

Natural Resources Board Act 250 Stakeholder Project Stakeholder Background Reading

Introduction

In May of 2023, the Natural Resources Board hired the Environmental Mediation Center (EMC), a non-profit facilitation and mediation organization based in Vermont, to help the Board draft a report, “Necessary Updates to the Act 250 Program,” to the Vermont Legislature.

Unlike the many previous studies, this report on Act 250 will emphasize areas and issues of consensus among the many stakeholders involved in the Act 250 process: environmental attorneys, engineers/consultants, planners/municipalities, housing/economic development/environmental justice organizations, environmental groups, and working lands operators. In short, the participation, discussions, and ideas of the stakeholders is of the utmost importance to the effectiveness of this report.

The Vermont Legislature passed Act 250 in 1970 in response to what was seen as rapid and haphazard development at the time. Towns often lacked the capacity to respond to large development proposals that would have significant negative impacts on the environment and local government services. At the time, Act 250 was an innovative and pioneering land use permitting program.

Since then, both federal and state legislation has been passed that protects many of the resources Act 250 also protects, such as air, water, navigable wetlands, and endangered wildlife habitat. This has resulted in some duplication in the review of development proposals. In addition, new environmental challenges have arisen, including climate change and forest fragmentation and biodiversity, and recognition of long-standing issues like environmental justice has increased. In recent years, Vermont has struggled to provide adequate affordable housing opportunities and to promote development in state-designated development areas. Also, some states have developed land use planning programs that employ incentives and regulations to encourage development in appropriate areas and discourage growth elsewhere, a strategy known as Smart Growth.

Although Act 250 has received minor amendments over the years, a lack of consensus among stakeholders has prevented significant legislative changes to modernize Act 250. The Legislature passed Act 182 (2022) and Act 47 (2023) requiring the Natural Resources Board (NRB) to seek input from stakeholders and draft a report to address the following issues:

- How to transition to a system in which Act 250 jurisdiction is based on location, which shall encourage development in designated areas, the maintenance of intact rural working lands, and the protection of natural resources of statewide significance, including biodiversity.
- Whether and how to use the Capability and Development Plan of 1973 in reviewing Act 250 applications.

- Whether NRB staffing levels are adequate in carrying out the Act 250 review and permitting process.
- Whether Act 250 permit fees provide sufficient revenue and adequate incentives and how the fees might be changed.
- Whether to make permanent the Act 250 jurisdictional threshold for housing at 25 or more units in state designated development areas.
- Whether to delegate the administration of Act 250 permits to municipalities.

These issues overlap and can be generally grouped into three broad categories; Act 250 governance, Act 250 jurisdiction, and the capability and development plan as a potential resource for Act 250 reviews.¹

The Process: Seeking Stakeholder Input

The NRB and the EMC determined that the most effective way to hear meaningful input was to hear from stakeholders who routinely work with Act 250. We formed a steering committee and six interest-based focus groups (environmental attorneys, engineers/consultants, planners/municipalities, housing/economic development/environmental justice organizations, environmental groups, and working lands operators) to provide feedback to the NRB. Each focus group has at least one representative who serves on the steering committee. The steering committee representative(s) will inform the focus group members about Act 250 issues under discussion and will also represent the focus group's interests before the steering committee. We anticipate a process where Act 250 issues will be generated and discussed in back-and-forth conversations between the steering committee and all the focus groups. Our goal is to build consensus around a series of recommendations about updates to Act 250 that are acceptable to the stakeholders because they have been vetted by the focus groups and the steering committee.

The steering committee began meeting in late June and has discussed the governance and jurisdiction of Act 250. During those meetings there appeared to be a few issues of possible consensus. These are only preliminary areas of possible consensus. So, the next and crucial step is seeking feedback from the broader interest-based focus groups.

We have divided the Act 250 topics into three areas: Governance, Jurisdiction, and the Capability and Development Plan. For each of the first two topics, we have listed potential shared goals, additional background information on how to achieve those goals, and questions for the focus groups to consider. We have yet to begin steering committee discussions on the capability and development plan and will create briefing notes for future focus group conversation once those discussions take place. For further information on the topics, please

¹ Act 250 required a statewide capability and development plan "made with the general purpose of guiding and accomplishing a coordinated, efficient, and economic development of the State." A capability and development plan was adopted but the plan was disabled shortly thereafter and no subsequent plan has been adopted.

feel free to review the detailed background readings for the steering committee available on the EMC website: <https://emcenter.org/vermont-act-250/>.

Governance

Potential Shared Goals

- Preserve the informality and accessibility of the district commission hearings.
- Oppose stricter evidentiary rules at District Commission hearings that would enable on-the-record appeals.
- Make the District Commission Chairs a paid part-time “professional” position.
- Ensure that the NRB has the necessary authority and experienced members for rulemaking and to oversee the program.
- Ensure Act 250 fees and exemptions are adequate and appropriate, and that they create incentives that align with program goals and statewide policy priorities.
- Ensure the District Commissions have sufficient resources to administer the Act 250 process effectively and efficiently.

Discussion

The steering committee members agreed that the informality and accessibility of District Commission hearings are a critically important feature of Act 250. Stricter evidentiary rules that are necessary for on-the-record appeals would make the hearings less accessible to the general public. This would make it more difficult for the general public to voice their concerns about a project without being represented by an attorney. Public participation is the heart and soul of Act 250, especially at the District Commission level.

Many steering committee members commented that the current structure of the NRB makes it difficult to provide oversight and rulemaking. The NRB has not promulgated rules in many years. The Chair of the NRB is a full-time professional position but the other members only participate in monthly meetings.

Several options were discussed to improve the NRB’s oversight of the Act 250 program. There seemed to be little to no interest in going back to the nine-member citizen board (like the Environmental Board) that included one full time chair. Other options discussed include having a professional board similar to the Public Utilities Commission (PUC) or having all or a sub-group of Chairs of the District Commissions serve or rotate onto the NRB with the full-time NRB Chair. Hybrid models discussed included either two or three professional members and two or three Chairs from the District Commissions. If the Chairs of the District Commissions served on the NRB, it was suggested that they be part-time professional positions. There was interest in ensuring that NRB Board members have the necessary background and experience that will weave together the permitting process with appropriate policy and rule-making guidance.

The steering committee spent considerable time debating whether the NRB should hear appeals from the District Commissions. Typically, there are around 10-20 appeals of Act 250 District Commission decisions per year, and these are heard by the Vermont Environmental Court. Some members of the steering committee preferred that the Environmental Court continue to hear appeals while other members asserted that the NRB should hear appeals because hearing appeals is critical to administering the program and rulemaking.

There was general concurrence that the NRB needs to have adequate resources to administer the program. Act 250 fees currently cover roughly 80% of the NRB's budget. Any changes to the role of the NRB and Act 250 jurisdiction need to consider the impact on fee revenues. For example, the HOME Act raised the trigger for Act 250 jurisdiction in designated development areas to 25 or more units (for three years, up from 10 or more units). This change is expected to result in lower Act 250 fee revenue.

Questions for Consideration

- Does the current informal hearing process before the District Commissions work effectively? How could it be improved?
- Does the current structure of the NRB work effectively? How could it be approved? Should the NRB or the Environmental Court hear appeals of District Commission decisions?
- Should the NRB be a professional board, and if so, should it be a PUC-like model (i.e., utilizing quasi-judicial regulatory proceedings), a hybrid of professional members and Chairs from the District Commissions, or a Chair with rotating members from for the District Commissions?
- Should the Chairs of the District Commissions be part-time paid professional positions?

Jurisdiction

Potential Shared Goals

- More effectively encourage needed development in appropriate locations, such as the designated development areas and possible additional buildable land areas that allow for economically successful and affordable growth.
- Provide greater protection for sensitive natural resource areas.
- Any changes or additions to Act 250 must add value to meeting the vision of compact settlements surrounded by working lands, and not add redundant regulations.
- Eliminate redundant regulations in Act 250 that have arisen since its inception 53 years ago.

Discussion

A central question is whether Act 250 overregulates needed development in appropriate areas and underregulates development in areas where development may not be appropriate. For example, an affordable housing project in a village may trigger Act 250 jurisdiction but a 9-lot subdivision in an environmentally sensitive area may not. The legislature recognized that problem in the current jurisdictional triggers and requested that the NRB explore “location-based jurisdiction.” Act 250 currently has location-based jurisdiction for any development over 2,500 feet. In addition, there are some jurisdictional exemptions for developments such as priority housing projects in certain designated areas. Otherwise, jurisdiction is triggered based on the number of lots, units, or acreage involved in the project, and depending on whether a development proposal is in a municipality with or without permanent zoning and subdivision regulations.

The steering committee agreed that we need to encourage development in appropriate designated areas. There are currently several designated areas such as designated downtowns and new town centers, but these areas were generally created for economic development and tax purposes, not land use policy. The steering committee discussed how these or new designated areas could be integrated into land use policy to encourage appropriate development. Although a few options were discussed, there was some interest in a process where a state entity such as the NRB would certify the designated area if it met certain conditions such as adequate local zoning and then developments in the area would be exempt from Act 250.

The steering committee only had preliminary discussions on increasing protection in sensitive natural resource areas. There seemed to be an openness to considering the protection of important large forest tracts by including a jurisdictional trigger and either a new Act 250 criterion or strengthening criterion 9(c) which protects forest soils but has rarely been used. The steering committee has yet to fully consider how to protect river corridors or high-quality waters, but questions were raised about whether these areas are, or should be, protected by other permits or programs.

The facilitation team shared strategies from other states that use either tiers or growth boundaries in their land use programs. A tiered program in Vermont could have:

- 1) a designated growth area with existing or planned sewer service, where either fewer Act 250 criteria apply or projects are exempt from Act 250;
- 2) a rural hamlet, village, and rural area served by on-site septic systems; and
- 3) a sensitive natural resources area.

The amount of regulatory protection would increase from the designated growth area to the rural hamlet, village, and rural area with on-site septic systems, to the sensitive natural resource area. Alternatively, we could consider just having designated growth areas as one designation and the rest of the state and add location based jurisdictional triggers for sensitive natural resource areas.

Other states use growth boundaries to contain growth within designated areas with existing or planned sewer service. The growth boundaries would be large enough to anticipate growth over the next 20 years and should also take into consideration that many village centers are located in flood zones and need to account for a changing climate.

Questions for Consideration

- Should Act 250 incentivize growth in appropriate designated areas?
- If so, should proposed projects in approved designated growth areas have fewer criteria apply or be exempt from Act 250? Are there other tools you'd suggest to appropriately incentivize growth?
- If so, should the designated growth areas have to be approved by a state entity such as the NRB?
- Should lots, units, and acreage continue to be utilized as jurisdictional triggers?
- Should we increase protection of sensitive natural resource areas?
- If so, which sensitive natural resource areas (large important forest tracts, river corridors, high quality waterways)?
- Should we recommend a tiered system for location-based jurisdiction?
- Should we recommend that towns and cities develop growth boundaries?
- If so, should the approval of the boundaries be by a regional or statewide entity?
- Should we remove any criterion that are redundant with programs or permits that protect the same resource or concern?
- If so, which ones?