Natural Resources Board Act 250 Stakeholder Project

Act 250 Jurisdictional Triggers

Act 182 of 2022 charged the Chair of the Natural Resources Board with producing a report on

> **"(1) How to transition to a system in which Act 250 jurisdiction is based on location, which shall encourage development in designated areas, the maintenance of intact rural working lands, and the protection of natural resources of statewide significance, including biodiversity. Location-based jurisdiction would adjust the threshold for Act 250 jurisdiction based on the characteristics of the location. This section of the report shall consider whether to develop thresholds and tiers of jurisdiction as recommended in the Commission on Act 250: the Next 50 Years Report."[1]**

This jurisdictional triggers "homework" focuses on the charge to look at Act 250 location-based jurisdiction and triggers. Location-based jurisdiction describes where an Act 250 may be required, such as for any development above 2,500 feet in elevation. A trigger is a threshold amount of development, above which an Act 250 permit is required, such as the creation of 10 or more lots in a town with planning and zoning. This homework summarizes options and raises questions, which are summarized below for the Steering Committee:

1. Does Act 250 need a form of critical areas designation(s) to better determine jurisdiction, support the Act 59 goal of conserving 30% of Vermont by 2030, and to support local and regional planning consistency?

a. Related To #1, should the agricultural lands provisions outside centers have additional provisions to protect working prime soils?

b. Related to #1, should the 2,500 feet elevation threshold be lowered?

c. Related to #1, should there be provisions to protect prime forest soils and similar to those for prime agricultural soils?

2. Do the Act 250 "centers" designations need clearer provisions and incentives to support and guide the more intensive development needed in appropriate areas within and adjacent to existing communities? What might those provisions and incentives be?

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[1] Act 182 of 2022. https://legislature.vermont.gov/Documents/2022/Docs/ACTS/ACT182/ACT182%20As%20Enacted.pdf. Pp. 64-65. See, Act 250 The Next 50 Years Report https://legislature.vermont.gov/Documents/2018.1/WorkGroups/Act250/Final%20Report/W~Ellen%20Czajkowski~Commission%20on%20Act%20250%20Final%20Report~1-11-2019.pdf.

a. Related to #2, should the agricultural soils mitigation threshold be raised within centers above the current two (2) acres, or other changes to support use of lands already within centers for needed development?

b. What provisions of Act 250 and related laws could encourage sound and needed expansion of already-developed centers to provide for needed development well-separated from a protected countryside?

c. Related to #2, will the effect of the HOME bill provisions for Act 250 thresholds significantly contribute to affordable housing availability and what other provisions might complement that?

3. Related to both #1 and #2 above, should an Act 250 jurisdiction trigger be extended to an appropriate radius of land surrounding interstate highway exchanges?

4. Should Act 250 Criteria be added to address needs and matters that have become better known and manifest since the Act's passage, namely a climate change criterion, an ecosystem services criterion, and a related forest fragmentation criterion?

Introduction

Act 250 has traditionally served as a way to assess and minimize the impacts of proposed developments on the environment and government services. To a lesser degree, Act 250 has provided a land use planning function, with the authority to implement local planning and zoning in some cases. On the one hand, there is general agreement that Act 250 has improved the quality of development in Vermont. On the other, the original Act 250 vision of compact settlements surrounded by open countryside has been challenged. The Legislature's Next Fifty Years report noted that " from 2008 to 2018, 83 percent of new residential structures and 60.63 percent of commercial structures were located outside existing centers" (p. 23).[2] One of the key aspects of jurisdiction is determining the role of Act 250 in both environmental protection and land use planning.

Background

It is important to understand what triggers an Act 250 permit review. Whether an Act 250 permit is needed before a development or subdivision can commence depends on whether it meets any of the statutory triggers. The triggers of Act 250 jurisdiction, briefly, include:

[2] See, Act 250 The Next 50 Years Report https://legislature.vermont.gov/Documents/2018.1/WorkGroups/Act250/Final%20Report/W~Ellen%20Czajkowski~Commission%20on%20Act%20250%20Final%20Report~1-11-2019.pdf

- Subdivision
    - 10 or more lots within 5 miles or District within 5 years (municipality with zoning)
    - 6 or more lots within 5 years (municipality without zoning)
- Development
    - Commercial purpose based on property acres: >10 acres with zoning, >1 acre without zoning, or >1 acre if elected by the municipality,
    - 10 or more units of housing within 5 miles within 5 years.
    - State purpose,
    - Construction for a governmental purpose if the project involves more than 10 acres or is part of a larger project that will involve more than 10 acres.
    - The construction of improvements for commercial, industrial or residential use above 2,500 feet in elevation,
    - Fissionable source material,
    - Oil and gas,
    - Telecommunication equipment height, and
    - Groundwater extraction.
- Substantially changed pre-Act 250 developments or subdivisions which would require a permit if built today.
- Materially changed permitted projects.

Notably, there are now a number of development projects that are excluded from Act 250 jurisdiction, either by definition or exemption. The recently passed HOME Act now allows for a 3-year increase of up to 25 dwelling units within five years and within a five-mile radius to be built without an Act 250 permit in a designated downtown development district, a designated neighborhood development area, a designated village center with permanent zoning and subdivision bylaws, or a designated growth center. Additionally, in an existing structure, the construction of up to four (4) units only counts as one unit for purposes of unit counts under the HOME Act. Lastly, under the HOME Act, Priority Housing Projects within a designated downtown development district, designated neighborhood development area, or a designated growth center do not trigger Act 250 jurisdiction until July 1, 2026.

If Act 250 jurisdiction is triggered, project developers must apply to a District Environmental Commission for an Act 250 permit.

What is the appropriate trigger for lots, dwelling units, and commercial development a) within designated downtowns and villages; b) in towns with permanent zoning and subdivision regulations; and c) in towns without permanent zoning and subdivision regulations?

Act 47 of 2023 (the HOME bill) removed Act 250 jurisdiction for three years in the case of housing projects of up to 25 dwelling units within five miles and five years. As of 2017, the program had designated 23 downtowns, 124 village centers, two new town centers, six growth centers, and five neighborhood development areas. Are the unit levels high enough or too high? Should the 25-unit level be made permanent and, if so, in what areas?

One way to address the trigger question is through the use of tiers that describe the capacity to accommodate development. For example, in 2012 the State of Maryland adopted a tiers approach for planning local development. Tiers 1 and 2 identify areas with existing and planned central sewer service, which can support greater density. These tiers are similar to Vermont's designated downtowns and villages. Tiers 3 and 4 apply to areas where there is no existing or planned central sewer service. Tier 3 is primarily a rural residential area whereas Tier 4 covers more remote rural areas. Tier 4 limits the number of subdivisions to between three and seven lots, depending on the size of the parcel. Maryland also requires counties to identify Priority Preservation Areas where the goal is to preserve 80 percent of the land.[3]

The tiers approach, if applied to Vermont might include a designated development tier, a rural residential tier, and a critical areas tier, each with a different trigger for Act 250 review. Critical areas have major limitations for development, such as steep slopes, wetlands, wildlife habitat, forest soils, extensive prime agricultural soils, and land holdings in large blocks.

Other states have used a somewhat different land use planning system. Hawaii in 1961 adopted a state land use plan which divided the state into four zones: urban, rural residential, agriculture, and conservation. The State Land Use Commission rules on the expansion or reduction of the boundaries of these zones. Most of Hawaii is zoned conservation, which allows very little development. But Hawaii lost 72 percent of its farmland between 1964 and 2017, according to the US Census of Agriculture. Hawaii's population grew by 130 percent from 1960 to 2020, according to the US Census Bureau.

Oregon in its 1973 state land use act required all cities and counties to draft comprehensive plans that incorporate 19 statewide goals, which carry the force of law. Prominent among these goals is Goal 14 which requires cities and counties to create urban growth boundaries, defined as a limit to the extension of urban services (especially central sewer and water and schools) and having within the boundary sufficient buildable land to support development needs for the next 20 years. A growth boundary may expand in the future, subject to state review.

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[3] See, Maryland Office of Planning. https://planning.maryland.gov/Pages/OurWork/SB236Implementation.aspx#:~:text=Sustainable%20Growth%20%26%20Agricultural%20Preservation%20Act%20of%202012%20Implementation%E2%80%8B%E2%80%8B&text=(the%20septics%20law)%20limits%20the,Chesapeake%20Bay%20and%20other%20waterways.

Outside of the urban growth boundaries, Oregon required counties to identify and zone for agricultural land, forest land, and rural residential areas. Agricultural land was zoned according to minimum lot sizes that vary from one house per 40 acres in Western Oregon to one house per 320 acres in the rangeland of Eastern Oregon. Commercial forest land is zoned in minimum lot sizes from one house per 80 acres to one house per 160 acres. Rural residential zones have minimum lot sizes that vary from one house per 3 acres to one house per 5 acres. These zones are supposed to be located away from commercial agricultural and forestry areas.

The combination of urban growth boundaries and agricultural and forestry zoning has resulted in the majority of new development locating within the urban growth boundaries.

New York's Adirondack Park Master Plan divides the six-million-acre park into state land (about 44% of the Park area) and private land (about 56% of the Park area). Virtually no development is allowed on state land, in keeping with the clause in the New York Constitution to keep state land "forever wild." Most of the private land is zoned for resource conservation at a density of one dwelling per 42 acres. Local governments control some local development within designated hamlets. The Adirondack Park Agency has set the standards in Table 1.[4]

Table 1. Land Use Classifications, Density Limits and Average Lot Size for the Private Lands within the Adirondack Park.

Land Use Area	Color on Map	Avg. # Principal Bldgs. (per sq. mile)	Avg. Lot Size (acres)
Hamlet	brown	no limit	none
Moderate Intensity Use	red	500	1.3
Low Intensity Use	orange	200	3.2
Rural Use	yellow	75	8.5
Resource Management	green	15	42.7
Industrial Use	purple	no limit	none

The only place with a similar political structure of Vermont's city-village-town form of local government that also uses urban growth boundaries is Lancaster County, Pennsylvania, which consists of 41 towns, one city, and 18 villages (known as boroughs). The towns and adjacent villages created 20 growth boundaries in 1993. In the countryside, 38 of the 41 towns have adopted agricultural zoning, which generally allows one building lot of 2 acres for every 25 acres. The towns also have some rural residential zones. In addition, Lancaster County has preserved more farmland through

[4] https://apa.ny.gov/property_owners/LandUse.html.

the purchase of conservation easements—120,000 acres—than any county in the United States.[5]

As in the case of Oregon, Lancaster County has been able to accommodate most of its population growth inside the urban growth areas.

Finally, the case of Washington State gives useful comparative perspectives to Act 250's situation.[6] In 1971 the adoption of the State Environmental Policy Act (SEPA) established a multi-criterion environmental impact assessment regulatory framework for "major actions" including large projects, and state and local policies and plans. Washington avoided Oregon's local planning-with-state-standards approach. But in 1978, a case before the state's Supreme Court established SEPA as the only law with regulatory powers to deny a development permit because of environmental impacts. For example,

> When an application for a building permit meets all other requirements and conditions for issuance, it may be denied solely on the basis of adverse environmental impacts disclosed by an environmental impact statement.[7]

Washington State's SEPA is similar to Act 250 in that both are basically broad environmental impact laws with certain limited regulatory powers. Despite SEPA's power, it failed to guide increasingly rapid and sprawling growth patterns in Washington State. So, in 1990 the Legislature enacted the Growth Management Act (GMA). The GMA incorporates provisions similar to Oregon's law in that local and county[8] land use plans must be consistent with 13 statewide goals, with provisions for appeals of local land use decisions. A key growth guidance feature of the GMA is the requirement for cities and counties to jointly designate urban service areas or urban growth boundaries to separate lands receiving urban services (especially central sewer and water) from lands without such services. Designation of urban service areas or growth boundaries requires a planning approach, as opposed to case-by-case project impact review. Growth areas are meant to accommodate the majority of new development and population growth. Undeveloped lands outside of urban growth boundaries are planned for appropriate densities and uses for future development. Tier systems also incorporate this urban growth and limited growth outside of urban areas strategy.

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[5] https://lancasteronline.com/news/local/lancaster-farmland-trust-reaches-35-000-preserved-acres-on-35th-anniversary/article_3a435b78-0ac8-11ee-ba87-3bbdbc9180dc.html. Daniels, T., & Payne-Riley, L. (2017). Preserving Large Farming Landscapes: The Case of Lancaster County, Pennsylvania. Journal of Agriculture, Food Systems, and Community Development, 7(3), 67–81. https://doi.org/10.5304/jafscd.2017.073.004

[6] https://mrsc.org/explore-topics/planning/general-planning-and-growth-management/growth-management-act

[7] https://casetext.com/case/polygon-corporation-v-seattle

[8] County governments in Washington have planning and zoning power over unincorporated lands, similar to other states outside of New England and the Northeast.

Should the elevation above which Act 250 applies be lowered from 2,500 feet to 2,000 feet?

The Next Fifty Years report noted that Vermont has 223 mountains that rise above the 2,000-foot level. So, a reduction in the Act 250 elevation jurisdiction would mean more development proposals coming under Act 250 review. Mountainous environments tend to be fragile and have constrained capacity to support development because of steep slopes, thin soils and shallow depth to bedrock, which limit the use of on-site septic systems. Soil erosion, habitat loss, and forest fragmentation are other concerns.

Should Act 250 jurisdiction be extended to interstate highway interchanges?

The Next Fifty Years report noted that review of projects located at interstate highway interchanges is also important to the overall goals of encouraging compact development and protection of natural and ecosystem resources. The report recommended extending Act 250 jurisdiction to those locations. Ideas contained in S. 214 and H. 784 were suggested as examples, both introduced in the 2017-18 biennium. S. 214 cites the planning goals in 24 VSA (4302) (i.e., compact settlement patterns and landscape resource protection as the basis for regulating development near interstate interchanges. S. 214 proposed defining "interchange areas" as the 3,000-foot radius around those locations, but not within existing designated villages or downtowns. S. 214 directed ANR to review proposed projects for permits to ensure that central sewer and water services are not approved nor funded for such areas unless other conditions are met. Consistency with the Vermont Interstate Design Guidelines was another aspect. Although S 214 referenced the relevant statutory chapter for Act 250 (10 VSA Chapter 151), ANR' was envisioned as playing the main role in the water and wastewater permitting and funding processes and in deciding on development near interchanges through the Act 250 review. In addition, S. 214 proposed a program of conservation easement acquisition in the interchanges areas to ensure landscape protection. This bill presented one example of how interchange planning might be approached. Significantly, the approach focuses in on guiding urban-level services to appropriate areas and away from undeveloped areas as a spatial planning tool, which is at the heart of many of the other state examples presented here such as in Maryland and Oregon.

Act 59 of 2023 calls for the conservation of 30 percent of Vermont by 2030. How could a "critical areas" jurisdiction for Act 250 aid in reaching this goal?

Act 59 states that "the vision of the State of Vermont is to maintain an ecologically functional landscape that sustains biodiversity, maintains landscape connectivity, supports watershed health, promotes climate resilience, supports working farms and forests, provides opportunities for recreation and appreciation of the natural world, and supports the historic settlement pattern of compact villages surrounded by rural lands and natural areas."[9]

[9] https://legislature.vermont.gov/Documents/2024/Docs/ACTS/ACT059/ACT059%20As%20Enacted.pdf

Act 59 notes that "the 2017 Vermont Forest Action Plan found that fragmentation and parcelization represent major threats to forest health and productivity and exacerbate the impacts of climate change." Also, in 2022 Act 183 tasked the Department of Forests, Parks and Recreation to develop the Vermont Forest Future Strategic Roadmap "to strengthen, modernize, promote, and protect the forest products sector and the greater forest economy and promote the importance of healthy, resilient, and sustainably managed working forests that provide a diverse array of high-quality products now and in the future."

Act 59 cites the Vermont Climate Assessment, which highlighted "an increase in extreme weather events such as droughts and floods as a significant impact of climate change in Vermont and recommends nature-based solutions as a proven, low-cost strategy for climate adaptation and resilience." The Vermont Climate Action Plan calls for investing in strategic conservation to increase the pace of permanent conservation towards the 30 by 30 targets, with Vermont Conservation Design, produced by the Agency of Natural Resources in 2018 as guiding of efforts. The Vermont Conservation Design notes that "the lands and waters identified in this project are the areas of the state that are of highest priority for maintaining ecological integrity. Together, these lands comprise a connected landscape of large and intact forested habitat, healthy aquatic and riparian systems, and a full range of physical features (bedrock, soils, elevation, slope, and aspect) on which plant and animal natural communities depend."[10] And, "when conserved or managed appropriately to retain or enhance ecological function, these lands will sustain Vermont's natural legacy into the future."[11]

In sum, "Vermont's most effective and efficient contribution to conserving biological diversity and maintaining a landscape resilient to climate change is to conserve an intact and connected landscape." These critical landscapes include:

(1) "Ecological reserve area" means an area having permanent protection from conversion and that is managed to maintain a natural state within which natural ecological processes and disturbance events are allowed to proceed with minimal interference.

(2) "Biodiversity conservation area" means an area having permanent protection from conversion for the majority of the area and that is managed for the primary goal of sustaining species or habitats. These areas may include regular, active interventions to address the needs of particular species or to maintain or restore habitats.

(3) "Natural resource management area" means an area having permanent protection from conversion for the majority of the area but that is

[10] https://vtfishandwildlife.com/conserve/vermont-conservation-design
[11] Ibid.

subject to long-term, sustainable land management."[12]

How should Act 250 jurisdiction involve these critical areas?

The 10 Criteria of Act 250 have in effect expanded to 32 criteria and sub-criteria. What criteria are needed and what could be revised or deleted? And what new criteria are needed, such as a climate change criterion, an environmental justice criterion, or a forest fragmentation criterion?

The 10 Criteria are the specific standards that District Environmental Commissions must use to evaluate every development and subdivision application that falls under Act 250. The 10 Criteria focus on projected impacts on air and water quality, water supplies, traffic, local schools and services, municipal costs, historic and natural resources, including scenic beauty, impacts of growth, and consistency with municipal and regional plans (see the Appendix below for the 10 criteria).

An example of an existing criterion to discuss is 9(B) prime agricultural soils. Prime agricultural soils have the best combination of physical and chemical characteristics for producing food, feed, and forage and is available for these uses, according to the US Department of Agriculture.[13] "Act 250 provides for both off-site and on-site mitigation (or a combination of both) of primary agricultural soils. Off-site mitigation is the default if the project is in a designated downtown district, growth center, new town center designated on or before January 1, 2014, or neighborhood development area associated with a downtown development district."[14] On-site mitigation is the default if the project occurs outside of a designated development area. Off-site mitigation of prime agricultural soils is required in the form of a payment to the Vermont Housing and Conservation Board for all primary agricultural soils impacted by the project, unless the District Commission determines that "appropriate circumstances" exist to allow for mitigation flexibility. Note that certain affordable housing projects are exempt from the requirement to pay an "off-site" mitigation fee if located in a designated growth center.[15] The ratio used to determine the mitigation fee is based on the location of the project and the soil type. An off-site mitigation agreement is entered into by the Act 250 applicant and the Vermont Department of Agriculture.

The prime agricultural soils criterion is also an important aspect of Act 250 because it is in effect the primary mapped spatial planning attribute affecting Act 250 permits after the dissolution of the Capability and Development Plan's role. As such, the agricultural soils criterion is a location-based jurisdiction feature of Act 250. Should any development within a designated downtown or village be exempt from the agricultural soil criterion? Outside of designated areas, should there be a threshold minimum area

[12] Ibid.
[13] https://efotg.sc.egov.usda.gov/references/public/CO/5a_Prime_Farmland_Definition.pdf.
[14] Next 50 Years Report. 2019, p. 20.
[15] https://anrweb.vt.gov/PubDocs/ANR/Planning/4C0400-19/CRITERION9B.pdf

below which the agricultural soils criterion does not apply? The current standard is less than two acres of agricultural soils do not need to be mitigated and a mitigation fee assessed. Would a slightly larger minimum threshold of, say, five acres be more acceptable to developers, Act 250 administrators, the agriculture community, and preservationists?

It is also important to note that productive forest soils have their own criterion (9 (C)). But primary productive forest soils are not defined and there is not a mitigation provision as with prime agricultural soils. Because forest soils (and forests) are much more extensive in Vermont than the limited best agricultural soils, there are locational issues connected to forestlands in the Act 250 review process. For example, conversion of forestlands to a commercial use, even if related to forestry, may become an issue. Furthermore, forest fragmentation has emerged as an issue of concern. Act 171 directs towns to assess forest blocks and habitat connectors and incorporate this information into a future land use map as part of the town plan.[16] **Does the treatment of forestlands under Act 250 warrant revisions?**

Other existing criteria to discuss. Criteria 9(H) and 9(L) relate to scattered development and the pattern of development. The Act 250 vision is compact settlements surrounded by open countryside. The Next 50 Years report found that "from 2004 to 2016 Vermont lost 147,684 acres or approximately 15 percent of its undeveloped woodland parcels, and 53,406 acres, or 9.3 percent, of its farmland parcels to public ownership or another land classification." (p. 23). The report then noted that "The data above suggest that Vermont is not meeting its settlement pattern goals with the majority of development occurring outside existing centers and with the loss of significant percentages of woodland and farmland in recent years" (p. 23).

Priority housing projects (PHPs). PHPs consist of mixed income housing, mixed uses, or any combination of those uses in one of four state-designated areas: downtown development district, new town center, growth center, or neighborhood development area. The HOME Act removed Act 250 jurisdiction over priority housing projects in three state-designated areas until July 1, 2026, and maintained the existing population limits for priority housing projects in designated new town centers.

Prior to the HOME Act and currently for PHPs in new town centers, rather than applying the 10-unit threshold, PHPs come under Act 250 jurisdiction only if they meet the unit counts in statute. Act 250 jurisdiction only applies to PHPs in new town centers with 75 or more units in a municipality with a population of 6,000 to 9,999 people, and 50 or more units in a municipality of less than 6,000 people. However, a priority housing project consisting of 10 or more units will require an Act 250 permit if it involves the demolition of a listed historic building, unless the State Division for Historic Preservation makes certain determinations listed in statute" (p. 31). Finally, PHP rentals are required to remain affordable for only 15 years. **Are these levels sufficient? Should the time-**

[16] https://anr.vermont.gov/act171_forestplanning.

limited exception for PHPs in the four other designated development areas remain permanently?

New criteria for Act 250 might include: climate change, environmental justice, and forest fragmentation, among others. **What new criteria should be included in Act 250 and how should they be included?**

Appendix Definitions and The Ten Criteria of Act 250

1. Definitions of "Development" 10 V.S.A. § 6001 (3)(A)

2. Definition of "Development Does Not Include" 10 V.S.A. § 6001 (3)(D)

3. Definition of "Subdivision" 10 V.S.A. § 6001 19 (A) and (B)

4. Permit not required under 10 V.S.A. § 6081 ix

5. Title 10 : Conservation And Development
Chapter 151 : State Land Use And Development Plans
Subchapter 004 : Permits
(Cite as: 10 V.S.A. § 6086)
§ 6086. Issuance of permit; conditions and criteria.

(a) Before granting a permit, the District Commission shall find that the subdivision or development:

(1) Will not result in undue water or air 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.

(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.

(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.

(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.

(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.

(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.

(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.

(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.

(2) Does have sufficient water available for the reasonably foreseeable needs of the subdivision or development.

(3) Will not cause an unreasonable burden on an existing water supply, if one is to be utilized.

(4) Will not cause unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result.

(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.

(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.

(6) Will not cause an unreasonable burden on the ability of a municipality to provide educational services.

(7) Will not place an unreasonable burden on the ability of the local governments to provide municipal or governmental services.

(8) 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) 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 would allow the development or subdivision to fulfill its intended purpose.

(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.

(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. 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.

(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:

(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;

(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;

(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

(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.

(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:

(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

(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

(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.

(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.

(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.

(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.

(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.

(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.

(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.

(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.

(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:

(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.

(10) Is in conformance with any duly adopted local or regional plan or 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.

(b) At the request of an applicant, or upon its own motion, the District Commission shall consider whether to review any criterion or group of criteria of subsection (a) of this section before proceeding to or continuing to review other criteria. This request or motion may be made at any time prior to or during the proceedings. The District Commission, in its sole discretion, shall, within 20 days of the completion of deliberations on the criteria that are the subject of the request or motion, either issue its findings and decision thereon, or proceed to a consideration of the remaining criteria.

(c)(1) Permit conditions. A permit may contain such requirements and conditions as are allowable proper exercise of the police power and that are appropriate within the respect to subdivisions (a)(1) through (10) of this section, including those set forth in 24 V.S.A. §§ 4414(4), 4424(a)(2), 4414(1)(D)(i), 4463(b), and 4464, the dedication of lands for public use, and the filing of bonds to ensure compliance. The requirements and conditions incorporated from Title 24 may be applied whether or not a local plan has been adopted. General requirements and conditions may be established by rule of the Natural Resources Board.

(2) Permit conditions on a wood products manufacturer.

(A) When issuing a permit with conditions on wood products manufacturing and delivery, the District Commission shall account for the seasonal, weather-dependent, land-dependent, and varied conditions unique to the industry.

(B) A permit condition that sets hours of operation for a wood products manufacturer shall only be imposed to mitigate an impact under subdivision (a)(1), (5), or (8) of this section. If an adverse impact would result, a permit with conditions shall allow the manufacturer to operate while allowing for flexible timing of deliveries of wood products from forestry operations to the manufacturer outside permitted hours of operation, including nights, weekends, and holidays, for the number of days demonstrated by the manufacturer as necessary to enable deliveries, not to exceed 90 days per year.

(C) Permit with conditions on the delivery of wood heat fuels. A permit with conditions issued to a wood products manufacturer that produces wood chips, pellets, cord wood, or other fuel wood used for heat shall allow for flexible delivery of that fuel wood from the manufacturer to the end user outside permitted hours of operation, including nights, weekends, and holidays, from October 1 through April 30 of each year. Permits with conditions shall mitigate the undue adverse impacts while enabling deliveries by the manufacturer.

(D) Permit amendments. A wood products manufacturer holding a permit may request an amendment to existing permit conditions related to hours of operation and seasonal restrictions to be consistent with subdivisions (B) and (C) of this subsection (c). Requests for condition amendments under this subsection shall not be subject to Act 250 Rule 34(E).

(d) The Natural Resources Board may by rule allow the acceptance of a permit or permits or approval of any State agency with respect to subdivisions (a)(1) through (5) of this section or a permit or permits of a specified municipal government with respect to subdivisions (a)(1) through (7) and (9) and (10) of this section, or a combination of such permits or approvals, in lieu of evidence by the applicant. A District Commission, in accordance with rules adopted by the Board, shall accept determinations issued by a development review board under the provisions of 24 V.S.A. § 4420, with respect to local Act 250 review of municipal impacts. The acceptance of such approval, positive determinations, permit, or permits shall create a presumption that the application is not detrimental to the public health and welfare with respect to the specific requirement for which it is accepted. In the case of approvals and permits issued by the Agency of Natural Resources, technical determinations of the Agency shall be accorded substantial deference by the Commissions. The acceptance of negative determinations issued by a development review board under the provisions of 24 V.S.A. § 4420, with respect to local Act 250 review of municipal impacts, shall create a presumption that the application is detrimental to the public health and welfare with respect to the specific requirement for which it is accepted. Any determinations, positive or negative, under the provisions of 24 V.S.A. § 4420 shall create presumptions only to the extent that the impacts under the criteria are limited to the municipality issuing the decision. Such a rule may be revoked or amended pursuant to the procedures set forth in 3 V.S.A.

chapter 25, the Vermont Administrative Procedure Act. The rules adopted by the Board shall not approve the acceptance of a permit or approval of such an agency or a permit of a municipal government unless it satisfies the appropriate requirements of subsection (a) of this section.

(e) This subsection shall apply with respect to a development that consists of the construction of temporary physical improvements for the purpose of producing films, television programs, or advertisements. These improvements shall be considered "temporary improvements" if they remain in place for less than one year, unless otherwise extended by the permit or a permit amendment, and will not cause a long-term adverse impact under any of the 10 criteria after completion of the project. In situations where this subsection applies, jurisdiction under this chapter shall not continue after the improvements are no longer in place and the conditions in the permit have been met, provided there is not a long-term adverse impact under any of the 10 criteria after completion of the project; except, however, if jurisdiction is otherwise established under this chapter, this subsection shall not remove jurisdiction. This termination of jurisdiction in these situations does not represent legislative intent with respect to continuing jurisdiction over other types of development not specified in this subsection.

(f) Prior to any appeal of a permit issued by a District Commission, any aggrieved party may file a request for a stay of construction with the District Commission together with a declaration of intent to appeal the permit. The stay request shall be automatically granted for 14 days upon receipt and notice to all parties and pending a ruling on the merits of the stay request pursuant to Board rules. The automatic stay shall not extend beyond the 30-day appeal period unless a valid appeal has been filed with the Environmental Division. The automatic stay may be granted only once under this subsection during the 30-day appeal period. Following appeal of the District Commission decision, any stay request must be filed with the Environmental Division pursuant to the provisions of chapter 220 of this title. A District Commission shall not stay construction authorized by a permit processed under the Board's minor application procedures.

(g) If a municipality fails to respond to a request by the applicant within 90 days as to the impacts related to subdivision (a)(6) or (7) of this section, the application will be presumed not to have an unreasonable burden on educational, municipal, or governmental services.