

CHAPTER 117 GUIDANCE DOCUMENT “Life after September 1, 2005”

INTRODUCTION

This Guidance Document is designed to provide an overview of the statutory requirements that *must* be complied with, and that will automatically override any inconsistent municipal bylaw provisions as of September 1, 2005. This Guidance Document is not intended as a review of all the 2004 amendments to Chapter 117 or of its many new enabling provisions.

ADDITIONAL TOOLS AND RESOURCES

Chapter 117 resources and tools are available at www.VPIC.info. These include the:

- Quicklist of Tools and Information for September 1, 2005 Compliance;
- Rules of Procedure and Ethics Manual;
- Plan and Bylaw Adoption Tools;
- Development Review Templates for Saving Clause Compliance;
- Sample Bylaws and Definitions for Saving Clause Compliance;
- Special Bulletins on the Chapter 117 Changes; and
- Frequently Asked Questions on the Chapter 117 Changes.

OVERVIEW OF SEPTEMBER 1, 2005 STATUTORY OVERRIDE PROVISIONS

On September 1, 2005, the amended Chapter 117 provisions discussed below will override inconsistent municipal bylaws and regulations. A bylaw will be deemed inconsistent if it does not contain the provisions of the amended Chapter 117 discussed below, or if it contains provisions that do not conform to the amended provisions. If a bylaw is inconsistent with the statute, the statute must be followed and used to supplement the bylaws.

This Guidance Document discusses the following sections of Chapter 117:

- Section 4412 (Required provisions and prohibited effects);
- Section 4413 (Limitations on municipal bylaws);
- Subchapter 9 (Adoption, Administration, and Enforcement);
- Subchapter 10 (Appropriate Municipal Panels); and
- Subchapter 11 (Appeals).

Each section will be discussed separately below and will emphasize only the most recent changes to Chapter 117 in each section that must be complied with as of September 1, 2005. In addition, if there is any inconsistency between a statutory definition in Section 4303 and a definition in the municipal bylaw, use the statutory definition after September 1st. These will rule.

A. SECTION 4412 - REQUIRED PROVISIONS AND PROHIBITED EFFECTS

There are several provisions in Section 4412 that have been amended and that create new requirements for municipalities. These include: Multifamily dwellings; Accessory Apartments; Residential Care Homes or Group Homes; Existing Small Lots; Required Frontage; Child Care Facilities; and Nonconformities. It is important to note, however, that *all* of the provisions contained in section 4412 must be adhered to after September 1, 2005, but that this Guidance Document only discusses the provisions that were amended by Act 115 in 2004.

1. **Multifamily Dwellings - 24 V.S.A. § 4412(1)(D)**

Effect Of September 1, 2005 Override: This amended section mandates municipalities to designate appropriate districts and reasonable regulations for multiunit or multifamily dwellings. The new statute does not, however, contain criteria that can be followed if a municipality's bylaws do not contain such regulations as of September 1, 2005. Because zoning administrators must strictly apply bylaws, zoning administrators cannot issue permits for multiunit or multifamily dwellings if such uses are not provided for in a zoning bylaw. Therefore, it is essential that bylaws be amended to include provisions for multiunit and multifamily dwellings. If a municipality does not make such a provision, the municipality will be deemed to exclude such housing units, which is a violation of the statute.

It is unclear how the Environmental Court will rule in a case where bylaws do not designate appropriate districts for multiunit or multifamily dwellings. Two possibilities could include the Court issuing a permit without the guidance of, or input from, the municipality, or the Court could invalidate that section of the bylaws. Another reason to make sure bylaws comply with this, and all of the Chapter 117 housing provisions, is that the new Chapter 117 requires the Attorney General to investigate any complaint that a bylaw violates the Chapter 117 housing provisions, and authorizes the Attorney General, upon determining that a violation has occurred, to file an action in the Environmental Court to challenge the validity of the bylaw or its manner of administration. *See* 10 V.S.A. § 4453.

Available Tools on www.VPIC.info: Bulletin number 1, 5, and 6; Sample Bylaws and Definitions; and Quicklist of Tools and Information.

2. **Accessory Apartments - 24V.S.A. § 4412 (1)(E) and (1)(F)**

Effect of September 1, 2005 Override: This amended section contains criteria that must be applied if a municipality's bylaws have not been amended since July 1, 2004 to comply with the new statutory requirements.

As of September 1, 2005, an accessory apartment *must* be allowed as a permitted use if: the accessory apartment is subordinate to an owner-occupied single-family dwelling; the property has sufficient wastewater capacity; the unit does not exceed 30 percent of the total habitable floor area of the single family dwelling; and all applicable setback, coverage and parking requirements are met. Occupancy restrictions have been eliminated. Occupancy can no longer be restricted to relatives, disabled persons, or persons over the age of 55.

Bylaws *may* regulate accessory apartments as conditional uses, but only if the accessory apartment involves a new structure, an increase in the height or floor areas of the existing dwelling, or an increase in parking area dimensions.

Accessory apartments *may* now be located within or "appurtenant to" the owner-occupied single-family dwelling. Prior law required the accessory apartment to be located within or attached to the primary residence. "Appurtenant" means an accessory dwelling that is contained in a free-standing structure, unattached to the primary owner-occupied dwelling.

The amended statute also expressly allows municipal bylaws to be "less restrictive" than the statute. This means, for example, that bylaws could allow accessory units to be larger than 30% of the habitable floor area of the primary structure, or allow new accessory units that are not attached to the primary single-family residence as a permitted use, not subject to conditional use approval.

Available Tools on www.VPIC.info: Bulletin number 6; Sample Bylaws and Definitions; and Quicklist of Tools and Information.

3. **Residential Care Homes Or Group Homes - 24 V.S.A. § 4412 (1)(G)**

Effect of September 1, 2005 Override: This section requires that residential care and group homes that meet the statutory requirements *must* be allowed as a permitted use, even if the municipal bylaws treat residential care and group homes as conditional or prohibited uses.

Available Tools on www.VPIC.info: Bulletin number 6; Sample Bylaws and Definitions; and Quicklist of Tools and Information.

4. **Existing Small Lots - 24 V.S.A. § 4412 (2)**

Effect of September 1, 2005 Override: This amended section contains criteria that must be applied if a municipality's bylaws have not been amended since July 1, 2004 to comply with the new statutory requirements.

Development on existing small lots of less than one-eighth acre in area or having a width or depth dimension of less than 40 feet must now be allowed, unless bylaws specifically prohibit it. Under prior law, development on lots of this size was automatically prohibited by statute.

Merger of small lots that come under common ownership with one or more contiguous lots after September 1, 2005 is no longer automatic. If municipalities want to continue to require merger of small lots, the bylaws must specifically require merger. Municipalities, however, are prohibited from requiring merger if: the lots are conveyed in their preexisting, nonconforming configuration; on the effective date of any bylaw, each lot was developed with a water supply and wastewater disposal system; at the time of transfer, each water supply and wastewater system is functioning in an acceptable manner; and the deeds of conveyance create appropriate easements on both lots for replacement of one or more wastewater systems, potable water systems, or both, in case there is a failed system or failed supply.

Available Tools on www.VPIC.info: Bulletin number 5; Sample Bylaws and Definitions; and Quicklist of Tools and Information.

5. **Required Frontage - 24V.S.A. § 4412 (3)**

Effect of September 1, 2005 Override: Like prior law, this section requires that bylaws contain provisions for required frontage. The amended section, however, gives municipalities the option to grant approval for easements for lots that do not have frontage on public roads or waters pursuant to zoning bylaws if subdivision bylaws have not been adopted or do not apply. Formerly, such approval was required to be pursuant to subdivision bylaws.

Available Tools on www.VPIC.info: Bulletin number 5; Sample Bylaws and Definitions; and Quicklist of Tools and Information

6. **Child Care Facilities - 24 V.S.A. § 4412 (5)**

Effect of September 1, 2005 Override: Municipalities are required to treat child care facilities as a permitted use if the specified statutory requirements are met. The amended statute has not substantively changed - the primary change is that this section is now located in the "Required Provisions" of Chapter 117, and not under the "Limitations."

Available Tools on www.VPIC.info: Bulletin number 5; Sample Bylaws and Definitions; and Quicklist of Tools and Information

7. Nonconformities

a. Nonconforming Uses, Structures, and Lots - 24 V.S.A. § 4412 (7)(A)

Effect of September 1, 2005 Override: Municipalities are required to define how nonconformities are regulated. Under prior law, municipalities were allowed, and not required, to regulate nonconformities. The new statute does not, however, contain criteria that can be followed if a municipality's bylaws do not contain such regulations as of September 1, 2005. Again, it is unclear how the Environmental Court would rule on a case involving bylaws that don't contain provisions defining how nonconformities will be regulated. The best approach is to ensure that your bylaws contain these, and all of the other provisions discussed in this Guidance. The new Chapter 117 also incorporates, under the term 'nonconformities,' nonconforming uses, structures, lots and parcels.

Available Tools on www.VPIC.info: Bulletin number 5; Sample Bylaws and Definitions; and Quicklist of Tools and Information.

b. Nonconforming Mobile Home Parks - 10 V.S.A. § 4412 (7)(B)

Effect of September 1, 2005 Override: Municipalities are required, to treat a mobile home park in its entirety as a nonconformity, and not the individual lots as a nonconformity, if a mobile home park is a nonconforming use. This section also *enables* municipalities to adopt specific site standards for individual lots in preexisting mobile home parks, provided that the standards do not have the effect of prohibiting the replacement of mobile homes on existing lots.

Available Tools on www.VPIC.info: Bulletin number 5; Sample Bylaws and Definitions; and Quicklist of Tools and Information.

B. LIMITATIONS ON MUNICIPAL BYLAWS- 24 V.S.A. § 4413

All of the provisions contained in section 4413 must be adhered to after September 1, 2005. However, only the provisions that were recently amended by Act 115 are discussed below.

Effect of September 1, 2005 Override: This section limits municipal authority to regulate the public facilities identified in the statute. Municipal regulations may only regulate the specified uses 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. Bylaws that regulate beyond these specified items are not authorized by statute. Municipalities are completely prohibited from regulating public utility power generating plants and transmission facilities regulated by 30 V.S.A. § 248 and agricultural and silvicultural practices that meet the listed statutory requirements. This section further limits municipal regulation by including "other places of worship" to the list of churches, convents and parish houses.

Available Tools on www.VPIC.info: Bulletin number 7; Sample Bylaws and Definitions; and Quicklist of Tools and Information.

C. SUBCHAPTER 9 - ADOPTION, ADMINISTRATION, AND ENFORCEMENT

Subchapter 9 governs bylaw adoption, administration and enforcement, including: new requirements for bylaw adoption; zoning administrator appointments; and the issuance of zoning permits.

1. **Preparation of Bylaws, Amendment or Repeal** - 24 V.S.A. § 4441(e)

Effect of September 1, 2005 Override: Planning Commissions are now *required* to prepare and approve a written report when considering any bylaw, amendment or repeal, and are required to submit this written report to the Department of Housing and Community Affairs (“DHCA”). A form for this report is provided by DHCA. Under prior law, this reporting requirement was only optional, but now it is required.

Available Tools on www.VPIC.info: Bulletin number 4; FAQs on Adoption, Amendment and Repeal Process; the form is available at www.dhca.state.vt.us/planning

2. **Routine Adoption** - 24 V.S.A. § 4442(c)(2) and (d)

Effect of September 1, 2005 Override: This section does not contain any mandates. Instead, it enables the legislative body, or the voters, in rural towns to vote to amend or repeal bylaws by Australian Ballot. If rural towns want to adopt bylaws by Australian Ballot, the legislative body must adopt a resolution to do so, or the town must vote on the issue at a special or annual town meeting.

Available Tools on www.VPIC.info: Bulletin number 4; FAQs on Adoption, Amendment and Repeal Process.

3. **Appointment and Powers of Administrative Officer** - 24 V.S.A. § 4448(a)

Effect of September 1, 2005 Override: This section prohibits zoning administrators from holding positions on the zoning board or development review board, a practice that was allowed under prior law. This section also clarifies that the zoning administrator is nominated by the planning commission and appointed by the selectboard.

Available Tools on www.VPIC.info: Bulletin number 7.

4. **Zoning Permits** - 24 V.S.A. § 4449(b)

Effect of September 1, 2005 Override: This section requires municipalities to post, or require the applicant to post, issued permits within view of the public right of way closest to the subject property for 15 days following the issuance of the permit. Failure to comply with this notice requirement may deny interested persons their due process rights and cause the validity of the permit to be subject to legal challenge.

Available Tools on www.VPIC.info: Bulletin number 8; The “Big P” Permit Notice Poster; Plan and Bylaw Adoption Tools; Sample Bylaws and Definitions; Quicklist of Tools and Information; Procedures for Administration and Enforcement of Vermont Zoning Bylaws.

D. SUBCHAPTER 10 - APPROPRIATE MUNICIPAL PANELS

Subchapter 10 incorporates new development review procedures, including public notice, hearing, and decision requirements. The term appropriate municipal panel (“AMP”) is used to refer to planning commissions performing development review, zoning boards of adjustment, development review boards, and legislative bodies performing development review.

1. Appropriate Municipal Panels - 24 V.S.A. § 4460(e)

Effect of September 1, 2005 Override: This section mandates that all matters, except for appeals of decisions of the zoning administrator, must come before the AMP by referral of the zoning administrator.

Available Tools on www.VPIC.info: Bulletins 8 and 10; Manual of Procedures for Administration and Enforcement; Sample Bylaws and Definitions, sections M & N; FAQs on the Development Review Process; Rules of Procedure and Ethics Manual

2. Development Review Procedures - 24 V.S.A. § 4461(a)

Effect of September 1, 2005 Override. This section requires AMPs to adopt rules of ethics, in addition to the prior requirement that rules of procedure be adopted. The statute does not dictate what rules of ethics must contain. It is also unclear how the Environmental Court would rule in a case involving a complaint that an AMP has failed to adopt the required rules of ethics. Even if an AMP has not yet adopted rules of ethics, conflicts of interest and ex parte communications must be avoided as they can constitute a violation of an interested party’s constitutional due process rights.

Available Tools on www.VPIC.info: Bulletin numbers 8 and 10; Sample Bylaws and Definitions; Quicklist of Tools and Information; Templates for Development Review Hearing Notices, Findings of Fact, and Decisions; Rules of Procedure and Ethics Manual; Procedures for Administration and Enforcement of Vermont Zoning Bylaws.

3. Information Gathering and Record of Participation by Interested Persons - 24 V.S.A. § 4461(b)

Effect of September 1, 2005 Override: This section requires municipalities to keep a written record of the names of persons participating in all hearings, and must allow persons wishing to achieve party status an opportunity to demonstrate why they are entitled to party status. Compliance with this requirement is essential because achieving party status is a prerequisite for participation in an appeal to the Environmental Court. Again, it is unclear how the Environmental Court would respond if this section is not complied with. Two possibilities could include Court remanding the matter to the local board for compliance with this section, or making the determinations on its own.

Available Tools on www.VPIC.info: Procedures for Administration and Enforcement of Vermont Zoning Bylaws.

4. Decisions - 24 V.S.A. § 4461(b)

Effect of September 1, 2005 Override: AMPs are required to issue *all* decisions, including site plan review, within 45 days of adjournment of the public hearing. Failure to comply with this requirement exposes towns to the risk of applications being “deemed approved” by operation of law.

Available Tools on www.VPIC.info: Manual of Procedures for Administration and Enforcement of Vermont Zoning Bylaws.

5. **Combined Review - 24 V.S.A. § 4462**

Effect of September 1, 2005 Override: Municipalities are required to conduct all reviews concurrently where feasible if a project requires more than one type of review, Bylaws must also define a process for the sequence of such review and the issuance of decisions.

Available Tools on www.VPIC.info: Manual of Procedures for Administration and Enforcement of Vermont Zoning Bylaws.

6. **Subdivision Review - 24 V.S.A. § 4463**

Effect of September 1, 2005 Override: This section creates a new time period of 180 days for filing plat approvals with the clerk of the municipality. Municipalities are prohibited from imposing expiration dates on plat approvals filed with the clerk of the municipality. Bylaws *may* authorize zoning administrators to extend the date for filing for an additional 90 days if other local or state permits are still pending.

Available Tools on www.VPIC.info: Manual of Procedures for Administration and Enforcement of Vermont Zoning Bylaws.

7. **Public Hearing Notice Requirements - 24 V.S.A. § 4464(a)(1) and (2)**

Effect of September 1, 2005 Override: 15 days public notice is required for hearings for conditional use review, variances, administrative officer appeals, and final plat review for subdivisions. All other development review hearings, including site plan review, require only 7 days notice and do not have to be published but do have to be posted. Notice for all hearings must now include written notification to the applicant and to owners of all properties adjoining the property subject to development, without regard to any public right-of-way. The notification is required to include a description of the proposed project and must be accompanied by information that clearly informs the recipient where additional information may be obtained, and that participation in the local proceeding is a prerequisite to the right to take any subsequent appeal. Because participation at the local level is a prerequisite to participation in an appeal in Environmental Court, it is likely that these notice requirements will be strictly interpreted and enforced by the Court.

Available Tools on www.VPIC.info: Manual of Procedures for Administration and Enforcement of Vermont Zoning Bylaws.

E. SUBCHAPTER 11 - APPEAL PROCEDURES

Subchapter 11 incorporates revised appeal provisions, including new definitions and participation requirements for “interested persons” and changes the process for filing appeals to Environmental Court.

1. **Appeals of Decisions of the Administrative Officer - 24 V.S.A. § 4465**

Effect of September 1, 2005 Override: The process for appealing a decision of the zoning administrator remains largely unchanged. However, the amended definition of interested persons now requires that property owners, or occupants, in the immediate neighborhood must demonstrate a physical or environmental impact under the criteria being reviewed, and no longer includes conservation commissions. Groups of ten persons or more are now required to designate a single representative for the group.

Available Tools on www.VPIC.info: Bulletin #9; Manual of Procedures for Administration and Enforcement; Sample Bylaws and Definitions, section O; FAQs on Appeals; Rules of Procedure and Ethics Manual

2. **Appeal To Environmental Court - 24 V.S.A. § 4471 (a)**

Effect of September 1, 2005 Override. In order to participate in appeals to Environmental Court, an interested person must participate in the municipal development review proceedings. Participation is defined as “offering oral or written testimony, evidence or statement of concern related to the subject proceeding.” 24 V.S.A. § 4471(a). Municipalities must prepare a list of all interested parties appearing at the local proceeding during the course of the municipal hearing, and must be prepared to provide such list to any appellants appealing to the Environmental Court.

Available Tools on www.VPIC.info: Bulletin #9; Manual of Procedures for Administration and Enforcement; Sample Bylaws and Definitions, section O; FAQs on Appeals; Rules of Procedure and Ethics Manual

3. **Filing An Appeal In Environmental Court - 24 V.S.A. § 4471(c)**

Effect of September 1, 2005 Override. Appeals from a final decision of an AMP are now required to be filed with the clerk of the Environmental Court. Under prior law, appeals were required to be filed with the secretary of the local board or municipal clerk.

Available Tools on www.VPIC.info: Bulletin number 9; Sample Bylaws and Definitions; Quicklist of Tools and Information; Manual of Procedures for Administration and Enforcement of Vermont Zoning Bylaws.

8/18/05