

**MEMORANDUM OF UNDERSTANDING
AMONG
THE LAND USE PANEL OF THE NATURAL RESOURCES BOARD,
THE VERMONT AGENCY OF TRANSPORTATION,
AND
THE VERMONT STATE TRAFFIC COMMITTEE**

This Memorandum of Understanding (MOU) is entered into among the Land Use Panel of the Vermont Natural Resources Board, the Vermont Agency of Transportation (VTrans), and the Vermont State Traffic Committee to establish and coordinate procedures for regulating certain transportation-related projects.

A. MATERIAL SUPPLY AND DISPOSAL AREAS

1. Purpose. The purpose of Sections 1 through 5 of this MOU is to establish and coordinate procedures for regulating material supply and disposal areas for VTrans-administered transportation construction projects.

2. General Requirements. The opening and closing of all material supply and disposal areas, regardless of jurisdiction under 10 V.S.A. Ch. 151 (Act 250), shall be subject to the requirements of Sections 105.25 through 105.28 of VTrans' 2006 *Standard Specifications for Construction* (available at <http://www.aot.state.vt.us/conadmin/Documents/2006%20Spec%20Book%20for%20Construction/2006Division100.pdf>). Those sections of the Specifications, which establish general requirements and covenants for the opening, operation, and closing of all material supply and disposal areas, shall be incorporated into all VTrans-administered transportation construction contracts.

3. District Environmental Commission Review. For VTrans-administered transportation construction projects that may be subject to the state land use permitting requirements of Act 250, the District Environmental Commissions (District Commissions) established pursuant to 10 V.S.A. § 6026 shall review proposed material supply and non-hazardous disposal areas in the following manner:

For those material supply and disposal areas related to transportation projects permitted under Act 250, the District Coordinator may visit the proposed site or sites that may be considered involved land under Act 250 Rule 2(C)(5). Pursuant to Act 250 Rules 2(C)(6) and 34, the District Coordinator may issue an administrative amendment approving the material supply or disposal area or a Jurisdictional Opinion determining whether a "material change" permit amendment is or is not required. The District Coordinator's Jurisdictional Opinion regarding the need for an amendment shall be subject to appeal in accordance with Act 250 Rule 3.

4. Instructions to Bidders and Contractors. Early in the bidding process for transportation projects subject to an existing Act 250 land use permit,

VTrans will advise bidders of all potential environmental constraints and procedures to obtain environmental approvals necessary to open new material supply and disposal areas. Contractors will be instructed to contact the appropriate District Coordinator as early as possible prior to the commencement of construction.

5. Effective Date; Scope. Effective for all VTrans-administered transportation projects let to contract on or after the date of this MOU, Sections 1 through 5 of this MOU supersede all previous applicable agreements or guidelines. Sections 1 through 5 of this MOU shall apply to all material supply and non-hazardous disposal areas associated with VTrans-administered transportation projects subject to Act 250 jurisdiction with the exception of all quarry operations and those material supply and disposal areas which are expected to remain in operation for commercial purposes following completion of the transportation project. In these situations, when Act 250 jurisdiction does apply, the contractor and the landowner will be required to apply for and obtain a land use permit prior to the opening of the area.

B. REGULATION OF DEVELOPMENT SUBJECT TO CONCURRENT VTRANS AND ACT 250 JURISDICTION

6. Purpose. The purpose of Sections 6 through 9 of this MOU is to coordinate the interrelationship of the Land Use Panel and VTrans and the dual responsibility of both entities to protect public safety through the regulation of development and subdivisions subject to their concurrent jurisdiction.

7. Act 250 Jurisdiction. Act 250 authorizes the Land Use Panel and the District Commissions to protect the environment and the public from many of the adverse consequences of development projects. Traffic impacts are included in the ten environmental criteria under which the District Commissions review state land use permit applications under Act 250. See 10 V.S.A. §§ 6086(a)(5) (relating to transportation) and 6086(a)(9)(K) (relating to development affecting public investments). In addition, the District Commissions and the Environmental Court (which hears appeals from the District Commissions) have “supervisory powers in environmental regulation” by legislative design. See, e.g., *In re Hawk Mountain Corp.*, 149 Vt. 179, 185, 542 A.2d 261, 264 (1988). The Court has also stated that “when Act 250 requires more stringent standards than provided in an ancillary permit process, Act 250 controls.” See *In re Agency of Transportation*, 157 Vt. 203, 208, 596 A.2d 358, 360 (1991).

8. VTrans Jurisdiction. 19 V.S.A. § 2(e) provides that VTrans “shall have the authority and administrative jurisdiction to develop, promote, supervise and support safe and adequate transportation services.” VTrans’ charge in 23 V.S.A. § 1025 is to ensure that the installation and operation of all traffic control devices and features in the State of Vermont shall be in accord with the provisions of the U.S. Department of Transportation Federal Highway Administration’s *Manual on Uniform Traffic Control*

Devices (MUTCD). The MUTCD establishes criteria for the installation of traffic signals as well as criteria for other traffic control features subject to state or local jurisdiction.

9. Access to State Highways. A person seeking to construct an access to a state highway, divert drainage to a state highway right-of-way, or undertake work within the state highway right-of-way must obtain a permit from VTrans in accordance with 19 V.S.A. § 1111. VTrans usually imposes certain conditions on such permits. For projects subject to dual jurisdiction, it is important that any conditions imposed by a District Commission not be in conflict with the *MUTCD*. Therefore, the practice shall be for the District Commissions to impose land use permit conditions in recognition of the requirements of the *MUTCD* and the role of VTrans in ensuring compliance with these requirements. The District Commissions will work with VTrans to avoid imposing conditions in Act 250 permits that cannot be implemented in accordance with the *MUTCD*. In cases in which District Commissions contemplate establishing permitting conditions more stringent than MUTCD criteria, the District Commissions shall seek the advice of VTrans regarding MUTCD conformance or require the permittee to seek VTrans approval prior to installation. It shall be the practice of the District Commissions and VTrans to resolve these issues before issuance of any land use permit.

C. TRAFFIC REGULATION ISSUES ON STATE HIGHWAYS

10. Purpose. The purpose of Sections 10 through 13 of this MOU is to coordinate the interrelationship of the Land Use Panel and the State Traffic Committee and to protect the public through the regulation of development and subdivisions subject to our concurrent jurisdiction.

11. Act 250 Jurisdiction. The jurisdiction of the Land Use Panel and the District Commissions to protect the environment and the public from the adverse consequences of development projects is set forth in paragraph 7 of this MOU.

12. Traffic Committee Jurisdiction. The Traffic Committee has the authority to regulate certain aspects of the use of state highways, including but not limited to the following:

(a) Set speed limits based upon an engineering and traffic investigation. 23 V.S.A. § 1003. Unless modified by the Traffic Committee, the speed limit on a state highway is 50 m.p.h. 23 V.S.A. § 1081(b).

(b) Control stopping, standing or parking. 23 V.S.A. § 1005.

(c) Establish “no passing” zones. 23 V.S.A. § 1036.

(d) Make “one-way traffic” designations. 23 V.S.A. § 1037.

(e) Order the removal or alteration of artificial lighting that creates a hazard for highway users. 19 V.S.A. § 1104

13. Coordination. From time to time, applicants for land use permits propose projects that a District Commission believes will have an impact on state highways in one or more of the areas also subject to review by the Traffic Committee. These proposed projects may be on or adjacent to state highways or may be close enough to state highways that their construction and operation may have an effect on the safe use of those highways. It is in the public interest for the District Commissions and the Traffic Committee to coordinate their efforts to make a comprehensive review of all such proposed projects. The review shall be done in the following way:

(a) When a District Commission receives a land use permit application or if information is received during the Act 250 hearing process for a proposed project that will or may affect the use of a state highway in a manner that may fall within the purview of the Traffic Committee, the District Commission shall take one or both of the following steps before issuing a decision:

(1) Request the Traffic Committee's assistance, in accordance with 10 V.S.A. § 6024, in reviewing the application. Because VTrans provides administrative support to the Traffic Committee, the District Commission may make its request (or may direct the applicant) to VTrans' Director of Policy and Planning.

(2) Require the applicant to secure the Traffic Committee's approval of the aspects of the application that pertain to the regulation of traffic that are subject to the Traffic Committee's jurisdiction.

(b) The Traffic Committee may review the applicant's traffic-related data (if any), may conduct its own study, or undertake a combination of the two approaches and shall report its recommendations to the District Commission.

The Traffic Committee shall make its best efforts to provide all relevant data to the District Commission before the District Commission issues a land use permit. In certain situations, however, it may be necessary for the Traffic Committee to review project-related traffic conditions after construction is completed. That is because some studies (particularly those related to parking, speed limits, and no passing issues), pursuant to prudent engineering practices, must be made in light of the traffic conditions that exist following project completion. Thus, some land use permits may be issued subject to revision upon the completion of the Traffic Committee's study. It is recognized that, to issue a land use permit, a District Commission must be able to make threshold affirmative findings under Criterion 5, 10 V.S.A. § 6086(a)(5) (relating to transportation), notwithstanding the potential need for further study and review following completion of the project. Any such post-development study shall be completed by the Traffic Committee and presented to the District Commission within six months from actual

completion of construction or full occupation of the project, or at such time as the traffic levels have stabilized, whichever is later. The District Commission shall retain jurisdiction over projects subject to post-development traffic studies and reserve the right to impose further permit conditions as the post-development traffic study may warrant.

(c) If the applicant for the land use permit is VTrans, the District Commission may request a copy of the signage plan and justification for the plan and may make compliance with that plan a condition of the permit.

(d) Regardless of whether the permit applicant is a private or public developer, the pertinent conditions of a land use permit shall be consistent with the most current edition of the MUTCD.

D. PROCEDURES FOR PHASED ACT 250 REVIEW OF VTRANS PROJECTS

14. Purpose. The purpose of Sections 14 through 19 of this MOU is to establish procedures for phased review of VTrans-administered projects under the criteria of Act 250 to avoid unnecessary and unreasonable costs. Under these procedures, District Commissions will identify issues as early as possible in the design of VTrans projects and may issue partial findings of fact and conclusions of law that will bind the District Commissions and all parties unless VTrans makes substantive project revisions as it completes a more detailed design. The purpose of these procedures is to ensure that the design of VTrans-administered projects will reflect and incorporate the objectives of Act 250 early in the design phase without the difficulties that can occur when permit applications are made only after final project design is completed. Except as specifically stated below, this MOU supersedes the July 19, 2001 and October 12, 1982 MOUs between the parties.

15. Permit Applications.

(a) Act 250 applications for VTrans-administered projects shall comply with 10 V.S.A. § 6083 and Act 250 Rules 10 and 21, except for the level of detail of the plans.

(b) VTrans will identify all potentially affected adjoining property owners before it files an Act 250 application.

(c) Plans filed with original applications shall be considered complete for the purposes of this agreement if they include a title sheet, layouts, profile and typical cross-section showing basic information about the location and nature of the project. Such plans are known as conceptual plans.

(d) When semi-final plans are available, VTrans shall file them with the District Commission, along with a letter stating what, if any, substantive changes it has made to the conceptual plans. The District Commission shall forward a copy of VTrans' letter to all parties and notify the parties that plans are available for review at the District Commission's office, the municipal clerk's office, the office of the District Transportation Administrator, and/or VTrans' Montpelier office. VTrans shall file a title sheet, layouts, profile, and typical cross-sections with the municipal clerk for each of the municipalities involved.

(e) For the purposes of Act 250 proceedings, semi-final plans shall be considered final plans. It is understood that VTrans uses semi-final plans as the basis for preparing plans for the acquisition of rights-of-way, and that the plans show both the limits of construction impacts and the expected physical features of the project. VTrans shall file a letter with the District Coordinator before final review, either stating that there have been no substantive changes in the semi-final plans or listing any such changes. The District Coordinator shall review the letter and, if necessary, shall issue a Jurisdictional Opinion specifying the substantial or material changes that have resulted from the preparation of the semi-final plans.

16. Hearings and Party Status.

(a) Hearings shall be convened on permit applications which contain conceptual plans if the applications are otherwise complete in accordance with Act 250 Rules 10 and 21. When VTrans files semi-final plans, all parties shall be entitled to notice and to an opportunity to request additional hearings.

(b) Party status shall be determined in accordance with Act 250 Rule 14 and 10 V.S.A. §6085(c).

17. Findings of Fact, Conclusions of Law, and Interim Decisions.

(a) Upon completing hearings on applications containing conceptual plans, the District Commission shall issue partial findings of fact and conclusions of law with respect to as many of the criteria as it deems appropriate, pursuant to Act 250 Rule 21. While the objective of this review is to identify and resolve as many issues as possible at this preliminary stage, it is understood that the final determination of the criteria for which findings of fact and conclusions of law are to be issued is reserved to the Commission pursuant to Act 250 Rule 21.

(b) Partial findings of fact and conclusions of law based upon conceptual plans may be appealed in accordance with 10 V.S.A. §8504(k)(3).

(c) VTrans-administered projects are subject to various time-consuming constraints that private developers do not encounter. These constraints

include, but are not limited to, the need to condemn land or rights in land, the need to negotiate with landowners who abut VTrans' linear projects, the need for project review under federal statutes and regulations, the need to obtain other permits, and delays in construction because of the competition among all VTrans-administered projects for limited state and federal funding.

(1) In recognition of these constraints, the reasonable and proper term for the following generally shall be five years:

(a) Partial findings of fact and conclusions of law under Act 250 Rule 21(D) and 10 V.S.A. §6086(b); and

(b) Construction completion dates for land use permits under 10 V.S.A. § 6091(d) and Act 250 Rule 32(B).

(2) For good cause shown by VTrans, the term of partial findings of fact and conclusions of law or the construction completion date may exceed five years or may be extended pursuant to Act 250 Rules 21 and 35.

18. Final Decisions and Permit Conditions.

(a) Upon completion of proceedings based upon semi-final plans, the District Commission shall issue a final decision.

(b) If it is established at any time that a "material change" has occurred in the semi-final plans, then the District Commission has full discretion with regard to the need for additional hearings, the criteria at issue, and necessary revisions to its prior partial findings of fact and conclusions of law.

19. Applicability. Unless otherwise specifically agreed to, the provisions of Sections 14-19 of this MOU shall apply only to applications for Act 250 permits filed on or after the effective date of this MOU. Applications for Act 250 permits filed before that date shall be subject to the terms of the July 19, 2001 MOU.

E. TRAINING

20. Training. The Land Use Panel will provide information and periodic training sessions for VTrans personnel as may be necessary to implement this MOU.

F. CONFLICT

21. Conflict. If there is any conflict between the provisions of this MOU and any current rule or statute or future amendments to any rule or statute, the rule or

statute shall prevail. Evolving case law under pertinent rules and statutes shall also prevail in the event of a conflict.

G. MODIFICATION

22. Modification. This Memorandum may be modified only by written agreement of the parties.

H. TERM

23. Term. This Memorandum shall be effective on the last date of signature below, for a period of four (4) years (Initial Term). This Memorandum and Delegation shall be automatically renewed for an additional two (2) years upon expiration of the Initial Term, unless either party provides written notice to the contrary not less than ninety (90) days prior to the Initial Term's expiration. If written notice is timely provided, then this Memorandum shall expire at the end of the Initial Term.

Dated at Montpelier, Vermont, this 2nd day of April 2009.

**LAND USE PANEL OF THE
NATURAL RESOURCES BOARD**

By: /s/ Peter F. Young, Jr.
Peter F. Young, Jr.
Chair

Dated at Montpelier, Vermont, this _7th_ day of April 2009.

AGENCY OF TRANSPORTATION

By: /s/ David C. Dill
David C. Dill
Secretary of Transportation

Dated at Montpelier, Vermont, this _7th_ day of April 2009.

STATE TRAFFIC COMMITTEE

By: /s/ David C. Dill
David C. Dill
Chair