



Conformance with the Municipal Plan

Background - the Consistency Doctrine

Under state statutes, municipal bylaws, including zoning and subdivision regulations, have long been one tool to implement the municipal plan. The plan provides the basis in public policy for enacting local land use regulations, therefore regulations should be consistent with the municipal plan. This is often referred to as the "consistency doctrine." As originally enacted, Chapter 117 provided that:

Any municipality which has adopted and has in effect a plan...may implement the plan by adopting, amending and enforcing any or all of the bylaws or the capital budget and program provided

What is the Consistency Doctrine?

The relationship of a bylaw, and individual development review decisions, to a local plan has been the subject of much analysis, debate and case law nationwide. Under the "consistency doctrine" actions must be directly linked to stated intentions - as such, the plan is intended to serve as more than a rhetorical document by describing those public policies that a local government intends to implement, through its regulations, review processes, and other actions.

Some states have enacted explicit consistency requirements that mandate bylaw amendments following plan adoption or amendment. This type of mandate was rejected for use in Vermont.

for in this chapter. All such bylaws and the capital budget and program shall have the purpose of implementing the plan, and shall be in accord with the policies set forth therein. [former §4401]

In practice, local zoning and subdivision regulations are often inconsistent with - and at times may directly contradict - plan policies and recommendations. For example, a plan may include recommendations for more affordable housing or higher densities of development in certain areas of town, but these recommendations are not reflected in zoning district designations or related zoning requirements. Inconsistencies between local plans and bylaws are often most apparent in Act 250 proceedings. Under Act 250 criteria, proposed development must be consistent with the municipal plan, but at the local level, the same project must meet local subdivision and zoning requirements which may differ markedly from plan policies.

When faced with such inconsistencies, the Vermont Supreme Court interpreted this former Chapter 117 language to mean that bylaws must reflect the municipal plan, but need not be "controlled" by it and that only plan policies specifically incorporated in a bylaw were legally enforceable. The court also determined that if plan policies were not stated clearly enough to be applied in Act 250, district commissions could refer instead to local land use regulations - as intended to implement the plan - to determine project conformance. (*Kalakowski v. John A. Russell Corp.*, 137

Conformance with the Plan

Definition [§4303(6)]

"Conformance with the Plan" means that a plan implementation tool, including a bylaw or bylaw amendment, is in accord with the municipal plan in effect at the time of adoption, if it:

- (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.

Vt. 219, 225 (1979) and *In re Molgano*, 163 Vt.25, 30 (1994).)

The fact that many plan recommendations have not been implemented through local bylaws was identified by the Vermont Legislature as a major impediment to sound growth management, and to certain types of development - in particular affordable housing development (see also Bulletin #6 Equal Treatment of Housing). As a result, recent changes to Chapter 117 under Act 115 were specifically intended to strengthen the long-standing statutory relationship between municipal plans and bylaws - and other methods of implementing the plan - while maintaining the status of the plan as a policy, rather than regulatory, document.

Bylaw Adoption

The reasons for inconsistencies between plans and bylaws are many. Beyond the difficulties inherent in enacting controversial land use regulations, inconsistencies also may arise from differences in the statutory requirements for adopting and amending plans and bylaws. Plans must be updated and readopted every five years or they expire. Bylaws, once adopted, remain in effect until amended or repealed. As a result bylaws often predate the current municipal plan, in some instances by years or even decades.

Prior to Act 115, the statutory adoption process for bylaws was more lengthy and difficult than for plans, especially in "rural" towns. Plans are typically, though not always, adopted by the Legislative Body. Bylaws, until recently, had to be adopted by Australian ballot in rural towns and, by petition, could be subject to adoption by an "extraordinary" (two-thirds majority) vote, making it sometimes difficult to get even minor amendments passed.

The extraordinary voting provision, originally intended to protect the minority rights of property owners, was deemed inherently undemocratic and repealed in 2001. Subsequent Act 115 amendments provided that rural towns adopt and amend bylaws by a majority vote of the Selectboard, rather than by Australian ballot, making it easier to regularly amend bylaws to conform with updated plans. Rural towns, however, retain the option under Chapter 117 to adopt bylaws by Australian ballot. ("Rural" towns, as defined in Chapter 117, include towns having a U.S. Census population of less than 2,500 persons, or a town having less than 5,000 persons that has voted by Australian ballot to be considered a rural town. See *Bulletin #4 Bylaw Preparation & Adoption*).

Addressing "Conformance with the Plan"

Any municipality that has adopted and has in effect a plan and has created a planning commission under this chapter may implement that plan by adopting, amending and enforcing any or all of the regulatory and nonregulatory tools provided for in this chapter. All such regulatory and nonregulatory tools shall be in conformance with the plan, shall be adopted for the purposes set forth in section 4302 of this title, and shall be in accord with the policies set forth therein. [§4401]

Under Act 115, a number of other provisions were incorporated throughout Chapter 117 to address conformance with the municipal plan.

Now all implementation tools, not just bylaws and capital improvement programs, must conform with the municipal plan [§4401]. As defined in statute, these include local land use regulations, official maps, impact fee ordinances, capital improvement programs, tax increment financing districts, tax stabilization contracts, the local purchase or acceptance of development rights, supporting plans, and the creation of advisory commissions. For some implementation measures - including the adoption of flood hazard bylaws

Miscellaneous Conformity Requirements

It is now specified in Chapter 117 that certain development review procedures, and related decisions, must conform with the municipal plan. For example:

- No bylaw shall have the effect of excluding housing that meets the needs of the population as determined in the housing element of the municipal plan [§4412(1)(A)].
- The "character of the area affected" under conditional use review must now be defined by the purpose or purposes of the zoning district within which a project is located, and specifically stated policies and standards of the municipal plan [§4414(3)(A)(ii)].
- Standards of review under zoning and subdivision regulations regarding access to renewable energy structures must be established in conformance with provisions of the energy element of the municipal plan [§4414(6)].
- Inclusionary zoning requirements must be in conformance with specific policies of the housing element of the municipal plan [§4414(7)(A)].
- Specific bylaw standards for granting "waivers" must be in conformance with plan goals and policies [§4414(8)(A)].
- Bylaws should provide for planned unit developments to permit flexibility in the application of land development regulations in conformance with the municipal plan [§4417(a)]. In addition, the approval of a proposed planned unit development shall be based on findings that it is in conformance with the municipal plan [§4417(f)].
- Subdivision bylaws must include standards for the design and layout of streets and other necessary improvements, [§4418(1)(B)], as well as standards for the design and configuration of parcel boundaries and the location of improvements necessary to implement the municipal plan and achieve desired settlement patterns [§4418(1)(C)].
- Under local Act 250 review, a Development Review Board is required to determine an Act 250 project's conformance with the municipal plan (in relation to plan conformance requirements under Act 250) [§4420].
- Freestanding bylaws for flood hazard, shoreland, and other "hazard areas" must now be in conformance with the municipal plan. [§4424]. "Hazard area" is defined as "land subject to landslides, soil erosion, earthquakes, water supply contamination or other natural or human-made hazards as identified within a "local mitigation plan" pursuant to federal requirements under 44 CFR Section 201.6 [§4303(8)(C)].

or many of the non-regulatory tools - this represents a major change.

"Conformance with the Plan" is now specifically defined in statute.

This definition in effect serves as a test to help determine if a program, bylaw, or decision based on the bylaw, is in conformance with the plan.

The Planning Commission must determine whether a proposed bylaw or bylaw amendment is in conformance with the municipal plan, as documented in a written report. It is now the responsibility of the Planning Commission to determine whether a proposed bylaw or amendment conforms to the municipal plan [§4441(c)]. Prior to holding a warned public hearing, the Commission is required to prepare a report for public warning and review that states how a proposed bylaw or amendment (in relation to the statutory definition):

- (1) Conforms with or furthers the goals and policies contained in the municipal plan, including the effect of the proposal on the availability of safe and affordable housing.
- (2) Is compatible with the proposed future land uses and densities of the municipal plan.
- (3) Carries out, as applicable, any specific proposals for any planned community facilities.

Guidance on report preparation, including a reporting form, is available from the Vermont Department of Housing & Community Affairs.

Plan Considerations

In the revised Chapter 117, the requirement that bylaws and other plan implementation measures clearly conform to the municipal plan has been identified as one of the constant themes, and greater challenges facing communities. Municipalities, and planning commissions in particular, must now make sure that the plan provides sufficient basis and justifica-

tion for the adoption, amendment and application of bylaws. This may mean strengthening plan policy language, developing more deliberate and detailed land use district designations, more clearly defining housing and infrastructure needs, and identifying specific types of implementation techniques to be considered for local adoption.

Strengthening the plan as a policy document, without turning it into regulatory document, presents a real challenge. Plans are intended to represent the long-term vision for the community, as expressed in broadly stated community goals or vision statements; but they must also, as policy documents, outline specific objectives and strategies for meeting these goals.

These are not new planning requirements under Chapter 117 - but more detailed attention to certain plan elements, and more specificity, may be in order. The degree of analysis required, and the acceptable degree of specificity, will necessarily vary among communities in relation to local conditions, local concerns and available resources.

As a result of Chapter 117 bylaw amendments, the development of a municipal plan will likely be more time consuming. However, in the end, clear plan policies should make bylaw development more straight forward, if not easier, and also better support the use of the plan in local development review and Act 250 proceedings.

Sometimes it may be necessary to amend the municipal plan to support a proposed bylaw amendment. Plan and bylaw amendment processes can occur concurrently, as long as the adoption procedures for each are met. A "multipurpose hearing" - a public hearing to be held for more than one purpose - is now specifically allowed under Chapter 117 for these types of situations [§4442(e)].

How Specific is *Specific*?

Under Criterion 10 of Act 250 - project conformance with a municipal plan - a determination must be made whether municipal plan provisions at issue are "specific" or "ambiguous." If provisions are ambiguous, the zoning bylaw may be examined to resolve the ambiguity - since zoning bylaws "are more than strong indications of legislative intent in determining the meaning of an ambiguous town plan; they are the specific implementation of a plan" [*In re Molgano*, 163 Vt. 25, 30 (1994)].

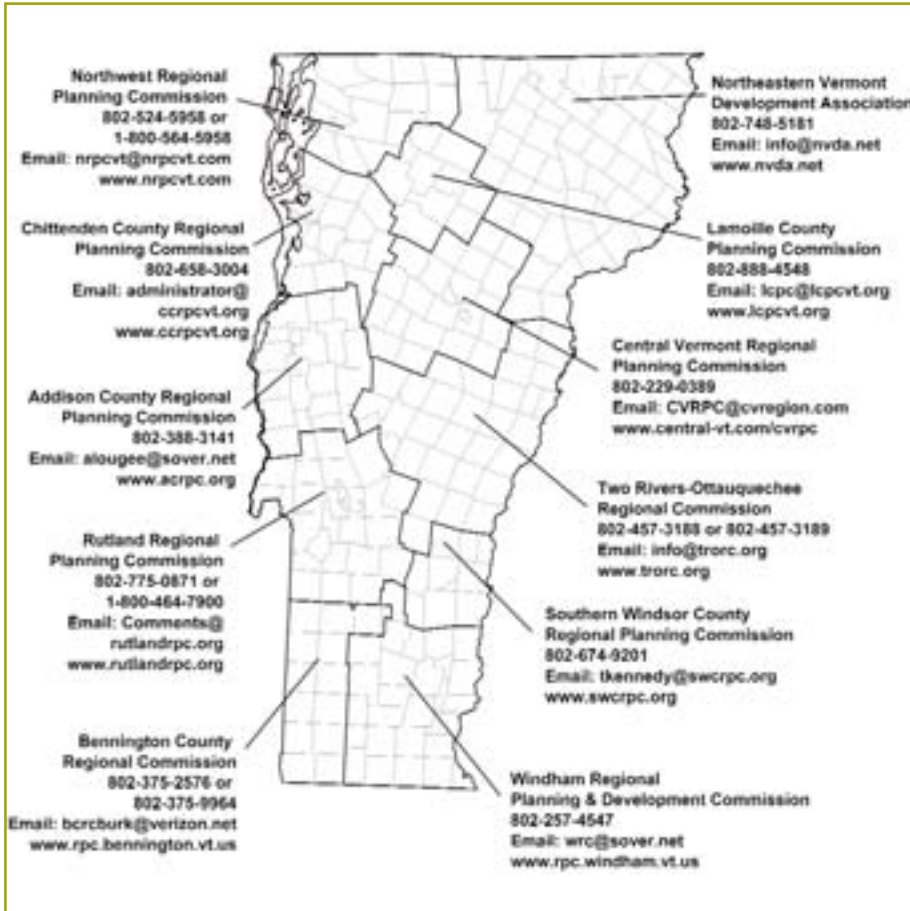
For purposes of Act 250, a municipal plan provision plainly shows a specific policy provision if it:

- pertains to the area or district in which the project is located;
- is intended to guide or proscribe conduct or land use within the area or district in which the project is located; and
- is sufficiently clear to guide the conduct of an average person, using common sense and understanding.

Moreover:

- A plan is not ambiguous where a town's prior actions with respect to a project - which represent the local community's interpretation and response to the plan's broad language - are clear.
- The use of the word "should" in a plan is not, by itself, an indication of ambiguity.

**Contact information:
Regional Planning Commissions**



**VERMONT LAND USE
Education & Training Collaborative**

Chapter 117 Bulletins

The following ten bulletins were published in November 2004 to provide information about the changes to 24 V.S.A. Chapter 117, the state statute governing local planning and regulation, enacted in 2004. These all are available through www.vpic.info and from the Education and Training Collaborative partners listed below.

1. **Chapter 117 Overview** (legislative intent and effective dates)
2. **Conformance with the Municipal Plan**
3. **Permissible Regulations**
4. **Bylaw Preparation & Adoption**
5. **Required Provisions & Limitations**
6. **Equal Treatment of Housing**
7. **Zoning Permits**
8. **Development Review Procedures**
9. **Appeals**
10. **Appropriate Municipal Panels**

Vermont Land Use Education and Training Collaborative

Working Together to Provide Improved Learning Opportunities for Vermont's Local Boards and Commissions

Questions about this bulletin and other chapter 117 materials produced by the Collaborative may be directed to the following members of the Vermont Land Use Education and Training Collaborative Steering Committee. For links to websites go to "About Us" at www.vpic.info.

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Vermont Association of Planning and Development Agencies (VAPDA)
Contact your Regional Planning Commission

Vermont League of Cities and Towns (VLCT)
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