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Act 250: Vermont's state-wide land use law

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Almost all municipalities have zoning ordinances that control the legal use of the land and define minimum requirements for development in line with the stated goals of the community. While these requirements sometimes appear onerous to investors and developers, a well-defined minimum standard that allows for visibility into permitting costs, timelines and outcomes would be an improvement over the open-ended Act 250 process now used throughout Vermont. Appraisers, especially those working on prospective development, must understand the market's response to the risk this legislation injects into a project.

Act 250, Vermont's state-wide land use law, was initially created by the Vermont legislature in 1970 and significantly updated in 2004. The law applies to development or subdivision of any parcel larger than 1 acre in towns that do not have zoning, do not have a town plan or chose to be a "1-acre" town. It also applies to development or subdivision of all parcels over 10 Acres and in cases where a single developer has multiple projects within a 10-mile radius regardless of site size.

Under the law there are no defined minimum development criteria; each project is evaluated on ten different criteria described in Title 10 Section 6086 of the Vermont Statutes:

1. Will not result in undue water or air pollution.
2. Does have sufficient water available for the reasonably foreseeable needs of the subdivision or development.
3. Will not cause an unreasonable burden on the existing water supply, if one is to be utilized.
4. Will not cause unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result.
5. Will not cause unreasonable congestion or unsafe conditions with respect to the use of highways, waterways, railways, airports and airways, and other means of transportation existing or proposed.
6. Will not cause an unreasonable burden on the ability of a municipality to provide educational services.
7. Will not place an unreasonable burden on the ability of the local governments to provide municipal or governmental services.
8. Will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas.
9. Is in conformance with a duly adopted capability and development plan, and land use plan when adopted.
10. Is in conformance with any duly adopted local or regional plan or capital program under 24 VSA Chapter 117.

The Act 250 process is administered by the Vermont Natural Resources Board (NRB) through nine local District Commissions (DC); an appointed three-member board. Permits applications are reviewed by local coordinators who ensure abutters are notified and decide if the application will be

handled administratively or after a public hearing. Applications to the DC are publically noted on their website and through publication in the local newspaper. The first step of the DC is to consider granting party status to any group showing a "particularized interest" in any one of the 10 criteria; the applicant, the landowner, the town and the state are always parties to a hearing. Hearings of the DC are held 'de novo'; anyone providing testimony is sworn in; decisions of the DC are required within 20 days of the completion of deliberations. The NRB has issued over 50 pages of rules that, along with the law, control the process. Any decision of the DC is appealable to a special two-judge Environmental Court in Berlin, Vermont, and any decision of the Environmental Court is appealable to the Vermont Supreme Court.

While this land-use process has controlled development in Vermont for over four decades it is often criticized for having no defined minimum criteria that, once met, allow a project to go forward. The result is that developers face a process with no defined minimums, no defined costs and no defined timeline. One recent application for a chain restaurant at the entrance to a regional mall was denied when traffic calculations showed at peak volume the left turn-lane would be Â½ of one car length over its existing capacity. This decision came after 12 months and a reported $100,000 in developer's expenses.

Furthermore Criterion 9(L), added by the Legislature in the 2014 session, has caused additional concern in the market. This was most recently used to deny the development of a previously-permitted retail project in an existing commercial strip, in the direction of growth, at the intersection of two US Highways:

"Criterion 9(L) supports Vermont's historic settlement patterns of compact village and urban centers separated by rural countryside, by encouraging development in existing settlements and setting requirements to guide and improve development in outlying areas. Under Criterion 9(L), the applicant must show that any project outside an existing settlement:

i. Makes efficient use of land, energy, roads, utilities and other infrastructure, and either:

ii. (I) Will not contribute to strip development, or

(II) If the project is "confined to" existing strip development, it incorporates infill and minimizes the characteristics of strip development."

Unknown permitting cost and time tables inject risk into new development that effectively forms a headwind limiting applications and controlling growth. While supporters state that over 80% of all applications are eventually approved there is often negotiation around a remedy to one or more of the ten criteria. Recently the proposed redevelopment of a functionally obsolete auto sales center at a signalized intersection on a US Highway was delayed for six months as the applicant and the DC negotiated the number of curb cuts to be closed, the need for a slip-lane, and how much the applicant would pay for additional traffic controls at the intersection.

Once issued not all permits are acted upon. Permits are considered involuntarily abandoned unless construction has started and substantial progress towards completion is made within three years of the issue date. In addition the applicant, the DC or any group holding party status may also initiate a voluntary abandonment hearing prior to the end of the three-year period. Once abandoned, any new permitting must start over at the beginning of the process.

This regulatory environment often results in the need for an appraiser to take an extraordinary assumption or a hypothetical condition specific to Act 250 to produce a credible assignment result when the subject property has any form of proposed subdivision, renovation, addition or new development. It also requires an appraiser to clearly communicate to their client market-supported

estimates of permit cost and time under a process with no defined minimum requirements.

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