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## EXECUTIVE SUMMARY

### Overview

This report to the Vermont General Assembly is the result of the work of the Municipal Planning Review Commission (MPRC), also referred to as the “Chapter 117 Committee.” The MPRC was created under Act 62 of the 2001 Legislature to review 24 VSA Chapter 117, subchapters six through nine (the regulatory component of the Planning and Development Act), and recommend changes designed to encourage and promote responsible development of affordable housing throughout Vermont.

Specifically, the MPRC was directed to consider the following:

1. Approaches that will increase flexibility in the management of land development and conservation to meet state land use goals, with the focus on development of affordable housing.
2. Methods to improve efficiency and effectiveness of the municipal regulatory process, including reconciliation of the municipal planning law with Act 250, the alignment of local zoning ordinances with municipal plans, and the frequency of zoning ordinance updates to assure consistency between those ordinances and regional and municipal plans.
3. Advisability of implementing a state review of any local decision that denied or limited affordable housing development, or a comprehensive permit review process for affordable housing.
4. Methods to improve the coordination between state and local permit review processes in order to eliminate redundancy and reduce the time and expense involved in developing affordable housing.
5. Strategies to increase the efficiency of the environmental court in deciding appeals from local permitting decisions, including an analysis of resource and personnel needs, the scope of the definition of “interested party,” expedited appeals from affordable housing projects, and other procedural approaches.
6. Methods to encourage municipalities to adopt inclusionary zoning practices and to establish minimum housing density standards.

The MPRC, appointed by the Governor in September 2001, met six times through January 2002 to:

- review existing statute, related reports and informational materials,
- receive testimony from expert witnesses, interested organizations and the general public,
- identify and discuss options available for statutory reform to promote affordable housing, and
- make specific recommendations, supported through consensus of the Commission, as included in this report.

The witness list is attached in the Appendix. Copies of meeting minutes may be requested from the Department of Housing and Community Affairs.

Gregory Brown, Commissioner of the Department of Housing and Community Affairs, chaired all MPRC meetings. DHCA staff provided administrative, legal and policy support. The planning firm of Burnt Rock Inc. was hired to assist with research, meeting preparation and facilitation, and the drafting of the final report.

For discussion, evaluation and reporting purposes, the six legislative considerations were organized under the following seven topic headings, presented together with the recommendations of the Commission. All recommendations reflect the consensus of the Commission.

## Summary of Recommendations

### Topic 1: Meeting State Goals for Conservation & Housing

The following recommendations recognize the strong influence that planning, as well as funding programs, can have in ultimately providing affordable housing. Recognizing the potential continued barrier of Vermont's outdated local regulatory enabling statute to affordable housing projects, some simple revisions are recommended for the short term, along with a recommendation for a more in-depth study of Chapter 117. In addition, the recommendations encourage responsible development of affordable housing through the continued support of excellent existing programs promoting affordable housing, such as the Vermont Housing and Conservation Trust Fund, the Vermont Downtown Program and the Municipal and Regional Planning Fund.

1. Continue to support a “smart growth” approach to planning and development, inherent in existing state planning goals, which incorporates and strengthens provisions for affordable housing (and land conservation) under Chapter 117.
2. Revise current Chapter 117 definitions pertaining to affordable housing to provide more flexibility in their regulatory application. It is recommended that this include:
  - referencing county, rather than state, median household income under §4303(25) to allow for geographic variation in the definition,
  - reducing, under the definition of “affordable housing development” [§4303(26)], the required percentage of affordable units from 50% to 20% of the total, or a minimum of 5 units, whichever is greater,
  - providing, under the definition of “affordable housing development,” that affordable units be subject to covenants or restrictions that preserve their affordability for a minimum period of fifteen (15) years, or longer as provided in municipal bylaws.
3. Continue to fund municipal, regional and state planning for affordable housing – through the Municipal and Regional Planning Fund [§4306] and the Department of Housing & Community Affairs – to strengthen planning and related technical assistance to municipalities, including:
  - the preparation of detailed housing studies to identify and quantify regional and municipal affordable housing needs, for use in regional and municipal plan housing elements,
  - the update of state and regional affordable housing guidelines [§4345a(7)], and
  - related updates of the housing section of the state’s planning and land use manual, as required by statute [§4304], to include references to the Federal Fair Housing Act, model bylaw language, and model rules of procedure.
4. Continue to fund municipal, regional and state planning for affordable housing – through the Municipal and Regional Planning Fund [§4306] and the Department of Housing & Community Affairs – provide additional training to municipal boards and staff regarding the federal Fair Housing Act, the extent of municipal authority under Chapter 117, board rules of procedure, the conduct of hearings, findings and decisions, and expedited development review procedures.
5. Appoint a special commission to undertake a comprehensive update of Chapter 117 using, as a starting point, model language prepared by the American Planning Association. It is clear from the findings of the Joint Housing Committee, and testimony presented to the MPRC, that a more comprehensive update of state planning statutes is needed, and that such an update was beyond the scope and schedule of the MPRC.

6. Continue to maintain property transfer tax funding for the Municipal and Regional Planning Fund under §4306, and for the Vermont Housing and Conservation Trust Fund, in support of planning for, and implementing, related affordable housing and land conservation programs.

## **Topic 2: Consistency between Municipal Plans & Bylaws**

Much of the work on town plans and by-laws in Vermont is conducted by lay volunteer planning commissioners. The study committee recommends tightening language in Chapter 117 to clarify our communities' responsibility to address housing needs in both municipal plans and by-laws, and to remove the problematic supermajority provision which has allowed minorities to defeat products of participatory community planning adopted by the majority, as follows:

1. Expand statutory requirements for the housing element of the municipal plan [§4382(a)(10)] to include an evaluation of current bylaws for consistency with proposed affordable housing program recommendations. Expand the implementation section [§4382(a)(7)] of the municipal plan to include the identification of bylaw changes needed to implement the proposed housing program, and an implementation schedule for the adoption of such changes.
2. Eliminate the “extraordinary majority voting” provision [§4404(e)] which requires, upon submission of a petition of 5% of the voters or 40% of affected landowners, a two-thirds majority vote for the adoption of a bylaw amendment.
3. Simplify the bylaw adoption process [§§4403, 4404] by eliminating the distinction between urban and rural municipalities [§4404(d)]; and authorize all municipalities to adopt all bylaws and amendments by a vote of the legislative body – while retaining the option for 5% of the registered voters to petition for a vote by Australian ballot as presently provided for urban municipalities [§4404(f)]. This should be accompanied by expanded public notice under §4447.
4. Require report preparation by the planning commission for proposed bylaw amendments—now optional under §4403(c)—to include an evaluation of whether a proposed amendment is consistent with the housing element of the municipal plan.

## **Topic 3: Improving the Efficiency & Effectiveness of the Municipal Regulatory Process**

The following recommendations, recognizing the potential barrier which local regulatory review under Vermont's outdated enabling statute can create for affordable housing projects, simplify and clarify sections of the statute. Some, such as (7), are clarifications deemed necessary by recent court decisions interpreting municipal authority under the statute.

1. Clarify the relationship between state agency referral and zoning permit issuance requirements [§4409 and §4443] to specify that state agencies shall receive notification of an application, and delete the reference to the 30 day referral period.
2. Clarify the relationship between zoning permit issuance requirements and other approval (e.g., site plan and conditional use) timing requirements and [§4443] specify that the time limit for a zoning administrator to issue a zoning permit shall begin upon the submission of a complete application, to include all necessary zoning approvals (e.g., conditional use, site plan review).
3. Revise statutory permit timelines (e.g., the time within which a decision must be made) to make them internally consistent. Such revision should require that a decision be rendered not more than 45 days from the date of the final hearing or meeting (in the case of site plan review) to consider the application [§§4407(2)(5), 4415, 4470].

4. More clearly authorize the adoption of unified bylaws, and unified land development permits, integrating zoning, subdivision and other bylaws [e.g., under §4401]. Such authorization should stipulate that adoption of a unified bylaw equates to the adoption of both zoning and subdivision regulations with respect to Act 250 jurisdiction.
5. Consolidate PRD and PUD provisions in statute [§4407(3)&(12)] into a single provision; and also:
  - allow for their application subject to subdivision and/or conditional use review, providing that any plat recording occurs in accordance with §4414;
  - eliminate the 50% cap and associated requirements for density bonuses (allow municipality to specify bonus);
  - more clearly authorize municipalities to require subdivisions or residential developments to be reviewed as PRDs/PUDs, and
  - provide greater statutory guidance regarding types of standards and review procedures [See attached model statutory language; see Recommendation #5 under Topic 7].
6. Revise statutory conditional use criteria [§4407(2)(B)] to specify that proposed conditional uses “shall not result in an undue adverse affect on ~~adversely affect~~ the character of the area affected, as defined by the purpose of the zoning district within which the project is located, and specifically stated policies and standards of the municipal plan.”
7. To expedite project reviews, expand and clarify allowed administrative reviews [§§4321(b) and 4462(b)], or otherwise specifically authorize administrative (staff) reviews, and/or the use of hearing officers to conduct pre-hearing meetings to identify issues and interested parties, and/or to exercise partial review authority on behalf of the planning commission, board of adjustment and/or development review board.
8. Revise current statute governing sewage allocation ordinances to specifically authorize communities to allocate wastewater capacity in a manner which implements the policies of the municipal plan (e.g., to allow capacity “set aside” for affordable housing projects and downtown development under T.24 §3625).
9. Require in statute (e.g., under §4401(a)(2)) that municipal regulations which define multiple review processes must establish a preferred order in which approvals should be obtained, and specifically enable concurrent and/or consolidated review processes (e.g., joint hearings).

#### **Topic 4: Coordinating Municipal & State Development Review**

Any improvements to development review will ease the cost and time associated with gaining approval for housing projects. Coordination between municipal and state development review can be improved by encouraging municipalities to incorporate Act 250 criteria and other state standards in the local review process, as well as by increasing understanding of state and local roles, as recommended in the following:

1. More clearly enable the incorporation of Act 250 criteria in municipal bylaws in accordance with local regulatory review procedures (under §4407).
2. Provide for the expansion of §4449 to enable municipalities to adopt additional Act 250 criteria under Local Act 250 review [the MPRC did not reach consensus with regard to which criteria to include].
3. Expand the exemptions from Local Act 250 review under §4449(b)(1) to allow a development review board to waive jurisdiction over minor Act 250 applications and minor amendments.

4. Promote the incorporation of state standards (definitions, review criteria) in municipal bylaws (e.g., under §4409(b)) where there is overlapping jurisdiction, without restricting municipalities authority to adopt local standards.
5. Revise state agency referral requirements to specifically reference associated state agency permitting processes, and strengthen state coordination and response requirements under this provision [§4409(c)].
6. Increase staffing at the municipal and state level, as funding permits, to ensure better coordination of state and municipal regulatory processes.
7. The Department of Housing & Community Affairs, Regional Planning Commissions and other state regulatory bodies (e.g., VANR, Environmental Board) should provide municipal staff and board training with regard to state permitting processes and requirements.
8. Specifically enable concurrent state and municipal development review processes under Chapter 117 (e.g., under §4409).

## Topic 5: Appeals

Performance of local review boards, as well as the Environmental Court, had been noted in testimony to the Joint Housing Committee among the difficulties in promoting responsible municipal planning to increase the provision of housing and in gaining predictable, fair decisions.

1. The recommendations set forth in the *Interim and Final Reports of the Environmental Court Study Committee* (2001, undated) are hereby endorsed and adopted by reference; efforts of the Department of Housing & Community Affairs to implement these recommendations are likewise endorsed.
2. The Department of Housing and Community Affairs and/or Regional Planning Commissions should:
  - Prepare and distribute to municipalities guidance materials, including model adoption language, and associated training regarding the use of MAPA to promote on the record appellate review under §4471. Such materials should include information regarding criteria for determining when and how on the record review should be applied.
  - Prepare and distribute to municipalities guidelines and training for drafting regulatory findings, conclusions and conditions of approval for review on appeal.
3. Revise the statutory definition of “interested person” [§4464] as follows:
  - §4464 (b)(3) “A person owning or occupying property in the immediate neighborhood of a property which is the subject of any decision or act taken under this chapter, who can demonstrate a material interest affected by the decision or act and who alleges that the decision or act, if confirmed, will not be in accord with the policies, purposes or terms of the plan or bylaw of that municipality.”
  - §4464(b)(4) “Any 10 persons owning real property in the municipality listed in subdivision (2) of this subsection, or a number of property owners equal to 1% of the registered voters of the municipality, whichever is greater, who, by petition to the board of adjustment or the development review board of a municipality, the plan or bylaw of which is at issue in any appeal brought under this title, allege that any relief requested by a person under this title, if granted, will not be in accord with the policies, purposes or terms of the plan of bylaw of that municipality. Such petition to the board of adjustment or the development review board must designate one person to serve as the principal contact regarding all matters related to the appeal.”
4. Revise the statutory provisions for appeals to environmental court as follows:

- §4471(a) An interested person who has participated in municipal regulatory proceeding authorized under this title may appeal a decision of a board of adjustment, planning commission or development review board to the environmental court. Participation in a local regulatory proceeding shall consist of offering, through oral or written testimony, evidence or a statement of concern related to the subject of the proceeding. An appeal from a decision of a board of adjustment, planning commission or development review board shall be taken in such manner as the supreme court may by rule provide for appeals from state agencies governed by sections 801 through 816 of title 3, ...”
5. Improve early notification requirements for potential interested persons by:
    - requiring, under §4447(a), the written notification of owners of all properties adjoining, without regard to rights-of-way, any property subject to development review proceedings authorized under Chapter 117 provided that the applicant may be required to bear the cost and/or responsibility of notification; and
    - requiring, under §4443, the posting of a notice of application on a form prescribed by the municipality, within public view, on any property subject to development review proceedings (excluding certificates of occupancy under §4443(a)(2)).
  6. Clarify and expedite the process for filing appeals under §4464 to stipulate that the notice of appeal shall be sent by certified mail, with fees, to the environmental court, and a copy of the appeal sent to the municipal clerk, or zoning administrator if so designated, who will supply a list of interested parties to the appellant within 5 working days.
  7. Enable an expedited appeal process in environmental court for applications involving affordable housing development (as defined under §4303, as amended), by rule or statute, to be referenced under §4471.

## **Topic 6: State Review**

The statute provides for state oversight to ensure that local plans adequately address housing issues, and that there are avenues for complaints to be reconciled. The following recommendations would strengthen existing roles and establish additional authority to ensure consistency with equal treatment of housing provisions in municipal bylaws.

1. Strengthen requirements for local and regional housing elements under 4382(a)(10) as previously recommended under other topics; and amend §4406(4)(B) (equal treatment of housing provisions) to specifically reference §4382(a)(10) with regard to the identification of local affordable housing needs.
2. Clarify and/or strengthen the existing process for filing complaints with the attorney general under equal treatment of housing provisions by:
  - cross referencing §4445a under §4471; and
  - revising §4445a to state that the attorney general *shall* investigate and *shall* hold a public hearing when there is a complaint that a bylaw or its manner of administration violates §4406(4).
3. Establish separate commissioner authority under §4351 to review existing and/or proposed municipal bylaws and bylaw amendments, to determine consistency with equal treatment of housing provisions under §4406 (as proposed to be amended). Where an adopted bylaw is found to be in violation, the Commissioner shall have the authority to suspend the municipality’s ability to levy impact fees and its eligibility for discretionary state funding programs (e.g., community development block grants, municipal planning grants) until the violation is remedied.

## **Topic 7: Regulatory Techniques to Promote Affordable Housing**

There are innovative regulatory tools available to Vermont's towns, which are not widely used, which would assist in gaining more affordable housing. The following recommendations would clarify or expand statutory authority to promote the application of these techniques.

1. Include in the listing of permitted regulations under §4407 a subsection specific to affordable housing that presents a list of some accepted regulatory techniques which may be used to promote affordable housing in appropriate locations within a municipality, and to otherwise meet statutory affordable housing requirements (see attached table summarizing regulatory techniques to promote affordable housing).
2. Define within Chapter 117 (e.g., under §4407) "inclusionary zoning" and "linkage ordinances" as specifically enabled types of regulation, and associated studies and administrative requirements necessary to document the nexus between proposed development and the affordable housing requirement. Linkage ordinances also could be addressed under Chapter 131 of Title 24 governing impact fee ordinances.
3. Revise §4406(4)(D)(i) to eliminate the age, disability and relationship standards for occupancy of accessory dwellings.
4. Expand protected types of housing under Chapter 117's equal treatment of housing provisions [§4406(E)] to require that bylaws "shall not have the effect of excluding multi-family dwellings from the municipality."
5. Expand protected types of housing under Chapter 117's equal treatment of housing provisions [§4406(F)] to require that bylaws "shall not have the effect of excluding planned unit developments and planned residential developments from the municipality, subject to subdivision or conditional use review."
6. To promote good community design and affordable housing, more clearly authorize under §4407 special provision to enable municipalities to waive one or more dimensional standard in accordance with locally defined criteria.
7. Specifically enable the adoption of incentive zoning provisions under §4407 (see attached APA model language).
8. Amend enabling legislation relating to wastewater and other municipal ordinances affecting affordable housing and land use to allow for or require consistency with and consideration of adopted municipal plan goals and policies (see Topic 3).

## INTRODUCTION

This report to the Vermont General Assembly is the result of the work of the Municipal Planning Review Commission (MPRC), also referred to as the “Chapter 117 Committee,” which was created under Act 62 of the 2001 Legislature to:

...review 24 VSA Chapter 117, subchapters six through nine, the regulatory component of the municipal and regional planning and development act, and recommend changes designed to encourage and promote responsible development of affordable housing throughout Vermont.

Specifically, the MPRC was directed to consider the following:

1. Approaches that will increase flexibility in the management of land development and conservation to meet state land use goals, with the focus on development of affordable housing.
2. Methods to improve efficiency and effectiveness of the municipal regulatory process, including reconciliation of the municipal planning law with Act 250, the alignment of local zoning ordinances with municipal plans, and the frequency of zoning ordinance updates to assure consistency between those ordinances and regional and municipal plans.
3. Advisability of implementing a state review of any local decision that denied or limited affordable housing development, or a comprehensive permit review process for affordable housing.
4. Methods to improve the coordination between state and local permit review processes in order to eliminate redundancy and reduce the time and expense involved in developing affordable housing.
5. Strategies to increase the efficiency of the environmental court in deciding appeals from local permitting decisions, including an analysis of resource and personnel needs, the scope of the definition of “interested party,” expedited appeals from affordable housing projects, and other procedural approaches.
6. Methods to encourage municipalities to adopt inclusionary zoning practices and to establish minimum housing density standards.

## Background

Act 62 (introduced as H.483), and the work of the MPRC, are in large part the result of the prior work and recommendations of the Legislature’s Joint Housing Committee, as set forth in their *1999 Joint Housing Committee Report*. The Joint Housing Committee was created by statute in 1997 (Act 103) to focus specifically on housing issues in Vermont, and to propose and support legislative solutions to address housing issues – and in particular affordable housing. The Committee’s 1999 report highlighted the current housing crisis in Vermont, included findings and recommendations that established clear legislative interest in identifying concrete measures to address the state’s housing shortage, and resulted in the enactment of Act 62. Each of the six considerations identified above relates to some aspect of the Joint Housing Committee’s findings and recommendations, as outlined in their report.

## Process

The MPRC, appointed by the Governor in September 2001, met six times through January 2002 to:

- review existing statute, related reports and informational materials,
- receive testimony from expert witnesses, interested organizations and the general public,
- identify and discuss options available for statutory reform to promote affordable housing, and
- make specific recommendations, supported through consensus of the Commission, as included in this report.

The witness list is attached in the appendix. Copies of the meeting minutes may be requested from the Department of Housing and Community Affairs.

Gregory Brown, Commissioner of the Department of Housing and Community Affairs, chaired all MPRC meetings. DHCA staff provided administrative, legal and policy support. The planning firm of Burnt Rock Inc. was hired to assist with research, meeting preparation and facilitation, and the drafting of the final report.

For discussion, evaluation and reporting purposes, the six legislative considerations were organized under the following topic headings:

- I. Meeting State Goals for Conservation & Housing [#1]
- II. Consistency between Municipal Plans & Bylaws [#2]
- III. Improving the Efficiency & Effectiveness of the Municipal Regulatory Process [#2]
- IV. Coordinating Municipal & State Development Review [#4]
- V. Appeals [#5]
- VI. State Review [#3]
- VII. Regulatory Techniques to Promote Affordable Housing [#6]

- Background information provided to the MPRC included copies of Chapter 117, the *1999 Joint Housing Committee Report*, and topic summaries and selected readings provided by the consultants. Readings were selected from a review of current planning and housing literature. A listing of readings and reference materials is attached. The work of other related study committees was also reviewed as available, including the *Interim & Final Reports of the Environmental Court Study Committee*.

Overviews, MPRC findings and recommendations are presented for each of the above topics in subsequent sections of this report.

## TOPIC 1: MEETING STATE GOALS FOR CONSERVATION & HOUSING

### Relevant Chapter 117 Sections

- State planning goals [§4302]
- Statutory definitions (affordable housing, affordable housing development) [§4303(25),(26)]
- Municipal & Regional Planning Fund [§4306]

### Overview

Vermont has attempted to address both land conservation and affordable housing as matters of public policy since at least the 1960s, with the passage of Act 250 and Vermont's Planning and Development Act (24 V.S.A. Chapter 117). Since the 1980s it has been state policy to accommodate both land conservation and affordable housing as compatible, rather than competing, goals. This has been accomplished in part through strengthened municipal and regional planning under Chapter 117, and continued legislative support for Vermont Housing and Conservation Board and Trust Fund.

**State Planning Goals.** Act 200, often referred to as Vermont's "Growth Management Act," represented a comprehensive update of the planning provisions of Chapter 117. Among the provisions included in this legislation, enacted in 1988, were a number of state planning goals – and related municipal and regional planning requirements – that address both land conservation and affordable housing. Inherent in these goals, found in §4302(b) of Chapter 117, is the legislative intent to accommodate both development and land conservation by planning for development "so as to maintain the historic settlement pattern of compact village and urban centers separated by rural country side (Goal 1)." Accordingly:

- intensive residential development is encouraged primarily in areas related to community centers,
- economic growth is encouraged in locally designated growth areas, and/or to revitalize existing village and urban centers, and
- public investments, including the construction and expansion of infrastructure, should reinforce the general character and planned growth patterns of the area.

A separate goal, related to encouraging and strengthening rural agricultural and forest industries (Goal 9), calls for:

- strategies to protect the long-term viability of agricultural and forest land, including maintaining a low overall density of development, and
- planning public investment to minimize development pressure on farm and forest land.

Finally, there are **housing specific goals** to be addressed in municipal and regional planning (under Goal 11). To ensure the availability of safe and affordable housing for all Vermonters:

- housing should be encouraged to meet the needs of a diversity of social and income groups in each community, particularly for citizens of low and moderate income,
- new and rehabilitated housing should be safe, sanitary, located conveniently to employment and commercial centers, and coordinated with the provision of necessary public facilities and services,
- sites for multi-family and manufactured housing should be readily available in locations similar to those generally used for single family conventional dwellings, and
- accessory apartments within or attached to single family residences which provide affordable housing in close proximity to cost effective care and supervision for relatives or disabled or elderly persons should be allowed.

The planning amendments enacted under Act 200 also require regional planning commissions to identify affordable housing needs within their regions, and develop regional plans that are consistent with state

planning goals. Municipalities are not required to adopt municipal plans, but those that do must develop a program to address affordable housing needs as identified by the regional planning commission. Municipal plans receiving regional approval, as needed to qualify for state planning funds, must also be found to be consistent with state planning goals.

While every community is asked to address affordable housing in its planning process, it is also intended that most new housing be located within existing or planned urban and village centers, at higher densities supported by infrastructure, in close proximity to services, jobs and transportation. The extent to which such settlement patterns also promote the conservation of farm and forest land outside of urban and village centers is largely a function of local plans, bylaws and related plan implementation.

As such, Chapter 117's planning provisions offer a "smart growth" approach to land development and conservation that recognizes the need to plan for and accommodate affordable housing. This approach is not limited to Vermont – smart growth initiatives nationwide are defining alternative patterns to scattered, low density development that make more efficient and effective use of public resources, and clearly establish the link between land conservation, the provision of infrastructure, and affordable housing.<sup>1</sup>

Despite Vermont's history of support for both land conservation and affordable housing, in practice the full promise of Act 200 has yet to be realized. It is widely perceived, based on our current housing shortage and patterns of development, that municipal and regional plans are not adequately addressing affordable housing, and are not being implemented through the regulatory provisions of Chapter 117. This may be the result of a number of factors identified to date, including but not limited to:

- the relatively higher cost of residential development within urban and village centers,
- a lack of detailed information for use in planning regarding affordable housing needs at the local and regional level (e.g., to establish regional and municipal housing needs),
- the greater difficulty in developing higher density, infill residential development within or adjacent to existing neighborhoods (NIMBYism) – as reflected in project denials and/or frivolous appeals,
- potentially exclusionary zoning practices in some communities, and
- inconsistent administration and enforcement of municipal regulations by local boards.

It has been the intent of the MPRC to address these and related issues, to the extent feasible, through our review of existing statute. It is clear, however, that not all issues identified have statutory remedies. Continued funding and support for planning, technical assistance, public education, and board training are also critical to the success of both affordable housing and land conservation initiatives.

**Chapter 117 Housing Provisions.** Attempts to address housing in Chapter 117 have been ongoing since its enactment in 1967. As originally passed, Chapter 117 included provisions for:

- an optional analysis of existing and projected housing needs for all economic groups in the municipality and region [§4382(c)(2)], and
- Planned Residential Developments (PRDs) providing regulatory flexibility to promote both concentrated, clustered housing development and land conservation [§4407(3)].

As noted in the *1999 Joint Housing Committee Report*, Chapter 117 – originally intended as a comprehensive law to address issues of future development – has been "riddled with piecemeal amendments for the more than 30 years the law has been in effect." The last comprehensive update of Chapter 117 under Act 200 focused on the Chapter's planning provisions, but did not extend to their application as governed by the regulatory sections of the Act.

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<sup>1</sup> Related articles detailing the relationship between smart growth initiatives and affordable housing are included in the attached reference list.

### Summary of Housing-Related Amendments to Chapter 117

1971	Planned Unit Developments (PUDs) allowing for mixed use development [§4407(12)]
1975	“Equal Treatment of Housing” provisions protecting from exclusion mobile homes, mobile home parks, and “housing to meet the needs of the population” [§4406(4)(A)-(C)]
1976	“Group Home” provision protecting homes for up to six disabled or handicapped residents [§4409(d)]
1981	A 25% density bonus as an incentive for PRD development [§4407(3)(B)]
1988	Complaints to the Attorney General challenging of the validity of municipal bylaws under equal treatment of housing provisions [§4445a] State planning goals specific to housing [§4302(c)(11)] Development of guidelines for the provision of affordable housing [§§4345a, 4351] Regional plan housing element that identifies affordable housing needs [§4383a(9)] Municipal plan housing element that includes a recommended program for addressing affordable housing needs, as identified by the regional planning commission [§4382(a)(10)] Optional review of municipal plans by the regional planning commission, and of regional plans by the Council of Regional Commissions, for consistency with state planning goals [§§4302(f), 4305, 4350] Commissioner review of unapproved municipal plans for compliance with housing goals, criteria [§4351]
1991	Accessory apartment provisions under state planning goals [§4302(c)(11)(D)], municipal plan requirements [§4382(a)(10)], and equal treatment of housing requirements [§4406(D)]
1999	Definitions of “affordable housing” and “affordable housing projects” [§4303] Up to 50% density bonus for affordable housing projects under PRD and PUD provisions [§4407].

There are concerns, as discussed in more detail in subsequent sections of this report, that Chapter 117 as currently constituted:

- does not clearly enough require consistency between municipal plans and implementing bylaws,
- does not provide sufficient flexibility, or clear enough enabling language, to address affordable housing through inclusionary or incentive zoning, and
- does not allow special provision for affordable housing projects in related permitting and appeals processes.

**Statutory Definitions of Affordable Housing.** It was not until 1999 that the following definitions pertaining to affordable housing were added to Chapter 117 [§4303], principally for regulatory purposes. Currently these definitions apply only to density bonuses offered as an incentive for affordable housing development under the planned residential and planned unit development sections of statute [§4407(3),(12)]. These could be broadened in their application under statute to other types of inclusionary or incentive zoning for affordable housing, and for expedited development review and appeals processes.

#### CURRENT STATUTORY DEFINITIONS [§4303]

“**Affordable housing**” means either of the following:

- (A) Housing that is owned by its inhabitants, whose gross annual household income does not exceed 80 percent of the state median household income, as defined by the United States Department of Housing and Urban Development, and the total annual cost of the housing, including principal, interest, taxes and insurance, is not more than 30 percent of the household’s gross annual income.
- (B) Housing that is rented by its inhabitants whose gross annual household income does not exceed 65 percent of the state median income, as defined by the United States Department of Housing and Urban Development, and the total annual cost of the housing, including rent, utilities, and condominium association fees, is not more than 30 percent of the household’s gross annual income.

“**Affordable housing development**” means a housing development of which at least 50 percent of the units are affordable housing units.

## Findings

- Chapter 117, first enacted in 1967 and since amended on a piecemeal basis, is in need of a comprehensive update.
- State planning goals under Chapter 117 adequately support a “smart growth” approach to planning for development, and address affordable housing and land conservation as compatible, rather than competing or conflicting, matters of public policy. Better implementation related to the promotion of affordable housing is needed, however, as provided for in the recommendations set forth in this report.
- Definitions of “affordable housing” and “affordable housing development” under Chapter 117, by referencing state rather than county median incomes, and by requiring that 50% of housing units meet the definition of affordability, are too limiting – particularly when this definition is used in reference to other forms of incentive or inclusionary zoning, or expedited appeals.
- It is widely perceived, based on Vermont’s current housing shortage and patterns of development, that municipal and regional plans are not adequately addressing affordable housing, and are not being implemented through the regulatory provisions of Chapter 117.
- It is clear that that not all issues identified in relation to Chapter 117 have statutory remedies. Continued funding and support for planning, technical assistance, public education, and local board training are also critical to the success of both affordable housing and land conservation initiatives.
- The Vermont Housing and Conservation Board, through the use of the Trust Fund, has balanced the state’s land development, conservation and affordable housing goals, and made a significant contribution to the supply of affordable housing since its inception.

## Recommendations

1. Continue to support a “smart growth” approach to planning and development, inherent in existing state planning goals, which incorporates and strengthens provisions for affordable housing (and land conservation) under Chapter 117.
2. Revise current Chapter 117 definitions pertaining to affordable housing to provide more flexibility in their regulatory application. It is recommended that this include:
  - referencing county, rather than state, median household income under §4303(25) to allow for geographic variation in the definition,
  - reducing, under the definition of “affordable housing development” [§4303(26)], the required percentage of affordable units from 50% to 20% of the total, or a minimum of 5 units, whichever is greater,
  - providing, under the definition of “affordable housing development,” that affordable units be subject to covenants or restrictions that preserve their affordability for a minimum period of fifteen (15) years, or longer as provided in municipal bylaws.<sup>2</sup>

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<sup>2</sup> The current APA model definition of “affordable housing development”: any housing development that is subsidized by the federal, state, or local government, or any housing development in which at least 20 percent of the dwelling units are subject to covenants or restrictions which require that such dwelling units be sold or rented at prices that preserve them as affordable housing units, pursuant to this section. As noted the MPRC also recommends that the development include a minimum of 5 affordable units.

3. Continue to fund municipal, regional and state planning for affordable housing – through the Municipal and Regional Planning Fund [§4306] and the Department of Housing & Community Affairs – to strengthen planning and related technical assistance to municipalities, including:
  - the preparation of detailed housing studies to identify and quantify regional and municipal affordable housing needs, for use in regional and municipal plan housing elements,
  - the update of state and regional affordable housing guidelines [§4345a(7)], and
  - related updates of the housing section of the state’s planning and land use manual, as required by statute [§4304], to include references to the Federal Fair Housing Act, model bylaw language, and model rules of procedure.
4. Continue to fund municipal, regional and state planning for affordable housing – through the Municipal and Regional Planning Fund [§4306] and the Department of Housing & Community Affairs – to provide additional training to municipal boards and staff regarding the federal Fair Housing Act, the extent of municipal authority under Chapter 117, board rules of procedure, the conduct of hearings, findings and decisions, and expedited development review procedures.
5. Appoint a special commission to undertake a comprehensive update of Chapter 117 using, as a starting point, model language prepared by the American Planning Association.<sup>3</sup> It is clear from the findings of the Joint Housing Committee, and testimony presented to the MPRC, that a more comprehensive update of state planning statutes is needed, and that such an update was beyond the scope and schedule of the MPRC.
6. Continue to maintain property transfer tax funding for the Municipal and Regional Planning Fund under §4306, *and* the Vermont Housing and Conservation Trust Fund, in support of planning for and implementing related affordable housing and land conservation programs.

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<sup>3</sup> *Growing Smart Legislative Guidebook: Model Statutes for Planning and the Management of Change*, 2002 edition, Stuart Meck, FAICP, General Editor (Chicago: American Planning Association). Available only in draft form for this project, these model statutes have been developed by the APA over several years based related research, including a review and analysis of enabling statutes in all 50 states. The final version is scheduled for release in January of 2002.

## TOPIC 2: CONSISTENCY BETWEEN MUNICIPAL PLANS & BYLAWS

### Relevant Chapter 117 Sections

- State planning goals (housing goals) [§4302(11)]
- Definition of “rural town” [§4303(10)]
- Municipal plan requirements (housing element) [§4382(10)]
- Municipal plan amendment requirements (PC report) [§4384]
- Bylaw adoption requirements (PC report, rural towns, extraordinary majority vote) [§§4403,4404]
- Purpose of municipal bylaws [§§ 4401(a)(1), 4402]
- Regional approval of municipal plans (review for consistency with state planning goals) [§4350]
- State review of municipal plans (for compliance with state housing affordability guidelines) [§4351]
- Local Act 250 review (conformance with the municipal plan) [§4449(c)(3)].

### Overview

Housing policies and recommendations, as required by statute for inclusion in municipal plans, are often not adequately implemented, through local bylaws and permitting processes. This suggests the need to:

- strengthen both local plans and bylaws, to more clearly identify and address housing needs,
- define more clearly the degree of required consistency between local plans and bylaws, and the role of the bylaw in implementing the municipal plan,
- clarify the use of the municipal plan in local development review, and
- provide additional information, training and model language to local commissions and boards.

**Plan Requirements.** Municipalities are not required to plan, but must have a plan in effect to adopt or amend bylaws, except on an interim basis [§4401]. Municipal plans must be updated and readopted (generally by vote of the legislative body) every five years. If a plan is not readopted it expires. Existing bylaws then remain in effect, but cannot be amended [§4387].

Municipal plans must also, by statute, include a housing element that recommends a program for addressing low and moderate income housing needs as identified by the regional planning commission [§4382(10)]. There currently are no Chapter 117 requirements under the housing element for an evaluation of the effect that local regulations may have on the provision of housing, nor for the identification of specific measures needed to implement recommended housing programs, including associated bylaw changes.

In considering plan amendments, the planning commission must prepare a report that addresses the extent to which the plan is consistent with state planning goals [§4384(c)]. The planning commission, however, is not required to consider whether the proposed plan amendment is consistent with other plan elements, including the housing element.

**Purpose of Bylaws.** Municipalities also are not required to adopt bylaws; however once adopted bylaws “shall have the purpose of implementing the municipal plan, and shall be in accord with the policies set forth therein” [§4401]. The supreme court has interpreted this language to mean that bylaws must reflect the municipal plan, but need not be controlled by it, and only those provisions incorporated in the bylaw are legally enforceable [Kalakowski v. John A. Russell Corporation (1979) 137 Vt. 219, 401 A.2d 906]. Bylaws also “shall be enacted for the purposes set forth in section 4302” (state planning goals) [§4402].

**Consistency Requirements.** There is no requirement in Chapter 117 that bylaws, once adopted, be updated on a regular basis to ensure consistency with the municipal plan. Inconsistencies may result when bylaws significantly predate the municipal plan. The planning commission also is not required to

evaluate whether a proposed bylaw amendment is consistent with the municipal plan or relevant state planning goals (e.g., as part of report preparation under §4403).

With regard to proposed development, many municipalities currently incorporate plan consistency requirements in their bylaws (e.g., under expanded site plan, conditional use or subdivision review). A determination of project conformance with the municipal plan is specifically required under Chapter 117 only in relation to optional local Act 250 review [§4449].

**Bylaw Adoption.** Inconsistencies also may result from statutory requirements that can make bylaw adoption much more difficult than plan adoption. In rural towns (< 2,500 population), bylaws and amendments must be adopted by a majority of voters by Australian ballot, rather than by a majority vote of the selectboard [§4404(d)]. In addition, the extraordinary majority voting provision in Chapter 117, which applies in both urban and rural municipalities, allows 5% of the voters to petition (file a written protest) requiring the adoption of a bylaw amendment by a 2/3 majority of those present and voting [§4404(e)]. This makes it extremely difficult, if not impossible, to pass bylaw amendments that may be consistent with plan recommendations – even those supported by a majority of voters.

**Regional/State Review.** Copies of proposed municipal plans, bylaws and amendments are forwarded to DHCA and regional planning commissions as part of the adoption process. At present, municipal plan consistency with state housing goals, and associated guidelines for the provision of affordable housing, may be determined either through the optional regional approval process [§4350], or by the Commissioner of DHCA [§4351]. There are no similar regional or state review processes for proposed bylaws.

## Findings

- An evaluation of bylaw consistency undertaken during the plan update process, and an associated schedule of proposed bylaw amendments to achieve consistency under the implementation program, should improve consistency without mandating a potentially unnecessary bylaw amendment process.
- Requiring an evaluation of a bylaw amendment's consistency with the housing element (and other elements) of the municipal plan as part of the bylaw amendment/adoption process would help ensure consistency and avoid the adoption of exclusionary zoning provisions.
- Some states have explicit statutory consistency requirements, tied to mandated bylaw amendments within a specified period after the adoption of a municipal plan. Such requirements could, however, undermine the function of the plan as a broadly focused policy document. They could also, by raising the consistency standard, result in additional rather than fewer court challenges to the housing (or other) provisions of local bylaws.
- Eliminating the distinction between rural and urban municipalities, and allowing Selectboards to adopt bylaws subject to a voter-petition for Australian ballot, would reduce the difficulty of amending bylaws to support a plan's housing policies (e.g., for incentive zoning or increased densities).
- Eliminating the extraordinary majority voting provision would remove a difficult impediment to revising bylaws to ensure consistency with municipal plans.

## Recommendations

1. Expand statutory requirements for the housing element of the municipal plan [§4382(a)(10)] to include an evaluation of current bylaws for consistency with proposed affordable housing program recommendations. Expand the implementation section [§4382(a)(7)] of the municipal plan to include the identification of bylaw changes needed to implement the proposed housing program, and an implementation schedule for the adoption of such changes.

2. Eliminate the “extraordinary majority voting” provision [§4404(e)] which requires, upon submission of a petition of 5% of the voters or 40% of affected landowners, a two-thirds majority vote for the adoption of a bylaw amendment.
3. Simplify the bylaw adoption process [§§4403, 4404] by eliminating the distinction between urban and rural municipalities [§4404(d)]; and authorize all municipalities to adopt all bylaws and amendments by a vote of the legislative body – while retaining the option for 5% of the registered voters to petition for a vote by Australian ballot as presently provided for urban municipalities [§4404(f)]. This should be accompanied by expanded public notice under §4447.
4. Require report preparation by the planning commission for proposed bylaw amendments—now optional under §4403(c)—to include an evaluation of whether a proposed amendment is consistent with the housing element of the municipal plan.<sup>4</sup>

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<sup>4</sup> A standard of review for determining the consistency of municipal and regional plans with state planning goals already exists in Chapter 117 [§4302(f)]. In addition, an example of such a consistency test is provided in *Growing Smart Legislative Guidebook: Model Statutes for Planning and the Management of Change*, 2002 Edition:

*The local planning agency shall find that proposed land development regulations, a proposed amendment to existing land development regulations, or a proposed land use action is consistent with the local comprehensive plan when the regulations, amendment, or action:*

- (1) furthers, or at least does not interfere with, the goals and policies contained in the local comprehensive plan;*
- (2) is compatible with the proposed future land uses and densities and/or intensities contained in the local comprehensive plan;*
- (3) carries out, as applicable, any specific proposals for community facilities, including transportation facilities, other public actions, or actions proposed by nonprofit and for-profit organizations that are contained in the local comprehensive plan.*

## TOPIC 3: IMPROVING THE EFFICIENCY & EFFECTIVENESS OF THE MUNICIPAL REGULATORY PROCESS

### Relevant Chapter 117 Sections

- Permitted types of regulations (conditional use, site plan review, design control & historic districts, PRD/PUDs) [§4407(2)(3)(5)(6)(12)&(15)]
- Zoning permit procedures [§4443]
- Subdivision approval procedures [§§4414-4415]
- Administrative approval authority [§§4321(b), 4442, 4462(b)]
- Duties of the zoning administrator [§4442]
- Authority to adopt unified bylaws [§§4401, 4449(3)]

### Overview

A reoccurring topic related to the efficiency and effectiveness of the municipal regulatory process is the tension between a process that is flexible and discretionary, and one that is rigid and predictable. Two common complaints regarding local regulations are that ‘they are not flexible, therefore preventing a developer from exercising creativity in meeting community goals,’ *and* ‘they are not clear, thereby not providing developers with specific rules with which to comply.’

The basis of such criticism is partly the broad discretion that municipalities have under Chapter 117 to craft local regulatory programs that best suit their specific needs. It is also the result of common interpretation and application of specific provisions of Chapter 117 which fall within the following three categories:

**Review Criteria.** Uncertainty may result from vague or overly discretionary review criteria. In addition to administrative requirements associated with the issuance of zoning permits, Chapter 117 specifically authorizes between seven and ten special review procedures (depending on how “review procedure” is defined), some of which may involve multiple hearings and/or approvals (e.g., subdivision regulations). In some instances, review criteria are specified in statute (e.g., historic districts, local Act 250 review); in others, communities are granted broad discretion to address locally defined issues with locally defined criteria (e.g., design control districts, PRDs). In most instances, however, Chapter 117 authorizes a combination of both specific criteria and broad local discretion (e.g., conditional use, site plan, subdivision review). Review criteria under different review processes (e.g., under site plan and conditional use review) may be redundant or inconsistent, resulting in conflicting permit or approval requirements – particularly when interpreted or administered by different boards.

**Timing & Sequence of Local Review Processes.** It is not uncommon for moderate or large scale housing projects to be subject to multiple review processes under local bylaws – including subdivision, PRD, site plan, conditional use, and/or design review. In addition, most municipalities also require other local approvals and permits (e.g., building, wastewater, access), many of which fall under the Chapter 117 definition of “municipal land use permit,” but are authorized under separate chapters of Title 24. Although a few review processes are concurrent by statute – e.g., PRD/PUD approval must occur with subdivision plat approval – no guidance is provided with regard to the timing or coordination of other reviews. This can be exacerbated by administrative inconsistencies between various review processes, especially those adopted under separate bylaws (e.g. zoning and subdivision). Finally, each of the several review processes has different statutory requirements for the timing of reviews and hearings, and issuance of approvals (see the accompanying table).

## STATUTORY TIMELINE

Review Process	Hearing Required	Decision Requirement	Statutory Citation(s)
Zoning Permit (permitted use)	No	30 days from submission of complete application to zoning administrator (may be subject to state agency referral requirements). The relationship between zoning permits and other approvals (site plan, conditional use) is not clear.	§4443
Site Plan Review	Not required by statute; often required by the municipality.	Within 60 days after the date of submission of a proposed plan.	§4407(5)
Conditional Use	Yes (15 day notice).	Within 60 days after the date of the final hearing.	§4407(2)
Subdivision Approval	Yes (15 day notice); additional preliminary hearing(s) are often required for "major" subdivisions (as defined locally).	Within 45 days after the date of the final hearing. Plats must be filed or recorded within 90 days of approval	§§4413-4421
PRD/PUD	Yes (review is concurrent with subdivision review).	As for subdivisions.	§4407(3) & (12)
Design Control & Historic Districts	Not defined.	Not defined (typically follows site plan or conditional use review procedures).	§4407(6) & (15)
Appeals to ZBA/DRB (including variances)	Yes (15 day notice); appeal period for act of ZA is 15 days from date of action; hearing must be held within 60 days of the filing of a notice of appeal.	Within 45 days after completing the hearing.	§§4464-4468, 4470
Local Act 250	Yes (15 day notice).	Subject to MAPA (none defined).	§4449

**Administrative Authority for Review.** In communities without a development review board, regulatory authority is split between the planning commission and the board of adjustment. This often results in two review bodies reviewing a single project under different timelines and against different, albeit possibly overlapping, criteria. In addition, all municipalities with zoning bylaws have zoning administrators, however the availability and training of zoning administrators varies considerably. There is some, but not consistent, provision in statute for the delegation of development review responsibilities to staff – to the planning director under §4321(b), or an authorized representative of the ZBA/DRB under §4462(b). Many communities, however, lack professional planning staff, and local review procedures are often administered entirely by volunteers.

### Findings

- Although statutory criteria for several development review procedures are not standardized, communities should retain the administrative ability, and regulatory flexibility, to address unique local issues in a creative manner. Some provisions of statute were, however, identified by the MPRC for potential revision and/or clarification. These include planned residential and planned unit development provisions, and statutory conditional use criteria.
- Standardizing the various time requirements for municipal review boards to issue decisions would eliminate potential confusion among applicants and other involved parties. Setting a maximum statutory time limit for the completion of the hearing process, however, would be detrimental to applicants working toward permit approvals and likely result in unnecessary denials.
- While it may not be appropriate to define a standardized review schedule that would apply to all municipalities, those municipalities electing to have multiple review processes should at minimum provide guidance regarding the coordination of those processes within their bylaws.

- Clarifying those permitting requirements which are unclear or inconsistent with other mandated requirements (e.g., zoning permits must be issued 30 days after submission of a complete application, however projects subject to state agency referral cannot be issued a permit within 30 days of the submission of a report to the state) would avoid confusion.
- Amending related municipal ordinance statutes, especially with regard to the municipal authority to allocate wastewater capacity to further housing and related municipal plan policies, would be an effective means with which to support housing (and downtown) development.
- Although some municipalities have adopted unified bylaws under current statute, an explicit authorization may encourage broader use of unified bylaws to streamline the development review process, and also to eliminate any confusion regarding the impact of such a bylaw relative to Act 250 jurisdiction.
- Planning and zoning staff are not clearly or consistently authorized to exercise administrative review authority otherwise held by local boards. Such authority, or the ability to appoint a hearing officer, might expedite the review process.

## Recommendations

1. Clarify the relationship between state agency referral and zoning permit issuance requirements [§4409 and §4443] to specify that state agencies shall receive notification of an application, and delete the reference to the 30 day referral period.
2. Clarify the relationship between zoning permit issuance requirements and other approval (e.g., site plan and conditional use) timing requirements and [§4443] specify that the time limit for a zoning administrator to issue a zoning permit shall begin upon the submission of a complete application, to include all necessary zoning approvals (e.g., conditional use, site plan review).
3. Revise statutory permit timelines (e.g., the time within which a decision must be made) to make them internally consistent. Such revision should require that a decision be rendered not more than 45 days from the date of the final hearing or meeting (in the case of site plan review) to consider the application [§§4407(2)(5), 4415, 4470].
4. More clearly authorize the adoption of unified bylaws, and unified land development permits, integrating zoning, subdivision and other bylaws [e.g., under §4401]. Such authorization should stipulate that adoption of a unified bylaw equates to the adoption of both zoning and subdivision regulations with respect to Act 250 jurisdiction.
5. Consolidate PRD and PUD provisions in statute [§4407(3)&(12)] into a single provision; and also:
  - allow for their application subject to subdivision and/or conditional use review, providing that any plat recording occurs in accordance with §4414;
  - eliminate the 50% cap and associated requirements for density bonuses (allow municipality to specify bonus);
  - more clearly authorize municipalities to require subdivisions or residential developments to be reviewed as PRDs/PUDs, and
  - provide greater statutory guidance regarding types of standards and review procedures [See attached model statutory language; see Recommendation #5 under Topic 7].
6. Revise statutory conditional use criteria [§4407(2)(B)] to specify that proposed conditional uses “shall not result in an undue adverse affect on ~~adversely affect~~ the character of the area affected, as defined by the purpose of the zoning district within which the project is located, and specifically stated policies and standards of the municipal plan.”

7. To expedite project reviews, expand and clarify allowed administrative reviews [§§4321(b) and 4462(b)], or otherwise specifically authorize administrative (staff) reviews, and/or the use of hearing officers to conduct pre-hearing meetings to identify issues and interested parties, and/or to exercise partial review authority on behalf of the planning commission, board of adjustment and/or development review board.
8. Revise current statute governing sewage allocation ordinances to specifically authorize communities to allocate wastewater capacity in a manner which implements the policies of the municipal plan (e.g., to allow capacity “set aside” for affordable housing projects and downtown development under T.24 §3625).
9. Require in statute (e.g., under §4401(a)(2)) that municipal regulations which define multiple review processes must establish a preferred order in which approvals should be obtained, and specifically enable concurrent and/or consolidated review processes (e.g., joint hearings).

## **Topic 4: COORDINATION BETWEEN MUNICIPAL & STATE DEVELOPMENT REVIEW**

### **Relevant Chapter 117 Sections**

- Municipal land use permits (definition) [§4303(24)]
- Development subject to both state and local regulation [§4409(b)]
- State agency referral requirements [§4409(c)]
- Zoning administrator duties (coordination of review) [§4442(c)]
- Local Act 250 review of municipal impacts [§4449]

### **Overview**

Housing development may be subject to a variety of development review processes at the municipal and state level. In accordance with state statute, housing authority projects are subject to the planning, zoning, sanitary and building laws ordinances and regulations applicable to the locality in which the project is located [T.24, Ch.113, §4013]. Such projects are also subject to all applicable state regulations. The lack of coordination between state and local permitting processes can result in unnecessary project delays, redundant or incompatible review criteria, and conflicting permit conditions.

**Application of Regulations.** Chapter 117 enables municipalities to regulate land development that is also subject to state regulation, providing that: “If any bylaw is enacted with respect to any development subject to regulation under state statutes, the more stringent or restrictive regulation applicable shall apply” [§4409(b)]. Apparent clashes of authority under this provision have been decided on appeal to court. For example, the Vermont Supreme Court has ruled that this provision applies only in relation to state statutes directly regulating land development, and not to those regulating public utilities that furnish a statewide service.

**Coordination of Review.** There currently are two provisions in Chapter 117 that specifically relate to the coordination of municipal and state agency review processes: state agency referral requirements and zoning administrator review responsibilities.

State agency referral provisions [§4409(c)], originally enacted in 1967 and most recently amended in 1995, define land development under local bylaws that is also subject to state agency reporting requirements (e.g., development in flood plains or wetlands). The zoning administrator must submit a report to the designated agency that describes the proposed use, its location, and an evaluation of its effect on the municipal and regional plan. The agency is given 30 days to respond. This provision, often adopted by reference in local bylaws, appears to be largely ignored by both municipalities and state agencies. It does not reference applicable state permitting processes, and as such provides for state notification without any specifically defined coordination function. It also has been suggested that state staffing levels are not adequate to ensure more substantial project review or permit coordination under this provision.

The duties and responsibilities of the zoning administrator, as outlined under Chapter 117 [§4442(e)], were amended in 1993 in an attempt to improve the coordination of state and local permitting processes. Under this provision, the zoning administrator should (not shall) coordinate all municipal permitting processes relating to land development; and also inform anyone applying for municipal permits to contact the regional permit specialist employed by the agency of natural resource “to assure timely action on any related state agency permits.” Taking on additional, non-mandated responsibilities may be difficult, particularly for part-time zoning administrators and without additional training.

**Local Act 250 Review.** The overlap in state and local jurisdiction over land development is perhaps most apparent under Act 250, which includes several review criteria pertaining to a project’s impact on

municipal facilities and services, and its conformance with the municipal plan. To date this overlap has been addressed primarily by:

- giving municipal legislative bodies and planning commissions party status in Act 250 proceedings under all ten review criteria,
- defining the scale of development over which Act 250 has jurisdiction in relation to whether a municipality has adopted both zoning and subdivision regulations,
- clarifying under statute and related rules when municipal bylaws may be used to interpret the conformance of a project with the municipal plan, and,
- under Chapter 117, creating a process for local Act 250 review of municipal impacts by a municipal development review board, to be considered in related state Act 250 proceedings.

The local Act 250 review provision in Chapter 117 [§4449], which went into effect in 1995, has not been widely adopted. It requires that a municipality adopt the municipal administrative procedures act (MAPA), a municipal plan, and zoning and subdivision regulations that incorporate related Act 250 criteria and definitions and are administered by a development review board. Local Act 250 review is limited to consideration of the impact of development on municipal and education services (criteria 6 and 7), and its conformance with the municipal plan (criterion 10). Determinations made by the board, to include written findings of fact and conclusions of law, create rebuttable presumptions in state Act 250 proceedings only to the extent that projects impacts under these criteria are limited to the municipality. It also should be noted that development review board determinations cannot be appealed to court, and that boards do not have separate party status under state Act 250 proceedings.

**Sequence of Review.** There is no requirement in Chapter 117, apart from local Act 250 review, that municipal review of development precede state review. Local and state permitting processes could occur concurrently; however some municipalities require in their bylaws, or as a condition of approval, that all state permits be obtained prior to the issuance of a zoning permit or certificate of occupancy. Developers, on the other hand, may find it easier or more cost effective to obtain local approvals prior to applying for state permits, given the relatively higher expense associated with state permit applications.

## Findings

- Chapter 117 enables municipalities to regulate land development that is also subject to state regulation, with the provision that the most restrictive standards shall apply. Where there is an apparent clash of authority, jurisdiction has been determined on appeal to court (e.g., with regard to public utilities). This does not appear to have been an issue with respect to housing development.
- The state agency referral process under Chapter 117 has not been effective in coordinating state review under municipal permitting processes, in part because the referral requirement is not tied to specific state regulatory programs.
- The zoning administrator presently has the statutory authority to coordinate all municipal review processes associated with land development (including those authorized under separate chapters of Title 24), and refer those applying for local permits to the state's regional permit specialist.
- State and local staffing levels may not allow for more substantive coordination under related Chapter 117 provisions; in addition, local zoning administrators often lack training and adequate resources to assume additional duties or responsibilities.
- Local Act 250 review has been adopted for municipal use on a very limited basis; the benefits in state Act 250 review proceedings do not appear to outweigh associated requirements (e.g., adoption of MAPA) and related costs to the municipality.

- The sequence of local and state review processes is not defined in Chapter 117 (concurrent review is authorized under Title 10 for Act 250 and municipal permits); however most developers find that it is more cost effective to seek local permits first.

## **Recommendations**

1. More clearly enable the incorporation of Act 250 criteria in municipal bylaws in accordance local regulatory review procedures (under §4407).
2. Provide for the expansion of §4449 to enable municipalities to adopt additional Act 250 criteria under Local Act 250 review [the MPRC did not reach consensus with regard to which criteria to include].
3. Expand the exemptions from Local Act 250 review under §4449(b)(1) to allow the development review board to waive jurisdiction over minor Act 250 applications and minor amendments.
4. Promote the incorporation of state standards (definitions, review criteria) in municipal bylaws (e.g., under §4409(b)) where there is overlapping jurisdiction, without restricting municipalities authority to adopt local standards.
5. Revise state agency referral requirements to specifically reference associated state agency permitting processes, and strengthen state coordination and response requirements under this provision [§4409(c)].
6. Increase staffing at the municipal and state level, as funding permits, to ensure better coordination of state and municipal regulatory processes.
7. The Department of Housing & Community Affairs, Regional Planning Commissions and other state regulatory bodies (e.g., VANR, Environmental Board) should provide municipal staff and board training with regard to state permitting processes and requirements.
8. Specifically enable concurrent state and municipal development review processes under Chapter 117 (e.g., under §4409).

## TOPIC 5: APPEALS

### Relevant Chapter 117 Sections

- Zoning permits (appeal language) [§4443(3)]
- Public hearing notice (requirements) [§4447]
- Appeal to ZBA/DRB [§§4464 to 4467, §4470, §4473]
- Definition of “Interested Person” (with standing to appeal) [§4464(b)]
- Appeal to environmental court [§§4471, 4475]
- On the record (v. de novo) review [§§4471(a), 4472]

### Overview

Housing projects may be delayed and made less affordable when they are held up due to appeals. Each decision made, in each step of the development review process (e.g., site plan, design review, conditional use approvals, preliminary and final subdivision approvals, zoning permits) may be separately appealed. An appeal may be filed by any interested party, as defined in Chapter 117 [§4464(b)]. The Joint Housing Committee has suggested that the local permitting process could be streamlined by narrowing the statutory definition of “interested party,” limiting appeal issues to those brought at the local level, and requiring a time certain for local decisions to be made.

**Appeal Requirements.** By statute, with few exceptions, decisions of the zoning administrator may be appealed to the board of adjustment or development review board. Decisions of the board of adjustment, development review board, and planning commission may be appealed to the environmental court. A written notice of appeal, stating the basis for appeal, must be filed by an “interested person” with standing to appeal, within the specified appeal period. Such notice must be filed within 15 days of the issuance of a zoning permit by the zoning administrator, or within 30 days of the rendering of a decision by another municipal review board.<sup>5</sup> For local appeals, the board of adjustment or development review must hold a public hearing, noticed under Chapter 117, within 60 days of the filing of notice. A written decision, to include findings of fact and conclusions of law, must be rendered within 45 days following the public hearing.

**Timing of Decisions & Appeal.** Decisions by a zoning administrator or other municipal review board by statute must be rendered within a specified period of time, or are otherwise “deemed approved,” which also serves to trigger associated appeal periods. The “deemed approved” provision is intended specifically to avoid protracted decision making at the local level.

Permit/Approval	Reviewed By	Action Required Within
Permit Application	Zoning Administrator	30 days of receipt of an application
Conditional Use Approval	ZBA, DRB	60 days after the final public hearing
Site Plan Approval	PC, DRB	60 days after the receipt of a plan
Subdivision Approval	PC, DRB	45 days after the final public hearing
Decision on Appeal	ZBA, DRB	45 days after the public hearing

This statutory remedy, however, has been narrowly applied by the courts in order to avoid the effect of circumventing local regulation.<sup>6</sup>

<sup>5</sup> When Chapter 117 was first enacted in 1967, the appeal period for decisions of the zoning administrator (e.g., the issuance of a zoning permit) was 90 days. In 1969 this was reduced to 30 days, and in 1971 to 15 days. The 30 day requirement for the issuance of a permit, including “deemed issued” language under §4464(a), was also added in 1971.

<sup>6</sup> For example, zoning administrator referrals do not represent action that would trigger the appeal period, and also may not be considered an example of protracted decision making that would require statutory remedy. Also, a

In most review processes, action is required after the close of the public hearing; however, there is no statutory time limit on the hearing process. A hearing may be continued as needed to receive additional testimony and evidence, and to give the applicant time to submit additional information to determine project conformance with local regulations.

This is not the case for site plan review, which currently requires a decision within 60 days of receipt of an application. Site plan review by statute does not require a public hearing, however many municipalities incorporate a hearing process as part of their review. Such time limits may result in the issuance of unnecessary denials, when sufficient information is not provided with the application. As a result, some municipalities define when an application is “complete” to start the clock, and/or extend the review period through an administrative agreement with the applicant, to avoid denials and/or statutory “deemed approved” provisions.

**Definition of “Interested Party.”** Interested persons— those having standing to appeal a decision – are specified in statute [§4464(b)]. Although all hearings of the board of adjustment or development review board on appeal are open to the public, only interested persons as defined in Chapter 117 may file or participate in the appeal. Renters, those with shared interests or common goals in a project, and those holding a purchase option on the property in question do not have standing to appeal. The courts also have strictly limited municipal standing to appeals of board decisions which call into question the validity or effect of the bylaw.

Interested parties most likely to appeal decisions relating to housing projects include:

- a person owning or occupying property in the immediate neighborhood of the project, or
- any ten people who own land within the municipality who, by petition, allege that the relief requested by the applicant is inconsistent with the policies, purposes or terms of the plan or bylaw of the municipality.

The Agency of Commerce and Community Development is specifically identified as an interested person, with standing to appeal local decisions – which could apply to denials of affordable housing projects. It should also be noted that “immediate neighborhood” has been consistently defined to date by the courts for purposes of establishing standing.

Public hearing notice requirements in Chapter 117 applying to local appeals are intended to give limited notice to potential interested parties. These include the posting of the notice in one or more public places, and the publishing of the notice in a newspaper of general circulation in the municipality, 15 days prior to the hearing date [§4447]. There is no statutory requirement to notify abutters, however some municipalities incorporate this under local bylaws.

A notice of appeal to environmental court must be sent to all interested parties having appeared and been heard in local appeal proceedings – however this does not preclude other potential interested parties from filing an appeal. The final decision as to who qualifies as an interested party rests with the environmental court.

**Scope of Appeal.** The scope of appeal is limited in part by the written notice of appeal, which must include reference to regulatory provisions applicable to the appeal, the relief requested by the appellant, and the alleged grounds for such relief [§4465]. For example, when specific conditions to a permit are appealed, the appeal may be limited to a review of those conditions. Under the Vermont Rules of Civil Procedure (VRCP), the appellant must also file with the court and interested parties a “Statement of Questions” that lists the issues he or she wishes to be resolved. Matters not specifically identified in the statement are generally considered beyond the scope of the appeal.

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defective vote of a board (representing less than the majority of the membership) or the issuance of an oral (rather than written) decision within the specified time period, may not result in statutory remedy.

Interested persons appealing to environmental court, however, are entitled to a *de novo* trial under the VRCP, unless the municipality has adopted the Municipal Administrative Procedures Act (MAPA) and has elected to have the matter reviewed on the record. When an appeal is *de novo*, the entire case is heard again, and new evidence may be presented. When an appeal is on the record, the record of the local board's proceedings is used to establish the facts of the case, and whether the decision was proper.

**On the Record Review.** To date, very few municipalities have adopted on the record review, in part due to the additional time, costs and formalities associated with the use of MAPA (T.24, Chapter 36). On appeal, a local review board is required to follow the rules of evidence applicable in contested cases in hearings before administrative agencies, as set forth in 3 V.S.A. §810 [§4467]. MAPA, however, as adopted for on the record appeal purposes, could be applied to all municipal development review proceedings. For purposes of appeal to court, municipalities are to define the development review decisions and the magnitude or nature of development subject to on the record review, and produce an adequate review record [§4471(a)]. All hearings under MAPA must be recorded, and conducted according to the rules of evidence as applied in civil court cases.

**Environmental Court.** The environmental court was created under separate statute in 1993 as a division of Vermont's Superior Courts specifically to hear environmental matters, including local land use issues. All local development review decisions, except for local Act 250 determinations, are separately appealable to court [§4471]. At this time there is only one judge who hears all environmental court cases. The Joint Housing Committee noted that the current case load and insufficient staff may be resulting in significant delays. A separate study has been undertaken to examine ways in which the speed and efficiency of the court may be improved.

## Findings

- The broad statutory definition of “interested persons” having standing to appeal, which includes by petition those who may not be directly affected, can result in appeals that unnecessarily delay housing projects.
- There are statutory time limits for the issuance of development review decisions, which also trigger associated appeal periods; however, except for site plan review these are tied to the close of the public hearing process. There is no time limit on the local hearing process. It was agreed, however, that setting a maximum statutory time limit for the completion of the hearing process would be detrimental to applicants working toward permit approvals and likely result in unnecessary denials.
- The statutory remedy provided by “deemed approved” provisions in Chapter 117, specifically intended to avoid protracted decision-making, does not readily apply to the hearing process, and has been narrowly applied by the courts to protect the integrity of municipal bylaws.
- Statutory requirements to notify potential interested parties at the local level are limited, which may result in appeals to court by parties that did not participate in local proceedings.
- Most appeals of local decisions to court are subject to *de novo*, rather than on the record review. While Chapter 117 enables municipalities to elect and conduct on the record reviews, very few have done so to date. This is due, in part, to the fact that language regarding the adoption and discretionary use of MAPA for on the record review under §4471 is unclear.
- Appeals of all local land use decisions, except for local Act 250 decisions, are heard by the environmental court. At this time there is only one judge to hear all environmental matters, including local land use decisions, in addition to limited staff and resources (as discussed in *Reports of the Environmental Court Study Committee*).

## Recommendations

1. The recommendations set forth in the *Interim and Final Reports of the Environmental Court Study Committee* (2001, undated) are hereby endorsed and adopted by reference; efforts of the Department of Housing & Community Affairs to implement these recommendations are likewise endorsed.
2. The Department of Housing and Community Affairs and/or Regional Planning Commissions should:
  - Prepare and distribute to municipalities guidance materials, including model adoption language, and associated training regarding the use of MAPA to promote on the record appellate review under §4471. Such materials should include information regarding criteria for determining when and how on the record review should be applied.
  - Prepare and distribute to municipalities guidelines and training for drafting regulatory findings, conclusions and conditions of approval for review on appeal.
3. Revise the statutory definition of “interested person” [§4464] as follows:
  - §4464 (b)(3) “A person owning or occupying property in the immediate neighborhood of a property which is the subject of any decision or act taken under this chapter, who can demonstrate a material interest affected by the decision or act and who alleges that the decision or act, if confirmed, will not be in accord with the policies, purposes or terms of the plan or bylaw of that municipality.”
  - §4464(b)(4) “Any 10 persons owning real property in the municipality listed in subdivision (2) of this subsection, or a number of property owners equal to 1% of the registered voters of the municipality, whichever is greater, who, by petition to the board of adjustment or the development review board of a municipality, the plan or bylaw of which is at issue in any appeal brought under this title, allege that any relief requested by a person under this title, if granted, will not be in accord with the policies, purposes or terms of the plan of bylaw of that municipality. Such petition to the board of adjustment or the development review board must designate one person to serve as the principal contact regarding all matters related to the appeal.”
4. Revise the statutory provisions for appeals to environmental court as follows:
  - §4471(a) An interested person who has participated in municipal regulatory proceeding authorized under this title may appeal a decision of a board of adjustment, planning commission or development review board to the environmental court. Participation in a local regulatory proceeding shall consist of offering, through oral or written testimony, evidence or a statement of concern related to the subject of the proceeding. An appeal from a decision of a board of adjustment, planning commission or development review board shall be taken in such manner as the supreme court may by rule provide for appeals from state agencies governed by sections 801 through 816 of title 3, ...”
5. Improve early notification requirements for potential interested persons by:
  - requiring, under §4447(a), the written notification of owners of all properties adjoining, without regard to rights-of-way, any property subject to development review proceedings authorized under Chapter 117 provided that the applicant may be required to bear the cost and/or responsibility of notification; and
  - requiring, under §4443, the posting of a notice of application on a form prescribed by the municipality, within public view, on any property subject to development review proceedings (excluding certificates of occupancy under §4443(a)(2).
6. Clarify and expedite the process for filing appeals under §4464 to stipulate that the notice of appeal shall be sent by certified mail, with fees, to the environmental court, and a copy of the appeal sent to the municipal clerk, or zoning administrator if so designated, who will supply a list of interested parties to the appellant within 5 working days.

7. Enable an expedited appeal process in environmental court for applications involving affordable housing development (as defined under §4303, as amended), by rule or statute, to be referenced under §4471.

## TOPIC 6: STATE REVIEW

### Relevant Chapter 117 Sections

- Council of Regional Commissions (review of regional and state agency plans) [§4305]
- State planning goals (housing, definition of “consistent”) [§4302]
- Regional plan housing element (housing [§4348a (9)])
- Municipal plan housing element [§4382(10)]
- Regional confirmation of municipal planning efforts [§4350]
- Commissioner review (housing element of unapproved municipal plans) [§4351]
- Equal treatment of housing provisions [§4406(4)]
- Challenges to housing provisions (by the attorney general) [§4445a]

### Overview

In order to address exclusionary zoning practices and/or to promote inclusionary zoning for affordable housing, several states have developed plan, bylaw and project review procedures that are specific to the implementation of state affordable housing goals and objectives. The intent is to encourage, or require, municipalities to address their “fair share” of affordable housing needs through varying degrees of state oversight.

**Planning Requirements.** Vermont, under Chapter 117, has established state planning goals “to ensure the availability of safe and affordable housing for all Vermonters” [§4302(11)]. As noted previously, Vermont municipalities are not required to plan, but adopted municipal plans must include a housing element that includes a recommended program for addressing low and moderate income persons’ housing needs as identified by the regional planning commission. The regional planning commission, in turn, is required to develop a regional housing element that “identifies the need for housing for all economic groups in regions and communities” based on available or collected data. Regional planning commissions are thus required to define municipal housing needs, but statute does not explicitly require any fair share allocation. Municipal and regional plans must be updated and adopted every five years to remain in effect.

**Plan Review.** Municipalities have the option to submit their plans for approval by the regional planning commission. Such approval requires a determination that the plan contains a housing element, and is consistent with state housing goals [§4350]. Plan approval is required to obtain the statutory benefits of regional confirmation (e.g., eligibility for state planning grants). The Commissioner of the Department of Housing and Community Affairs has the statutory responsibility to review municipal plans that have not been submitted to for regional approval, specifically for compliance with state affordable housing goals and related criteria [§4351].

The Council of Regional Commissions (CORC) was established in 1988 under Chapter 117 to review regional and state agency plans for consistency with state planning goals, and to serve as an appeal body for decisions of the regional planning commission (e.g., with regard to municipal plan approval) [§4305]. The Council, however, has been largely inactive since its inception, due in part to a lack of funding and administrative staff support.

**Bylaw Requirements.** As noted previously, municipalities also are not required by statute to adopt land use regulations. Bylaws adopted under Chapter 117 provisions are intended to implement the municipal plan and state planning goals, however there is no specific consistency requirement.

Municipal bylaws are required to incorporate statutory “equal treatment of housing provisions” [§4406(4)] which prohibit the exclusion of:

- mobile homes, modular housing, or other forms of manufactured housing, except upon the same terms and conditions that conventional housing is excluded,
- housing to meet the needs of the population as determined in the planning process (i.e., as identified by the regional planning commission and addressed in the municipal plan),
- mobile home parks,
- accessory apartments, as defined by statute as conditional uses, within or attached to single family dwellings.

**Bylaw Review.** There currently is no regional or state review of local bylaws for consistency with local and regional plans, or state planning goals.

There is, however, provision in Chapter 117 for state attorney general review of bylaws and related municipal decisions which may violate equal treatment of housing provisions in Chapter 117 [§4445a]. When a complaint is filed under this provision, the attorney general or his designee may investigate and hold a public hearing to determine if a violation exists. If such a determination is made, the attorney general may then file an action to challenge the validity of the bylaw, or its manner of administration, in superior court. The municipality then has the burden of proof to establish that the bylaw or its administration is not in violation of statutory housing requirements. If the court finds that a violation exists, it must grant the municipality a reasonable amount of time to correct the violation. If the violation continues, the court “shall order the municipality to grant all requested permits and certificates of occupancy for housing relating to the area of continuing violation.”

**Other State Models.** Three general approaches employed by states to address affordable housing have been identified, as presented in other materials distributed for review by the committee. Vermont incorporates elements of each, which are summarized as follows:

<b>Bottom-Up Approach</b>	<b>Top-Down Approach</b>	<b>Appeals Approach</b>
State: CA	State: NJ	States: MA, CT, RI
<ul style="list-style-type: none"> <li>• Municipalities must plan</li> <li>• Plans must include a housing element</li> <li>• The housing element must include analyses and program and bylaw recommendations to meet their allocated need</li> <li>• Regional councils, in association with the state, are required to develop local housing need allocations</li> <li>• The state has the authority to review local housing elements for compliance</li> <li>• There is no regional or state enforcement beyond plan adoption; however state funds may be withheld.</li> </ul>	<ul style="list-style-type: none"> <li>• State Council of Affordable Housing (COAH) establishes municipal fair share allocations</li> <li>• Municipalities enacting zoning have a legal obligation to meet their fair share allocation</li> <li>• Municipalities may elect to complete housing elements showing how they will meet their obligation, and submit this for state certification</li> <li>• Certification provides a statutory “presumption of validity” against any exclusionary zoning claims</li> <li>• In the absence of certification, builders/developers may petition the courts for permission to proceed with an affordable housing development</li> </ul>	<ul style="list-style-type: none"> <li>• Establishes a direct appeal and override of local decisions which reject or restrict affordable housing proposals</li> <li>• May be administered through court, or a separate state appeals board</li> <li>• Shifts the burden of proof to the municipality, which must justify its exclusion or conditions</li> <li>• Appeals statutes are not planning statutes per se— they require no local, regional or state planning framework; however they may be supported by related statutory planning, consistency or allocation requirements.</li> </ul>
Considered minimally effective in meeting targets.	Mandated by court ( <i>Mt. Laurel I, II</i> ); most effective in terms of units built.	Effectiveness appears to vary by state

## Findings

- Municipalities that adopt plans are required to include housing elements that address affordable housing needs, but the criteria for related analyses and implementation strategies are not specified in statute.
- Regional planning commissions are required to identify regional and municipal housing needs; however a determination of municipal “fair share” allocations is not specified in statute. There is also no provision for this at the state level (e.g., through DHCA). As a result, municipal needs or obligations, and related bylaws and growth management programs may not be clearly defined within a broader state or regional context. This is partly due to the lack of data and difficulty in making detailed projections at the local level.
- State review of regional plans (by CORC) or unapproved municipal plans (by the commissioner) for consistency with state housing goals and related criteria is authorized by statute, but to date has not been consistently implemented due to the lack of funding and staff resources. It is anticipated that funding for CORC will not be available in the foreseeable future.
- There is no statutory requirement that municipal bylaws, or other ordinances, be consistent with state planning goals, or implement municipal plan policies and recommendations. There is also no regional or state bylaw review process to determine consistency (see other topic).
- Other states (e.g., New Jersey, Massachusetts) have adopted an administrative review process of affordable housing project permit denials or permit conditions which precludes court appeals and places the burden of proof on the municipality rather than the appellant. A complaint process to the attorney general which governs violations of equal treatment of housing provisions under Chapter 117 already exists in statute, separate from the judicial appeals process. This has not been used in Vermont however, because it places the onus on the developer to file the complaint, and it also does not supercede or replace the court appeals process.

## Recommendations

1. Strengthen requirements for local and regional housing elements under 4382(a)(10) as previously recommended under other topics; and amend §4406(4)(B) (equal treatment of housing provisions) to specifically reference §4382(a)(10) with regard to the identification of local affordable housing needs.
2. Clarify and/or strengthen the existing process for filing complaints with the attorney general under equal treatment of housing provisions by:
  - cross referencing §4445a under §4471; and
  - revising §4445a to state that the attorney general *shall* investigate and *shall* hold a public hearing when there is a complaint that a bylaw or its manner of administration violates §4406(4).
3. Establish separate commissioner authority under §4351 to review existing and/or proposed municipal bylaws and bylaw amendments, to determine consistency with equal treatment of housing provisions under §4406 (as proposed to be amended). Where an adopted bylaw is found to be in violation, the Commissioner shall have the authority to suspend the municipality’s ability to levy impact fees and its eligibility for discretionary state funding programs (e.g., community development block grants, municipal planning grants) until the violation is remedied.

## TOPIC 7: INCLUSIONARY ZONING

### Relevant Chapter 117 Sections

- Authorization to adopt bylaws [§4401]
- Zoning districts [§4405]
- Required regulations (existing small lots, equal treatment of housing) [§4406(1),(4)]
- Permitted types of regulations [§4407]
- Limitations (residential care homes) [§4409(d)]
- Subdivision regulations [§§4413-4420]
- Capital Budget & Program [§4426]

### Overview

A number of regulatory techniques are in use around the country to promote – or require – the development of affordable housing. A listing of such techniques, compiled from a review of recent planning and housing literature, is included in the attached table. Many of these techniques are currently in use in Vermont under general enabling provisions of Chapter 117. Some – such as density bonuses, accessory apartment provisions and limits on the exclusion of mobile homes– are either specifically enabled or required by statute. It appears that any of the identified techniques could be applied in Vermont; however a few, such as inclusionary zoning and linkage ordinances, must be based on a clearly documented nexus between the proposed development and the affordable housing requirement. Therefore, they may require specific enabling legislation to address legal and administrative requirements.

**Authorization to Adopt Bylaws.** Vermont municipalities are authorized, but not required, to adopt bylaws that regulate land use [§4401]. The types of bylaws specifically enabled under this section of Chapter 117 include zoning regulations, subdivision regulations, official maps, shoreland bylaws and flood hazard area bylaws. Municipalities also have the authority under separate statute to adopt related ordinances and rules – for example wastewater, road, building, and impact fee ordinances, which may be referenced in their land use regulations. A recent Vermont Supreme Court decision regarding wastewater allocations, however, suggests that land use may only be regulated under the provisions of Chapter 117.<sup>7</sup>

**Required Regulations.** Chapter 117 requires that all zoning regulations apply to all lands within the municipality, but allows for the application of different standards to “different classes of situations, uses and structures” (e.g., this could apply to affordable housing projects), and to separate zoning districts as defined by the municipality [§4405].

Required regulations also include protections for existing small lots, which allow for the development of lots in existence prior to bylaw adoption that do not meet minimum area requirements, if they are at least 1/8<sup>th</sup> of an acre in area [§4406(a)]. As noted previously, under “equal protection of housing” provisions [§4406] municipal bylaws cannot have the effect of excluding:

- mobile homes or manufactured housing except as conventional housing is excluded,
- housing to meet the needs of the population (as determined in the planning process),

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<sup>7</sup> In *Brennan Woods Limited Partnership v. Town of Williston* (2001) the court found that the town’s sewer ordinance may be used to control population density and growth only in relation to the load on the wastewater system; it cannot be used to allocate wastewater capacity based on adopted growth policies included in the municipal plan. This is consistent with an earlier decision, *Bryant v. Town of Essex* (1989), which held that a town could use a sewer allocation ordinance to control growth generally, but only if it acted under its zoning authority and the policy was adopted under the procedures required to adopt zoning ordinances. This suggests that at present, wastewater set-asides for affordable housing may be adopted only under zoning, and not under related wastewater ordinances. Legislation may be introduced this session to expand municipal authority under wastewater allocation ordinances.

- mobile home parks,
- an accessory apartment as a conditional use, as defined by statute, within or attached to a primary single family dwelling.

Multi-family dwellings are not currently afforded similar protection under Chapter 117, however small group homes (for 6 or fewer residents) are protected under a separate section of Chapter 117 [§4409((d))].

Such provisions are intended to help prevent exclusionary zoning practices, but do not specifically enable, require, or otherwise reference regulatory approaches that promote affordable housing.

**Permitted Regulations.** Chapter 117 grants broad authority to municipalities to regulate development under zoning: “Any municipality may adopt zoning regulations that may include, *but shall not be limited to*, any of the following provisions...” [§4407, emphasis added].

This section goes on to list several regulatory tools that are specifically enabled (but not required) by statute, which may affect the provision of affordable housing. These include:

- certain districts in which residential development may be restricted or excluded,
- conditional use review requirements, including statutory review standards – e.g., a proposed conditional use shall not adversely affect “the character of the area,” or the capacity of existing or planned community facilities,
- site plan review provisions,
- planned residential and planning unit development provisions, which allow for modifications of zoning requirements (e.g., dimensional standards), and include optional density bonuses (up to 50%) for affordable housing projects,<sup>8</sup>
- parking provisions – including an allowed waiver for “transit passes,” but not for affordable housing projects,
- design control and historic districts, which may exclude certain types of housing design, and
- transfer of development right (TDR) provisions, which may be used to increase the density of development in designated areas.

Many other regulatory techniques in use in Vermont have been adopted under the broader authority provided by §4407. For example, many municipalities have designated relatively high density zoning districts – typically where supporting infrastructure exists – which allow for smaller lots, reduced setback requirements, and multi-family dwellings. Mixed use and adaptive reuse provisions, though not specifically authorized, are also increasingly common.

Subdivision requirements are much less clearly defined in statute. Under §4413, subdivision regulations shall contain “standards for the design and layout of streets, curbs, gutters, street lights, fire hydrants, shade trees, water, sewage and drainage facilities, public utilities and other necessary improvements.” Such improvements, depending on related design standards, could significantly increase the cost of a housing project. This section of Chapter 117, however, also includes a provision allowing the planning commission or development review board to waive, subject to appropriate conditions, any standard which in their judgement is not required to protect public health, safety, or general welfare. Some municipalities specifically waive certain requirements for affordable housing projects, although this is not a consideration identified in statute.

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<sup>8</sup> Under 4407, PUD and PRD provisions in zoning (including density bonuses) are to be “permitted in association with the approval of a subdivision plat” which appears to require that a municipality have both zoning and subdivision regulations. In practice, however, many municipalities have adopted PUD/PRD standards under zoning, without also having adopted subdivision regulations. Also under these provisions, “no person shall be required to apply for or accept a density increase” which may limit their use.

**Inclusionary Zoning.** Though not specifically enabled under Chapter 117 [e.g., under §4407], at least one municipality in Vermont – the City of Burlington – has adopted “inclusionary zoning.” Inclusionary zoning consists of either a mandatory requirement or voluntary goal under zoning and/or subdivision regulations to reserve a specific percentage of units in new housing developments for low- to moderate-income households. In this manner most new residential development is expected to contribute to affordable housing within a municipality, at minimum public cost; and affordable housing is not concentrated within isolated, often stigmatized, affordable housing projects. New Jersey and California have enabled or required inclusionary zoning programs for many years. Perhaps the most well known and successful program is Montgomery County, Maryland’s “Moderately Priced Dwelling Unit Law” (MPDU), first passed in 1974.

**Common elements of an inclusionary zoning program include:**

- a minimum development/subdivision size (e.g., 5 to 25 units);
- a specified percentage of rental or for-sale units to be made available within each new housing development (e.g., 15 to 20%);
- density or other bonuses (e.g., fee waivers) to developers who participate – for voluntary programs bonuses are used as an incentive, for mandatory programs bonuses are used as compensation to avoid constitutional “takings” challenges;
- income limits for eligibility (e.g., very-low or low-income, 30% of income);
- criteria specifying pricing for the affordable units, when units must be brought on-line, and some period of control over resale prices or rental increases (e.g., 5 years to perpetuity), which are often applied through developers’ agreements;
- building and design standards (e.g., to resemble market rate units, reduced dimensional standards and parking requirements, etc.).

**Many jurisdictions also allow for:**

- partnerships with non-profit housing trusts and providers, and/or
- the provision of units off-site, the payment of a fee (e.g., into a housing trust), or “credit transfers” to another jurisdiction, in lieu of housing construction.

Inclusionary zoning programs require a relatively sophisticated level of municipal administrative capacity, in part to address constitutional and other legal issues<sup>9</sup>, and also to enforce program requirements. Such programs may also involve a degree of regional coordination (e.g., in association

**City of Burlington’s Inclusionary Zoning Ordinance**

The intent of Burlington’s inclusionary zoning ordinance (IZ) is to provide housing for citizens of low and moderate income, and thereby ensure that housing development will meet the needs of all economic groups in the city. Burlington’s IZ:

- requires 15% of rental units to be affordable units,
- requires 15 to 25% of for sale units to be affordable units,
- includes general requirements, as well as requirements to deal with rent, sale, resale and marketing issues, and
- requires new housing developments to obtain a “Certificate of Inclusionary Housing Compliance,” issued by the Housing Trust Fund, as a prerequisite for the approval of further permits by other city offices.

At least 92 units of affordable housing have been created within 12 private development projects under these zoning provisions.

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<sup>9</sup> Mandatory inclusionary zoning did not fare well in early zoning decisions – in 1973 the Virginia Supreme Court rejected a mandatory set-aside ordinance as exceeding municipal authority which resulted in the taking of private property. This argument, however, has been rejected outside the state of Virginia; inclusionary zoning has been specifically enabled elsewhere to further constitutional housing mandates (e.g., New Jersey). Compensation mechanisms, in the form of density bonuses, fee waivers, or alternatives to on-site construction are often provided under mandatory programs as relief to developers in exchange for required participation.

with fair share housing requirements). For these reasons most programs, and related program requirements, are specifically enabled by statute.

**Linkage Ordinances.** Jurisdictions throughout the United States have adopted “linkage ordinances” which require nonresidential development to contribute to the costs of providing affordable housing. The rationale is that, by bringing new employees and households to the municipality, the municipality is justified in charging some of the costs of providing affordable housing to new nonresidential development. Such programs are not currently enabled under Chapter 117 (or related impact fee ordinance statutes), and do not appear to be in use at the municipal level in Vermont. Similar fees, however, have been referenced in Act 250 proceedings.

Linkage programs typically require that developers of commercial, office, industrial or institutional development:

- build housing, on- or off-site (e.g., for seasonal workers), or
- pay an in-lieu of fee to a housing trust fund, or
- make equity contributions to a low income housing project.

As with inclusionary zoning, there are considerable administrative and legal considerations in implementing a linkage ordinance, which are often set forth in related enabling legislation. Linkage ordinances are based on studies that identify the relationship between job and housing creation, in order to meet constitutional “rational nexus” and “proportionality” standards similar to those required for impact fees and dedications of land.<sup>10</sup> Linkage ordinances and fees that are based such studies have withstood constitutional challenge in other states. No reported decision to date has ruled that a linkage program constitutes a taking.

**Good Faith Requirement.** The use of inclusionary zoning or linkage programs essentially ties development approval to the adequacy of available affordable housing to accommodate new growth. Where the rate of growth is tied to the adequacy of infrastructure (or other carrying capacity standard) the municipality, to withstand challenge, must also show that a “good faith” effort is being made to remedy existing housing and infrastructure needs. This can be done through the use of other funding sources such as transfer taxes or other development excise taxes, housing trust funds, and other public-private partnerships.

## Findings

- “Equal treatment of housing” protections under §4406(4) presently do not address multi-family dwellings. In addition, this section does not specifically reference affordable housing needs as identified in the housing element of the municipal plan [§4382(a)(10)].
- The definition of accessory dwelling under §4406(4)(D) limits occupancy to elderly or disabled relatives of the owner of the principal dwelling, which limits its application (e.g., to provide affordable rental units for other types of households).
- Chapter 117 allows for, but does not specifically identify, enable or require many regulatory techniques that could promote affordable housing development.
- Statutory waiver provisions are not consistent, and are not specifically enabled in relation to affordable housing projects (e.g., through an incentive zoning provision).

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<sup>10</sup> In Vermont, such studies are required for the imposition of impact fees; municipalities are also required to have a regionally approved plan and a capital budget and program in place.

- Certain regulatory approaches, such as inclusionary zoning and linkage ordinances, because of legal and administrative considerations, may need specific enabling legislation to withstand legal challenge and be more widely accepted and used in Vermont.
- Given recent supreme court decisions regarding wastewater ordinances, enabling legislation also is needed to allow for the consideration of municipal plan goals and policies related to affordable housing and land use in other municipal ordinances (e.g., that require the issuance of “municipal land use permits” as defined under Chapter 117).

## Recommendations

1. Include in the listing of permitted regulations under §4407 a subsection specific to affordable housing that presents a list of some accepted regulatory techniques which may be used to promote affordable housing in appropriate locations within a municipality, and to otherwise meet statutory affordable housing requirements (see attached table summarizing regulatory techniques to promote affordable housing).
2. Define within Chapter 117 (e.g., under §4407) “inclusionary zoning” and “linkage ordinances” as specifically enabled types of regulation, and associated studies and administrative requirements necessary to document the nexus between proposed development and the affordable housing requirement. Linkage ordinances also could be addressed under Chapter 131 of Title 24 governing impact fee ordinances.
3. Revise §4406(4)(D)(i) to eliminate the age, disability and relationship standards for occupancy of accessory dwellings.
4. Expand protected types of housing under Chapter 117’s equal treatment of housing provisions [§4406(E)] to require that bylaws “shall not have the effect of excluding multi-family dwellings from the municipality.”
5. Expand protected types of housing under Chapter 117’s equal treatment of housing provisions [§4406(F)] to require that bylaws “shall not have the effect of excluding planned unit developments and planned residential developments from the municipality, subject to subdivision or conditional use review.”
6. To promote good community design and affordable housing, more clearly authorize under §4407 special provision to enable municipalities to waive one or more dimensional standard in accordance with locally defined criteria.
7. Specifically enable the adoption of incentive zoning provisions under §4407 (see attached APA model language).
8. Amend enabling legislation relating to wastewater and other municipal ordinances affecting affordable housing and land use to allow for or require consistency with and consideration of adopted municipal plan goals and policies (see Topic 3).