned or -operated institutions and facilities
- Jurisdiction over community-owned- or- operated institutions and facilities
- Jurisdiction over public and private schools and other educational institutions certified by the Agency of Education
- Jurisdiction over churches and other places of worship, convents, and parish houses
- Jurisdiction over regional solid waste management facilities
- Jurisdiction over hazardous waste management facilities

4420 - Local Act 250 review of municipal impacts

4412 - ability to review the increased housing densities of 4412(12) and (13) for effects on any of the Act 250 criteria, including: congestion, growth, effects on municipal facilities and services.

subject	Act 250 criterion or subcriterion (6086(a))	Coverage by Chapter 117, subchapters 6 and 7.
Water pollution	(1) Will not result in undue water . . . pollution. In making this determination it shall at least consider: the elevation of land above sea level; and in relation to the flood plains, the nature of soils and subsoils and their ability to adequately support waste disposal; the slope of the land and its effect on effluents; the availability of streams for disposal of effluents; and the applicable Health and Environmental Conservation Department regulations.	<p>Optional - 4411(b)((3)(C)) - steep slope Optional - 4412(2)(A) - small lots Optional - 4414(1)(D) - shorelands Optional - 4414(2) - overlay districts Optional - 4414(9) - stormwater management and control Optional - 4414(13) - wastewater and potable water supply systems</p> <p>Several provisions benefit from having municipal water and sewer available. However, those provisions do not require determinations as to whether the water supply or sewer system is functioning properly or has sufficient capacity for the development.</p>

subject	Act 250 criterion or subcriterion (6086(a))	Coverage by Chapter 117, subchapters 6 and 7.
Air pollution	(1) Will not result in undue . . . air pollution. In making this determination it shall at least consider: . . . the applicable Health and Environmental Conservation Department regulations.	Optional - 4414(5) - performance standards
Headwaters	(1)(A) Headwaters. A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other applicable criteria, the development or subdivision will meet any applicable Health and Environmental Conservation Department regulation regarding reduction of the quality of the ground or surface waters flowing through or upon lands which are not devoted to intensive development, and which lands are: (i) headwaters of watersheds characterized by steep slopes and shallow soils; or (ii) drainage areas of 20 square miles or less; or (iii) above 1,500 feet elevation; or (iv) watersheds of public water supplies designated by the Agency of Natural Resources; or (v) areas supplying significant amounts of recharge waters to aquifers.	Not addressed in subchapters 6 or 7.
Waste disposal	(1)(B) Waste disposal. A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other applicable criteria, the development or subdivision will meet any applicable Health and Environmental Conservation Department regulations regarding the disposal of wastes, and will not involve the injection of waste materials or any harmful or toxic substances into ground water or wells.	Optional - 4414(5) - performance standards
Water conservation	(1)(C) Water conservation. A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other applicable criteria, the design has considered water conservation, incorporates multiple use or recycling where technically and economically practical, utilizes the best available technology for such applications, and provides for continued efficient operation of these systems.	Not addressed in subchapters 6 or 7.
Flood hazard areas and river corridors	(1)(D) Flood hazard areas; river corridors. A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other applicable criteria, the development or subdivision of lands within a flood hazard area or river corridor will not restrict or divert the flow of floodwaters; cause or contribute to fluvial erosion; and endanger the health, safety, and welfare of the public or of riparian owners during flooding.	Optional - 4411(a)(5) - regulate uses Optional - 4411(b)((3)(G) and (H) - additional classifications in districts Optional - 4413(a)(2) - regulate for compliance with flood insurance Optional - 4414(1)(G) - RC's / buffers Optional - 4414(2) - overlay districts Optional - 4424 - shorelands; river corridor protection areas; flood or flood hazard area

subject	Act 250 criterion or subcriterion (6086(a))	Coverage by Chapter 117, subchapters 6 and 7.
Streams	(1)(E) Streams. A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other applicable criteria, the development or subdivision of lands on or adjacent to the banks of a stream will, whenever feasible, maintain the natural condition of the stream, and will not endanger the health, safety, or welfare of the public or of adjoining landowners.	Optional - 4411(b)((3)(B) - additional classifications in districts
Shorelines	(1)(F) Shorelines. A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other criteria, the development or subdivision of shorelines must of necessity be located on a shoreline in order to fulfill the purpose of the development or subdivision, and the development or subdivision will, insofar as possible and reasonable in light of its purpose: (i) retain the shoreline and the waters in their natural condition; (ii) allow continued access to the waters and the recreational opportunities provided by the waters; (iii) retain or provide vegetation which will screen the development or subdivision from the waters; and (iv) stabilize the bank from erosion, as necessary, with vegetation cover.	Optional - 4411(a)(1) - uses in shorelands Optional - 4411(b)((3)(B) - additional classifications in districts Optional - 4414(1)(D) - shorelands Optional - 4414(2) - overlay districts Optional - 4424 - shorelands; river corridor protection areas; flood or flood hazard area; special or freestanding bylaws
Wetlands	(1)(G) Wetlands. A permit will be granted whenever it is demonstrated by the applicant, in addition to other criteria, that the development or subdivision will not violate the rules of the Secretary of Natural Resources, as adopted under chapter 37 of this title, relating to significant wetlands.	Optional - 4411(b)((3)(F) - additional classifications in districts Optional - 4414(1)(D) - shorelands
Available water	(2) Does have sufficient water available for the reasonably foreseeable needs of the subdivision or development.	Optional - 4414(13) - wastewater and potable water supply systems
Existing water supply	(3) Will not cause an unreasonable burden on an existing water supply, if one is to be utilized.	Optional - 4414(13) - wastewater and potable water supply systems
Soil erosion	(4) Will not cause unreasonable soil erosion . . .	Not addressed in subchapters 6 or 7.
Water capacity	(4) Will not cause . . . reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result.	Not addressed in subchapters 6 or 7.
Transportation (A)	(5)(A) Will not cause unreasonable congestion or unsafe conditions with respect to use of the highways, waterways, railways, airports and airways, and other means of transportation existing or proposed.	Optional - 4411(b)(3)(A) - additional classifications in districts Optional - 4411(b)((3)(E) - additional classifications in districts Optional - designations - 4414(1)(C) - airport hazard areas Optional - 4414(3) - conditional uses (roads and highways)

subject	Act 250 criterion or subcriterion (6086(a))	Coverage by Chapter 117, subchapters 6 and 7.
Transportation (B)	(5)(B) As appropriate, will incorporate transportation demand management strategies and provide safe access and connections to adjacent lands and facilities and to existing and planned pedestrian, bicycle, and transit networks and services. In determining appropriateness under this subdivision (B), the District Commission shall consider whether such a strategy, access, or connection constitutes a measure that a reasonable person would take given the type, scale, and transportation impacts of the proposed development or subdivision.	Optional - 4414(1)(A) - designations
Educational services	(6) Will not cause an unreasonable burden on the ability of a municipality to provide educational services.	Optional - 4414(3) - conditional uses
Municipal and governmental services	(7) Will not place an unreasonable burden on the ability of the local governments to provide municipal or governmental services.	Optional - 4414(3) - conditional uses Optional - 4414(3) - conditional uses
Scenic or natural beauty	(8) Will not have an undue adverse effect on the scenic or natural beauty of the are . . .	Optional - 4414(2) - overlay districts
Aesthetics	(8) Will not have an undue adverse effect on . . . aesthetics . . .)	Optional - 4411(b)((3)(F) - additional classifications in districts Optional - 4414(1)(E) - design review districts Optional - 4414(15) - solar plants; screening
Historic sites	(8) Will not have an undue adverse effect on . . . historic sites . . .	Optional - 4411(b)((3)(F) - additional classifications in districts Optional - 4414(1)(F) - local historic districts and landmarks Optional - 4414(11) - archaeological resources
Natural areas	(8) Will not have an undue adverse effect on . . . rare and irreplaceable natural areas.	Optional - 4411(b)((3)(F) - additional classifications in districts

subject	Act 250 criterion or subcriterion (6086(a))	Coverage by Chapter 117, subchapters 6 and 7.
Wildlife habitat and endangered species	<p>(8) (A) 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</p> <p>(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</p> <p>(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</p> <p>(iii) a reasonably acceptable alternative site is owned or controlled by the applicant which would allow the development or subdivision to fulfill its intended purpose.</p>	Optional - 4411(b)((3)(F) - additional classifications in districts
Capability and development plan	<p>(9) Is in conformance with a duly adopted capability and development plan, and land use plan when adopted. However, the legislative findings of subdivisions 7(a)(1) through (19) of Act 85 of 1973 shall not be used as criteria in the consideration of applications by a District Commission.</p>	[NOTE: There is no duly adopted capability and development plan.]
Growth	<p>(9)(A) Impact of growth. In considering an application, the District Commission shall take into consideration the growth in population experienced by the town and region in question and whether or not the proposed development would significantly affect their existing and potential financial capacity to reasonably accommodate both the total growth and the rate of growth otherwise expected for the town and region and the total growth and rate of growth which would result from the development if approved. After considering anticipated costs for education, highway access and maintenance, sewage disposal, water supply, police and fire services, and other factors relating to the public health, safety, and welfare, the District Commission shall impose conditions which prevent undue burden upon the town and region in accommodating growth caused by the proposed development or subdivision.</p> <p>Notwithstanding section 6088 of this title, the burden of proof that proposed development will significantly affect existing or potential financial capacity of the town and region to accommodate such growth is upon any party opposing an application, excepting however, where the town has a duly adopted capital improvement program the burden shall be on the applicant.</p>	Not addressed in subchapters 6 or 7.

subject	Act 250 criterion or subcriterion (6086(a))	Coverage by Chapter 117, subchapters 6 and 7.
Primary agricultural soils	<p>(9)(B) Primary agricultural soils. A permit will be granted for the development or subdivision of primary agricultural soils only when it is demonstrated by the applicant that, in addition to all other applicable criteria, either, the subdivision or development will not result in any reduction in the agricultural potential of the primary agricultural soils; or:</p> <p>(i) the development or subdivision will not significantly interfere with or jeopardize the continuation of agriculture or forestry on adjoining lands or reduce their agricultural or forestry potential;</p> <p>(ii) except in the case of an application for a project located in a designated area listed in subdivision 6093(a)(1) of this title, there are no lands other than primary agricultural soils owned or controlled by the applicant which are reasonably suited to the purpose of the development or subdivision;</p> <p>(iii) except in the case of an application for a project located in a designated area listed in subdivision 6093(a)(1) of this title, the subdivision or development has been planned to minimize the reduction of agricultural potential of the primary agricultural soils through innovative land use design resulting in compact development patterns, so that the remaining primary agricultural soils on the project tract are capable of supporting or contributing to an economic or commercial agricultural operation; and</p> <p>(iv) suitable mitigation will be provided for any reduction in the agricultural potential of the primary agricultural soils caused by the development or subdivision, in accordance with section 6093 of this title and rules adopted by the Natural Resources Board.</p>	Not addressed in subchapters 6 or 7.
Productive forest soils	<p>(9)(C) Productive forest soils. A permit will be granted for the development or subdivision of productive forest soils only when it is demonstrated by the applicant that, in addition to all other applicable criteria, either, the subdivision or development will not result in any reduction in the potential of those soils for commercial forestry; or:</p> <p>(i) the development or subdivision will not significantly interfere with or jeopardize the continuation of agriculture or forestry on adjoining lands or reduce their agricultural or forestry potential; and</p> <p>(ii) except in the case of an application for a project located in a designated growth center, there are no lands other than productive forest soils owned or controlled by the applicant which are reasonably suited to the purpose of the development or subdivision; and</p> <p>(iii) except in the case of an application for a project located in a designated growth center, the subdivision or development has been planned to minimize the reduction of the potential of those productive forest soils through innovative land use design resulting in compact development patterns, so that the remaining forest soils on the project tract may contribute to a commercial forestry operation.</p>	Not addressed in subchapters 6 or 7.

subject	Act 250 criterion or subcriterion (6086(a))	Coverage by Chapter 117, subchapters 6 and 7.
Earth resources	(9)(D) Earth resources. A permit will be granted whenever it is demonstrated by the applicant, in addition to all other applicable criteria, that the development or subdivision of lands with high potential for extraction of mineral or earth resources, will not prevent or significantly interfere with the subsequent extraction or processing of the mineral or earth resources.	Not addressed in subchapters 6 or 7.
Extraction of earth resources	(9)(E) Extraction of earth resources. A permit will be granted for the extraction or processing of mineral and earth resources, including fissionable source material: (i) When it is demonstrated by the applicant that, in addition to all other applicable criteria, the extraction or processing operation and the disposal of waste will not have an unduly harmful impact upon the environment or surrounding land uses and development; and (ii) Upon approval by the District Commission of a site rehabilitation plan that ensures that upon completion of the extracting or processing operation the site will be left by the applicant in a condition suited for an approved alternative use or development. A permit will not be granted for the recovery or extraction of mineral or earth resources from beneath natural water bodies or impoundments within the State, except that gravel, silt, and sediment may be removed pursuant to the rules of the Agency of Natural Resources, and natural gas and oil may be removed pursuant to the rules of the Natural Gas and Oil Resources Board.	Not addressed in subchapters 6 or 7.
Energy conservation	(9)(F) Energy conservation. A permit will be granted when it has been demonstrated by the applicant that, in addition to all other applicable criteria, the planning and design of the subdivision or development reflect the principles of energy conservation, including reduction of greenhouse gas emissions from the use of energy, and incorporate the best available technology for efficient use or recovery of energy. An applicant seeking an affirmative finding under this criterion shall provide evidence that the subdivision or development complies with the applicable building energy standards under 30 V.S.A. § 51 or 53.	Optional - 4413(g) (solar collectors are not energy conservation.) Optional - 4413(g) clotheslines) Optional - 4414(6) - access to renewable energy resources Optional - 4414(8) - waivers Optional - 4418(2) - subdivisions
Private utilities	(9)(G) Private utility services. A permit will be granted for a development or subdivision which relies on privately owned utility services or facilities, including central sewage or water facilities and roads, whenever it is demonstrated by the applicant that, in addition to all other applicable criteria, the privately owned utility services or facilities are in conformity with a capital program or plan of the municipality involved, or adequate surety is provided to the municipality and conditioned to protect the municipality in the event that the municipality is required to assume the responsibility for the services or facilities.	Optional - 4418(1) - subdivisions

subject	Act 250 criterion or subcriterion (6086(a))	Coverage by Chapter 117, subchapters 6 and 7.
Scattered development	(9)(H) Costs of scattered development. The District Commission will grant a permit for a development or subdivision which is not physically contiguous to an existing settlement whenever it is demonstrated that, in addition to all other applicable criteria, the additional costs of public services and facilities caused directly or indirectly by the proposed development or subdivision do not outweigh the tax revenue and other public benefits of the development or subdivision such as increased employment opportunities or the provision of needed and balanced housing accessible to existing or planned employment centers.	Optional - designations - 4414(1)(A)
----	(9)(I) [NOTE: There is no (I) in the statutes.]	
Public utilities	(9)(J) Public utility services. A permit will be granted for a development or subdivision whenever it is demonstrated that, in addition to all other applicable criteria, necessary supportive governmental and public utility facilities and services are available or will be available when the development is completed under a duly adopted capital program or plan, an excessive or uneconomic demand will not be placed on such facilities and services, and the provision of such facilities and services has been planned on the basis of a projection of reasonable population increase and economic growth.	Optional - 4418(1) - subdivisions
Public investments	(9)(K) Development affecting public investments. A permit will be granted for the development or subdivision of lands adjacent to governmental and public utility facilities, services, and lands, including highways, airports, waste disposal facilities, office and maintenance buildings, fire and police stations, universities, schools, hospitals, prisons, jails, electric generating and transmission facilities, oil and gas pipe lines, parks, hiking trails and forest and game lands, when it is demonstrated that, in addition to all other applicable criteria, the development or subdivision will not unnecessarily or unreasonably endanger the public or quasi-public investment in the facility, service, or lands, or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to the facility, service, or lands.	Not addressed in subchapters 6 or 7.

subject	Act 250 criterion or subcriterion (6086(a))	Coverage by Chapter 117, subchapters 6 and 7.
Settlement patterns	(9)(L) Settlement patterns. To promote Vermont’s historic settlement pattern of compact village and urban centers separated by rural countryside, a permit will be granted for a development or subdivision outside an existing settlement when it is demonstrated by the applicant that, in addition to all other applicable criteria, the development or subdivision: <ul style="list-style-type: none"> (i) will make efficient use of land, energy, roads, utilities, and other supporting infrastructure; and (ii)(I) will not contribute to a pattern of strip development along public highways; or (II) if the development or subdivision will be confined to an area that already constitutes strip development, will incorporate infill as defined in 24 V.S.A. § 2791 and is designed to reasonably minimize the characteristics listed in the definition of strip development under subdivision 6001(36) of this title. 	Optional - 4414(1)(A) - designations Optional - 4418(1) - subdivisions
Local or regional plan; capital program	(10) Is in conformance with any duly adopted local . . . plan . . . under 24 V.S.A. chapter 117. In making this finding, if the District Commission finds applicable provisions of the town plan to be ambiguous, the District Commission, for interpretive purposes, shall consider bylaws, but only to the extent that they implement and are consistent with those provisions, and need not consider any other evidence.	Not addressed in subchapters 6 or 7. [NOTE: Zoning is supposed to implement the local plan and in theory zoning bylaws are in conformance with the local plan.]
Local or regional plan; capital program	(10) Is in conformance with any duly adopted . . . regional plan . . . under 24 V.S.A. chapter 117. In making this finding, if the District Commission finds applicable provisions of the town plan to be ambiguous, the District Commission, for interpretive purposes, shall consider bylaws, but only to the extent that they implement and are consistent with those provisions, and need not consider any other evidence.	Not addressed in subchapters 6 or 7.
Local or regional plan; capital program	(10) Is in conformance with any duly adopted . . . capital program under 24 V.S.A. chapter 117. In making this finding, if the District Commission finds applicable provisions of the town plan to be ambiguous, the District Commission, for interpretive purposes, shall consider bylaws, but only to the extent that they implement and are consistent with those provisions, and need not consider any other evidence.	Optional - 4403(1) - nonregulatory implementation tools Optional - 4417(c) - PUD's Optional - 4422 - adequate public facilities; phasing