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Defining Vermont's Landscape

“Vermont, more than any other American state, has worked to preserve those qualities and characteristics that make it unique. ... If you want to see New England as you imagine it, go to Vermont.” (*National Geographic Travel*, Nov.-Dec. 2009)

Vermont, despite its small size and population, is a state rich in both natural and human resources. The state is water rich – sometimes too much so! We value the land and landscapes, both rural and urban, which sustain us. We strive to provide the resources that ensure a vibrant and diversified economy. We have historically tolerated different opinions and lifestyles, many of which have left their mark on the state. Vermont is a travel destination for people from around the world. Hence we recognize the truth of the quote above. On the other hand, Vermont is an expensive state to live in, a difficult place to start a career, and is host to an aging population. It has what many would consider a harsh climate and high taxes. Vermont municipalities reflect all those realities, both positive and negative. And local governments address all the attendant issues in their land use plans and bylaws.

“It is the intent and purpose of this chapter to encourage the appropriate development of all lands in this state by the action of its constituent municipalities and regions, with the aid and assistance of the state... In implementing any regulatory power under this chapter, municipalities shall take care to protect the constitutional right of the people to acquire, possess and protect property.” (24 V.S.A. § 4302)

Municipal Planning and Zoning. Chapter 117 of Title 24, the Municipal and Regional Planning and Development statute, establishes the purposes of Vermont’s municipal land use law. What it does not say is that the ambitious agenda of 14 goals (section 4302 (b)) and 12 plan elements (section 4382 (a)) set forth in statute is carried out by volunteer boards, who, with little professional help and minimal financial or technical support from the state, must nevertheless adhere to the constraints of state and federal mandates or pre-emption on a wide range of issues. In recent years, water quality and building communities that are resistant to disaster – most frequently floods – have taken center stage as issues that the state and municipalities must address together. New laws that went into effect this past July require town plans to include a flood resiliency plan.

According to the Vermont Constitution, cities, towns, and villages are constituent parts of the state. They are authorized to perform only those functions that the legislature specifically permits. In 1921, the Vermont Legislature first enabled municipalities to create planning commissions and adopt land use plans; a decade later, the legislature enabled municipalities to adopt zoning. Historically, cities, towns, and villages that have adopted municipal plans and zoning or subdivision regulations have been the only entities in Vermont that regulate development of projects on all lands within their borders. Planning and zoning are core functions of local government in those cities, towns, and villages that undertake them.

Nevertheless, the legislature limits municipal zoning jurisdiction of uses such as daycare facilities with six or fewer children, accessory apartments, firearm discharges at existing sport shooting ranges, accepted agricultural or silvicultural practices, churches, schools, electric generation and transmission facilities, telecommunications facilities, solid waste facilities, and more. Despite grandiose statements espousing the need for strong locally-determined land use decisions, every legislative session seems to add more limitations to municipalities' ability to guide their future development. Legislators in 2014 extended restrictions on local regulation of development of a telecommunications facility. Legislation (24 V.S.A. § 4414) also encourages municipalities to plan and adopt bylaws to build transportation alternatives, develop in compact patterns, conserve energy, promote green development, and adopt and enforce energy efficiency building codes.

As of September 2013 (the most recent figures available), 244 cities, towns, and villages had adopted municipal plans, of which 208 had been confirmed by their regional commissions. A somewhat larger number of municipalities had planning commissions, and 205 had zoning bylaws as well as the zoning boards of adjustment or development review boards (108) to administer them. One hundred and forty-nine municipalities had adopted subdivision regulations, and at least 38 had invested in professional planning staff.

The State of Vermont also regulates some land use through Act 250, and the Public Service Board (PSB) regulates electric generation and transmission and telecommunications facilities (Title 30, Section 248). State and federal laws require protection of waterways and regulate the impact of developments on the quality of our rivers and lakes, air, wetlands, archaeological heritage, natural and fragile areas, and historic buildings. Municipalities address many of those issues through the 12 required elements of a comprehensive municipal plan, as well as zoning and subdivision bylaws, local Act 250 review incorporated into local bylaws in 30 towns and cities, shoreland protection bylaws, stormwater management and flood hazard area bylaws.

Despite the considerable attention legislators pay to local planning and zoning issues every year, they provide little financial or technical assistance to sustain them. In FY15, aggregate state appropriations totaled \$7.3 billion. The appropriation for municipal planning grants totaled \$440,000, a small percentage of revenues raised from the property transfer tax. In FY13, the Department of Housing and Community Development received \$733,000 in requests.

Water Laws. The goals of land use and water resources are unequivocally linked. They also, in significant measure, conflict with each other, a clash that state agencies have worked hard to reconcile in the three years since Tropical Storm Irene. Local officials often have to make land use decisions that impact water quality. The state Agency of Natural Resources (ANR) is charged primarily with protecting water quality as Vermont is a “delegated state” under the federal Clean Water Act. Act 138, passed by the Vermont Legislature in 2012, was written to (1) facilitate the coordination of federal, state, and local management activities for flood hazard areas, (2) encourage local governmental units to manage flood hazard areas and other flood-prone lands, (3) provide state assistance to those local efforts (including mapping of vulnerable areas), and (4) comply with National Flood Insurance Program (NFIP) requirements for regulating development to ensure eligibility for flood insurance.

A Total Maximum Daily Load (TMDL) is a calculation of the maximum amount of a pollutant that a waterbody can receive and still meet water quality standards. In Lake Champlain, that pollutant is phosphorus. In 2010, the U.S. Environmental Protection Agency (EPA) revoked the Lake Champlain TMDL as it applies to Vermont. In 2012, we wrote that “Vermont has still not heard from the [EPA] Region 1 with a new TMDL for Lake Champlain (to include stormwater management obligations for the 145 Vermont cities and towns in that watershed).” Last May, after numerous meetings with stakeholders and the EPA, ANR submitted its Vermont Lake Champlain Phosphorus TMDL Phase 1 Implementation Plan (www.watershedmanagement.vt.gov/erp/champlain/) to the EPA.

VLCT convened an eleven-member Water Quality Advisory Committee to consult with the Department of Environmental Conservation Commissioner on implementing the Lake Champlain TMDL, once it is

approved by the EPA, and the Phase I Implementation Plan to clean up Lake Champlain. ANR says that it will apply those TMDL requirements to upgrade local highways and wastewater treatment facilities and address stormwater runoff from impervious surfaces on a statewide basis, once they are approved. Future TMDLs approved for waterways around the state would include the same kinds of requirements in any case. State officials expect that they will first target the most polluting areas.

In addition to the convergence of municipal land use regulations and the waters of the state, municipalities play two additional aquatic roles: providing a supply of clean drinking and fire-protection water to most homes and businesses in the state, and processing waste water produced by those same entities through municipal treatment facilities for eventual discharge to the waters of the state. The statutory definition of “waters of the state” is “all rivers, streams, creeks, brooks, reservoirs, ponds, lakes, springs and all bodies of surface waters artificial or natural, which are contained within, flow through or border upon the state or any portion of it.” A water body’s highest and best use is based upon its classification. As of this writing, the EPA and Army Corps of Engineers are revising the definition of “waters of the U.S.,” which are administered by those federal agencies and does not always line up with waters of the state.

Vermont is home to 812 significant lakes and ponds that total about 230,900 acres, 7,100 miles of rivers and streams, and 300,000 acres of wetlands, which is about five percent of the total state landmass. With waterways in every nook and cranny of the state, management of water resources dictates how land is used in Vermont if the land in question is anywhere close to a body of water. While land use regulation is largely local, water laws are generally enacted at the federal and state levels of government. This division of labor does not, however, tell the whole story, as federal and state laws often anticipate that local governments will implement and enforce both the actions and restrictions they impose and abide by their sometimes forceful guidance. In recent years, new state laws have given municipalities the authority to regulate land uses adjacent to waters of the state, in areas likely to flood, in some towns to which the program is delegated, and along lake shorelands.

The federal Clean Water Act – the godfather of water law in this country – was adopted in 1972. It employs both regulatory and non-regulatory tools to reduce direct pollutant discharges into waterways (from point sources), finance municipal wastewater treatment facilities, and require management of polluted runoff. A broader goal is to restore and maintain the integrity of the nation’s waters so that they are fishable and swimmable. Point sources (wastewater treatment facilities) may not discharge to U.S. waters without a National Pollution Discharge Elimination System (NPDES) permit. Some argue that NPDES permits should be extended to non-point sources as well. State authority to adopt and implement water quality standards, TMDLs, Municipal Separate Storm Sewer System (MS4) permits, and basin planning all derive ultimately from the Clean Water Act. The federal government delegated implementation of the act and the NPDES permitting system to Vermont.

Implementing the Clean Water Act in Vermont are the State Water Quality Policy (10 V.S.A. § 1250) and the Vermont Water Quality Standards that implement the statutory policy. The law:

1. protects and enhances the quality of surface waters and assures public health;
2. maintains the purity of drinking water;
3. prevents, abates, or controls all activities harmful to water quality;
4. ensures maintenance of water quality to sustain existing aquatic communities;
5. provides standards for permitting and management of discharges;
6. protects and preserves high quality waters, and their ecosystems;
7. manages waters to promote a healthy and prosperous agricultural community, increases opportunities for use of forest, parks, and recreational facilities, and
8. seeks over the long term to upgrade quality of water and reduce existing risks to waters.

Energy Generation. According to Act 170 of the 2011-2012 biennium, 55 percent of each retail electric utility’s annual sales must be met by renewable energy in 2017 and 75 percent by 2032. The Public Service Department established a goal that renewables will supply 90 percent of Vermont’s energy needs (electric, heating, and transportation) by 2050. These ambitious goals do much to drive renewable energy projects around the state. On one hand, local officials strongly support those goals and energy committees dedicate significant efforts to helping meet them; on the other hand, renewable projects proposed by private businesses often run afoul of other vital municipal planning priorities. Balancing those competing priorities is an arduous and complex undertaking.

Renewable energy project proposals are heard at the PSB instead of either a local zoning or development review board or Act 250 district commission. While the PSB is required to consider municipal plans, it is under no obligation to ensure that priorities expressed in the plans are addressed. The impact of proposed wind projects, transmission projects including natural gas pipelines and large solar installations – and the PSB’s permitting decisions on these projects – have resulted in a public outcry.

According to longstanding statute 30 V.S.A. § 248, a municipality may not regulate any public utility power generating plant or transmission facility that the PSB regulates. This law has tied the hands of municipal officials who want to address the local impacts of energy projects on behalf of their municipalities. Municipalities that want a say in the development of proposed energy facilities within their borders need to be certain that their town plans are detailed and comprehensive and establish “a clear community standard.” As part of its “248 process” – the proceeding initiated when a project developer wants to secure a Certificate of Public Good (i.e., a permit to undertake the project) – the PSB is required to evaluate whether or not a new project “unduly interfere[s] with the orderly development of [a] region with “due consideration” having been given to the recommendations of the municipal legislative bodies and the land conservation measures contained in the plan of any affected municipality.” (30 V.S.A. § 248 (b) (1))

VLCT commented to legislative committees throughout the last biennium and to the gubernatorially created Energy Siting Commission that municipal findings and determinations regarding projects seeking a PSB Certificate of Public Good should be given “substantial consideration,” as is the standard in the PSB 248a process for permitting telecommunication facilities. Our recommendation has not yet been acted upon.

Community Flood Resiliency. As we learned in the wake of the 2011 spring floods and Tropical Storm Irene, the Federal Emergency Management Administration (FEMA) administers the NFIP, a program in which all but 24 towns in Vermont participate. A new website, Floodready.vermont.gov, provides many useful resources to help towns become more flood resilient. Vermont had nine federally declared disasters between 2011 and 2014, all but one of them due to flooding. From the perspective of planning, public safety, water quality and river health, developing flood resiliency is vital. As mentioned above, Vermont’s municipal planning and development efforts are now mandated to include flood resiliency as a goal through local regulation. FEMA also requires municipalities to adopt a Local Hazard Mitigation Plan and urges local officials to incorporate it into their municipal comprehensive land use plans.

Addressing the Costs. Federal officials estimate that the cost to all levels of government of improving clean water infrastructure over the next 20 years could exceed \$400 billion (*Governing Magazine*, September 2012). That infrastructure includes wastewater treatment plants, stormwater management infrastructure, sanitary sewer and combined sewer overflow mitigation, green infrastructure, fluvial erosion hazard zones, and riparian protection zones. In Vermont, the effort to clean up phosphorus in the Lake Champlain basin alone could cost between \$400 and \$800 million according to ANR staff. Estimates for Vermont wastewater treatment facilities to comply with an eventual Long Island Sound TMDL for the northern portions of the Connecticut River range up to \$200 million. The FY14-FY15 capital budget allocated \$3 million for wastewater treatment facility loans.

Regarding water supply, municipalities are facing obsolete infrastructure, increasing demands, and sometimes minimal planning or governance. The FY14-FY15 capital budget allocated \$4.1 million to water supply projects.

As well, putting in place the “clear community standard” to address energy generation and telecommunications projects that the PSB requires from municipalities to consider their perspectives can be a highly technical issue, and towns will likely require professional help to develop the standard. And participating in the Certificate of Public Good permitting process is in itself an expensive process, requiring attorneys to successfully argue a case if the town’s position is to have any real influence.

Municipalities enact zoning and subdivision bylaws to implement comprehensive plans that are developed and adopted through a public process. Many municipalities have also designated growth centers, designated downtowns, Tax Increment Financing Districts (TIFs), and village centers to help implement those plans and to ensure the landscape continues the tradition of compact growth surrounded by rural countryside. About 20 percent of cities and towns have adopted regulations protecting buffers and requiring building setbacks adequate to protect shoreland vegetation, thus protecting lake water quality and habitat. Municipalities have also enacted ordinances for flood protection, stormwater management, low impact development, and riparian protection. In each of these instances, the municipality took on the regulatory and financial burden of developing, implementing, and enforcing a municipal program or bylaw that the state strongly encourages.

What Next for Municipal Land Use and Water Quality Protection? Given the unresolved nature of regulations and permits surrounding the re-opened Lake Champlain and Connecticut River TMDL, the anti-degradation rule, which would require protection of existing uses of waters of the state and water quality, revisions to the water quality standards, measures to increase protection from flooding and how to pay for all of the above, municipal officials might not know what initiative to undertake first. Legislators will continue to wrestle with balancing smart growth land uses that spur much needed economic development, transportation investment and provide necessary housing and energy generation for Vermonters with protection of our water resources and compliance with our TMDLs. Who pays for implementation once these disputes are settled is a question that will again dominate all discussions in the legislature during the next biennium.

Local Boards: Realizing a Municipality’s Vision. How does a local volunteer planning commission or DRB member, state staffer, or indeed any applicant sort through the myriad regulations that govern the approval of a given project? In how many venues must the same issues be addressed? Where and how do local boards implement the goals that their residents have worked hard to express in the comprehensive plan that the regional commission has approved and the local legislative body or voters have adopted? How do those goals and visions mesh with the requirements of state and federal law to protect and clean up the waters of the state or to provide clean energy for Vermont? Who should decide that a project can finally go forward? These questions are far more difficult to answer than they should be, and they may not be resolved without the involvement of the legislature, the administration, and the EPA.

VLCT Recommendations

1. Allocate property transfer tax revenue to cities and towns for municipal planning purposes at the rate established in Act 200.
2. Further consolidate, coordinate, and expedite all state permit processes required for all projects.
3. If a local or state permit decision is made subsequent to appropriate hearing and review, do not allow issues addressed in that decision to be revisited in another forum, such as Act 250.



A flood-proofed Burnham Hall, Lincoln, Vt. in October 2011. Tropical Storm Irene had devastated the building.

4. Provide incentives to spur development that promotes smart growth and mitigates damage caused by natural or manmade disasters in locally planned growth centers as well as designated downtowns, new town centers, and village centers.
5. Establish additional state programs that are easy to implement, provide incentives to municipalities, and fund municipal infrastructure necessary to support community economic development.
6. Ensure that public dollars earmarked for the implementation of TMDLs for waters of the state, including Lake Champlain, are spent fairly, effectively, and efficiently to mitigate phosphorus and other TMDL-regulated discharges. All potential mitigation efforts should undergo a cost-effective analysis, and implementation should be prioritized based on that analysis.
7. Accord automatic party status to host municipalities in Section 248 proceedings. In every Certificate of Public Good process, the Public Service Board (PSB) should give “substantial consideration” to municipal determinations by holding hearings in municipalities that are potentially affected. The PSB should include all local determinations regarding the project within the PSB docket, formulate areas of inquiry based on concerns raised in local hearings, and ensure that the PSB decision addresses concerns raised in local hearings, determinations, and adopted municipal plans.