



### Zoning - Required Provisions and Limitations

#### Background

Municipalities have broad discretion under Chapter 117 to tailor bylaws to meet local needs and circumstances. In exercising this discretion, however, bylaws must address how "grandfathered" uses, structures and lots that don't comply with newly adopted standards are to be regulated. The authority to regulate certain pub-

#### Grandfathering

"Grandfathering" is the granting of an exception that allows a pre-existing situation to remain as is, despite a change to the contrary in subsequently adopted rules. It's often used as the verb "to grandfather" or to describe a "grandfather clause." The term has its roots in "Jim Crow" laws that were passed in southern states at the turn of the 20th century to prevent blacks from voting. In 1870 the 15th Amendment -granting former slaves the right to vote - was ratified. In response, southern states passed laws providing that anyone allowed to vote before the Civil War, and any of their descendants, were exempt from poll taxes and/or supposed "literacy" tests required at the time. In effect, if your grandfather could vote, you could vote (remember, your grandmother could not vote in most states until the 19th Amendment was ratified in 1920). In zoning, the grandfather clause has a much more benign meaning. Rather than being used to deny rights to a particular group or individual, it is intended to protect landowners who may own a property that does not comply with newly imposed standards.

lic and private uses is also limited by statute to ensure that local bylaws do not circumvent a greater public interest, exclude certain types of development, or unduly restrict the use of private property.

Most of Chapter 117's "required provisions and prohibited effects" and "limitations" pertaining to bylaws are contained in two sections - §4412 and §4413. These provisions, most of which existed in some form before Act 115 took effect, were revised as follows:

- "Equal treatment of housing" provisions were revised to address multifamily and multiunit housing, individual mobile home park sites, and new accessory dwelling requirements. The occupancy of residential care or "group homes" also was increased from six to eight residents. This topic is addressed in more detail in *Bulletin #6 Equal Treatment of Housing*.
- The statutory merger requirement for pre-existing small lots in contiguous ownership was eliminated. Bylaws must now specify whether lot merger will be required.
- The standard for evaluating the effect of home occupations on the character of the surrounding area or neighborhood was changed to include a determination of "undue adverse effect."
- Provisions on how "nonconformities" are to be addressed were restructured by separately defining nonconforming uses, structures and lots, thereby overriding recent case

law.

- Procedural requirements for approving development on pre-existing lots that lack frontage on public roads and/or waters was clarified by requiring that they be specified in local bylaws.
- The authority of municipalities to regulate certain public uses and utilities was clarified, and in some cases further restricted.
- State agency referral requirements were eliminated, except for flood hazard area review.

#### Required Provisions & Prohibited Effects [§4412]

Bylaws - most importantly zoning - must protect the rights of property owners whose property does not conform to standards adopted after a parcel or use was established.

"Nonconformities," as now defined in statute, include nonconforming uses, structures and lots. Municipalities, however, may regulate changes to nonconformities through their bylaws, and discourage their perpetuation or expansion. Chapter 117 limits the extent to which bylaws may restrict the use of private homes for certain nonresidential uses. There are also limitations on regulating public facilities and utilities that serve the public good, though such uses may be carefully controlled. The following summarizes the required provisions, as recently revised by Act 115:

### Existing Small (Nonconforming)

**Lots.** Chapter 117 ensures that a parcel (lot) in existence prior to the adoption of zoning may be developed even if it no longer complies with minimum lot size standards. A municipality, however, may prohibit development of a lot that is less than one-eighth acre in area, or has a width or depth dimension of less than 40 feet. Contiguous small lots in common ownership that do not have functioning wastewater systems and potable water supplies (as defined in Chapter 117) are no longer required to be merged. A municipality may require such merger, as provided in its bylaw, in accordance with specified statutory criteria [§4412(2)].

**Required Frontage/Access to Public Roads or Waters.** Chapter 117 [§4412(3)] provides the means to allow development on lots that lack the minimum road (or surface water) frontage required by a bylaw - in particular to protect the ability to access, and therefore make use of, nonconforming lots. Development may be permitted on any lot lacking necessary frontage, provided that the approval is granted in accordance with a process and standards specified in the bylaw. Where subdivision regulations do not apply, another review process and related standards must be established in the bylaw for this purpose. Such standards should assure safe and adequate access, and in no case may allow access over a deeded easement or right-of-way of less than 20 feet. An important consideration for communities drafting regulations is the extent to which road frontage should be used to regulate the linear densities of development, e.g. access management and utility line extensions. As well, the bylaw should address whether the creation of new - as opposed to pre-existing - nonconforming frontage lots should be allowed and, if so, under what circumstances.

### Protection of Home

**Occupations.** A bylaw may not prevent a resident from using "a minor portion of a dwelling unit for an occupation which is customary in residential areas and which does not have

an undue adverse effect upon the character of the residential area in which the dwelling is located" (emphasis added) [§4412(4)]. This provision was revised from the prior standard that a home occupation "does not change the character of" a residential area. Many communities are choosing to establish different categories, or levels, of home-based businesses in order to allow home occupations, as defined in statute, as a permitted or exempted use, while subjecting larger, more intensive home businesses to one or more development review procedures.

**Home Child Care Facilities.** A "family child care home" or facility is a type of accessory use to a single-family dwelling that is granted separate protection from that given to

### Family Day Care Home

#### V.S.A. 33 §4402(3)

According to Vermont statute, a *family day care home* is a day care facility which provides for care on a regular basis in the caregiver's own residence for not more than ten children at any one time. Of this number up to six children may be provided care on a full-time basis and the remainder on a part-time basis. For the purpose of this subdivision, care of a child on a part-time basis shall mean care of a school-age child for not more than four hours a day. These limits shall not include children who reside in the residence of the caregiver; except:

- these part-time school-age children may be cared for on a full-day basis during school closing days, snow days and vacation days which occur during the school year; and
- during the school summer vacation, up to 12 children may be cared for provided that at least six of these children are school age and a second staff person is present and on duty when the number of children in attendance exceeds six. These limits shall not include children who are required by law to attend school (age 7 and older) and who reside in the residence of the caregiver.

home occupations. Bylaws must treat the care of up to six (6) children on a full time basis within a single-family dwelling as a permitted use of the dwelling, but may require site plan approval for facilities that care for up to six (6) full time children and four (4) part time children. This provision only applies to facilities where the owner or operator is required to be licensed or registered by the state (see sidebar).

### Heights of Certain Structures.

Height requirements for antenna structures, wind turbines (with blades less than 20 feet in diameter), and roof-top solar collectors less than 10 feet high, which are mounted on complying structures, may only be regulated if the bylaw provides specific standards for their regulation. If a zoning bylaw imposes height standards (e.g., by zoning district), but remains silent on how these structures are to be treated, the structures are by statute exempted from these standards.

### Nonconformities

**(Grandfathered Uses, Structures & Lots).** Bylaws are required to specify how "nonconformities" are regulated [§4412(7)]. As noted, three categories of nonconformity are now defined: nonconforming uses, nonconforming structures, and nonconforming lots (addressed under existing small lots). Under this provision, bylaws may specify:

- a time period for determining the abandonment or discontinuance of a nonconforming use (the time period may not be less than six months);
- the extent to which, and circumstances under which, a nonconformity may be maintained or repaired;
- the extent to which, and circumstances under which, a nonconformity may be changed or expanded;
- standards for the relocation or enlargement of structures containing nonconforming uses;
- circumstances in which a nonconformity that is destroyed may be rebuilt; and
- other appropriate circumstances in which nonconformity must comply

with the bylaws.

In addition, a provision was added stipulating how nonconforming mobile home parks, including individual mobile home sites, must be addressed (see *Bulletin #6 Equal Treatment of Housing*).

## Limitations on Municipal Bylaws

Chapter 117 [§4413] does not allow bylaws to prohibit certain uses from locating within municipal boundaries. This is designed to ensure that those uses intended to serve community and religious functions are not denied a reasonable opportunity to locate in all Vermont's communities.

**Public Facilities.** According to Chapter 117 [§4413(a)], "the following uses may be regulated only with respect to location, size, height, building bulk, yards, courts, setbacks, density of buildings, off-street parking, loading facilities, traffic, noise, lighting, landscaping, and screening requirements, and only to the extent that regulations do not have the effect of interfering with the intended functional use:

- State- or community owned and operated institutions and facilities.
- Public and private schools and other educational institutions certified by the state department of education.
- Churches and other places of worship, convents, and parish houses.
- Public and private hospitals.
- Regional solid waste management facilities certified under 10 V.S.A. §159.
- Hazardous waste management facilities for which a notice of intent to construct has been received under 10 V.S.A. §6606a."

This provision gives greater protection to these uses than was previously the case. While communities may specify districts in which any or all of these uses are allowed - and those in which they are not allowed - there must be a reasonable opportunity for each listed facility to locate somewhere in the community. Districts or locations cannot be designated to functionally exclude listed uses from the community. If no provision is made under the bylaw, a facility could be located in any district.

In addition, a bylaw may require that a protected use comply with one or more development review proce-

dures; however conditions of approval under applicable review standards are limited to those statutory considerations listed above. A bylaw may not impose standards associated with other review processes (e.g., conditional use, site plan review), unless those standards are consistent with this provision.

**Power Generation & Transmission Facilities.** Power generation and transmission facilities regulated by the Vermont Public Service Board [30 V.S.A. §248] may not be regulated in any manner under municipal bylaws. These include wind towers and other private generating facilities that are "net metered" or hooked into the power grid. Communities that want to influence the location of generation and transmission facilities within their borders should identify and address related concerns - and define clear community standards to be applied to such projects - in their municipal plan, for consideration in the Public Service Board's "Section 248" review process.

**Agricultural & Silvicultural Practices.** Bylaws may not regulate accepted agricultural and silvicultural practices, including the construction of farm structures, as defined by the Secretary of Agriculture, Food and Markets or the Commissioner of Forests Parks & Recreation, respectively. Written notification, including a sketch plan showing structure setback distances from road rights-of-way, property lines, and surface waters may be required by the Zoning Administrator prior to any construction of a farm structure. Such structures must meet all setback requirements under these regulations, unless specifically waived by the Secretary [§4413(d)].

**Hunting, Fishing & Trapping.** This provision [§4413(e)] was added to clarify that municipalities may not regulate hunting, fishing or trapping through their bylaws. This exemption does not apply to land uses (e.g., firing ranges, hunting camps) that may be associated with hunting, fishing or trapping.

### Keeping those Nonconformities Straight

A common tenet of zoning is phasing out non-conformities over time to bring all properties into compliance with the bylaw, while maintaining the grandfathered rights of landowners to continue to use their properties. Many communities find it helpful to address nonconforming uses as distinct from nonconforming structures for the purpose of regulating ongoing maintenance, discontinuance or abandonment, enlargement or relocation. Chapter 117 [§4303] now helps communities with this approach by providing the following three definitions:

• **Nonconforming lots or parcels** means lots or parcels that do not conform to the present bylaws covering dimensional requirements but were in conformance with all applicable laws, ordinances, and regulations prior to the enactment of the present bylaws, including a lot or parcel improperly authorized as a result of error

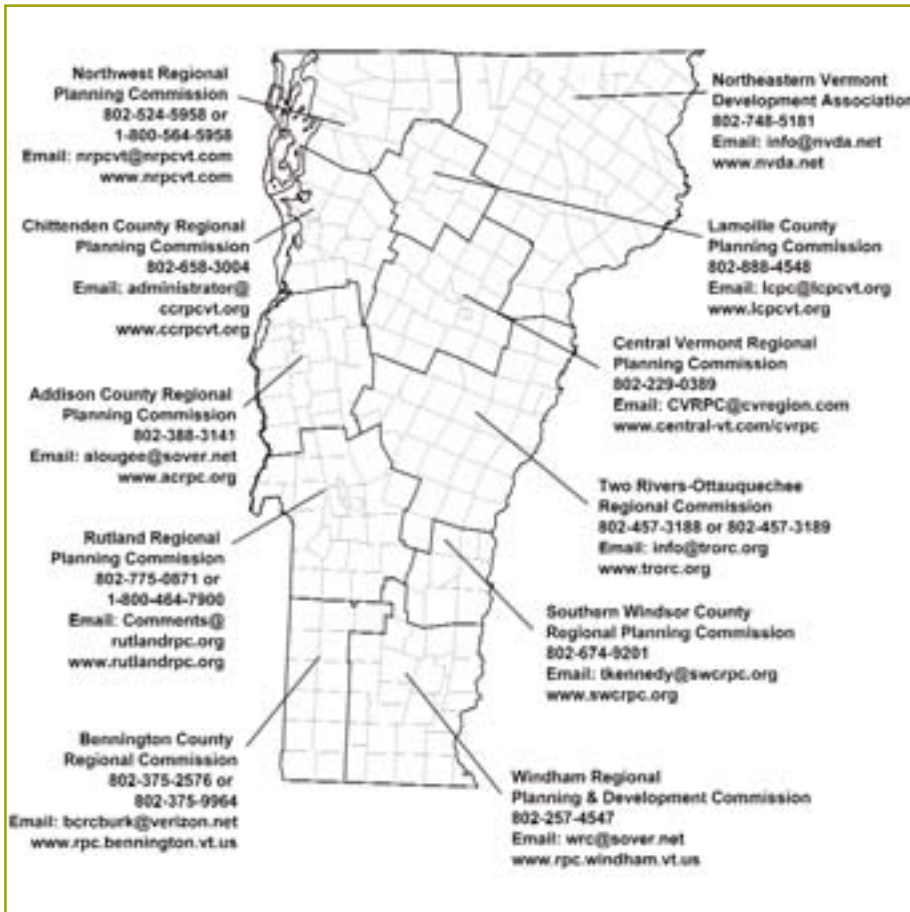
by the administrative officer.

- **Nonconforming structure** means a structure or part of a structure that does not conform to the present bylaws but was in conformance with all applicable laws, ordinances, and regulations prior to the enactment of the present bylaws, including a structure improperly authorized as a result of error by the administrative officer.
- **Nonconforming use** means use of land that does not conform to the present bylaws but did conform to all applicable laws, ordinances, and regulations prior to the enactment of the present bylaws, including a use improperly authorized as a result of error by the administrative officer.

These definitions, which were enacted as part of Act 115, clarify that nonconformities may result not only from pre-existing conditions, but also from conditions authorized in error by the administrative officer.



**Contact information:  
Regional Planning Commissions**



**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](http://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](http://www.vpic.info).

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**Department of Housing and Community Affairs (DHCA)**, Planning Division  
National Life Building Dr. 20  
Montpelier, VT 05620-0501  
(802)828-5249

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

**Vermont League of Cities and Towns (VLCT)**  
89 Main Street, Suite 4  
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**Vermont Secretary of State's Office**  
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**FOR MORE INFORMATION GO TO [WWW.VPIC.INFO](http://WWW.VPIC.INFO)**