Natural Resources Board

Act 250 Necessary Updates

Steering Committee Meeting

October 26, 2023, 1:00 – 5:00pm

Discussion General Approach

This is the final scheduled meeting of the steering committee. Based on the outcome of this meeting, we will draft a report with recommendations and circulate it for comments in early November. Depending on the comments, we may schedule another meeting.

The Conceptual Recommendations are intended to be a balanced package. Exempting developments from certain designated areas must be balanced with heightened protections in other areas. We received comments from ANR which raised valid points about the latter aspect, and we need to work on tier 3. The prior draft recommendations did not have clear language accepted by all parties for tier 3. For example, "necessary wildlife habitat" has a legal meaning that is established. Likewise, "important" forest blocks could make up significant percentage of Vermont. Either need new terms or definition of a workable and meaningful process. A hope is that this overall package can integrate with the other VAPDA Future Land Use and SGA Designation studies.

Recommendation

Is everyone on board with the notion of exemption in 1a/1b, a road rule in tier 2, and a tier 3 subject to the settling of questions noted?
There was conceptual approval of 3 tiers, pending further discussion on the road rule in tier 2, discussion of tier 3 and the adoption of a balanced package satisfying the range of SC interests.

Tier 1A

Recommendation

Approval of complete exemption for residential, commercial, industrial, state, and municipal developments in Tier 1A.

Tier 1B

Discussion on Unit Jurisdictional Trigger

The consideration is that the difference between tier 1A and 1B includes different administrative capacity at the municipal level reflected in both the local bylaws and the staff capacity.
Current proposal is – no density triggers (units) status quo for all other things –

- One thing would still like to explore in 1B, high density is great, but unlimited gives pause. Just want to put it on table, should there be an upper limit for residential units? Could be multiple 50-unit projects in 1B.
- The question discussed was: If credence is given to the local zoning/subdivision bylaws, why are we second guessing the municipality?
    - In 1b there's no review of zoning/subdivision laws and might not have admin capacity to review in depth
    - Might not be as robust as 1A but it is being review and needs to reach certain benchmark of quality.
- If there was a 50-unit limit per project, where apart from 1A would it actually go?
- 1A and 1B need to go through application process.
- 1B as written without a review of local zoning looks like it's responding to legislature and others saying we want more places in Vermont to create housing; this is a low barrier to entry; many communities would qualify for 1B. If there's a ceiling of 50-unit threshold in Act 250, I don't think it's out of the question. If there is a review of local zoning that looks more like 1A then maybe there shouldn't be a ceiling for 1B. 50 seems fine, not going to see a lot of residential buildings larger than that.
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Recommendation

Approval of modifying the recommendation in Tier 1B from no unit trigger to a 50-unit trigger.

Discussion on Strip Development, Mixed Use, Footprint lots

Strip development in 1B – bylaw needs to include a provision for that; if there's are going to be the areas outlining the 1A areas there's going to be pressure for strip-like development that you see now (Williston). Should be some language.

- Not exempting commercial and not changing lot triggers (status quo)
- If take out all geographic area outside 1A/1B it's making the bar higher, it's not the status quo, since you wouldn't count units it 1A/1B in a geographical area in the equation for 10/5/5 or 6/5/5
- We all want to discourage sprawl; we are addressing that by incentivizing that where we want it, leave it the same where it is with the policy goal of driving development into area that we want it.
    - Small projects are contributing to the sprawl.
- Mixed use developments – wouldn't get triggered under lots/units, and 10acres; you can do mixed use under 10 acres and not trigger Act 250 – this is covered by existing statue, so we aren't going to address this in the report.

- Footprint lot – condo developments even if separate units, the house might own the footprint of the house (lot size of house) and condo owns rest of land; might have a few buildings that are multi units and then have individual house, they would constitute a lot. They count towards lot trigger in act 250.

    - Is it a density issue? Or why should they be treated differently than other lots?
        - You can have 10 townhouses right together on relatively small acreage and that would get triggered like a 10 lot development.
    - It's a definition/semantic issue; act 250 definition and threshold, how does act 250 currently treat footprint lots?
    - Put footprint lots into the parking lot – no recommendation.
- State board is critical for designating these areas.

Recommendation: None adopted

Discussion Changing Designations Over Time/Enforcement

State Board, possibly the NRB, could recertify designated areas every 8 years.
What happens if municipality changes regs or capacity?

Recommendation:

Municipalities should have to re-certify every 8 years.
State Board certifying designated area, could be the NRB, should be able to re-visit determination at any time if there is reason to believe the municipality's designated area would no longer be in compliance with requirements.

Tier 2 and Road Rule

Discussion:

Tier 2 is all the land not 1a/1b or 3, this would be the vast majority of the state; it's status quo on jurisdictional triggers, mention that planner focus group endorsed a jurisdictional trigger should be 4 lots and 4 units, but the steering committee approved the status quo.
Road Rule with a 2000ft combo driveway/road, flag that there is a lot to get into with the Road Rule it is so easy to get into the weeds with this and this has come up a lot internally/externally. Seems like everyone agrees with the first of this and then you mention the road rule and that's where no one agrees.

- Is there consensus endorsing that Road Rule should be part of the package?
- Not totally comfortable with it, but as a compromise to having a tier 1 area, comfortable including it in package.
- Can we highlight the problem of 1999 ft road and one approach suggested was 800ft and this is an issue that should be addressed? Would rather stick with what has previously passed (but not enacted). Willing to be vague about it.
- The steering committee also discussed the fact that single driveway of 1999 could have a lot of impact to forest and that legislature could consider a linear distance off an existing road as a separate trigger.

- Steering committee endorses Road Rule with 2000 ft combo; additional issue that legislature needs to address.
- Should all criteria apply when the Road Rule triggers jurisdiction or a subset of the criteria?
    - Coordinator perspective is that the scope and detail that applications come forward with is always based on permit history, development proposal; already exists that some criteria are "waived" very cursory review involved. Don't support a different standard for having piecemeal criteria based on the type of project.
    - Encourage applicants to contact coordinator pre-application to get guidance/direction in the application/permit.
    - There is no way for coordinator to "waive" a criterion.
    - We need to think about criteria we are worried about (road rule related)
    - Could give the commission the authority to waive criteria on a case-by-case basis when the Road Rule triggers. This would be a statutory change and/or develop a rule that conditionally waives criteria. No agreement on this question.

- lot trigger and land fragmentation, leaving the status quo or relaxing things because of geographic exemptions (1a/1b), not sure the Road Rule will be going far enough to address sprawl, worried we will still see areas with smaller subdivisions and roads. Planners' stakeholders group have suggested 4-4 as a trigger instead of 10-6, such as used to trigger full subdivision review in municipalities. However, steering committee is endorsing the status quo with the Road Rule in tier 2 and the report will include the planning group and district coordinators believe it should be 4-4.
    - Comment that this isn't status quo, it's relaxing jurisdiction since you aren't counting lots in 1a/1b; would be in favor of lowering the threshold.

Recommendation

Road Rule where any combination of road and driveway over 2,000 feet triggers jurisdiction.
The report should also point out shortcomings of the proposed road rule such as the 1,999-foot driveway leading to a single house that could result in significant impacts to forest or wildlife habitat yet not trigger Act 250 jurisdiction. An additional trigger based on the linear distance from existing roads should be considered, such as any development 800 feet linear distance from an existing road would trigger jurisdiction. This possible second jurisdictional trigger needs further study because the implications have not been fully vetted.

Tier 3

Discussion

Tier 3 is part of the balanced package, but we are struggling to define it. We know it when we see it, but we are not describing it successfully to find accord around the table. Want to make it clear that Tier 3 is for limited, special, natural resource areas, cumulative acreage of above 2500ft is 2.5-3%, not talking about 60-70% land covered in forest and mapped as such. Important to members of steering committee that a tier 3 be included and defined to the extent that we can but deferring to recommending a necessary process (rulemaking or something else) unless someone else has a better way to do it, we haven't come up with the right language yet. It's not that the acreage needs to be equal in tiers 1 and 3 (apples and oranges). We have to come up with something but not kick the can down the road by asking for further study. What can we agree on?

- Unless there's desire to do it here it will be hard to nail down criteria, there needs to be side boards on this, talking about a limited subset of features. Will be hard to determine which features go into the statute. Some have been put on the table. I.e. wildlife habitat, high quality waters, rare and irreplaceable natural areas, forest connectivity. Rule making process that can decide what are the highest sensitive areas that should be under jurisdiction. Municipalities and RPCs might want to include, maybe a subset of forest blocks. Suggestion to agree that there is merit for Tier 3 but need to develop standards and criteria (maybe through rulemaking that outlines what would be more automatic or those that are discretionary).
- Regional plan doesn't need to be something that this group needs to do; come to consensus that tier 3 is an important part of report and set up process for identifying the resources that can be mapped and agreement on that and task RPCs to map those and some resources identified by municipalities that are exemption and not captured by state maps and then we go from there.
- How do we set up the guardrails so that someone doesn't look and say, "my whole town could be tier 3?"
    - because of act 171 but need consensus on what resources will be mapped and what data will be captured.
    - Also need an appeals process, need recourse because those resources still exist even if people don't like it
- Either need to be very broad or if we get into details, we need to get into them, *but don't really have time to do that*. General agreement in creating a tier 3 that will have subsets of highly valued natural resources and that will need to be done through empirical scientific process. Once we start talking about wildlife and forest blocks, we are getting into numbers that exist, don't agree that "when you know it you see it"
- Generally, agree with what's been said, would be looking to ANR to bring forward expertise in defining areas. No more studies. Don't need to keep delaying this.
- Do RPCs have the ability, info, resources, to do what we are talking about?
    - Not sure, but once we get help from those that know the resource and decide what we are mapping and how depict on map, think we can do it.
    - Takes time. Having legislature make decisions this year and then rulemaking process will take time. Exemptions for Tier 1 won't happen overnight, and this won't either.
- Should we list the resources that we want? Or leave it up to the legislature?
- General agreement about preserving a subset of highly valued areas and other areas were also discussed and then say it's up to the legislature what to include.
    - We haven't discussed those areas in enough detail.

Recommendation

Tier 3 needs to be part of the balanced package, but it needs further study and rulemaking to define the standards to identify the resources that trigger automatic jurisdiction. Potential resources to be considered could include a subset of vulnerable highly valued areas such as forest wildlife habitat, river corridors, high quality waters. The steering committee does not make a specific recommendation on which resources should be included for consideration in Tier 3, but that the Act 250 program in Vermont needs a Tier 3 as part of package to:

- Address the resource areas that are not getting sufficient oversight and protection from fragmented land use conversion—falling through the cracks of Act 250 currently.
- Create a process with due definition and focus to identify and address such areas.

Governance

Appeals

Discussion

SC offered some expert commentary from appropriate members: What are the causes of delays of appeals, and what about the notion that some appeals be dismissed as unfounded? if you start from premise that there is a category of cases that are nonsense, you need to identify those cases, but to identify those cases the court needs to hear them to determine that. Delays are not always because of the court; the court doesn't weigh in on whether it's the court or the environmental board. Need to look at what the delay is and how to address it. Court has disposition guidelines and timelines for addressing various matters. Can guarantee that there are cases where developer said it took too long and can find motion on record where they were asking for more time, not just the appellants. As for a "rocket docket" with set guidelines – be careful what you wish for; in this case you only have 6 months to get taken care of, but "well I just had open heart surgery need more time, sorry too bad, no extra time because we only have 6 months." Creates new dilemmas.

- Suggested that the bench bar should, and can, look at the guidelines, have bench bar meetings with attorneys and stakeholders, and assess whether the guidelines are sufficient or do we need to change and streamline the process? Also affords the court opportunity to tighten timeframes up, so as to not allow people to drag things out. When looking at the issue of delays, the system we have works, we just need to look at it more closely and see where it can be improved. Seems like this is a place we could benefit from. Actions that can be taken by the court to address the concerns.
    - Other SC members point out have an experience where the appellant is delayed by missing timelines, filings, etc. and it's the court process that fosters this. It's not working and in this housing crisis and it takes 12-24months to resolve.
    - Recognition of housing crisis means we could give preference of housing appeals.
    - Can we prioritize certain areas (housing, critical infrastructure) that need to be heard in a reasonable amount of time, could that work?
        - Yes, judicial discretion.
- We don't plan to promote a certain conclusion one way or the other.
- There are other things that developers do to keep out of act 250 or appeals.
- It's a matter of policy when it comes to who can appeal, cost of losing on appeals.
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Recommendation

No recommendation on what body hears appeals.
But if the NRB is going to hear JO appeals, then it needs to be a professional board, with an appeal to the Supreme Court.
Whatever body hears appeals should meet with stakeholders to discuss timeliness of issuing decisions and the possibility of prioritizing some cases such as housing and critical infrastructure appeals.

Reducing Redundancy

Discussion

- Changing rebuttable presumptions to make it dispositive ones for purposes of Act 250 review could reduce redundancy and improve timeliness of the permitting process.

- The presumption would apply only in areas where the other permit directly overlaps with the relevant Act 250 criterion, and only to the extent of that direct overlap.

Recommendation

Approve changing rebuttable presumptions to dispositive permits. Note that a permit only is dispositive for the specific issue covered in the four corners of the permit. I.e., a definitional example is that a stormwater permit only is dispositive for stormwater issues, not all water resource issues that are addressed by the relevant criterion under Act 250.

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Board Structure and Authority

Discussion

- Recommend that something needs to change with the board.
- Concern about scope of NRB rulemaking and balance of legislature and its powers and tenure of the NRB making rules.
- Adequate resourcing and qualifications
- Giving NRB authority to operate and define within existing authority.
- When we say we recommend greater rule making authority it is not suggesting that they can change the statute by rulemaking.
- We need to encourage the NRB to use its rulemaking authority with the needed resource capacity as well.
- To help ensure independence of the NRB there was mention of having the NRB board members go through a judicial nominating process (similar to judges and public service board)
    - This was not consensus on this notion.
    - Legislature is clear on the process they want to use.
    - However, comment that if and only if the NRB is hearing appeals, then NRB nominees should go through the judicial nominating process.
- 4 options/models of the board: discussion focused on the professional board models; the other two models with rotating and mixed members viewed as much less effective.
    - 3-person professional board with 1 being a former district commissioner.
        - PUC is 3-person board and 2 are part time.
    - 5-person professional board with some more diverse backgrounds being on there.
        - Feels big in terms of resources.

Recommendation

The steering committee takes no position on who should hear appeals, however like the court judicial nominating process, any body who hears appeals should go through judicial nominating process.

NRB should be a professional board comprised of 3-5 people with relevant backgrounds in land use planning, engineering, environmental law, environmental science, and other related fields and adequately resourced with respect to compensation framework and agency resources.

A NRB with professional members should engage in rulemaking.

Working Lands

Discussion

include a summary of challenges and remove prescriptive challenges.

- Prime Ag soils mitigation – narrow it to 1:1; in secondary process operations i.e., sawmills. Sawmills have a conservation benefit that Walmart does not.
    - Seems analogous to industrial parks that have 1:1 soil mitigation.
- Exempt Act 250 jurisdiction for harvesting over 2500ft and move oversight to either current use program or ANR to review harvest plans.
    - Only for projects that are under current use program.
    - This would involve a lot of work since FPR, and F&W don't issue permits. It's possible but not comfortable recommending that in this report.
    - There aren't many of these permits each year, it might be more trouble than its worth.

Recommendation

Approve reducing the agricultural soils mitigation ratio for Forest Processing enterprises to 1:1.
No recommendation on exempting Act 250 jurisdiction for logging over 2,500 feet but we could highlight this as an issue for the legislature to investigate, assuming there are other permitting programs to provide oversight.

Permitting Efficiency, Predictability, and Resourcing

Discussion

- History was permit specialist as the conduit between the lay person and all the state permits that were required. Maybe not as necessary when you have an experienced developer on the project, but when you have a lay person who hasn't engaged with state permits before, the specialist was able to provide support and answer questions before applying for permits.
    - Act 250 staff are now trying to direct applicants to the correct places, which isn't really their role.
- Permit navigator – the people who don't need, don't use it, the people who do need it have a hard time using it. A computer algorithm isn't going to convey nuance.
- Better information on what you need for a complete application – a completeness checklist that you can refer to and bring forward a complete application.
- ACCD as a resource and not a regulatory, could be an appropriate place for an applicant to go and get answers/concerns are addressed; especially in terms of social/environmental justice having it outside the regulatory arena is helpful. RDCs not the right place.
- Don't agree ACCD is the place, sometimes they are hostile to Act 250 and try to circumvent it. Agree that RDCs are overkill.

Recommendation

There could be improvements in the resources available to applicants for the full range of permits required for a project, Act 250 and other permits.

Permit applicants need further support.
Permit specialists could be available to provide a wide range of permit advice.

Fees

Discussion

- Certain upgrades to buildings shouldn't be calculated in fees cost because it causes a disincentive to upgrade and add expensive features that are energy efficient.
- Program will be less funded by permit application fees, and we need more general funding.

Recommendation

Act 250 needs adequate funding.
Due to exemptions in Tier 1, there will be less application fees and a greater need for funding from the general fund.

Next steps – circulate a draft report and gather written feedback from steering committee members.