



# ▶ SUSTAINING AGRICULTURE

## State Regulations



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The Agriculture Land Use Planning Task Force of the Farm to Plate Network has developed a series of planning guidance modules that build off the work of **Sustaining Agriculture**, an agriculture planning guide from the 1990s developed by the Agency of Agriculture.

1. Agriculture and Food Systems Planning
2. Agricultural Land Conservation
3. Farmland and Property Taxes
4. Local Regulatory Context
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# STATE REGULATIONS: PROTECTING AGRICULTURAL SOILS IN VERMONT THROUGH RIGHT TO FARM AND ACT 250

State laws in Vermont have evolved to protect agricultural soil with a few gaps in consistency over the years. It is important to note when discussing state regulations (e.g., Vermont’s Right to Farm Law and Act 250) that municipal and regional plans can act as a bridge and fill the gap to better protect primary agricultural soils and the future of farming in the state. These municipal and regional plans can set specific directives to protect primary agricultural soil and define tolerances for farming in local ordinances to overcome limitations of Act 250 review and the Right to Farm law. Please see Part 1, Agriculture and Food System Planning, for more ideas on planning.

## I. Vermont’s Right to Farm Law

As land next to farms transforms into residential subdivisions, it can make farming operations more difficult. People are attracted to the pastoral landscape, but farming can involve a lot of noise, odor, dust, and long hours of operation, which neighbors can experience as a nuisance. Some newcomers complain to the farmer and/or public officials or even file lawsuits to try to eliminate agricultural activities they find offensive.

Responding to complaints isn’t just discouraging for farmers. It can lead to lost time, expense, and new restrictions—to the point where the farmer is forced to give up farming. In 1981, Vermont passed the **Right to Farm Law** (see 12 V.S.A. § 5751-3) to provide farmers with some protection from nuisance lawsuits as long as “acceptable agricultural practices” are being followed. Due to a number of shortcomings discovered via court decisions under that law, it was updated in 2004. Before the changes, the law was considered fairly weak for protecting farmers,<sup>1</sup> and the revisions seem to have further weakened the law for farmers.

The 2004 revisions clarified the legislative findings and purpose section to “protect reasonable agricultural activities conducted on the farm from nuisance lawsuits.”<sup>2</sup> It also inserted language in the purpose statement that addressed changes in agricultural operations over time, adding the phrase “initiation of new agricultural activities” and noting that “farms will likely change, adopt new technologies, and diversify into new products, which for some farms will mean increasing in size.”

Definitions of Accepted Agricultural Practices (AAPs) were expanded. An agricultural activity had to meet the following conditions for it not to be considered a nuisance:

<sup>1</sup> Brighton and Northrup, *Sustaining Agriculture: A Handbook for Local Action*, 58.

<sup>2</sup> 12 V.S.A § 5751

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(A) is conducted in conformity with federal, state, and local laws and regulations;

(B) it is consistent with good agricultural practices;

(C) it is established prior to surrounding nonagricultural activities; and

(D) it has not significantly changed since the commencement of the prior surrounding nonagricultural activity.<sup>3</sup>

In another section of law, the generally accepted practices provision, 10 V.S.A. § 1259 (f), vested authority in the secretary of the Vermont Agency of Agriculture, Food, and Markets to define AAPs after conducting a public hearing.<sup>4</sup>

In the next provision under this section of the revised Right to Farm Law, the amendment notes that:

(2) *The presumption that the agricultural activity does not constitute a nuisance may be rebutted by a showing that the activity has a substantial adverse effect on health, safety, or welfare, or has a noxious and significant interference with the use and enjoyment of the neighboring property.*<sup>5</sup>

This amendment actually increases opportunities for residential landowners to rebut the presumption of reasonableness. Under the 1981 version of the law, landowners had to prove that a contested agricultural activity substantially threatened the public health and safety, but the revised statute has expanded beyond public harm to “noxious and significant interference with the use and enjoyment of the neighboring property”—or private harm.<sup>6</sup>

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<sup>3</sup> 12 V.S.A. § 5753

<sup>4</sup> Chrostek, “A Critique of Vermont’s Right -to-Farm Law and Proposals for Better Protecting the State’s Agricultural Future,” *Vermont Law Review*, 247.

<sup>5</sup> 12 V.S.A. § 5753

<sup>6</sup> Chrostek, “A Critique of Vermont’s Right-to-Farm Law,” 248.

The revisions have created a quandary by clearly acknowledging in the purpose statement that farming operations change over time, but then stating in provisions added in subsequent sections that, for a farming activity to not be considered a nuisance, it must predate the arrival of a neighbor, who is lodging a complaint, and the activity must not have significantly changed since the arrival of the new neighbor.

Vermont’s Right to Farm Law was considered weak for protecting farm operations before the 2004 amendments. Those revisions have further weakened the law by introducing more opportunities for dispute. On the other hand, the exemption of farm structures and use from municipal zoning regulation indicates a strengthening of support for agricultural use.

The authors of ***Sustaining Agriculture: A Handbook for Local Action*** suggested that, until the state enacts a stronger state law to protect farming as a land use, towns could adopt a local ordinance that offers additional right-to-farm protection. Such a local ordinance could incorporate protective provisions that:

- 🔥 require buffers on residential development and/or make all uses other than agriculture conditional uses in locally designated agricultural districts;
- 🔥 recommend dispute resolution or mediation, or create a local dispute resolution committee, to hear both sides and recommend a solution fair to both saving the cost of representation by attorneys in court proceedings;
- 🔥 include a notice provision attached to all real estate exchanges in the agricultural district, that new owners must be able to tolerate the sights, sounds, odors and other activities that can be expected from an agricultural operation.

## Court Cases

**Coty v. Ramsey Associates:** This is the famous Stowe pig farm case, where the defendant intentionally established a hog farm to retaliate against a neighbor who had defeated his application to construct a hotel on his property on Route 100. The Vermont Supreme Court noted that the defendant’s actions were premised on malice or spite, and that this was outside the scope of Vermont’s Right to Farm Law. The agricultural operation was found by the courts to be an actionable nuisance, and the “farmer” was found to be ineligible for protection.<sup>7</sup>

**Trickett v. Ochs:** This case may have sparked the 2004 amendments to Vermont’s Right to Farm Law. An orchard divided Peter and Carla Ochs’s land into two parcels; they maintained an agricultural operation on one parcel and sold the other parcel, which had an existing residence on it, to George and Carole Trickett. The Ochs kept the orchard and expanded the operation to meet market conditions, which included storing apples on site in refrigerated tractor trailer trucks. The Tricketts successfully sued the Ochs, with the Vermont Supreme Court agreeing with their complaint that the truck storage had not been in place when the residence next door was established. The residence had been in existence about as long as the orchard. The court further noted the right-to-farm statute couldn’t be applied because the state had not adopted AAP rules related to noise and truck exhaust.<sup>8</sup>

**John Larkin, Inc. v. Marceau:** In this case, the plaintiffs, instead of lodging a nuisance complaint, claimed that drifting pesticides from the neighboring farming operation trespassed on their property—and so avoided facing the right-to-farm defense. The courts rejected the plaintiffs’ claim, however, determining that trespass required a physical impact and that particles in the ambient air could not create such an impact.

<sup>7</sup> *Coty v. Ramsey Associates*, 149 Vt. 451, 546-48 A.2d 196-202 (1988).

<sup>8</sup> *Trickett v. Ochs*, 176 Vt. 89, 838 A.2d 66 2003 VT 91; Chrostek, “A Critique of Vermont’s Right-to-Farm Law,” 250.

**In re Eustance Act 250 Jurisdictional Opinion:** In this Act 250 case, the landowners, Robert and Lourdes Eustance appealed the opinion of the district coordinator to the Vermont Supreme Court. The Eustances purchased their property in a permitted residential subdivision in 1999 and then began an alpaca-breeding operation. They cleared land for pasture, constructed barns and other farm structures, added a pond, and acquired fifty-three alpacas and five llamas. The neighboring property owners complained of odor from the manure bins, the view of the bins from their house, and the excessive truck traffic.

While the neighboring property owners did not bring a nuisance claim against the Eustances, they sought a jurisdictional opinion from the district environmental commission that would require a permit amendment for the Eustances’ farming activities in violation of the original Act 250 permit that was issued when the property was subdivided for residential development in 1993. In response, the Eustances argued that their agricultural improvements were exempt because agriculture is not considered development under Act 250. While the coordinator agreed that agriculture is not development, it found that the changes were material and substantial and, thus, required a permit amendment. The coordinator also relied upon a condition of the Act 250 permit that required an amendment for any “sale [or] further construction” on that parcel. The Environmental Court and the Vermont Supreme Court affirmed.

In support of its decision, the Vermont Supreme Court references the Vermont Right to Farm Law in a footnote. The court reasons that because the legislature denied protection against nuisance suits to agricultural uses that commence after surrounding nonagricultural lands are established, it is reasonable to conclude that agricultural

<sup>9</sup> *John Larkin, Inc. v. Marceau*, 2008 VT 61, 184 Vt. 207, 959 A.2d 551 (2008); Chrostek, “A Critique of Vermont’s Right-to-Farm Law,” 250.

<sup>10</sup> *In re Eustance Act 250 Jurisdictional Opinion*, 2009 VT 16 n.11, 185 Vt. 447, 970 A.2d 1285;

activities that are commenced within a preexisting residential subdivision may be subject to Act 250 regulation to reduce or eliminate conflict.

## II. Criterion 9(B) of ACT 250: Protecting Agricultural Soils as a Natural Resource

### Overview

Despite its rural nature and strong farming culture—represented by the dairy industry, an increasing number of diversified and value-added producers, and the general growth of the localvore movement—Vermont is not immune to loss of its farmland. Between 1982 and 2007, the number of acres of agricultural land in Vermont decreased (i.e., was converted to another use) by 22 percent.<sup>11</sup> During the same time period, the amount of developed land in Vermont increased by 50 percent—nearly 2.5 times the rate of population growth.<sup>12,13</sup> More recently, the rate of land consumption has been even higher: between 2002 and 2007, land was developed at four times the rate of population growth, meaning that people are “consuming” more land per capita.

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<sup>11</sup> See U.S. Department of Agriculture, *Summary Report: 2007 National Resources Inventor*. In the survey, agricultural land was defined by the authors as the sum of “cropland” and “pastureland” as defined by the Natural Resources Inventory (NRI).

<sup>12</sup> See U.S. Department of Agriculture, *Summary Report: 2007 National Resources Inventory*. The NRI defines developed land as “a combination of land cover/ use categories, Large urban and built-up areas, Small built- up areas, and Rural transportation land.” An elaboration on developed land can be found on page 5 of the report.

<sup>13</sup> [Vermont Department of Health Population Data](#).

Not all of this development has taken place on farmland, but the trends highlight that there are many competing uses for Vermont’s lands. According to *Sustaining Agriculture: A Handbook for Local Action*, “Vermont’s Act 250 provides a review of certain major development projects against 10 criteria—some of which are related to agriculture.”<sup>14</sup>

This is a valuable process for local officials to understand as they work to help preserve agricultural land, support farms, and encourage agricultural enterprises. **This section describes how Act 250 relates to agriculture, and how communities can participate in the Act 250 process, particularly through Criterion 9(B): Primary Agricultural Soils.**

### What Are Primary Agricultural Soils?

**Act 250’s Criterion 9(B)** protects primary agricultural soils. Soils classified as primary represent the best farmland in Vermont. If lost to development, erosion, or nutrient depletion, it can be very difficult to return these soils to agricultural production, leading many to consider primary agricultural soils a nonrenewable resource.

Projects that have impacts on primary agricultural soils are evaluated under Criterion 9(B) and its four subcriteria in Title 10 V.S.A. § 6086 (a)(9)(B).

Some applicants have been denied Act 250 permits for failure to meet one or more of the four subcriteria of 9(B). Most applicants are able to meet the legal requirements through permit conditions. In general, the review process has three steps.

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<sup>14</sup> Brighton and Northrup, *Sustaining Agriculture: A Handbook for Local Action*. 67.

### Act 250's Criterion 9(B)

(B) Primary agricultural soils. A permit will be granted for the development or subdivision of primary agricultural soils only when it is demonstrated by the applicant that, in addition to all other applicable criteria, either, the subdivision or development will not result in any reduction in the agricultural potential of the primary agricultural soils; or:

(i) the development or subdivision will not significantly interfere with or jeopardize the continuation of agriculture or forestry on adjoining lands or reduce their agricultural or forestry potential; and

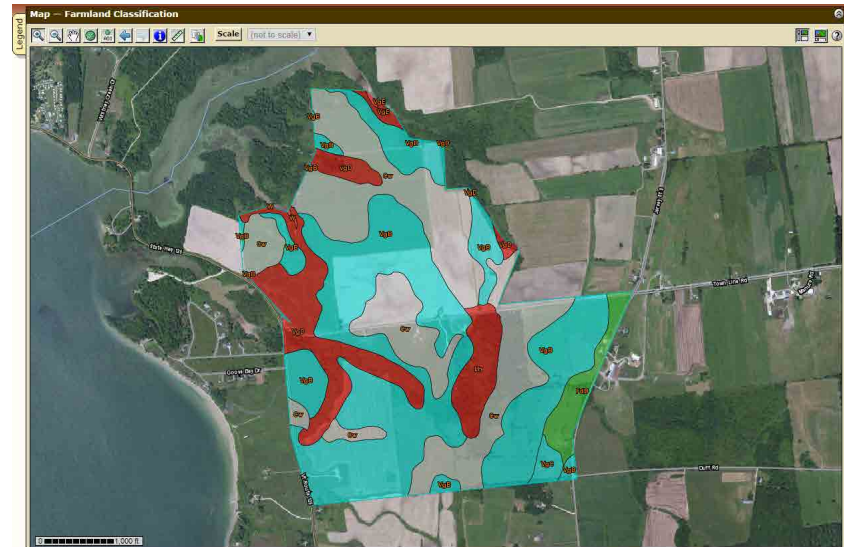
(ii) except in the case of an application for a project located in a designated growth center, there are no lands other than primary agricultural soils owned or controlled by the applicant which are reasonably suited to the purpose of the development or subdivision; and

(iii) except in the case of an application for a project located in a designated growth center, the subdivision or development has been planned to minimize the reduction of agricultural potential of the primary agricultural soils through innovative land use design resulting in compact development patterns, so that the remaining primary agricultural soils on the project tract are capable of supporting or contributing to an economic or commercial agricultural operation; and

(iv) suitable mitigation will be provided for any reduction in the agricultural potential of the primary agricultural soils caused by the development or subdivision, in accordance with section 6093 of this title and rules adopted by the land use panel.

### Step 1: Determine Whether Primary Agricultural Soils

**Are Located on the Parcel:** Applicants use Natural Resource Conservation Service maps, [available online](#), to provide information about the types of soils present and the acreage of each as a first step in determining whether primary agricultural soils are impacted.<sup>15</sup> If the maps confirm that there are no primary agricultural soils on the site, Criterion 9(B) is fulfilled.



*Web Soil Survey example.*

If mapped primary agricultural soils are present on the site, the applicant should contact the Agency of Agriculture, Food, and Markets' Act 250 specialist "early in the process so that the Agency's comments can be included" with the application.<sup>16</sup> The Agency provides a soil review letter that becomes part of the application for the district commission's consideration, and provides the Agency's

<sup>15</sup> Natural Resources Board, "District Commission Flow Chart: Analysis under Criterion 9(B) – Primary Agricultural Soils."

<sup>16</sup> See [http://agriculture.vermont.gov/protecting\\_lands\\_waters/land\\_use/act\\_250](http://agriculture.vermont.gov/protecting_lands_waters/land_use/act_250).

opinion on the presence of primary agricultural soils, direct and indirect impacts, and total mitigation required.<sup>17</sup>

The definition of primary agricultural soils in Act 250 was amended in 2014. The new definition is:

(15) “Primary agricultural soils” means each of the following:

(A) An important farmland soils map unit that the Natural Resources Conservation Service of the U.S. Department of Agriculture (NRCS) has identified and determined to have a rating of prime, statewide, or local importance, unless the District Commission determines that the soils within the unit have lost their agricultural potential. In determining that soils within an important farmland soils map unit have lost their agricultural potential, the Commission shall consider:

(i) impacts to the soils relevant to the agricultural potential of the soil from previously constructed improvements;

(ii) the presence on the soils of a Class I or Class II wetland under chapter 37 of this title;

(iii) the existence of topographic or physical barriers that reduce the accessibility of the rated soils so as to cause their isolation and that cannot reasonably be overcome; and

(iv) other factors relevant to the agricultural potential of the soils, on a site-specific basis, as found by the Commission after considering the recommendation, if any, of the Secretary of Agriculture, Food and Markets.

(B) Soils on the project tract that the District Commission finds to be of agricultural importance, due to their present or recent use for agricultural activities and that have not been identified by the NRCS as important farmland soil map units. 10 V.S.A. § 6001(15).

Under the new definition, soils mapped by NRCS with a rating of prime, statewide, or local importance are primary agricultural soils unless the Commission determines otherwise. Soils that are not mapped as such by NRCS may also be determined to be primary agricultural soils if they are being used or have recently been used for agricultural activities. The previous definition included several qualifying factors that led to litigation over issues that did not focus on protecting the resource.

### **Step 2: Evaluating the Proposed Project for Compliance**

**with Act 250’s Four Subcriteria:** Once the district commission determines that the proposal affects primary agricultural soils, it evaluates and determines compliance with the four subcriteria of Act 250 Criterion 9(B) (see criteria box above). These include whether the project will impact agriculture or forestry on adjoining parcels, whether there has been suitable mitigation, and, for projects outside designated growth centers, whether the project makes efficient use of land (is “clustered”) and whether the applicant owns or controls other land suitable for the project that would not impact primary agricultural soils. Any requirements for mitigation (subcriterion iv) depend on where the project is located and whether there are “appropriate circumstances” that affect the type of mitigation required—on or off site. Guidance from the Natural Resources Board (NRB) on making findings on “appropriate circumstances” can be found at [www.nrb.state.vt.us/lup/publications/9banalysis.pdf](http://www.nrb.state.vt.us/lup/publications/9banalysis.pdf).

**Step 3: Mitigating Impacts on Soils:** Mitigation of impacts is a key part of Act 250 review. Within Act 250, mitigation of primary agricultural soils means setting aside primary agricultural soils to

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<sup>17</sup> Natural Resources Board, *Guide to Applying for an Act 250 Land Use Permit* (10 V.S.A. Ch. 151).



compensate for the loss of soils that were converted to development. The amount of land set aside depends on the location of development. The mitigation ratio varies between 1:1 and 3:1, depending on the location of the proposed development, in an effort to encourage development in areas planned for growth. On-site mitigation is the default except in designated areas, or if the district commission finds “appropriate circumstances”, a combination of on-site and off-site mitigation or all off-site may be allowed. The next section provides more detail on how Act 250 handles mitigation in order to protect Vermont’s agricultural lands.

### Mitigation of Development on Primary Agricultural Soils

A system of off-site mitigation for the development of agricultural lands evolved in the 1990s through a series of district commission and former Vermont Environmental Board decisions. This happened because it became clear that in some cases it made sense to allow development in some places, even if that meant developing primary agricultural soils.

To address the impact on soils while still allowing development, mitigation fees were assessed that ensured the protection of a greater number of acres (generally two to three times the amount) of agricultural soils in another location. The applicant paid the fees to the Vermont Housing and Conservation Trust Fund, and the Vermont Housing and Conservation Board (VHCB) then used the funds to purchase permanent easements agricultural land. In 2006, the legislature codified this approach to mitigation by amending Act 250 and establishing criteria for both on-site and off-site mitigation.

State law was enacted in 2006 to encourage high-density development in and near designated downtowns and village centers by allowing automatic off-site mitigation in designated growth centers. Growth centers are areas designated by the Vermont

#### Off-Site Mitigation

In 2001 the Environmental Board denied the application of the Southwestern VT Health Care Corp. to build a retirement facility on primary ag soils served by town water and sewer, but affirmed the use of off-site mitigation with the following statement in its ruling:

*“...some agricultural lands are located in areas that are experiencing rapid transition to nonagricultural uses and that are no longer suited to agricultural production because of inaccessibility and conflicts with designated growth centers. A narrow interpretation of Criterion 9(B), allowing only on-site mitigation for a project may, in the long run, fail to carry out Act 200’s and Act 250’s goals by attempting to preserve farmland which will ultimately be overwhelmed and fragmented by development at the expense of protecting large parcels of land which are more amenable to preservation.”* Southwestern Vermont Health Care Corp, #8B0537-EB (February 22, 2001).

Downtown Board that meet certain criteria that reinforce a compact, smart-growth style of development<sup>18</sup>.

Between 2006-2014, in these designated areas, if off-site mitigation is allowed, the fee was determined by multiplying the price per acre by the acres affected by the project at a 1:1 ratio. The developer pays an off-site mitigation fee and may fully develop the parcel. This lower mitigation ratio is a benefit particularly in areas where most of the developable land is primary agricultural soils. For locations outside designated growth centers, on-site mitigation was required, unless the district commission determines that “appropriate circumstances” exist (more on this below). In 2014, the legislature extended this 1:1 mitigation benefit to include development proposed in downtowns

<sup>18</sup> These are distinct from the “growth centers” identified by municipalities in their town plan maps; only the state-designated centers receive the benefits described here.

and new town centers designated on or before January 1, 2014, and neighborhood development areas associated with a designated downtown development district.

### **How Mitigation Works inside Designated Centers**

When a proposed development inside a designated growth center (or, since 2014, in a downtown development district or new town center designated on or before January 1, 2014, or in a neighborhood development area associated with a designated downtown development district) impacts primary agricultural soils, off-site mitigation is required. . The Agency of Agriculture, Food and Markets is automatically a party to every Act 250 permit application involving primary agricultural soils and assesses the relative quality of the soils to be impacted using Natural Resources Conservation Service (NRCS) soils maps.

After the district commission determines the amount of primary agricultural soils impacted, it authorizes the applicant and the agency to enter into a mitigation agreement. This agreement specifies the mitigation fee. The agency determines the amount of the fee by multiplying the number of impacted acres by the average per acre value of recent conservation easements located in the same geographic area. Then, when construction begins, the developer pays the fee to VHCB. VHCB uses the funds to buy permanent conservation easements on farms, generally in the same region. The funds are also used to help support the agency’s work related to Act 250 Criterion 9(B).

Within industrial parks established prior to January 1, 2006, development that impacts primary agricultural soils may be also mitigated off site by paying a fee based on a 1:1 ratio. In addition, the statute includes an exemption from mitigation fees for affordable housing projects (as defined by the state) in growth centers.

### **Mitigation Outside Designated Centers**

When a proposed development impacting primary agricultural soils is located outside a those certain designated growth center areas (growth center, downtown development district or new town center,, or a neighborhood development area associated with a designated downtown development district), on-site mitigation of the impacted soils is required to minimize the impact of development. The number of affected acres is multiplied by a factor between two and three (depending on the quality of the impacted soils), and that acreage must be set aside on site (i.e., cannot be developed). The land set aside on site must be capable of supporting or contributing to an economic or commercial agriculture operation.

In some cases, applicants with projects outside a designated center may argue that they have “appropriate circumstances” that make off-site mitigation acceptable. If the district commission determines that appropriate circumstances exist, they may allow off-site mitigation, or a combination of on-site and off-site mitigation, even though areas are outside a designated center. The Natural Resources Board (NRB), which administers Act 250, has adopted a procedure defining these circumstances. The procedure specifies that appropriate circumstances may exist where:

- (1)(A) the tract of land containing primary agricultural soils is of limited value in terms of contributing to an economic or commercial agricultural operation and that devoting the land to agricultural uses is considered to be impractical based on the size of the tract of land, or its location in relationship to other agricultural and nonagricultural uses, or*
- (B) the project tract is surrounded by or adjacent to other high density development with supporting infrastructure and, as a result of good land use design, the project will contribute to the existing compact development patterns in the area, or*

*(C) the area contains a mixture of uses, including commercial and industrial uses, and a significant residential component, supported by municipal infrastructure, and*

*(2) the district commission determines that payment of an offsite mitigation fee, or some combination of onsite or offsite mitigation, will best further the goal of preserving primary agricultural soils for present and future agricultural use with special emphasis on protecting prime agricultural soils thus serving to strengthen the long-term economic viability of Vermont's agricultural resources.<sup>19</sup>*

The NRB procedure also clarifies that, when appropriate circumstances exist, “reasonable compliance” with the clustering subcriterion is still required, even if the remaining soils on the site are not of sufficient acreage to support or contribute to an economic or commercial agricultural operation.<sup>20</sup> This provision requires the clustering of development on land outside growth centers, and encourages efficient use of the land while also minimizing the loss of the agricultural potential of that land.<sup>21</sup> Clustering is also necessary to demonstrate how much land could potentially be left over for on-site mitigation where appropriate circumstances exist, since appropriate circumstances mean that a combination of on-site and off-site mitigation may be used.

### Considerations

As described above, the type of mitigation required for building on primary agricultural soils depends on the location of the proposed

development—either inside or outside a designated growth center. When the 2006 legislation was passed, the expectation was that communities would apply for growth center designation, since it could help them more easily meet Act 250 criteria and to receive financial benefits. However, this has not happened. As of 2014, there are only six designated growth centers in the state.<sup>22</sup>

This means that almost all proposed development is outside growth centers, although not necessarily outside areas of compact development (areas where, according to Vermont’s statutory planning goals, development should be concentrated).<sup>23</sup> This has led to significant frustration with the requirement for on-site mitigation for projects outside growth centers, since a project may be outside a growth center but still part of a compact development. It has also led to more frequent use of the “appropriate circumstances” test when applicants request mitigation flexibility.

### What Citizens and Municipalities Can Do

When a district commission authorizes on-site mitigation, the agricultural land that is set aside on the parcel being developed should be able to support or contribute to an economic agricultural operation. Act 250 cannot require that this land be made available to agriculture. However, Act 250 permits do state that farming is permitted on lands exempt from amendment jurisdiction under 10 V.S.A. § 6081(s). (In general, those lands are the primary agricultural soils preserved on site.) Towns or members of the public could

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<sup>19</sup> Natural Resources Board, “Statement of Procedure: Preservation of Primary Agricultural Soils.”

<sup>20</sup> Ibid.

<sup>21</sup> Argentine, *Vermont Act 250 Handbook: A Guide to State and Regional Land Use Regulation*, 171.

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<sup>22</sup> As of this publication, there are six state-designated growth centers: Bennington, Colchester, Hartford, Montpelier, St. Albans City, and Williston.

<sup>23</sup> 24 V.S.A. § 4302 (c) (1).

support the use of land mitigated on site by looking for opportunities to connect local farmers to these lands, or promote their use for community or school gardens, so that they do not remain fallow.

### Using Local and Regional Plans to Promote Sustaining Agriculture via Act 250

Criterion 10 of Act 250 can also help sustain agriculture in Vermont. As quoted in Sustaining Agriculture, 10 V.S.A. § 6086(a)(10) requires subdivisions and developments to be “in conformance with any duly adopted local or regional plan or capital program.” Sustaining Agriculture notes that “this means that projects will be expected to satisfy the municipal and regional plan’s goals and policies for sustaining farming and farmland.”<sup>24</sup> However, only clear and mandatory plan provisions can be enforced in Act 250, not ambiguous or aspirational provisions.

Strong, clear policies regarding agriculture can help district commissions understand whether a proposed project is compatible with a community’s plans for its future. Municipalities can integrate general goals and policies in support of farming and farmland by doing the following:

- Add clear, specific policies about sustaining farming and farmland to the land use or economic development sections of the plan. Policies will have the most impact in Act 250 review if the plan explicitly and clearly states what can and cannot be done in a particular area regarding nonagricultural uses.
- Write specific goals and policies, addressing each section of

town that is designated to remain predominantly agricultural. Note that if the plan does not explicitly prohibit a nonagricultural use in these areas, Act 250 cannot separately prohibit it through Criterion 10.

- Include policy statements about the importance of maintaining consolidated blocks of farmland and minimizing disruptions to farming and loss of primary agricultural soils.

### Agripreneurial Uses and Act 250

Act 250 exempts “farming” as defined in 10 V.S.A. 6001(22), but many agripreneurial enterprises do not fit within this definition. As a result, some agripreneurial projects – those that are considered “commercial,” and that exceed Act 250’s acreage thresholds – may be subject to Act 250 review. District Coordinators, who staff the state’s nine district commissions, make the determination about whether something is subject to Act 250 review. Though “farming” as defined in statute may be exempt, it is important not to assume that just because a use is on a farm it is automatically a “farm use.” Contacting the District Coordinator or the VT Agency of Agriculture, Food and Markets is the best way to resolve any questions about the applicability of Act 250. A list of the districts and their coordinators can be found here: [http://nrb.state.vt.us/lup/commission\\_members.htm](http://nrb.state.vt.us/lup/commission_members.htm)

Act 250’s potential applicability to non-exempt farm uses means that town plans have a role to play in supporting these enterprises. “Criterion 10” – one of the 10 Act 250 criteria – states that projects subject to review must be in conformance with local and regional plans.

Municipalities wishing to promote non-exempt agricultural enterprises should include clear policy statements to guide review of projects and ensure that they support, rather than undermine, this goal.

<sup>24</sup> Brighton and Northrup, *Sustaining Agriculture: A Handbook for Local Action*. 67.

- 👉 Note the types of developments and land uses that are least compatible with farming, and state clearly where these land uses are prohibited and where they are allowed.
- 👉 Add primary agricultural soils to future land use maps.<sup>25</sup> The plan could then prohibit development on these soils (except for certain agricultural or related uses). Maps could also be used to inform specific policies outlining what must be done to avoid, minimize, or mitigate any impacts to primary agricultural soils that may occur.

As policies related to sustaining agriculture are added or updated, make sure that they are compatible with other plan policies. For example, if the goal is to encourage agriculture in a certain part of the community, make sure that is not the same area where new housing growth is targeted.

**The Role of Municipal and Regional Plans in Reviewing Criterion 9(B)**

In addition to enforcing clear, mandatory plan policies under Criterion 10, municipal and regional plans can also be used to guide the district commission’s review of proposals under Criterion 9(B). There are two key ways that a municipal or regional plan can influence Act 250 decisions on Criterion 9(B):

1. For projects in those certain designated areas, Act 250 authorizes the district commission to require on-site mitigation where it is “consistent with the agricultural elements of local and regional plans and the goals of 24 V.S.A.

§ 4302. In this situation, the approved plans must designate specific soils that shall be preserved inside growth centers”; see 10 V.S.A. § 6093 (a)(3)(A).

2. For projects outside those designated areas, Act 250 authorizes the district commission to approve off-site mitigation, on-site mitigation, or some combination thereof, in appropriate circumstances, but only if “consistent with the agricultural elements of local and regional plans and the goals of 24 V.S.A. § 4302”; see 10 V.S.A. § 6093 (a)(3)(B).

In short, the agricultural elements of the applicable plans can have a bearing on the commission’s determination on how best to mitigate impacts to primary agricultural soils.

**The Importance of Writing Clear Plan Policies**

A plan is only as strong as its policies. Ambiguous policies make it difficult for district commissioners to know the municipality’s or the region’s intent and cannot be enforced in Act 250. For example, if a policy is to “discourage non-agricultural uses in areas of town with primary agricultural soils,” that does not mean that nonagricultural uses are prohibited under Criterion 10. If a district commission has trouble interpreting unclear language, towns may find that their underlying intentions are not reflected in Act 250 permit decisions. The bottom line is that a plan cannot be enforced under Criterion 10 without a clear mandate or prohibition.

Writing plan policies is a political process, and it can be challenging to adopt strongly worded policies. “Shalls” can become “shoulds,” and policies that “require” can be changed to “encourage,” as planning commissioners and select board members work to reach compromises that allow advancement of certain policies. While softer language may get certain polices into the plan, it is important

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<sup>25</sup> 24 V.S.A. § 4382 states that the land use plan must “[indicate] those areas proposed for . . . agriculture . . . and [set] forth the present and prospective location, amount, intensity and character of such land uses.”

to understand that this can undermine the effectiveness of these policies in Act 250 review.

CLEAR LANGUAGE	AMBIGUOUS LANGUAGE
Shall Must Require Prohibit	Should May Considerations Where appropriate Where feasible Where reasonable Encourage/Discourage

To be effective in Act 250, the plan must state a clear, unqualified, and unambiguous restriction on the proposed use. A number of legal cases have established this, and the test for determining what constitutes an “ambiguous” policy continues to evolve with subsequent decisions.<sup>26</sup>

If a term or provision in the plan is ambiguous, then Criterion 10 says the district commission must consider the zoning bylaw for interpretive purposes, as long as the bylaw implements the plan.<sup>27</sup>

While Criterion 10 offers municipalities and regions an opportunity to have their voices heard, it admittedly asks a lot of the plan. On the one hand, the municipal plan is meant to be a visionary document—one that brings people together to articulate their broad goals and

<sup>26</sup> For example, *In re Appeal of Times & Seasons, LLC and Hubert K. Benoit*, 2008 VT 7, paragraphs 21–23, holding that plan provision requiring commercial development be located “within or close to” village “where feasible” is too ambiguous to be enforced. “Nonregulatory abstractions” in the plan are not enforceable, because they give too much discretion to the reviewing body.

<sup>27</sup> 10 V.S.A. § 6086 (a) (10).

aspirations for the future. On the other hand, in Vermont these plans must be more mandatory and specific if they are to play a role in Act 250. Either way, however, towns will be better able to protect their primary agricultural soils if the policies are clear.

One of the steps in getting involved is to call the Act 250 district coordinator in the region where the project is taking place, to learn more about the application and participate in the Act 250 process. Please see “Resources” at the end of this section for more information.

### **The Importance of Local Regulation and Zoning**

Act 250 can supplement—but not replace—local efforts to save farmland. Act 250’s Criterion 9(B) can help ensure that primary agricultural soils are protected so that farming can continue throughout Vermont, but local zoning and subdivision regulations still have an important role to play. Why? Only a very small portion of development review goes through Act 250. In fact, a study of eight representative Vermont towns found that, between 2002 and 2009, only 4 of the 381 subdivisions—1 percent of the total subdivisions, representing about 8 percent of the total land area in these subdivisions—went through Act 250 review.<sup>28</sup> This means that towns have an important and complementary role to play by addressing primary agricultural soils and nonexempt agricultural uses in their zoning and subdivision bylaws. See Local Regulatory Context section of this guide for information on techniques such as conditional use review, clustering, transfer of development rights, and more.

<sup>28</sup> Fidel, Shupe, and Brighton, “Informing Land Use Planning and Forestland Conservation Through Subdivision and Parcelization Trend Information,” 8.

### III. Resources

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Vermont Natural Resources Board, *District Commission Members and Staff*: [www.nrb.state.vt.us/lup/commission\\_members.htm](http://www.nrb.state.vt.us/lup/commission_members.htm); Act 250: [www.nrb.state.vt.us/lup/publications/nrb1.pdf](http://www.nrb.state.vt.us/lup/publications/nrb1.pdf).

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