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11. Writing Standards for Development Review

Overview

There are several options for communities to regulate land use and development to maintain large blocks of forest and protect wildlife habitat. Regardless of the regulatory option used – many of which are described in the following chapters – it is important to clearly communicate *how* a development review board or zoning board of adjustment evaluates a community’s natural resources during development review. This is typically done with *development review standards*: requirements, found in a zoning bylaw or subdivision regulation, which a proposed development must meet. Whether a proposal is reviewed by a zoning administrator, a planning commission, development review board, or a zoning board of adjustment, standards serve as a kind of checklist to determine if a development proposal is compatible with the community’s goals.

Types of Standards and Statutory Authority

Vermont’s land use statute enables municipalities to develop zoning bylaws (24 V.S.A. §4411). Within these bylaws, various types of standards can be incorporated in different places and each type addresses natural resources in a different way. For instance:

- **General standards** are those that apply to most or all development, regardless of the zoning district. Since all development proposals must meet the general standards, addressing natural resources in the general standards ensures that a basic level of natural resource protection is met.
- **District standards** differ by zoning district. For example, a forest district that includes lands that are higher than 1,500 feet above sea level might have a different standard than a rural residential district for reviewing forest resources.
- **Use standards** apply to particular uses (for example, seasonal camps, ski areas, or gravel pits) regardless of the zoning district where they occur. Use standards recognize that different uses have potential impacts on natural resources.

Standards are also used in various review processes:

- **Site plan review standards** (24 V.S.A. §4416)

apply to site layout and design associated with the development of a particular property. Typically, site plan review looks at building sites, site circulation, access, parking, screening, and landscaping. Site plan review can also include standards to preserve or protect important elements or features identified on the site – including significant natural resources such as rare forest communities, wetlands or endangered species. It’s important to note, however, that site plan review does not apply to single or two-family homes, as specified in statute, and is therefore probably not the best option for conserving large tracts of land.

- **Conditional use standards** evaluate certain uses for which it has been determined that an additional level of review is necessary to identify and avoid or mitigate the impacts of development. If communities choose to label certain uses as “conditional,” then state law (24 V.S.A. §4414(3)(A)) lists certain *general conditional use standards* that must be included in any conditional use review process (for example, to address impacts on local roads, community facilities and services, and neighboring properties). Though these general conditional use standards do not address natural resources, state law (24 V.S.A. §4414(3)(B)) also gives communities the option to include *specific conditional use standards*, including “any other standards or factors that the bylaws may include.” Specific standards often address impacts to natural resources – especially if



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applied to allowed uses within resource conservation districts.

- **Subdivision standards** are a required part of any subdivision bylaw. State statute (24 V.S.A. §4418(1)) specifies that these must include “standards for the protection of natural resources...as appropriate in the municipality” in association with the creation of new lots. Other required subdivision standards govern the layout of streets and utilities, guide the design and configuration of parcel boundaries, and ensure that the layout of lots and supporting infrastructure implements the desired settlement pattern as detailed in the municipal plan. Statute specifies that communities may include supplemental standards as well, and that these can be used for natural resource protection (24 V.S.A. §4418(2)). Since the subdivision of land typically precedes its sale and development, resource or open space protection standards applied at this stage of review are particularly important.
- **Planned Unit Development (PUD)** (24 V.S.A. §4417) allows communities to be flexible in the application of land development regulations under subdivision or conditional use review – subject to additional PUD standards, as required by statute – including, but not limited to open space standards. Standards that require the clustering of development and guide the layout of roads and utilities, the location of structures, and the location and use of open space can all help protect large forest blocks and wildlife resources.

When it comes to the types of standards communities may choose to develop, Vermont’s enabling statute goes one step further. It authorizes towns to adopt one or more of the review criteria from 10 V.S.A. §6086 (the ten criteria used in Act 250 review) under conditional use review (24 V.S.A. §4414(3)(C)) and subdivision review (24 V.S.A. §4418(2)(D)). Act 250 criteria are more commonly addressed in communities that have adopted “local Act 250 review” of municipal impacts (24 V.S.A. §4420), which gives local decisions additional weight under some criteria in related Act 250 proceedings. The advantage of adopting Act 250 criteria is that the standards are comprehensive and familiar to many developers. The potential downside is that the criteria may be difficult for many applicants and local boards to interpret without the help of experts.

The Importance of Developing Clear Standards

It is important that resource protection provisions or standards in local bylaws (and plans that are intended for use in Act 250 or other regulatory proceedings) are very clear and consistently applied to withstand legal challenge. Just as

importantly, clear standards help the applicant and municipal review boards to interpret the regulations. A regulation must:

- **Clearly identify and define the resources to be addressed** so that the review panel, the applicants, and other participants know what resources are to be identified, evaluated and conserved. Note that a map alone may not be enough; resource maps should be accompanied by clear bylaw definitions or standards that more specifically describe the type and characteristic of the resources to be addressed. See *Chapter 18, Writing Clear Definitions* for more information.
- **Include specific standards in clear, unqualified language** especially with regard to avoiding or mitigating the impacts of land subdivision or development on those resources identified for protection.
- **Identify priorities.** If you are trying to achieve “balance” between development and resource protection, it’s important to clarify how competing objectives should be prioritized and addressed.

Guidance from Vermont’s courts suggest that, to survive a legal challenge, standards must:

- Sufficiently guide municipal decisions;
- Give sufficient notice and information to applicants and property owners affected by the regulation;
- Be sufficiently clear to guide the conduct of an average person, using common sense and understanding;
- Spell out the desired level of protection in the regulations, for example requiring that the impacts of development be completely avoided, or allowing for mitigation through the use of best management practices.

JAM Golf and the Importance of Being Specific

Clear standards – especially for natural resources – are more important than ever because of a 2008 Vermont Supreme Court Decision (In re: Appeal of JAM Golf, LLC, 2008 VT 110). In this decision, the court struck down portions of a South Burlington zoning bylaw that required “protection” of “important natural resources including streams, wetlands, scenic views, wildlife habitats and special features such as mature maple groves or unique geologic features.” These sections of the bylaw were ruled unenforceable because they lacked standards for what constituted “protection,” and did not specify the conditions under which such protection would apply. The take-home lesson of the JAM Golf decision is that if standards for protecting habitat and natural areas are to be legally defensible, they have to be clear, specific and consistent.

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In addition, wherever possible, standards should provide guidance about how the standard can be achieved (e.g., through clustering, buffers, adherence to an approved forest management plan). Otherwise, the reviewing body can be given too much discretion (referred to by one court as “unbridled discretion”) causing problems for both the applicant and the reviewers and, in the event of a legal challenge, the municipality.

Without an adequate level of detail, a bylaw can be deemed too vague to enforce, as the JAM Golf court case demonstrated (see sidebar on previous page). In fact, a follow up case (In re: Highlands Development Co., LLC) delineated what the failure to protect looks like.¹ That decision said that “even if the resource or feature under consideration is clear – for example, a clearly mapped stream or wetland – a [regulation] is unconstitutionally vague if it provides no standards.”

(For more on applying Development Review Standards, see the Vermont Planning Information Center Topic Paper 19-3, “Open Space & Resource Protection Regulations,” available at <http://vpic.info/ImplementationManual.html>)

Implementation

Municipal Plan

Incorporate clearly stated resource protection policies and objectives in the municipal plan. The municipal plan describes what a community wishes to achieve and establishes the framework for plan implementation, including the adoption and update of local land use regulations. Local bylaws and associated resource protection standards must conform to and have the purpose of implementing the municipal plan. A clear description and discussion of natural resources in the plan and specific policies or objectives for their protection or conservation is key to developing and

implementing good bylaw standards.

If a bylaw is contested in court as too vague, a well-written town plan may provide needed clarification and guidance. Consistent and clearly stated municipal plan policies and objectives, in addition to providing guidance for the development of review standards, can also be referenced in Act 250 and other local and state development review proceedings. (See *Chapters 12-14, Conservation Zoning Districts, Forest Zoning Districts, and Overlay Districts.*)

Writing Standards²

Ensure that each zoning district has a clear purpose statement. In a zoning bylaw, each description of a zoning district should begin with a purpose statement. A well-written purpose statement describes the goals of each district. If there is a lack of clarity in other parts of the zoning bylaw, a purpose statement can help users of the bylaw (and if necessary, the courts) interpret the standards of the section. For example, if a community wants to protect large forest blocks, the purpose statement can say that the district’s purpose is to “ensure that large blocks of forestland (parcels over 50 acres) are maintained so that they can continue to provide economic, ecological, and wildlife habitat benefits.”

In addition to having a purpose statement for each zoning district, there should be a purpose statement for the entire zoning bylaw, and for sections pertaining specifically to resource protection. Most subdivision regulations also open with a purpose statement or a list of objectives that the subdivision regulation seeks to achieve. (See *Examples of Development Review Standards.*)

Develop specific guidance and standards, using text and illustrations. Bylaws should be written with numerical (quantitative) guidelines if at all possible. For example, “slopes greater than 20%” is better than “steep slopes.” “Lots larger than 25 acres” is preferable to “large lots.” When the standard allows for some flexibility (like “mitigation” rather than just outright “prohibition”), it is important to be clear about what types of actions can be taken to achieve the standard. Guidance on siting can also include illustrations.

Bylaw provisions should provide clear guidance on how to avoid or mitigate impacts. This can be accomplished with your choice of language. For instance, “mays” allow for some flexibility on the part of the applicant and review panel, but may not be enforceable unless agreed to and incorporated under conditions of approval, whereas specific requirements or “shalls” must be met for board approval. This is illustrated by an example from the Town of Bolton’s 2005 Land Use and Development Regulations:

“(D) **Natural Areas & Wildlife Habitat.** Subdivision boundaries, lot lines and layout, and building envelopes shall be located and configured to avoid the fragmentation of and adverse impacts to natural areas and critical wildlife habitat



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identified in the town plan, by the Vermont Department of Fish & Wildlife, or through site investigation. Methods for avoiding such adverse impacts include but may not be limited to the following:

- (1) Building envelopes shall be located to exclude identified natural and critical wildlife habitat areas, including but not limited to wildlife travel corridors, deer wintering areas, critical bear habitat areas, peregrine falcon nesting sites, and rare, endangered or threatened natural communities.
- (2) A buffer area of adequate size, as determined in consultation with the Conservation Commission, state officials or other qualified consultants, shall be established as needed to protect critical wildlife habitat areas and natural communities.
- (3) Roads, driveways and utilities shall be designed to avoid the fragmentation of identified natural areas and wildlife habitat.
- (4) The Board may require the submission of a management plan, prepared by a wildlife biologist or comparable professional, to identify the function and relative value of impacted habitat, and associated management strategies.
- (5) Identified natural areas, critical wildlife habitat and associated buffer areas should be included as designated as open space, in accordance with Section 7.4 [Open Space and Common Land].”³

Define all terms in the purpose statement and the body of the text. Bylaws should include clear definitions (e.g., in the “definitions” section) that explain terms to reduce vagueness and avoid confusion. Though certain terms may seem straightforward, it is important not to assume that terms are common knowledge. For example, “wildlife habitat” and “steep slopes” are two examples of terms often found in zoning bylaws without definitions. (See *Chapter 18, Writing Clear Definitions* for more on this topic.) It is equally important to define how resources should be protected, or the techniques used to do so (i.e., building envelope, management plan, vegetated buffer).

Use plain language. When courts read bylaw language, they read them “according to their plain and ordinary meaning,” which is another reason to use language that is clear and well-defined.⁴ Two ways to make the language as plain as possible include:

- (1) Using the active voice:
Example: active voice (good): “The applicant shall submit a map that shows all natural resources present on the parcel.” This specifies who will take the action – the applicant.
Example: passive voice (avoid): “A map showing all natural resources present on the parcel shall be submitted.” This is vague because it does not say who is responsible for submitting the map.

(2) Using “proscriptive” language that tells the applicant and review board what must happen, rather than what could happen. The following table summarizes examples of clear and ambiguous language:

Clear	Ambiguous
Shall Must Maximize Minimize The applicant will... The development review board must find...	Should May “Considerations” Where appropriate Where feasible Where reasonable The development review board may require...

Things to consider:

Do not cut and paste standards from another community. Another community may have on-the-ground conditions that mean their standards make sense in their context, but not in yours. You can use another community’s standards as a guide, but look carefully at what makes sense in your community, consulting with your regional planning commission, the Vermont Fish and Wildlife Department, the Vermont Department of Forests, Parks, and Recreation, a biologist, or other resource.

Think about writing standards in terms of usability for both the applicant and the review board. Standards are not simply rules; they are tools for advancing the goals of a community. Make them easy to use and understand by including clear, plain language, illustrations, and measurable standards. This will ease the process for both the applicant and the reviewing body.

Including clear, proscriptive language can be challenging as local boards seek to balance flexibility and clarity. Including “shalls” and “musts” in bylaw language (and the municipal plan) can be a challenge for planning commissions and selectboards. There is often an understandable desire

More Information

The Land Use Planning and Implementation Manual, Development Review Training Modules: Interpreting and Applying Development Standards, along with other modules on development review, provide information to help review boards make fair and consistent decisions in the development review process. www.vpic.info/Publications/Reports/DevelopmentReviewModules/Interpreting.pdf



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to avoid placing requirements, which may seem harsh or inflexible, on one's neighbors. Often, community members will feel that a word like "should" adequately reflects local desires (for example, "Development of homes on ridgelines should be avoided"). However, from an applicant's perspective, and from the perspective of the courts, this kind of language is not decisive. It may leave room for land uses that undermine the community's goals, and it gives the local reviewing body insufficient guidance for fairly and equitably reviewing development proposals. For these reasons, when creating or updating regulations, it is essential for the community to understand what different language choices will – and will not – achieve.

Craft language carefully to strike a balance between legally defensible, yet flexible, standards. One of the biggest challenges that municipalities face is drafting standards that fit a variety of situations (i.e., are flexible and fair) yet contain the kind of detail described above — especially because courts have criticized and thrown out bylaw standards that give review boards "unbridled discretion." If the town intends to provide flexibility, the bylaw must also provide specific guidance so that the applicant and the board can follow and apply the standards. This helps to ensure that the bylaw will not be interpreted as giving the board unbridled discretion.



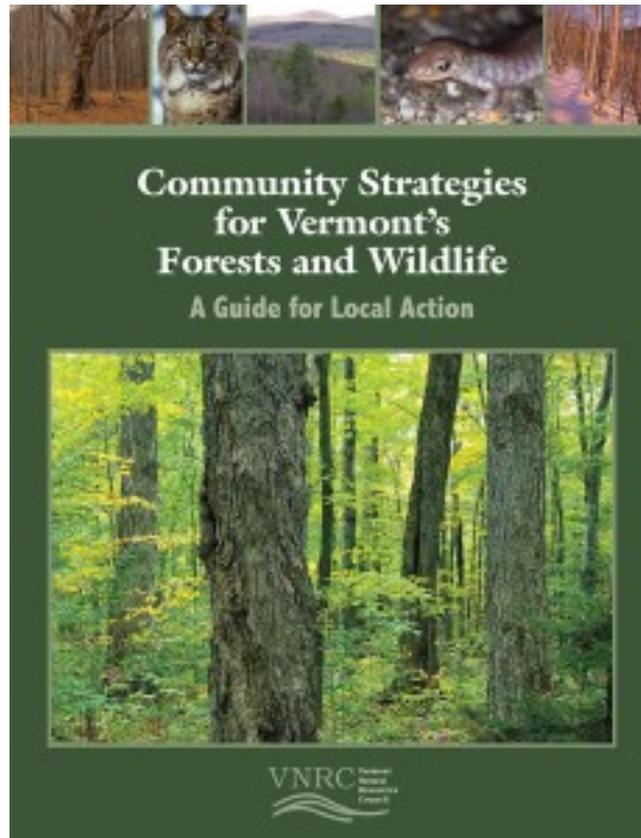
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Remember that certain uses are exempt from municipal regulation. As you craft standards for different districts and uses, keep in mind that silvicultural practices cannot be regulated by local bylaws (see 24 V.S.A. §4413 for a full list of exempt activities). Clearing of land for purposes other than forestry and silviculture can be regulated. This can be done by creating standards that require maintaining a certain percentage of forest/vegetation cover, defining building envelopes, and requiring limits on road lengths.



This chapter is part of a larger publication called ***Community Strategies for Vermont's Forests and Wildlife: A Guide for Local Action***. You can download the entire publication or individual chapters (including the endnotes, resources, and credits page) for FREE at:

www.vnrc.org/programs/forests-wildlife/guide/



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