
Bogey Bylaws - What to Do?

VLS JAM Golf Workshop

March 20, 2009

Front Porch Community Planning & Design

Sharon Murray AICP

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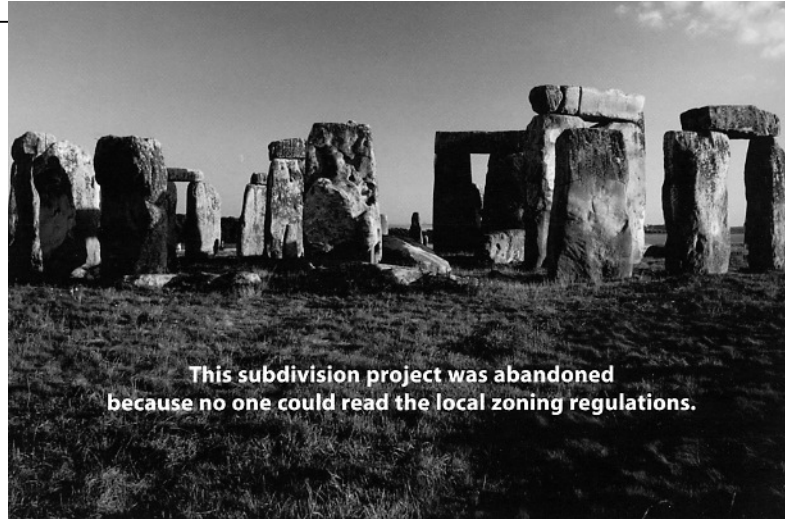
3249 Duxbury Road

Waterbury, VT 05676

T: 802-434-4118

F:802-434-3716

New Case, Old Concern



Though the JAM Golf decision puts planners on notice that clear regulatory standards and guidance are a matter of due process, subject to constitutional protections, the need for clear standards has long been established in case law – including at least two Environmental Court decisions within the past year – and in practice. Clear, well crafted standards are the foundation for good decisions, and hopefully good development.

In re Due Process

■ Procedural – Fair, equitable permit process

- Notice
- Hearing
- Deliberation
- Findings/Decision
- Appeals



WHAT THE CHART DOESN'T
SHOW IS THE TOTAL CHAOS
CAUSED AT THIS POINT BY
COMMISSIONER
INSERT NAME



■ Substantive – Content

- Clear, unambiguous language and standards
- Reasonably related to a legitimate public purpose—
i.e., municipal plan goals, policies, objectives

There are two components to due process: procedural (making sure that everyone is treated fairly and equitably) and substantive (making sure that regulations are unambiguous and are tied to a legitimate public purpose). In recent years we've gotten better at addressing procedural due process requirements. The 2004 changes to the Vermont Planning and Development Act (24 VSA Chapter 117) were intended in part to clarify, in statute, the requirements for development review – including requirements for public notice, hearings, issuing decisions based on findings under the regulations, and for appeals. They also more clearly link regulations to municipal plans – regulations must now conform to and implement the plan as the policy basis for regulation. There are some requirements in Chapter 117 regarding standards of review, but much less specific guidance. And the courts haven't been much help in this area either.

Writing the regs...

**As for lawyers, it's more fun to play
one than to be one.**

Sam Waterston, Law and Order

Planners are not lawyers, but local planning commissioners are the ones under state law charged with drafting bylaws – often without the benefit of legal counsel. All lay and professional planners involved in writing regulations should have a basic understanding of the constitutional protections and statutory limitations that frame our work. Training, resources, technical assistance and legal guidance are critical to this process.

In re Plain English

■ Active versus passive voice

- Avoid the silent “we” or “you” – *identify who...*
No: A grading plan shall be submitted.
Yes: The applicant shall submit a grading plan.

■ State clearly

- Simple sentence construction, careful punctuation
- Tables, bulleted lists

■ Limit jargon – legaleze *and* plannereze

- Utilize use simple words
- Explain or avoid acronyms

■ Explain

- Define
- Illustrate
- B-Notes and “Oops Lists” – keep track of interpretations

Planners unfortunately write like planners – often using a passive voice intended not to offend. We can’t hide behind words when writing regulations. Bylaws are not lofty plans – they’re directives. Regulations should be clear, concise, direct, and easy to understand to someone not well-versed in legal or planning jargon – including, apparently, the courts. Pay attention to details. No run on sentences – word choice (e.g., “and” and “or”) and punctuation are critical. Define and illustrate as budgets allow. Keep a record of past interpretations for consistent interpretation and future bylaw updates. A recommended reference: *Planning in Plain English: Writing Tips for Urban and Environmental Planners* by Natalie Macris, available through the American Planning Association (www.planning.org).

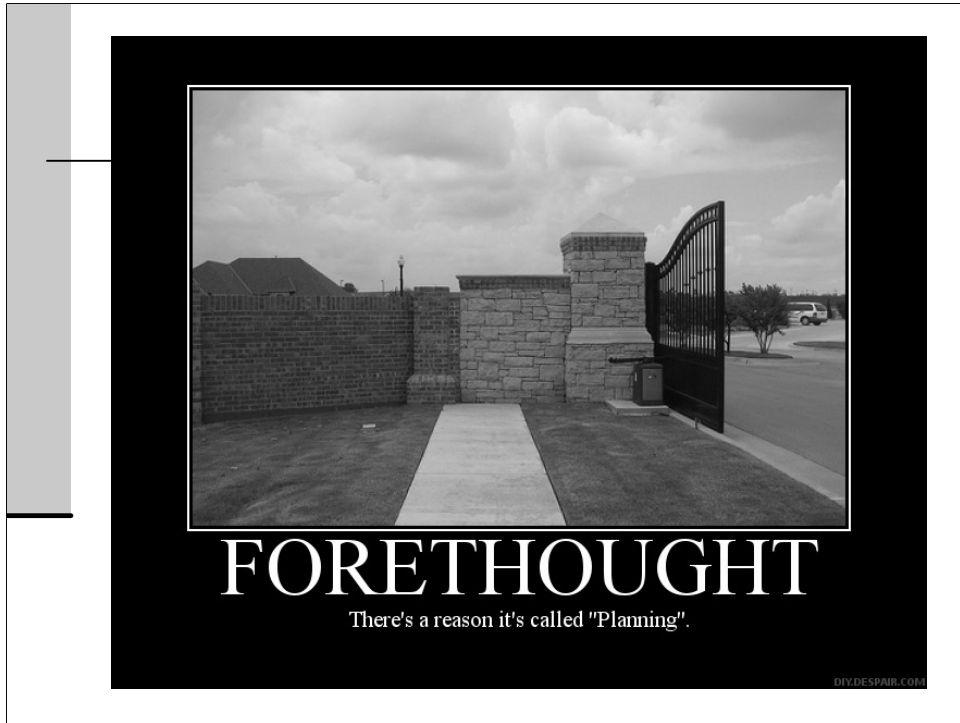
In re the Need for Clear Standards

You've got to be very careful if you don't know where you're going, because you might not get there.

If you ask me anything I don't know, I'm not going to answer.

Yogi Berra

Clear standards, based on community goals and objectives identified in the municipal plan, are needed to guide both applicants and review boards, and to make good decisions. Writing standards that get us all where we want to go – especially in an adversarial setting where words really count – is also the hardest part of the job.



Without clear standards, regulations – and development they engender – may be viewed as "arbitrary and capricious" in the eyes of the court and the public.

Meat on the bones

- Use “shall” when you mean it, “should” when you don’t, really...maybe?
- Avoid vague “considerations”
- Incorporate rather than reference, e.g.:
 - Statutory criteria
 - Technical standards
- Quantitative versus qualitative standards
 - Numeric – unambiguous and inflexible
 - Descriptive – w/guidance, bounded discretion
- Consistent standards
- Who What Where When ***Why....and How!***

Don't be afraid of “shall” – when writing regs it's important to say what you mean and mean what you say. Avoid should (what does that mean?) and vague “considerations” unless intended only as guidance and not as a requirement. Be careful when incorporating statutes or standards by reference – make sure copies of everything referenced are readily available to applicants and boards. And not all statutory standards, on their own, suffice. Statutory conditional use standards? Maybe – though “character of the area,” if not further defined, is often at issue. Site plan and subdivision standards? No. Quantitative (numeric) standards are pretty straightforward, but also pretty inflexible. Descriptive, qualitative standards offer more flexibility, but also more opportunity for arbitrariness. Additional guidance that aids in their interpretation and application – and that bridles board discretion – is necessary. Regulatory standards also should be consistent – within a bylaw (e.g., site plan and conditional use review standards), and also between applicable regulations (e.g., a bylaw and a highway ordinance). It also helps to review draft regulations to see if they answer all the questions – the “five Ws and H”.

True Life Example:

Development is prohibited on slopes over 25%.

This type of language is found in many of the regs I've helped write, and seems pretty straightforward on its face. But an applicant will likely have no idea what a slope of 25% means, or whether the slopes on his or her property exceed 25%. An engineer will question the type and extent of slope – is it pre- or post-development? Does it include manmade curbs and berms? A lawyer will question what you mean by “development” (even though land development is defined in statute) – does it apply to a driveway or access road? A septic system? If only a “small” area of steep slope is disturbed, e.g., for an access road “incidental” to the development of a natural terrace, is this prohibition necessary or reasonable?

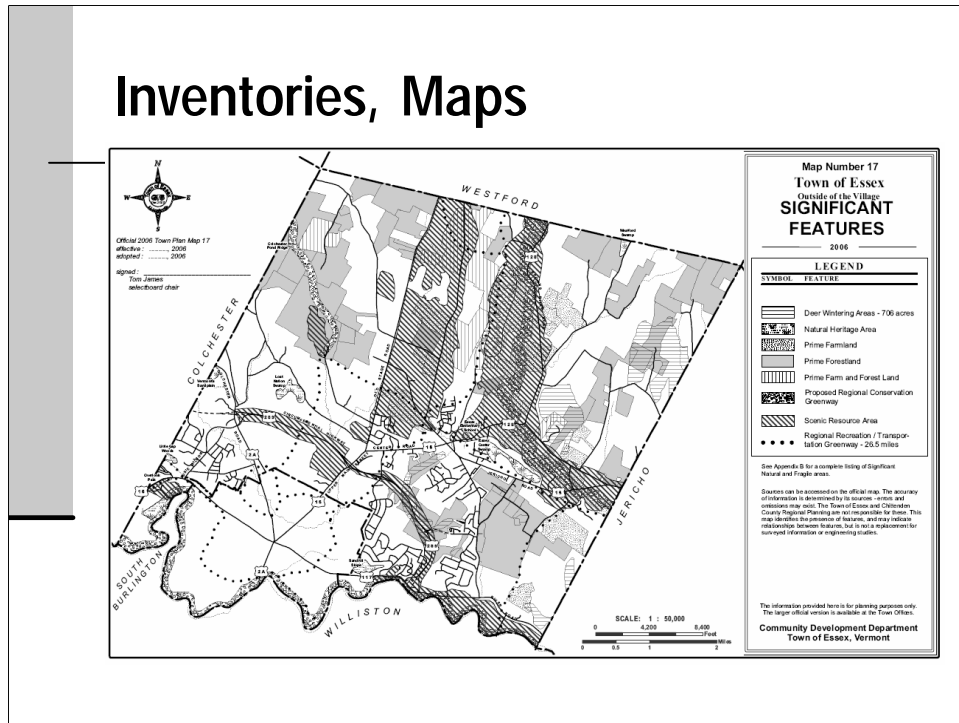
What does this mean when writing regulations? Resources and terms need to be mapped, defined, illustrated and more clearly explained in context. And, as a result, regulations will likely get longer and more complex. Some examples follow...

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 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:

- 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.
- 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.
- Roads, driveways and utilities shall be designed to avoid the fragmentation of identified natural areas and wildlife habitat.
- 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.
- Identified natural areas, critical wildlife habitat and associated buffer areas should be included as designated as open space, in accordance with Section 7.4.

An excerpt from subdivision standards sections of Bolton's Land Use & Development Regulations which tries to answer, in context, some of the whats and hows of required resource protection.

Inventories, Maps



One several resource maps from the Essex Town Plan, that is also referenced in the town's regulations. Essex also has in-house GIS capacity to help applicants and review boards more specifically identify protected resources on properties being developed. It's important to remember though, that while mapped information is useful to define, identify and flag potential resources located on a site, site investigation and site visits are also necessary to confirm if and where resources are located are on the ground.

Instructions...

To be followed in order:

Step 1. Identify Conservation Areas. The subdivider shall delineate the boundaries of all primary and secondary conservation areas defined in Section 7.3. Based on the delineation of these features, goals and policies set forth in the Warren Town Plan, and any guidance provided by the Development Review Board during sketch plan review, a conservation plan shall be developed to ensure the preservation of these features to the fullest extent feasible. The plan shall clearly define the location and area of designated conservation areas and the method of protection in accordance with Section 7.4.

Step 2. Identify Potential Development Areas. Potential development areas should be identified to exclude designated conservation areas. Development areas shall be selected to avoid any adverse impact to primary conservation areas, and to minimize to the extent feasible, adverse impacts to secondary conservation areas. Maximum development density shall be determined based on the density requirements for the zoning district in which the subdivision is located. Subdividers should refer to planned residential or planned unit development provisions under Article 8 to allow for increased densities of development outside of designated conservation areas.

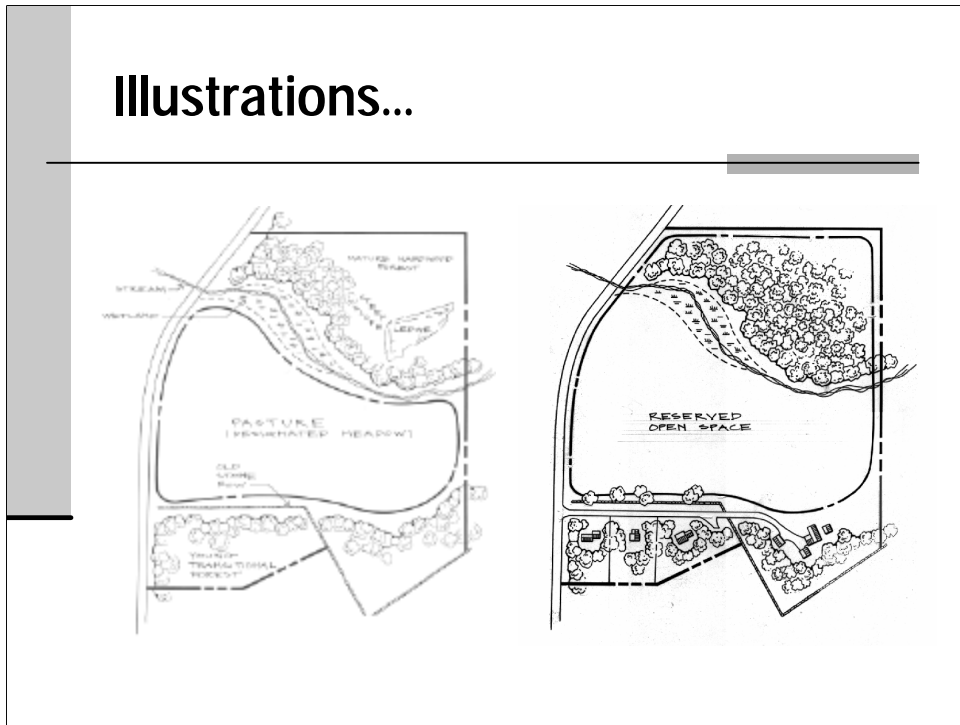
Step 3. Identify Building Sites & Envelopes. Building footprints for principal structures, and building envelopes (to include the area for accessory structures and/or parking), shall be identified and laid out in accordance with Sections 7.2 and 7.3, and any other applicable requirements of these regulations.

Step 4. Layout Roads, Driveways & Utilities. Roads, driveways, and utilities shall be laid out in accordance with Section 7.3 and other applicable requirements of these regulations.

Step 5. Identify Proposed Lot Boundaries. Lot boundary lines shall be laid out to avoid the fragmentation of designated conservation areas, and to encompass building sites and envelopes, in accordance with Section 7.3 and any other applicable requirements of these regulations.

Instructions from the Town of Warren's development regulations that specify how conservation subdivisions are to be designed.

Illustrations...



Warren's regulations also include illustrations to help describe the design process and what's expected from applicants.

Definitions...

- **Riparian Buffer:** The width of land measured horizontally from the mean water level for lakes and from top of bank or top of slope for streams, to the edge of other land uses. Riparian buffers are typically undisturbed areas, consisting of trees, shrubs, groundcover plants, duff layer, and a naturally vegetated uneven ground surface.
- **Stream:** The full length and width, including the bed and banks, of any watercourse, including rivers, creeks, brooks, and branches and intermittent watercourses that have a defined channel and evidence of water and sediment transport, even if such watercourses do not have surface water flow throughout the year or throughout the channel. For purposes of this regulation, constructed drainageways including water bars, swales, and roadside ditches, are not considered streams.
- **Top of bank:** The point along a streambank where an abrupt change in slope is evident, and where the stream is generally able to overflow the banks and enter the adjacent floodplain during flows at or exceeding the average annual high water stage.
- **Top of slope:** A break in slopes adjacent to steep-banked streams that have little or no floodplain; or a break in slope where the side slopes adjacent to an incised, or deeply cut channel meet floodplains that have been abandoned or are undergoing abandonment.

Source: VLCT Model Riparian Buffer Ordinance

Good definitions are critical – especially for technical terms. These come from VLCT’s model riparian buffer ordinance, and are consistent with state definitions.

Never Ending Process...

- Develop inventories, reference materials
- Develop supporting plans
 - Open space plans under 24 VSA §4432
- Update municipal plan
 - Policies – be specific if used in regulation
 - Maps – including reference maps
- Update bylaws
 - Purpose statements
 - Review standards
 - Definitions

Drafting clear regulations is a never ending process – they have to be updated on a regular basis to conform to new plans, and there's always room for improvement and clarification. Be sure to consult with the zoning administrator, development review board, town attorney – and the local “oops” list – when updating regulations.

Help!!!

- Planning Staff (in-house expertise, drafting)
- Zoning Administrator, Zoning Board (issues, deficiencies)
- Municipal Attorney (legal review, drafting)
- Regional Planning Commissions (technical, drafting, mapping, training)
- State – DHCA, VANR (data, manuals, models, training)
- Legal – VLCT, VLS (legal questions, examples, models)
- Nonprofit – VNRC, Vermont Smart Growth (assistance, models)
- Planning Organizations – e.g., American Planning Association (resources, models)
- Professional – Planning Consultants, Land Use Attorneys
- Internet (listserv, Google)

There are also many sources of assistance for local planning commissions—less so for professional planners. Training sessions such as the one today are much needed.

And lawyers are our friends... Thank you.