SPECIAL SECTION:
CHAPTER 117 UPDATE
PART 1

As many local officials are aware, the local planning and zoning laws (Chapter 117 of Title 24) were comprehensively rewritten during the last legislative session. There are essentially two types of changes in the new law, known as Act 115: **substance** changes, which establish new parameters for the regulation of particular uses, and **process** changes, which establish new timelines and procedures for issuing decisions, filing appeals, and updating bylaws. This special section of the *VLCT News* is the first of two (look for the second special section in the August/September issue) that will advise towns on important steps for implementing Act 115.

CHANGES TO THE LOCAL REGULATORY LANDSCAPE

Act 115 contains multiple effective dates: July 1, 2004, September 1, 2005, and July 1, 2011. Practically speaking, this means that Act 115 has three types of provisions:

1. "Self–Executing" Provisions – Those that do not require a local bylaw change and became the law of the land on July 1.

2. 2011 Bylaw Change Provisions
– Those that are "enabling" as of July 1, 2004, but require a bylaw change in order to be implemented and are optional until July 1, 2011.

3. "Saving Clause" Provisions
– Particular provisions where local bylaws must be consistent with statute or they will be overridden on September 1, 2005. A municipality must consciously adopt these provisions for them to take effect prior to September 1, 2005.

The Saving Clause provisions can be found in 24 V.S.A. § 4481[1], which establishes six areas where the new law will control on September 1, 2005. Until then, although these provisions have the force of law, they are not mandatory. The Legislature has set September 1, 2005 as a phase-in date so that towns don't have to revise their bylaws overnight to comply with the new law. This Special Section, Part I is primarily devoted to the saving clause provisions.The other provisions will be dealt with in the Special Section, Part II.

WHAT CHANGES MUST WE MAKE BY SEPTEMBER 1, 2005?

In order to ensure compliance with the new law, towns will need to make a number of changes to their bylaws. If you are currently in the process of changing your bylaws, you may want to hold off until early autumn 2004 in order to take advantage of the publications of the *Land Use Education Collaborative* (see sidebar). Nonetheless, any upcoming or current bylaw changes should include the six saving clause provisions described below:

1. Required Provisions and Prohibited Effects (24 V.S.A. § 4412)

This section contains new parameters that must be complied with in your zoning bylaws. Three areas where the changes are most significant concern affordable housing, small lots, and frontage requirements.

Beginning September 1, 2005, towns will be required to make broader accommodations for affordable housing in town bylaws and in the town plan. In particular, bylaws must not "have the effect of" excluding affordable housing, such as accessory apartments and mobile homes. The law specifies that one "accessory dwelling unit" located within or appurtenant to an owner-occupied single-family dwelling shall be considered a permitted use. The characteristics of such a unit include it not exceeding 30% of the total habitable floor space of the single family dwelling, and its having sufficient wastewater capacity. A town may consider an accessory apartment as a conditional use if construction of the accessory apartment results

in a new accessory structure, expands parking or adds an increase in height or floor area to the owner-occupied single-family dwelling. 24 V.S.A. § 4412(1).

The law on existing small lots has also been changed in response to a Vermont Supreme Court case (see October, 2002 *VLCT News*). Now, instead of a mandatory requirement that contiguous small lots merge with one another, the law is enabling and allows towns to consciously adopt it. Therefore, *merger is no longer automatic under the law;* it will only happen if so provided for in your bylaw. Moreover, municipalities may now be less restrictive of existing small lots than the state law, which was not permitted before.

In addition, the required frontage for developments has been lessened. This provision will allow applicants to develop a property so long as they have been granted a permit by the Appropriate Municipal Panel (AMP)[2], in accordance with standards and processes specified in the bylaws. The 20-foot minimum right-of-way width still exists, though that requisite width may be increased in the bylaws.

There are additional protections granted to home occupations, child care facilities and nonconformities. Also, certain structures are protected from zoning regulation which do not exceed a certain height (e.g., small wind turbines and solar panels). Be sure to examine the language of the new 24 V.S.A. § 4412 for the full text of these regulations.

2. Limitations on Municipal Bylaws (24 V.S.A. § 4413)

Before Act 115, certain structures and uses enjoyed special protection from local zoning. Now, those same interests will enjoy even stronger protection from municipal zoning regulations. In language that seems likely to result in litigation, this section expands those protections by stipulating that regulations must not "have the effect of interfering with the intended functional use" of a project. Some of the facilities which are entitled to this protection include State-owned facilities, public and private educational facilities, churches and other places of worship, hospitals, regional solid waste management facilities, and certain hazardous waste management facilities. Additionally, the new law clarifies that electrical generation and transmission facilities may not be regulated through zoning if those facilities require a certificate of public good pursuant to 30 V.S.A. § 248.

3. Adoption, Administration and Enforcement (24 V.S.A. §§ 4440-4454)

This section contains many of the procedural changes, including provisions for preparing new bylaws, appointing the administrative officer, and enforcement procedures.

Perhaps the farthest-reaching change in these provisions is that "rural towns"[3] may now vote their bylaw amendments by a vote of the legislative body, instead of by Australian ballot. However, the voters will retain two separate methods of referendum. The first method essentially mirrors the permissive referendum procedures found in 24 V.S.A. Ch. 59 for the adoption of traditional, non-zoning ordinances. Under that method, the voters may petition for a vote to disapprove an ordinance that was adopted by a majority of the legislative body. The second method allows the voters, at a special or regular town meeting, or the legislative body at a regular meeting, to make a conscious decision to vote on zoning bylaw amendments by Australian ballot. This procedure would then stand until rescinded by the voters at another town meeting.

Another notable change can be found in 24 V.S.A. § 4449 (a) (3), which clarifies that no permit shall take effect until the time for an appeal has expired. If an appeal is filed first with the AMP and second with the Environmental Court, the permit will not take effect until local adjudication of the permit is complete, or the Environmental Court rules on whether or not to issue a stay or until 15 days has expired, whichever comes first.

4. Appropriate Municipal Panels (24 V.S.A. §§ 4460-4464)

This new term applies to all development review panels (see endnote 2) and provides new procedures for appointment of members, development review (including subdivision), and hearing and notice requirements. The roles of the respective boards will not change under the new law, and there is no requirement that towns switch from a zoning board of adjustment (ZBA) to a development review board (DRB). The new law harmonizes terminology so that it is easier to refer to a board as simply an "AMP."

The most substantive change in this section is the creation of a more rigid allocation of jurisdiction, authorizing the zoning administrator (ZA) to decide which board has jurisdiction to consider a

particular development review function. This act by the ZA is then appealable as any other decision of the ZA would be. Moreover, the zoning bylaw must specify which AMP is to consider some of the following issues: review of rights-of-way or easements for land development without frontage, review of land development within an historic district, and review of conditional uses, planned unit developments, site plan review, and so on. Be certain when revising your bylaws to carefully review 24 V.S.A. § 4460 (e) to ensure jurisdictional consistency with state law.

Additionally, this chapter of the law provides more specialized development review procedures, requiring adoption of rules of procedure and rules of ethics. 24 V.S.A. § 4461 (a).

5. Appeal Procedures (24 V.S.A. §§ 4465-4472)

This section clarifies definitions for interested persons who may appeal zoning decisions, the process for filing appeals, and the criteria for granting variances.

The biggest change is that in order to participate in appeals to environmental court, an interested person must participate in the municipal regulatory proceedings. Participation is defined as "offering oral or written testimony, evidence or statement of concern related to the subject proceeding." 24 V.S.A. § 4471 (a). If appeals of certain decisions of appropriate municipal panels are *on the record* pursuant to a decision of the selectboard or voters, then appeals from such decisions shall be on the record at the Environmental Court.

However, many of the interested person criteria remain the same, including "the ability to demonstrate a physical or environmental impact on the person's interest under the criteria reviewed;" the allegation that the bylaw imposes an "unreasonable or inappropriate restriction of present or potential use;" and ten persons who may be *voters* or property owners who by signed petition allege that the relief requested will not be in accord with the "policies, purposes, or terms of the bylaw of that municipality."

Such interested persons may appeal any decision or act by the zoning administrator by filing a notice of appeal with the secretary of the AMP, or with the municipal clerk if a secretary has not been elected. Appeals from a final decision of an AMP, in which the final municipal hearing was held on or after July 1, 2004 shall be filed with the clerk of the Environmental Court. Appeals from a final decision of an AMP in which the final municipal hearing was held prior to July 1, 2004, shall be filed with the secretary of the AMP or municipal clerk if no secretary has been elected. 24 V.S.A § 4471 (c); V.R.C.P. 76 (e). This section also clarifies the language in the criteria for granting variances, though it continues to be a high standard with all of the same criteria. 24 V.S.A § 4469.

6. Definitions (24 V.S.A. § 4303)

This section provides new definitions, which must be included in your bylaws by September 1, 2005. Towns are advised to pay close attention to these new definitions when updating bylaws. The saving clause in § 4481 will invalidate any alternative definitions as of September 1, 2005. One new definition of note is "conformance with the town plan," which is widely required throughout Act 115.
That phrase is defined as follows:

"Conformance with the plan" means a proposed implementation tool, including a bylaw or bylaw amendment that is in accord with the municipal plan in effect at the time of adoption, when the bylaw or bylaw amendment includes all the following:

(A) Makes progress toward attaining, or at least does not interfere with, the goals and policies contained in the municipal plan.

(B) Provides for proposed future land uses, densities, and intensities of development contained in the municipal plan.

(C) Carries out, as applicable, any specific proposals for community facilities, or other proposed actions contained in the municipal plan.

In summary, towns are advised to update their municipal bylaws over the next year to ensure compliance with the six saving clause provisions identified above. We will explore the **"Self- Executing" Provisions** and the **2011 Bylaw Change Provisions** in Part II of this Special Section, to be included in the August/September 2004 issue of the *VLCT News.*

— Dominic Cloud, Manager, and Brian Monaghan, Attorney, VLCT Municipal Assistance Center

1 Note that all references to statutes are to the new law. As of this writing, the Vermont Statutes Online (http://www.leg.state.vt.us/statutes/statutes2.htm) has not been updated to include the new law, and pocket parts for the "green books" will not be available until late summer. For a full copy of the new law, go to: http://www.leg.state.vt.us/docs/legdoc.cfm?URL=/docs/2004/acts/ ACT115.HTM.
2 Appropriate Municipal Panel. Defined as, "a planning commission performing development review, a board of adjustment, a development review board, or a legislative body performing development review." 24 V.S.A. § 4303 (3).
3 A town with a population of less than 2,500 persons, or a town having between 2,500 and 5,000 which has voted by Australian ballot to be considered a rural town.

VLCT News, July 2004

COLLABORATIVE EDUCATION EFFORTS

Act 115 contained an appropriation to the *Land Use Education Collaborative* to "provide outreach and training for municipal officials on municipal land use planning and regulation." The Collaborative is comprised of organizations that are involved with municipal land use planning and education such as the Regional Planning Commissions (RPCs), VLCT, UVM Extension, Secretary of State's Office, and many others, and is facilitated by the Department of Housing and Community Affairs.

The Collaborative has developed a three-phase education plan, with phases one and two devoted largely towards outreach and education surrounding Act 115. Phase 1 will be completed by September 1, 2004 and will include two main products: up to 10 **bulletins**, which will provide a plain English guide for implementing Act 115; and a **Model Administration and Enforcement Bylaw**, which towns can use to incorporate all of the process changes into their local bylaws.

During Phase 2, between September 1 and December 30, 2004, every town that has adopted zoning will receive one or more visits from RPC staff who will provide technical assistance for implementing the new law. RPC staff will rely on the materials developed during Phase 1 to ensure a consistent message and efficient implementation statewide.

In addition, members of the Collaborative will deliver education sessions that focus on particular topics within Act 115 as well as an overview of all the changes. These sessions will be delivered via multiple venues, including the Vermont Interactive Television Planning and Zoning Series, UVM Extension's MOMS and TOEC sessions, and onsite workshops delivered in your municipal offices. More information on the Collaborative and copies of material will be distributed at www.vpic.info as it becomes available.

For more information on filing notices of appeal to the Environmental Court, please contact Jackie Stevens, Environmental Court Manager, tel., 802/479-4486.