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A LAND USE LAW ANALYSIS TO EMPOWER SMALL-SCALE AGRICULTURE IN TETON COUNTY, WYOMING

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INTRODUCTION

Localizing or regionalizing food systems can provide an effective alternative to help remedy the adverse environmental, social, and economic outcomes resulting from conventional food systems.[2] Local or community food systems are "a collaborative effort to integrate agricultural production with food distribution to enhance the economic, environmental, and social well-being of a particular place."[3]

In Teton County, Wyoming, interest in and demand for a community food system is increasing. Teton Conservation District (TCD) is a local government entity working with many stakeholders to conserve natural resources in Teton County for the "health and benefit of the people and the environment."[4] While many components of a Teton County community food system warrant exploration, TCD has a particular interest in small-scale agricultural production based on unique conditions within the County.[5] As

2. Naomi Robert & Kent Mullinix, *Municipal Policy Enabling Regional Food Systems in British Columbia, Canada: Assessing Focal Areas and Gaps*, 8 J. AGRIC., FOOD SYS., & CMTY. DEV. 115, 116 (2018); Rachel Carey et al., *Integrating Agriculture and Food Policy to Achieve Sustainable Peri-Urban Fruit and Vegetable Production in Victoria, Australia*, 1 J. AGRIC., FOOD SYS., & CMTY. DEV. 181, 183–84 (2011).

3. Carrie Edgar & Laura Brown, *A Review of Definitions of Community Food Systems*, UNIV. OF WIS. COOP. EXTENSION, https://fyi.extension.wisc.edu/cfsi/files/2012/10/CFS-definitions-5-21-13.pdf (last updated May 2013) (citation omitted).

4. *Mission and History (About)*, TETON CONSERVATION DIST., https://www.tetonconservation.org/about (last visited Nov. 30, 2023).

5. Telephone Interview with R. Sgroi, Land Resources Specialist, Teton Conservation Dist. (Feb. 27, 2020). Throughout this Article, the term "small-scale agriculture" is used to provide consistency, given that the term "small agriculture" is used in the 2020 and 2021 Teton Conservation District Annual Reports. While there is no specific definition for small-scale agriculture, we use it to denote agriculture in a variety of unused or abandoned spaces that can be supported by infrastructure like greenhouses, hoop houses, raised beds, containers, building walls, and hydroponics. TETON CONSERVATION DIST., TETON CONSERVATION DISTRICT ANNUAL REPORT: JULY 1, 2019 – JUNE 30, 2020, 13 (2020); TETON CONSERVATION DIST., TETON CONSERVATION DISTRICT ANNUAL REPORT: JULY 1, 2020 – JUNE 30, 2021, 16 (2021).

the population of the western United States continues to grow, more counties are facing challenges similar to those faced by Teton County.[6] This analysis offers solutions that could apply to a number of similarly situated western counties and municipalities.

The first unique condition driving TCD's focus on production is that 97% of Teton County is public land.[7] Not only does the prevalence of publicly owned land limit the land available to produce food, but the remaining 3% of privately owned greenspace is rapidly developing for residential and commercial purposes.[8] Second, communities in Teton County are surrounded by large mountain ranges and vast areas of forested public land. Consequently, importing food over often snow-covered roads can be challenging.[9] Third, current local production capacity cannot meet tourists' and residents' increasing demand for locally produced food.[10] All these conditions combine to challenge the resilience of Teton County's food system. Teton County, Idaho; Gallatin County, Montana; and many others inside the Greater Yellowstone Ecosystem and the broader Intermountain West face similar conditions and challenges.[11]

Small-scale agriculture provides one avenue toward local and sustainable production methods. In Teton County, small-scale agriculture could provide a conservation tool to keep limited greenspace and private land from further development while also utilizing uniquely situated spaces for local food production. Additionally, local food production through small-scale agriculture can support communities in building resilient and accessible food systems. Local food systems that utilize small-scale agriculture can help communities withstand national and multinational supply interruptions and reduce the unsustainable importation of food.[12] Small-scale agriculture could also help to fill the current gap between demand and supply of locally produced food in Teton County, increasing access to healthy food while also supporting local farmers and businesses. However, Teton County lacks a comprehensive, shared understanding of the barriers to local food production

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6. *See* Arthur Middleton et al., *The Role of Private Lands in Conserving Yellowstone's Wildlife in the Twenty-First Century*, 22 WYO. L. REV. 237, 249–50 (2022).

7. Susan Marsh, *Is Development on Private Land in Jackson Hole Causing the Community to Burst at its Seams?*, MOUNTAIN J. (May 6, 2019), https://mountainjournal.org/growth-is-pushing-parts-of-jackson-hole-to-burst-at-its-seams.

8. *Id.*

9. Telephone Interview with R. Sgroi, Land Res. Specialist, Teton Conservation Dist. (Feb. 27, 2020).

10. *Id.*

11. *See* Marsh, *supra* note 7 (describing the contemporary threats and obstacles facing public land management and conservation in the Greater Yellowstone Ecosystem); TETON CNTY., IDAHO, COMPREHENSIVE PLAN 9 (2012); GALLATIN CNTY., MONT., GALLATIN GROWTH POLICY 7-1 to -25 (2021).

12. Robert & Mullinix, *supra* note 2.

and opportunities offered by small-scale agriculture, including around policy and planning.

Local and regional policy and planning can play an influential role in creating food policy and systems change.[13] However, policy and planning practices addressing unsustainable conventional food systems and navigating toward a community food system are absent in many communities.[14] Food policy is essential at the local and regional planning levels and should be "comprehensive in scope and attentive to the temporal dimensions and spatial interconnections among important facets of community life" that cannot be addressed in isolation.[15] Land use policies found in comprehensive plans can "assist in securing access to and ensuring the preservation of land for agricultural uses" and drive future community development approaches.[16]

This Article analyzes three important local land use planning and regulatory frameworks in Teton County: the Jackson/Teton County Comprehensive Plan (the Comprehensive Plan); the Teton County land development regulations (LDRs); and the Town of Jackson LDRs.[17] Given the identification of land use planning as influential on a community food system and its future development, this Article primarily focuses on the Comprehensive Plan.

That said, the Comprehensive Plan "is a policy document that articulates the community Vision and does not have a regulatory effect or the force of law."[18] While the Comprehensive Plan's Vision can support a sustainable and resilient community food system, some mechanism with regulatory effect or the force of law is necessary to ultimately enact that vision.[19] Therefore, this Article briefly analyzes components of the Teton County

13. Megan Masson-Minock & Deirdra Stockmann, *Creating a Legal Framework for Urban Agriculture: Lessons from Flint, Michigan*, 1 J. AGRIC., FOOD SYS., & CMTY. DEV. 91, 92 (2010) (citation omitted).

14. Julia Freedgood et al., *Emerging Assessment Tools to Inform Food System Planning*, 2 J. AGRIC., FOOD SYS., & CMTY. DEV. 83, 98 (2011).

15. *APA Policy Guide on Community and Regional Food Planning*, AM. PLAN. ASS'N (May 11, 2007), https://www.planning.org/policy/guides/adopted/food.htm; *see* Robert & Mullinix, *supra* note 2 (discussing food policy in Canada).

16. HEATHER WOOTEN & AMY ACKERMAN, NAT'L POL'Y & LEGAL ANALYSIS NETWORK TO PREVENT CHILDHOOD OBESITY, SEEDING THE CITY: LAND USE POLICIES TO PROMOTE URBAN AGRICULTURE 5 (2011).

17. The Comprehensive Plan, Teton County LDRs, and Town of Jackson LDRs are not the only planning and regulatory frameworks that could support small-scale agriculture. *See* discussion *infra* Sections I(B), II(B) (explaining other frameworks that, while not the focus of this article, could support small-scale agricultural production in Teton County, Wyoming).

18. JACKSON, WYO. & TETON CNTY., WYO., JACKSON/TETON COUNTY COMPREHENSIVE PLAN AV-19 (2020) [hereinafter COMPREHENSIVE PLAN].

19. *Id.*

LDRs and Town of Jackson LDRs that, if integrated with certain elements of the Comprehensive Plan, would enable the Plan to carry the force of law.[20]

While each component of a community food system could receive better support through targeted revisions to these land use planning and regulatory frameworks, this research specifically focuses on small-scale agricultural production. This Article explores the legal frameworks that impact small-scale agricultural production in three discussions: (1) how Teton County's three existing frameworks both support and challenge small-scale agricultural production in Teton County; (2) how other communities use similar land use planning and regulatory frameworks to support their small-scale agricultural production; and (3) how Teton County could adopt these land use planning and regulatory frameworks to better support small-scale agricultural production. Finally, this Article provides examples of policy or planning approaches that other geographically and socially similar counties in the West could replicate or adapt.

Each of the following two Parts begins with a brief overview of the planning or regulatory document's pertinent features. Then, each Section A summarizes the organization of each respective framework and identifies the provisions that support or challenge small-scale agricultural production in Teton County. Then, each Section B discusses the approaches (e.g., regulatory structure and language) other communities have used in their comprehensive plans and land use regulations to support small-scale agricultural production. Finally, each Section C synthesizes the preceding Sections to make recommendations for adapting each Teton County planning and regulatory framework to better support small-scale agricultural production.

I. JACKSON/TETON COUNTY COMPREHENSIVE PLAN

Through state statute, the State of Wyoming directs municipalities to develop comprehensive plans for physical development and gives them statutory authority, or "the power and duties assigned to a government official or agency through a law passed by . . . state legislature," to do so.[21] The Town of Jackson obtains its statutory authority from Wyoming Statutes §§ 15-1-501 through 15-1-506.[22] Teton County obtains its statutory authority

20. While other sources have described incorporating food policy into comprehensive plans as a successful strategy, this Article will not deeply analyze whether this strategy is more effective than amendments to LDRs. *See* Freedgood et al., *supra* note 14, at 97. Rather, this Article discusses the advisory role of the Comprehensive Plan, the regulatory authority and legally binding role of the Teton County and Town of Jackson LDRs, and the relationship between these two frameworks.

21. WYO. STAT. ANN. § 9-8-301 (2023); *Statutory Authority*, BALLOTPEDIA, https://ballotpedia.org/Statutory_authority (last visited Dec. 3, 2023).

22. WYO. STAT. ANN. §§ 18-5-201, 15-1-501 to -506 (2023).

from Wyoming Statutes §§ 18-5-201 through 18-5-202.[23] The Comprehensive Plan is a planning document developed by a collaborative group of Teton County stakeholders, technical advisors, elected officials, and planning staff.[24] To guide Teton County officials and agencies with regulatory authority, a coalition of government and community organizations completed the current framework for the Comprehensive Plan in 2012.[25] In 2020, these entities updated the Comprehensive Plan as a result of a Growth Management Program review process, which was triggered by a 5% growth in residential units between 2016 and 2020.[26]

The Comprehensive Plan's Vision is to "[p]reserve and protect the area's ecosystem in order to ensure a healthy environment, community[,] and economy for current and future generations."[27] Because 97% of Teton County is public land, including a portion of the Greater Yellowstone Ecosystem, this Vision emphasizes the relationship between Teton County residents, tourists, wildlife, and the natural landscape.[28] The Comprehensive Plan commits to three Common Values meant to strengthen the Vision: "Ecosystem Stewardship," "Growth Management," and "Quality of Life."[29] The 2020 Vision and the three Common Values remain the same as those set by the 2012 version.[30]

The first eight of 10 chapters of the Comprehensive Plan focus on the Plan's Common Values. These chapters reflect the most important land management and planning issues for the County.[31] Each chapter contains a "Chapter Goal," an articulation of the goal, principles, and policies for each principle that aim to achieve that chapter's Common Value. Additionally, each chapter provides "starting-point" strategies, and completed strategies are indicated with a checkmark symbol. Chapters 9 and 10 focus on adaptive management and plan implementation that "provide how this Plan will remain current and consistently implemented."[32]

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23. *Id.* §§ 18-5-201 to -202.
24. COMPREHENSIVE PLAN, *supra* note 18, at v.
25. *Id.* at iv–vi.
26. *Growth Management Program Review & Comp Plan Update*, JACKSON/TETON CNTY. LONG-RANGE PLAN., http://jacksontetonplan.com/315/Growth-Management-Program-GMP-Review-Upd (last visited Dec. 3, 2023).
27. COMPREHENSIVE PLAN, *supra* note 18, at ES-2.
28. *Id.* at CV-1-2.
29. *Id.* at AV-18.
30. *Id.* app. at B-25.
31. *See infra* Table 1.
32. COMPREHENSIVE PLAN, *supra* note 18, at AV-1.

Table 1 *Chapter Goals of the Three Common Values*[33]

Common Value	Chapter	Chapter Goal
Ecosystem Stewardship	Chapter 1. Stewardship of Wildlife, Natural Resources, and Scenery	Maintain healthy populations of all native species and preserve the ability of future generations to enjoy the quality natural, scenic, and agricultural resources that largely define our community character.
Ecosystem Stewardship	Chapter 2. Climate Sustainability	Emit less greenhouse gases than we did in 2012.
Growth Management	Chapter 3. Responsible Growth Management	Direct at least 60% of future growth into Complete Neighborhoods to preserve habitat, scenery and open space and provide workforce housing opportunities.
Growth Management	Chapter 4. Town as Heart of the Region - The Central Complete Neighborhood	The Town of Jackson will continue to be the primary location for jobs, housing, shopping, educational and cultural activities.
Quality of Life	Chapter 5. Local Workforce Housing	Ensure a variety of workforce housing opportunities exist so that at least 65% of those employed locally also live locally.
Quality of Life	Chapter 6. A Diverse and Balanced Economy	Develop a sustainable, vibrant, stable and diversified local economy.
Quality of Life	Chapter 7. Multimodal Transportation	Travel by walk, bike, carpool, or transit will be more convenient than travel by single-occupancy vehicle.

33. *Id.* at CV-1-2 to CV-3-28.

Quality of Life	Chapter 8. Quality Community Service Provision	Timely, efficiently, and safely deliver quality services and facilities in a fiscally responsible and coordinated manner.

Additionally, the Comprehensive Plan identifies 15 "Character Districts," which divide the county into "Rural Areas" or "Complete Neighborhoods," then suggests different policies based on the characteristics of the district.[34] A Character District can either be a Rural Area focused on the Ecosystem Stewardship Common Value or a Complete Neighborhood focused on enhancing the Quality of Life Common Value.[35] Each Character District also includes "Subareas" with one of four classifications: preservation, conservation, stable, or transitional.[36] Each classification has character priorities that help achieve the desired future character of the Subarea. These priorities are depicted by "Character Defining Features" and "Neighborhood Forms."[37] Character Defining Features are described in writing under the Subarea's pertinent subsection and illustrated as map symbols on the "Vicinity Map."[38] Neighborhood Forms describe the general form of development that has occurred in a Character District. Each Subarea can have one or more Neighborhood Forms.[39] The Neighborhood Forms include acre size, building height, uses, and special considerations.[40] The Plan also lists "Policy Objectives," drawn from policies in the first eight chapters, that are helpful for achieving a given Character District's desired future character.

When a project is proposed in Teton County, the Comprehensive Plan considers three things. First, the project should respond to the targets and indicators set out by each Chapter Goal and the "Achieving Our Vision" chapters (i.e., Chapters 9 and 10).[41] Second, the project should be sited in a Character District where it has been explicitly identified as a possible project.[42] If that project type is not listed, the best location should be identified by using the Character District framework that optimally incorporates each of the eight Chapter Goals.[43] Third, the project should

34. *Id.* at IV-2.
35. *Id.*
36. *Id.* at CV-2-4, IV-2, IV-6.
37. *Id.* at IV-2.
38. *Id.* at IV-8.
39. *Id.* at IV-10.
40. *Id.*
41. *Id.* at ES-3.
42. *Id.*
43. *Id.*

implement the Comprehensive Plan's eight Chapter Goals.[44] If a project is specifically identified in the Comprehensive Plan as a strategy to achieve the goals of the plan, it is automatically considered to have optimized the Chapter Goals. If a project is not specified in the Comprehensive Plan, more analysis must be performed, and the plan must address each target identified in the Chapter Goals. By examining and adhering to these three key considerations, the Comprehensive Plan relies on "predictable," "locally relevant," and "regionally responsible" decision-making to achieve optimal results.[45]

A. Components of the Jackson/Teton County Comprehensive Plan Supporting and Challenging Small-Scale Agricultural Production

Agriculture fits within the Comprehensive Plan's Principles, Policies, and Strategies to achieve the Vision and Common Values through its role in conserving open space. Agriculture's role is primarily discussed in Chapter 1 (Stewardship of Wildlife, Natural Resources[,] and Scenery).[46] Chapter 1 highlights four Principles that inform each of the Policies proposed by that chapter. Principle 1.4 creates a foundation for these Policies to ensure that development occurs in a way that protects open space, recognizing that agriculture can protect open spaces from development and maintain the heritage of the region.[47] Policy 1.4.b recognizes the important role of agriculture in conserving open space:

> The conservation of agriculture and agricultural lands also conserves open space. Historically, the agricultural community has provided much of the stewardship of the natural and scenic resources valued by the community. Conservation of open space via agriculture protects the historic western character of the community and can support wildlife movement corridors, natural resources, and scenery. Regulations that are generally applicable to development may functionally or procedurally impede the continuation of agricultural operations. The County will evaluate the impacts of its regulations on active agricultural operations that conserve significant open space and continue to provide exemptions to requirements that preclude continued agricultural stewardship of large tracts of open space. The County will also explore other incentives to support and encourage continued agricultural conservation of open space.[48]

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44. *Id.*
45. *Id.*
46. *Id.* at CV-1-2.
47. *Id.* at CV-1-10.
48. *Id.*

Building from Principle 1.4, Policy 1.4.c suggests an incentive program that should protect and steward agricultural lands and the open space and habitat those lands provide.[49] The Comprehensive Plan specifies Strategies for the county to meet the Principles and Policies of each chapter, including 1.4.S.2, which requires entities to review and update exemptions and incentives that encourage agriculture as a means of conserving open space.[50]

Chapter 3 of the Comprehensive Plan (Responsible Growth Management) also discusses agriculture.[51] Principle 3.1 emphasizes the preference of conserving rural areas and directing any growth into urban areas or existing neighborhoods.[52] The County's policy to encourage growth outside of open areas differs depending on whether the development is inside a Complete Neighborhood or Rural Area:

> Outside Complete Neighborhoods, it is the community's goal to maintain our historic western, rural character, wildlife habitat[,] and scenic vistas. In the Rural Areas, rural character is defined by limited development, actively stewarded agricultural land, and a high ratio of natural to built environment. To maintain this character, the County will first promote non-development conservation, including active agricultural stewardship; second incentivize development that occurs in Complete Neighborhoods and preserves wildlife habitat, scenery[,] and open space; third incentivize development that is clustered away from sensitive areas in exchange for preservation of wildlife habitat, scenery[,] and open space; and finally, allow for development of base property rights. To further maintain rural character, the County will limit building size consistent with historic agricultural compounds and require a dominance of landscape over the built environment.[53]

Additionally, agriculture is a Character Defining Feature and a Neighborhood Form assignable to a Character District's Subarea, depicted by a symbol on the County maps that show the Character Districts and Subareas.[54] The agriculture map symbol signifies that "[a]gricultural use

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49. *Id.*

50. *Id.* at CV-1-13. As of the 2020 update to the Comprehensive Plan, this strategy had not yet been completed.

51. *Id.* at CV-2-2.

52. *Id.* at CV-2-6. Principle 3.1 is titled "Direct growth out of habitat, scenery, and open space." *Id.*

53. *Id.* at CV-2-7.

54. *Id.*

should be characteristic of the subarea." [55] As previously mentioned, Neighborhood Forms determine "the general pattern and intensity of development that meets the desired character," including the acres, building height, uses, and special considerations.[56]

Subareas with the "Agriculture Neighborhood Form" have the acreage characteristic of 70 or more acres and residential and conservation characteristic uses.[57] A maximum height for buildings is not applicable for this Neighborhood Form.[58] The special considerations for this Neighborhood Form are the applicable "agricultural exemptions [and] incentives" and the "scale of historic agricultural compounds."[59]

Character Districts 9, 10, 14, and 15 have Subareas with agriculture as either a Character Defining Feature or Neighborhood Form.[60] Therefore, these Character Districts have common directions for their desired future characteristics for land use and development intensity. These common directions include describing agriculture as a continuous land use tool that can prevent development and preserve open spaces, which serve as wildlife habitat and migration corridors.[61] Any agricultural development in these Districts should be consistent with the historical agricultural compounds of the community. [62] Other common directions include clustering new development near existing development or directing it into Complete Neighborhoods that border these Subareas.[63]

Character Districts 9, 10, 14, and 15 also list the following policies as Policy Objectives: Policy 1.4.b, Policy 1.4.c, and Policy 3.1.c. [64] This Article's preceding paragraphs discuss these policies, which present agriculture as a land use tool that can preserve significant tracts of open space by encouraging its use through incentives and regulatory exemptions and promoting its use in Rural Area Character Districts. Each Subarea's common desired future characteristics support these policies.

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55. *Id.* at IV-8.
56. *Id.* at IV-2.
57. *Id.* at IV-10.
58. *Id.*
59. *Id.*
60. *Id.* at IV-59, IV-65, IV-71, IV-95, and IV-10. The Subareas with this Character Defining Feature on the vicinity map are 8.2 (Large River Bottom Parcels); 9.2 (Agricultural Foreground); 10.2 (Central South Park); 14.1 (Alta Farmland); 15.1 (Large Outlying Parcels); and 15.3 (Buffalo Valley). The Subareas with the Agriculture Neighborhood Form are 9.2 (Agricultural Foreground); 10.2 (Central South Park); 14.1 (Alta Farmland); 15.1 (Large Outlying Parcels); and 15.3 (Buffalo Valley).
61. *Id.* at CV-1-10.
62. *See, e.g.*, *id.* at IV-103 (describing the Character Defining Features of the Large Outlying Parcels Subarea in Character District 15).
63. *Id.* at IV-67.
64. *Id.* at CV-1-10, CV-2-7. Policy 1.4.b is titled "Conserve agricultural lands and agriculture"; Policy 1.4.c is titled "Encourage rural development to include quality open space"; and Policy 3.1.c is titled "Maintain rural character outside of Complete Neighborhoods."

Due to Teton County's setting amid large areas of public land and key wildlife habitat, wildlife is a major focus in the Comprehensive Plan. Keeping the characteristics of Rural Area Character Districts and directing development into Complete Neighborhood Character Districts conserves and protects large tracts of land, which provide wildlife habitat in Teton County.[65] Subareas with agriculture as a Character Defining Feature or Neighborhood Form are located in areas of Teton County with large tracts of natural landscape and minimal development.[66] Agriculture is one tool for protecting large areas of open space from residential and commercial development. However, the language of the Comprehensive Plan limits agriculture as a supported land use.

The Comprehensive Plan policies discuss agriculture only as a tool to conserve large tracts or other significant open space.[67] For example, agricultural buildings should be limited to a size consistent with "historic agricultural compounds" so as to "further maintain rural character."[68] The Agriculture Neighborhood Form is assigned to Subareas with sites of at least 70 acres.[69] Directions for developing incentives and regulatory exemptions are discussed only in the context of conserving historical or large (70+ acre) tracts of agricultural land, which primarily support large-scale agriculture ventures.[70] These large tracts could also support small-scale agricultural production, of course. However, small-scale agricultural production is possible in a variety of settings and is therefore not limited to large tracts of open space.

Recognizing and supporting agriculture only in this context limits the vast opportunities for local food production on a smaller scale on rural and non-rural land. Additionally, the Comprehensive Plan does not mention sustainable food production as an alternative to conventional practices. Further, exemptions and incentives that appear in policies and strategies only support the role agriculture plays in conserving large tracts of open space rather than small tracts. Agencies guided by the Comprehensive Plan are not obligated to implement regulatory frameworks that support the wide spectrum of potential small-scale agricultural production practices, particularly if the Comprehensive Plan does not explicitly recognize this production strategy.

A producer could assess whether and where a small-scale agricultural development could occur in Teton County. However, the kind of agriculture

65. *Id.* at CV-1-10.
66. *Id.* at IV-4 to -5.
67. *Id.* at CV-1-10.
68. *Id.* at CV-2-7.
69. *Id.* at IV-10.
70. *Id.* at IV-67, IV-74, IV-97.

cited in the Chapter Goals is more likely large-acreage agriculture that conserves significant open space from development. The Comprehensive Plan does not explicitly identify methods and practices of small-scale agriculture found in suburban and urban settings as possible projects in any of the Character Districts. Further, only nine of the 15 Character Districts identify large-scale agriculture as possible projects.[71] A small-scale agricultural producer or other stakeholder would have to identify whether the project optimized all eight Chapter Goals, which may be burdensome for both the stakeholder and regulatory decisionmakers and potentially prohibit desirable small-scale agricultural production. Unambiguous Comprehensive Plan Principles, Policies, Strategies, and recommendations for potential projects supporting the broad scope of sustainable small-scale agricultural production would better encourage those ventures.

B. Other Community Comprehensive Plans Supporting Small-Scale Agricultural Production

One important step for supporting small-scale agriculture is identifying where agricultural goals, policies, and actions appear in a community's comprehensive plan. Many comprehensive plans incorporate agriculture into multiple chapters, which typically cover topics like land use, transportation, environmental sustainability, housing, economic development, and public health. These elements are often similar to the Comprehensive Plan's use of Chapter Goals. Alternatively, communities may organize a comprehensive plan by including a section for agriculture under a specific plan element. Some plans take the additional step to organize agriculture in two settings: (1) in typical rural settings that aim to conserve open spaces via agriculture; and (2) agriculture in developed environments. For example, the City of San José, California's plan separates agriculture into rural and urban categories within a single chapter.[72]

In that chapter, urban agriculture falls within the "Urban Land Use" subsection and rural agriculture falls within the "Non-Urban Land Use" subsection.[73] San José's policies dictate that rural agriculture is designed to work in concert with the "Greenline/Urban Growth Boundary."[74] This Greenline/Urban Growth Boundary distinguishes between lands "where urban services can efficiently be provided" and lands "that are intended to remain permanently rural in character."[75] The urban agriculture goals,

71. *Id.* at IV-34, IV-48, IV-54, IV-58, IV-64, IV-70, IV-80, IV-94, IV-100.

72. SAN JOSÉ, CAL., ENVISION SAN JOSÉ 2040 GENERAL PLAN ch. 6, 18, 32 (2023) [hereinafter SAN JOSÉ PLAN].

73. *Id.* ch. 6 at 4, 18, 32.

74. *Id.* ch. 1 at 24.

75. *Id.*

policies, and implementation actions are intended to maintain agricultural land, improve and promote access to and production of locally grown foods, and support producers' ability to sell their food locally.[76] The San José Plan does not define rural agriculture or urban agriculture, but the Greenline/Urban Growth Boundary suggests where each subsection's policies and implementation actions should focus.[77] Separating agriculture into these types of categories recognizes the specific needs of each setting and acknowledges the multiple environments and scales in which agricultural activities may occur.

In addition to overall comprehensive plan organization, the specific language of goals, policies, and actions can support small-scale agricultural production. The language of the goal, policy, or action tends to reflect the element it is found under. As exemplified by the San José General Plan, land use elements may discuss small-scale agriculture.[78] Under its land use element, the San José General Plan includes several policies for urban agriculture, including:

- Policy LU-12.2 — "Support urban agriculture opportunities such as back-yard, roof-top, indoor, and other gardens that produce ecologically sound food for personal consumption. Encourage developers to incorporate gardens that produce ecologically sound food for residents and workers."[79]
- Policy LU-12.7 — "Encourage incorporation of edible landscaping in appropriate locations on new and existing residential, commercial, and public development projects."[80]
- Policy LU-12.8 — "Support the efforts of non-profit organizations and the County to integrate and/or maintain sustainable small-scale agriculture within existing and planned parks and open spaces including the planned Martial Cottle County Park, Guadalupe Gardens, and other publicly or privately owned properties where appropriate."[81]
- Action LU-12.11 — "Revise the Zoning Ordinance to allow both community gardens and incidental gardening as permitted uses in appropriate zoning districts."[82]

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76. *Id.* ch. 6 at 18.
77. *Id.* ch. 6 at 28–29.
78. *Id.* ch. 6 at 19, 34.
79. *Id.* ch. 6 at 18.
80. *Id.* ch. 6 at 19.
81. *Id.*
82. *Id.*

King County, Washington is another community that supports small-scale agricultural production in the County's comprehensive plan's land use section.[83] Much of this subsection discusses agriculture in a rural context. However, these policies are also transferrable to small-scale agricultural production elsewhere and include:

- Policy R-659 — "King County should work with other jurisdictions, farm advocacy groups and others to support Farmlink, farmer training[,] and other programs that help new farmers get started, gain access to farmland[,] and develop successful marketing methods."[84]
- Policy R-661a — "To help make more farmland accessible to beginning and low-income farmers, King County should expand its leasing of agricultural land to farmers where appropriate and should encourage private farmland owners to lease unused land to farmers."[85]
- Policy R-674 — "King County should work with farmers and ranchers to better understand the constraints to increased food production in the county and develop programs that reduce barriers and create incentives to growing food crops and raising food-producing livestock."[86]
- Policy R-677 — "King County should promote local food production and processing to reduce the distance that food must travel from farm to table."[87]

Additionally, the King County Comprehensive Plan has policies in its agriculture section specifically targeting small-scale agricultural production:

- Policy R-517 — "King County should explore ways of creating and supporting community gardens, Farmers Markets, produce stands[,] and other similar community-based food growing projects to provide and improve access to healthy, affordable food for all rural residents."[88]
- Policy R-657 — "King County shall work with and provide support to Washington State University Extension for its research and education programs that assist small-scale commercial farmers."[89]
- Policy U-132a — Although it is not located in the agriculture section, another important policy under the "Urban Communities" chapter states

83. KING CNTY., WASH., 2016 KING COUNTY COMPREHENSIVE PLAN 3-1 (2020) [hereinafter KING COUNTY PLAN]. Chapter 3 of the Plan is titled "Rural Areas and Natural Resource Lands." *Id.*
84. *Id.* at 3-63.
85. *Id.*
86. *Id.* at 3-68.
87. *Id.* at 3-69.
88. *Id.* at 3-37.
89. *Id.* at 3-68.

> that "King County shall allow and support the development of innovative community gardens and urban agriculture throughout the public realm of residential and commercial areas."[90]

Environmental sustainability is another typical comprehensive plan element that often discusses small-scale agricultural production. The City of Madison, Wisconsin's 2018 Comprehensive Plan includes a "Green and Resilient" element with strategies and actions supportive of small-scale agriculture.[91] Madison's commitment to sustainability is evident in its definition of "sustainable agriculture":

> An integrated system of plant and animal production practices having a site-specific application that will, over the long term: satisfy human food and fiber needs; enhance environmental quality and the natural resource base upon which the agricultural economy depends; make the most efficient use of nonrenewable resources and on-farm resources and integrate, where appropriate, natural biological cycles and controls; sustain the economic viability of farm operations; and enhance the quality of life for farmers and society as a whole.[92]

To achieve sustainable agriculture, the Madison Comprehensive Plan strategizes that the City should support farming and gardening in a way that sustainably protects the ecosystem and public health.[93] The actions appearing under this strategy—working with partners to continue to support community gardens and associated infrastructure, identifying opportunities to support local food production within the City, and establishing guidelines for sustainable agricultural best practices—all support small-scale agriculture.[94]

The Madison Comprehensive Plan provides opportunities for implementing Action "b" under Strategy 9, which seeks to "[i]dentify opportunities to support local food production within the city," including as part of properties owned by the City, currently undeveloped properties, properties in commercial and industrial areas, and "agrihoods."[95] The Madison Comprehensive Plan defines an agrihood as a "neighborhood with a working farm integrated into its urban or suburban surroundings that provides or sells its crops and other agricultural products to neighborhood residents and the surrounding community through farm stands, CSA shares,

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90. *Id.* at 2-16.
91. MADISON, WIS., CITY OF MADISON COMPREHENSIVE PLAN 86 (2018) [hereinafter MADISON PLAN].
92. *Id.* at 179.
93. *Id.* at 98, 119 (*see* row "Strategy 9").
94. *Id.* at 98.
95. *Id.* at 176, 179.

local retailers, and farmers' markets."[96] Action "b" suggests that the City should make a map of existing agricultural operations and prioritize areas where the City could encourage future agricultural development.[97] A paragraph expanding on Action "c" encourages the City to establish guidelines to promote best practices for urban agriculture to support environmental and public health.[98] Under Strategy 9, the Madison Comprehensive Plan defines urban agriculture to include "market farms, community gardens, school gardens, full-year vegetable production in greenhouses, orchards, rooftop gardens, and the raising of chickens, fish[,] and bees."[99]

The Madison Comprehensive Plan's Green and Resilient element also includes Strategy 5, which aims to "[i]mprove and preserve urban biodiversity through an interconnected greenway and habitat system."[100] One action under Strategy 5 is to "[i]ntegrate vegetation into the built environment, such as terrace plantings, living walls, and green roofs."[101] To create and preserve the greenway and habitat system, the Madison Comprehensive Plan outlines several recommendations:

> The City should seek opportunities for greenspace in intensively developed areas. . . . Madison should support integration of vegetation into the built environment. Methods such as living walls, vines, green roofs, and urban agriculture should be integrated wherever possible to support biodiversity and increase equitable access to the myriad positive health benefits associated with contact with nature.[102]

The definitions of "terrace," "living walls," and "green roofs" can be interpreted to include agricultural production, and "vegetation" is a broad term that can encourage the integration of edible vegetation.[103] Regardless, Strategy 5 uses the term "urban agriculture," recognizing that agricultural production can occur in many different settings, including neighborhoods and intensively developed spaces.

Economic development and housing are other comprehensive plan elements that may feature provisions for small-scale agricultural production.

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96. *Id.* at 176. Agrihoods can be "developed at a variety of scales but may be most appropriate on the edge of the city where they serve as a transition to existing rural uses." *Id.* at 98.

97. *Id.* at 98.

98. *Id.*

99. *Id.*

100. *Id.* at 93.

101. *Id.*

102. *Id.* Urban agriculture is defined as "the production of food for personal consumption, market sale, donation, or educational purposes within cities and suburbs" *Id.* at 180.

103. *Id.* at 177–79.

For example, the King County Comprehensive Plan encourages the County to "explore opportunities to support agricultural tourism and value-added programs related to agriculture," including awareness of product availability, the importance of buying local, unification of regional tourism, and development of new markets.[104] Additionally, the Madison Comprehensive Plan's "Neighborhoods and Housing" element aims to offer quality affordable housing across the City.[105] One strategy under this element is aimed at ensuring that nutritious food is affordable and specific to cultures.[106] One action under this strategy suggests "[i]dentify[ing] public and private spaces suitable for community gardens and explor[ing] expansion of existing gardens to meet demand."[107]

The King County, Madison, and San José comprehensive plans all exemplify how the organization and language of such plans can support sustainable small-scale agricultural production by incorporating food policy within existing elements, but a comprehensive plan could also develop a new element dedicated solely to food policy. For example, the Puget Sound Regional Council developed strategies for the City of Seattle to include food policy in its Comprehensive Plan.[108] The Puget Sound Regional Council acknowledged that City staff expressed a preference for incorporating updates into existing elements rather than adding new elements; [109] consequently, the Puget Sound Regional Council's recommendations were largely aimed at amending existing elements in Seattle's Comprehensive Plan.[110] Under this approach, the Council recommended developing a "brief summary detailing which sections include food-related policies." [111] However, the Council explained the City could incorporate food systems planning either by integrating such concepts throughout the plan or by adding a new, dedicated food-policy element.[112]

C. Recommendations to Better Support Small-Scale Agriculture Through the Jackson/Teton County Comprehensive Plan

This Section discusses how the Comprehensive Plan can better support small-scale agriculture. These recommendations synthesize analysis from Sections I(A) and I(B) of this Article. Section I(A) discussed Teton County's

104. KING COUNTY PLAN, *supra* note 83, at 10–17.
105. MADISON PLAN, *supra* note 91, at 45.
106. *Id.* at 46.
107. *Id.* at 58.
108. PUGET SOUND REG'L COUNCIL, INTEGRATING FOOD POLICY IN COMPREHENSIVE PLANNING: STRATEGIES AND RESOURCES FOR THE CITY OF SEATTLE 1 (2012).
109. *Id.* at 3.
110. *Id*.
111. *Id.*
112. *Id.*

current framework and components of the Comprehensive Plan that support small-scale agriculture. Section I(B) discussed how other communities use their comprehensive plans to support small-scale agricultural production. First, this Section provides organizational recommendations. These recommendations reflect the two approaches identified by the Puget Sound Regional Council and the categories of agriculture used by the San José General Plan.[113] Second, this Section provides language recommendations for policies and strategies.

1. Create a Community Food System Chapter in the Jackson/Teton County Comprehensive Plan

Neither agriculture nor food has its own chapter in the Comprehensive Plan. Instead, the Plan discusses agriculture throughout its policies. The Plan also integrates agriculture across multiple sections. Adding a ninth chapter specifically committed to supporting and expanding Teton County's food system would address the inherent complexities involved with community food systems. This chapter would include a chapter goal, principles, policies, strategies, and chapter indicators, similar to the current structure of the Comprehensive Plan. Section I(B) of this Article discussed policies and actions other communities have taken to support sustainable small-scale agricultural production. Teton County should incorporate policies and actions that support every component of a community food system, including processing, distribution, and consumption. Policies and strategies in the San José General Plan, the King County Comprehensive Plan, and the Madison Comprehensive Plan recognize other components of a community food system, but these plans largely do not address such components.[114] Adding a ninth chapter to the Comprehensive Plan would facilitate a more nuanced understanding of these four components and would provide Teton County with the opportunity to plan around each component.

2. Distinguish Agriculture into Categories

A new chapter in the Comprehensive Plan that distinguishes between rural agriculture and non-rural agriculture would provide a pathway for future agriculture in non-rural areas. If a new chapter is not the right approach for Teton County, policies and strategies identifying agricultural settings supportive of small-scale agricultural production can be integrated throughout existing chapters. One common approach for incorporating

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113. *Id.*; SAN JOSÉ PLAN, *supra* note 72.

114. SAN JOSÉ PLAN, *supra* note 72; KING COUNTY PLAN, *supra* note 83; MADISON PLAN, *supra* note 91.

agriculture into an existing plan distinguishes between rural agriculture, a tool for conserving large tracts of open space, and agriculture in developed areas. The San José General Plan and the Madison Comprehensive Plan use terms like "rural agriculture" and "urban agriculture" to provide a similar bifurcation of agriculture.[115]

For its part, the Madison Comprehensive Plan defines the term "urban agriculture" but does not define traditional or non-urban agriculture.[116] The San José General Plan distinguishes between the meaning of "rural" and "urban" agriculture through the Greenline/Urban Growth Boundary.[117] Rural agricultural goals, policies, and implementation actions in the San José General Plan work in concert with the Greenline/Urban Growth Boundary. The Greenline/Urban Growth Boundary separates lands "where urban services can efficiently be provided" from lands "that are intended to remain permanently rural in character."[118] This distinction is very similar to the Comprehensive Plan's vision of continuously concentrating amenities and development into Complete Neighborhood Character Districts while keeping Rural Area Character Districts available for open spaces, wildlife habitat, and wildlife movement.[119]

However, the Comprehensive Plan uses only the more general term "agriculture" and does not distinguish between rural and urban forms of agriculture. No definition is provided for this term, and it is used only in the context of conserving significant open spaces. To support small-scale agriculture, current and new Policies, Strategies, and Character Defining Features of the Comprehensive Plan should recognize the different environments in which small-scale agriculture can occur and delineate their exact locations. The Comprehensive Plan could use the terms *Rural Agriculture* and *Urban Agriculture*, like other comprehensive plans. Alternatively, the plan could use its two categories of Character Districts—Rural Areas and Complete Neighborhoods—to categorize agriculture.

In addition to continuing to recognize agriculture in its traditional Comprehensive Plan sense as a tool for conserving open spaces, *Rural Area Agriculture* could recognize and encourage small-scale agricultural activities. *Complete Neighborhood Agriculture* could explicitly recognize potentially successful small-scale agricultural activities in developed settings. Regardless of the route, the Comprehensive Plan should replace language broadly referencing agriculture with some version of *Rural Agriculture* and *Urban Agriculture*. This will better guide those obligated to

115. SAN JOSÉ PLAN, *supra* note 72, ch. 5 at 18; MADISON PLAN, *supra* note 91, at 180.
116. MADISON PLAN, *supra* note 91, at 180.
117. SAN JOSÉ PLAN, *supra* note 72, ch. 1 at 24, ch. 6 at 29.
118. *Id.* ch. 6 at 29.
119. COMPREHENSIVE PLAN, *supra* note 18, at CV-2-5.

fulfill the policies and strategies of the Comprehensive Plan on how to support small-scale agriculture.

Moreover, each category of the Comprehensive Plan should develop definitions and standards for small-scale agricultural practices to meet the community's needs. For example, the City of Madison developed a strategy under which an implementing action recommends "[e]stablish[ing] guidelines for sustainable agricultural best practices" and defines the term "sustainable agriculture" within the context of the City.[120] Further examples of small-scale agricultural practices in other community comprehensive plans include farmer's markets, community gardens, school gardens, backyard gardens, greenhouses, orchards, rooftop gardens, animal husbandry, beekeeping, living walls, vertical gardens, edible landscaping, and backyard gardens.[121] The Comprehensive Plan is a policy document containing general visions, goals, objectives, and methods. Therefore, Teton County and the Town of Jackson should request that another entity develop definitions and standards for small-scale agriculture. Moreover, the County and Town should also request that an entity with regulatory authority develop a framework for empowering small-scale agriculture.

3. Include Agricultural Categories in Character Districts

The Comprehensive Plan should update Character Districts to better reflect small-scale agriculture as a category in Character Districts. This includes the Character Defining Feature of Agriculture assignable to a Character District's Subarea. In the maps of the County and Town included in the Comprehensive Plan, Agriculture as a Character Defining Feature is depicted by a map symbol.[122] As explained in Section I(A), the Subareas with this Character Defining Feature are typically located in the rural areas of Teton County that could conserve open space. Further, the Agriculture Neighborhood Form is limited—parcels with this Neighborhood Form must be 70 or more acres.[123] The current structure of Agriculture as a Character Defining Feature and Neighborhood Form supports agriculture's role of conserving open space but does not acknowledge the spectrum of small-scale agricultural production activities.

For Agriculture as a Character Defining Feature, the Comprehensive Plan could retain a single map symbol for Agriculture. The Comprehensive Plan could then differentiate between Agriculture for a Rural Area Character District and Agriculture for a Complete Neighborhood Character District

120. MADISON PLAN, *supra* note 91, at 98, 179.
121. *Id.*; SAN JOSÉ PLAN, *supra* note 72, ch. 6 at 18; KING COUNTY PLAN, *supra* note 83, at 3-37.
122. COMPREHENSIVE PLAN, *supra* note 18, at IV-8.
123. *Id.* at IV-10.

where the Comprehensive Plan first introduces map symbols. The Plan could also maintain the Agriculture Neighborhood Form and its features as is. Doing so would provide consistency with the existing Comprehensive Plan. Then, to better support small-scale agriculture, Neighborhood Forms could list small-scale agriculture as a special consideration, which would reflect the spectrum of environments where small-scale agriculture could exist.

4. Integrate Amended and New Food System Policies and Strategies Under Existing Chapters

Integrating food system policies and strategies under existing chapters in the Comprehensive Plan provides an alternative to a new chapter focused on promoting a community food system. A brief summary detailing where the Comprehensive Plan incorporates food systems-related policies would support this multi-chapter approach. Other community comprehensive plans support small-scale agriculture through this approach in some manner, usually with the bulk of their policies and strategies located in one main element and a few others located elsewhere. As shown in Section I(C)(1)(4), these elements typically relate to land use, environmental sustainability, transportation, economic development, and housing.[124] The Comprehensive Plan does not currently include an in-depth discussion of agriculture found in other comprehensive plans; however, it does minimally integrate agriculture into existing chapters.[125] This multi-chapter approach could better support small-scale agricultural production. Additionally, the Comprehensive Plan could amend chapters that do not currently mention agriculture to better support small-scale agricultural production.

a. Amend Existing Policies and Strategies Under Chapter 1

Chapter 1 of the Comprehensive Plan (Stewardship of Wildlife, Natural Resources[,] and Scenery) currently references agriculture,[126] but it could better support small-scale agriculture. As discussed in Section I(A) of this Article, Chapter 1 of the Comprehensive Plan supports agriculture through Policy 1.4.b, Policy 1.4.c, and Strategy 1.4.S.2.[127] The Policies and Strategy in Chapter 1 of the Comprehensive Plan incentivize agriculture as a tool for conserving open space. For example, Policy 1.4.b calls for regulations that

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124. *See* discussion *infra* Subsection I(C)(4)(b) (noting that other comprehensive plans implement policies that support small-scale agriculture in elements related to sustainability, transportation, land use, housing, and economic development).

125. *See* COMPREHENSIVE PLAN, *supra* note 18, at CV-1-10 (explaining that Principle 1.4 aims to use agriculture "to protect open space from development while providing active stewardship of the land").

126. *Id.* at CV-1-2.

127. *Id.* at CV-1-10, CV-1-13.

encourage agriculture, stewardship of agricultural lands, and incentives to support agriculture as a means of conserving open space.[128] This policy supports activities that use large tracts of open space, like ranching, but does not explicitly support small-scale agriculture, which could occur on these sites. Chapter 1 should adjust these policies and its strategy to support both large-acreage operations and small-scale agricultural production.

In Section I(B), this Article highlights Policies R-659, R-661a, R-674, and R-657 of the King County Comprehensive Plan. These policies give guidance for developing programs to: reduce barriers and incentivize operations to contribute to local food production; understand constraints and resource availability for these operations; support stakeholders with programs assisting small-scale commercial farmers; and train farmers and giving them access to farmland. The following addition to Policy 1.4.b, which uses sample language found in the King County Comprehensive Plan and the Policy's existing language,[129] could better support small-scale agriculture:

> *The County will evaluate the impacts of its regulations on small-scale agriculture in Rural Area Character Districts that conserve open space and continue to provide exemptions to requirements, including exemptions for small-scale agricultural operations. The County will also explore other incentives to support and encourage Rural Area agriculture that include small-scale agriculture. The County should work with farmers and ranchers to better understand the constraints facing small-scale agriculture in Rural Area Character Districts. The County will develop programs and support the work of other stakeholders to equitably assist small-scale agriculture commercial farmers in these open space areas, including but not limited to research, education, and training programs that assist commercial farmers in getting started, gaining access to farmland, and developing successful marketing methods.*

The following strategy could achieve Principle 1.4, discussed in detail in Section I(A) of this Article: *Develop and support programs with equitable access that assist small-scale commercial farmers*. Another strategy for Principle 1.4 could require an inventory of potential small-scale agricultural sites. For example, the City of Madison Comprehensive Plan, highlighted in Section I(B) of this Article, identifies opportunities for local food production.

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128. *Id.* at CV-1-10.

129. KING COUNTY PLAN, *supra* note 83, at 3-63, 3-68.

Madison's policy encourages the creation of a map to identify current agricultural properties and determine areas with future potential for food production.[130] Principle 1.4 could incorporate a similar strategy for Rural Area Character Districts within Jackson and Teton County.

As Section I(C)(2) of this Article discussed, the Comprehensive Plan should develop definitions and standards for small-scale agricultural practices.[131] An additional strategy for Principle 1.4 should state: *Evaluate and update the Teton County and Town of Jackson Land Development Regulations to promote and allow sustainable small-scale agricultural practices and activities in Rural Area Character Districts, including but not limited to defining each agricultural activity, developing standards for each activity, and establishing guidelines for alternative agriculture best practices*. The Comprehensive Plan should adopt the City of Madison's definition of sustainable agriculture.[132] Lastly, Policy 1.4.c and Strategy 1.4.S.2 should include terms distinguishing categories of agricultural activities.

b. Amend Existing Policies and Strategies and Develop New Food System Policies and Strategies for Chapter 3

Chapter 3 of the Comprehensive Plan could also better incorporate policies and strategies for small-scale agricultural production. To preserve habitat and open space, Chapter 3 highlights a goal of encouraging at least 60% of future growth in Complete Neighborhoods instead of Rural Areas.[133] However, terms that encourage agriculture are used only to refer to Rural Area Character Districts. Meanwhile, terms like "nonresidential development not associated with agriculture" are used for Complete Neighborhood Character Districts.[134] This approach treats small-scale agricultural production activities as a land use incompatible with Complete Neighborhoods. Policies and strategies can incorporate language that more directly supports small-scale agricultural production in Complete Neighborhood Character Districts.

For example, Principle 3.2 of the Comprehensive Plan includes Policy 3.2.b, which encourages nonresidential development in Complete Neighborhoods.[135] This Policy states: "Complete Neighborhoods should

130. MADISON PLAN, *supra* note 91, at 98.

131. *See* discussion *supra* Subsection I(C)(2) (recommending that the Comprehensive Plan define agricultural terms).

132. *See* MADISON PLAN, *supra* note 91, at 179 (defining sustainable agriculture).

133. COMPREHENSIVE PLAN, *supra* note 18, at CV-2-2.

134. *Id.* at CV-2-7.

135. *Id.* at CV-2-7 to -8.

contain locally oriented nonresidential uses such as restaurants, convenience retail, childcare, schools, and other services oriented toward neighborhood residents. . . ."[136] Small-scale agricultural production activities could fall within a catch-all provision of the Policy.[137] However, the Policy could include the term *small-scale agriculture* within the list of locally oriented nonresidential uses to better support the term's use in the section of the plan governing Complete Neighborhood Character Districts.

Policy 3.2.e recognizes the importance of public spaces for the Town of Jackson and Teton County.[138] This policy could be amended to support the integration of small-scale agriculture in public spaces. This approach is similar to the City of Madison's view of agriculture as a form of visually engaging greenspace that can promote biodiversity and public health.[139] Similar to Madison, an amended policy for the Comprehensive Plan could state: *Integrating agriculture activities like living walls, vines, green roofs, and other small-scale agriculture in the design of projects will be encouraged to create unique and visually engaging public spaces*.

In addition to these amendments, a policy focused solely on small-scale agricultural production would better support its use. Following San José General Plan Policy LU-12.8 and King County Comprehensive Plan Policies R-517 and U-123a, this policy could acknowledge a full range of opportunities for small-scale agriculture. The Town of Jackson and Teton County should better acknowledge the range of opportunities for small-scale agriculture by adding the following policy:

> *Teton County shall support the efforts to integrate and/or maintain sustainable small-scale agricultural production within Complete Neighborhoods as infill and redevelopment projects aimed at enhancing the desired character of Complete Neighborhoods. Teton County shall equitably allow and support small-scale agriculture projects throughout publicly and privately owned property, including in residential and commercial areas.*

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136. *Id.* at CV-2-8.

137. The catch-all provision encourages "other services oriented toward neighborhood residents." *Id.*

138. *Id.* at CV-2-9. Policy 3.2.e is titled "Promote quality public spaces in Complete Neighborhoods." *Id.*

139. *See* MADISON PLAN, *supra* note 91, at 93 ("Madison should support integration of vegetation into the built environment. . . . [Such methods] support biodiversity and increase equitable access to the myriad positive health benefits associated with contact with nature."). EPA describes the "built environment" as "the man-made or modified structures that provide people with living, working, and recreational spaces." *Basic Information About the Built Environment*, EPA, https://www.epa.gov/smm/basic-information-about-built-environment (last updated Feb. 27, 2023).

This update to Principle 3.2 would achieve the goals of encouraging more small-scale agriculture in the County.

In Section I(C)(4)(a), which suggests updates to Principle 1.4, this Article recommends that the strategy *evaluate and update the Teton County and Town of Jackson Land Development Regulations to promote and allow sustainable small-scale agricultural practices and activities in Rural Area Character Districts, including but not limited to defining each agricultural activity, developing standards for each activity, and establishing guidelines for alternative agriculture best practices*. Principle 3.2 could adopt this recommendation: *Evaluate and update the Teton County and Town of Jackson Land Development Regulations to promote and allow small-scale agricultural practices and activities in Complete Neighborhood Character Districts, including but not limited to defining each agricultural activity, developing standards for each activity, and establishing guidelines for alternative agriculture best practices*.

Additionally, the recommended amendment to Policy 1.4.b could be another strategy for Principle 3.2.[140] Based on the recommendations, a new strategy for Principle 3.2 could state:

> *The County will identify the barriers and constraints facing small-scale agriculture in Complete Neighborhoods. The County will develop programs and support the work of other stakeholders to assist small-scale agriculture in Complete Neighborhoods by implementing infill and redevelopment projects, including but not limited to research, education, and training programs that are equitably accessible.*

The proposed amendment directs the County to coordinate with farmers to identify the barriers and constraints facing small-scale agriculture in Complete Neighborhood Districts, develop programs and support the work of other stakeholders that assist small-scale agriculture commercial farmers, and develop an inventory and map of properties where food production could be encouraged as a land use.[141]

Additionally, exemptions and incentives in Chapter 1 could support small-scale agriculture in Complete Neighborhoods. The existing language of Policies 1.4.b and 1.4.c and Strategy 1.4.S.2 encourages exemptions and

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140. *See* discussion *supra* Subsection I(C)(4)(a) (recommending that Principle 1.4 define sustainable agriculture, develop programs that support small-scale farmers, and identify opportunities for local food production).

141. *See* discussion *supra* Subsection I(C)(4)(a) (recommending that Principle 1.4.b be amended "to support both large acreage operations and small-scale agricultural production").

incentives for "agricultural conservation of open space."[142] The above recommendations for Chapter 1 suggest that these exemptions and incentives additionally consider small-scale agricultural production in Rural Areas. An additional similar strategy for Principle 3.2 should state: *Evaluate and update agricultural exemptions and incentives to encourage small-scale agricultural production in Complete Neighborhoods*.

c. Integrate New Food Policies and Strategies in Chapter 5

Chapter 5 (Local Workforce Housing) could better incorporate policies for small-scale agriculture. Due to the high cost of living in Teton County, especially the Town of Jackson, many workers commute from outside the County, where housing is more affordable.[143] In response, Teton County has dedicated an entire chapter of the Comprehensive Plan to this issue.[144] The Chapter's goal is to "ensure a variety of workforce housing opportunities exist so that at least 65% of those employed locally also live locally."[145] Teton County wants to preserve the interactions of diverse residents with similar values, and local residents are likely to invest in the community to maintain those values.[146]

The San José General Plan recognizes new development as an opportunity for urban agriculture through Policies LU-12.2 and LU-12.7.[147] By adopting language similar to San José's Plan, a strategy for Chapter 5 of the Comprehensive Plan could state: *Encourage developers to incorporate alternative and small-scale agricultural activities like agrihoods, residential gardens, living walls, or edible landscaping on new and existing workforce housing that produce ecologically sound food for residents.* Incorporating small-scale agriculture into affordable housing would provide seasonal workforce and year-round residents a source of healthy and local food while encouraging community development and interaction.

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This Article offers recommendations developed by examining the Comprehensive Plan and other communities' comprehensive plans. The Article first recommended adding a new chapter dedicated to Teton County's community food system, with a chapter goal, principles, policies, strategies,

142. COMPREHENSIVE PLAN, *supra* note 18, at CV-1-10, CV-1-13.
143. *Id.* at CV-3-3.
144. *Id.* at CV-3-2.
145. *Id.*
146. *Id.* The "Implement the Workforce Housing Action Plan" can be found under Policy 5.4.a. *Id.* at CV-3-8.
147. SAN JOSÉ PLAN, *supra* note 72, ch. 6 at 18–19.

and indicators. Alternatively, it recommended integrating policy supporting small-scale agriculture into existing chapters by amending existing sections and adding new sections.

For either approach, this Section of the Article recommends developing specific categories of agriculture to recognize the different contexts in which small-scale agriculture can occur. Mirroring the two categories of Character Districts in the Comprehensive Plan,[148] these recommended categories include *Rural Area Agriculture* and *Complete Neighborhood Agriculture*.

Any discussion of agriculture should recognize these categories, whether they are incorporated into principles, policies, strategies, Character Defining Features, Neighborhood Forms, or possible projects. These recommendations, though not comprehensive, are likely to have the greatest impact on supporting small-scale agriculture through the Comprehensive Plan. Teton County stakeholders should review the entire Comprehensive Plan for further opportunities to explicitly support small-scale agricultural production.

The County could implement these recommendations by updating the plan update and taking corrective actions. The Comprehensive Plan requires a plan update once the growth rate of the County reaches 7%.[149] Due to recent growth trends, the Comprehensive Plan estimates the County will meet the 7% threshold shortly.[150] If the evaluation reveals that growth is not occurring in suitable locations or that growth is not providing workforce housing, then the Comprehensive Plan must be updated.[151] Further, if growth is not meeting the requirements of the plan, the County must consider corrective actions, like amending the community's goals, amending policies or tools, and creating new partnerships.[152] The County could include policies and strategies for small-scale agricultural production through such an update to the Comprehensive Plan.

II. TETON COUNTY AND TOWN OF JACKSON LAND DEVELOPMENT REGULATIONS (LDRS)

Two sets of LDRs exist for Teton County—the Teton County LDRs[153] and the Town of Jackson LDRs.[154] The Teton County LDRs govern the

148. *See* COMPREHENSIVE PLAN, *supra* note 18, at ES-6 (dividing Character Districts into two categories—Rural Areas and Complete Neighborhoods).

149. *Id.* at Plan AV-4.

150. *Id.*

151. *Id.* at AV-5.

152. *Id.* at AV-6.

153. TETON CNTY., WYO., TETON COUNTY LAND DEVELOPMENT REGULATIONS art. 1, div. 1.3 (2023) [hereinafter TETON COUNTY LDRS].

154. JACKSON, WYO., LAND DEVELOPMENT REGULATIONS art. 1, div 1.3 (2023) [hereinafter JACKSON LDRS].

unincorporated lands of Teton County, while the Town of Jackson LDRs govern the incorporated Town of Jackson.[155] Planners organized the LDRs around three focus areas: (1) "Current Planning" or "day-to-day processing of planning permits, resort planning, physical development review[,] and general public assistance"; (2) code enforcement; and (3) "Long-Range Planning," which "focuses on the broader picture items like updates to the Comprehensive Plan, Teton County [LDRs], and amendments to the zoning map."[156]

Although separate regulatory documents, both sets of LDRs are organized under nine articles with the same titles.[157] The LDRs provide standards for how a landowner can develop their site and explain the processes for compliance. The LDRs provide a tool for implementing the Comprehensive Plan. The Town Council of the Town of Jackson (Town Council) and the Board of County Commissioners of Teton County (BCC) have legislative discretion to amend the LDRs.[158] Decisionmakers must consider the Comprehensive Plan when amending LDRs.[159] Amendments to LDRs must improve the implementation of the Comprehensive Plan, should develop predictable regulations, and should build coordination between Teton County and the Town of Jackson.[160]

Although the County's legislative discretion is not controlled by one factor,[161] the Comprehensive Plan influences the LDRs. If the Comprehensive Plan is updated to better support small-scale agricultural production, the LDRs are obligated to consider these new provisions.

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155. TETON COUNTY LDRS, *supra* note 153, art. 1, div. 1.5.2.A; JACKSON LDRS, *supra* note 154, art. 1, div. 1.5.2.A.

156. *Planning Division*, TETON CNTY., WYO., https://www.tetoncountywy.gov/559/Planning-Division (last visited Dec. 29, 2023).

157. These articles are titled as follows: "Article 1. General Provisions," "Article 2. Complete Neighborhood Zones," "Article 3. Rural Area Zones," "Article 4. Special Purpose Zones," "Article 4. Special Purpose Zones," "Article 5. Physical Development Standards Applicable in All Zones," "Article 6. Use Standards Applicable in All Zones," "Article 7. Development Option and Subdivision Standards Applicable in All Zones," "Article 8. Administrative Procedures," and "Article 9. Definitions." TETON COUNTY LDRS art. 1, div. 1.4; JACKSON LDRS art. 1, div. 1.4.

158. TETON COUNTY LDRS, *supra* note 153, art. 1, div. 1.2; JACKSON LDRS, *supra* note 154, art. 1, div. 1.2.

159. TETON COUNTY LDRS, *supra* note 153, art. 8, div. 8.7.1.A; JACKSON LDRS, *supra* note 154, art. 8, div. 8.7.2.A.

160. TETON COUNTY LDRS, *supra* note 153, art. 8, div. 8.7.1.C; JACKSON LDRS, *supra* note 154, art. 8, div. 8.7.2.C.

161. TETON COUNTY LDRS, *supra* note 153, art. 8, div. 8.7.1.C; JACKSON LDRS, *supra* note 154, art. 8, div. 8.7.2.C.

A. Components of Teton County and Town of Jackson LDRs Supporting and Challenging Small-Scale Agricultural Production

Twenty-five zoning districts exist under the Teton County LDRs, and 28 zoning districts exist under the Town of Jackson LDRs.[162] The County provides maps identifying the boundaries of these zones.[163] Through the County maps, a landowner can identify which zoning district(s) their land falls within.[164] To reflect the Comprehensive Plan, the LDRs create "Complete Neighborhood Zones"[165] and "Rural Area Zones,"[166] which are both further divided into "Character Zones"[167] and "Legacy Zones."[168] Every zone has a "Use Schedule" that specifies the principal, accessory, and temporary uses allowed within the zone.[169] Land uses are broken down into five categories: principal, incidental, accessory, primary, and temporary.[170]

A "principal use" is a "use that may exist as the sole use of the property," but a property can have more than one principal use.[171] There are eight categories of principal uses in Teton County and the Town of Jackson.[172] One of those categories is "Open Space Uses," defined as "the enjoyment or maintenance of land that occurs predominantly outside of any structure."[173] Agriculture falls within this category. Both LDRs define agriculture as "the

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162. TETON COUNTY LDRS, *supra* note 153, art. 6, div. 6.1.1; JACKSON LDRS, *supra* note 154, art. 6, div. 6.1.1.F.

163. *Teton County, WY: Town of Jackson Zoning*, TETON CNTY., WYO., https://gis.tetoncountywy.gov/portal/apps/instant/sidebar/index.html?appid=be131ab314a84391b8e14c3ba84320c7 (last visited Dec. 29, 2023); *Teton County, WY: County Zoning*, TETON CNTY., WYO., https://gis.tetoncountywy.gov/portal/apps/instant/sidebar/index.html?appid=38556c6be8d8403a9c8a7d34b16ef79f (last visited Dec. 29, 2023).

164. *Teton County, WY: County Zoning*, *supra* note 163.

165. TETON COUNTY LDRS, *supra* note 153, art. 2, div. 2.1; JACKSON LDRS, *supra* note 154, art. 2, div. 2.1.

166. TETON COUNTY LDRS, *supra* note 153, art. 3, div. 3.1; JACKSON LDRS, *supra* note 154, art. 3, div. 3.1.

167. *See* TETON COUNTY LDRS, *supra* note 153, art. 2, div. 2.1 (explaining Complete Neighborhood Character Zones in Teton County); *see also* JACKSON LDRS, *supra* note 154, art. 2, div. 2.1.1 (showing Complete Neighborhood Character Zones in the Town of Jackson); *See* TETON COUNTY LDRS, *supra* note 153, art. 2, div. 2.2; JACKSON LDRS, *supra* note 154, art. 2, div. 2.1.1 (exemplifying Rural Area Character Zones).

168. *See* TETON COUNTY LDRS, *supra* note 153, art. 2, div. 2.3 (showing Complete Neighborhood Character Zones in Teton County); *see also* JACKSON LDRS, *supra* note 154, art. 2, div. 2.1.2 (showing Complete Neighborhood Legacy Zones in the Town of Jackson).

169. TETON COUNTY LDRS, *supra* note 153, art. 6, div. 6.1.1; JACKSON LDRS, *supra* note 154, art. 6, div. 6.1.1.

170. TETON COUNTY LDRS, *supra* note 153, art. 6, div. 6.1.2.A; JACKSON LDRS, *supra* note 154, art. 6, div. 6.1.2.A.

171. TETON COUNTY LDRS, *supra* note 153, art. 6, div. 6.1.2.B.1; JACKSON LDRS, *supra* note 154, art. 6, div. 6.1.2.B.1.

172. TETON COUNTY LDRS, *supra* note 153, art. 6, div. 6.1.2.B.1(a)-(h); JACKSON LDRS, *supra* note 154, art. 6, div. 6.1.2.B.1(a)-(h).

173. TETON COUNTY LDRS, *supra* note 153, art. 6, div. 6.1.3.A.1; JACKSON LDRS, *supra* note 154, art. 6, div. 6.1.3.A.1.

farming or ranching of land," which includes cultivation of the soil; production of forage, crops, or timber; growing of ornamental or landscaping plants; greenhouses; and rearing, feeding, and management of livestock.[174] Ten out of 14 Teton County zoning districts and seven out of 19 Town of Jackson zoning districts allow agriculture as principal use.[175]

Principal uses also include "incidental uses." An incidental use is "commonly integrated into the operation of a principal use, even if the incidental use would be classified as a different use if it were separated."[176] An incidental use can only exist for a given property if there is an established and recognized principal use.[177]

An "accessory use," on the other hand, "constitutes a minority of the use or character of the property and is secondary and subordinate to another use of the same property, but which is not an incidental use."[178] An accessory use may "only be permitted in association with an active, [principal] primary use designated for the accessory use."[179] The LDRs do not explicitly allow agricultural production as an accessory use.[180]

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174. TETON COUNTY LDRS, *supra* note 153, art. 6, div. 6.1.3.B; JACKSON LDRS, *supra* note 154, art. 6, div. 6.1.3.B.

175. TETON COUNTY LDRS, *supra* note 153, art. 2, div. 2.3.1.C; div. 2.3.2.C; div. 2.3.5.C; art. 3., div. 3.2.2.C; div. 3.2.3.C; div. 3.2.4.C; div. 3.3.1.C; div. 3.3.3.C; div. 3.3.4.C; div. 3.3.5.C; JACKSON LDRS, *supra* note 154, art. 2, div. 2.2.2.C; div. 2.2.3.C; div. 2.2.4.C; div. 2.2.5.C; div. 2.2.5.C; div. 2.3.1.C.

176. TETON COUNTY LDRS, *supra* note 153, art. 6, div. 6.1.2.B.2; JACKSON LDRS, *supra* note 154, art. 6, div. 6.1.2.B.2.

177. TETON COUNTY LDRS, *supra* note 153, art. 6, div. 6.1.2.B.2; JACKSON LDRS, *supra* note 154, art. 6, div. 6.1.2.B.2.

178. TETON COUNTY LDRS, *supra* note 153, art. 6, div. 6.1.2.B.3; JACKSON LDRS, *supra* note 154, art. 6, div. 6.1.2.B.3.

179. TETON COUNTY LDRS, *supra* note 153, art. 6, div. 6.1.11.A; JACKSON LDRS, *supra* note 154, art. 6, div. 6.1.11.A. "Primary Uses" are Principal Uses associated with an accessory use. TETON COUNTY LDRS, *supra* note 153, art. 6, div. 6.1.11.A.2.a; JACKSON LDRS, *supra* note 154, art. 6, div. 6.1.11.A.2.a.

180. *See* TETON COUNTY LDRS, *supra* note 153, art. 6, div. 6.1.11; *see also* JACKSON LDRS, *supra* note 154, art. 6, div. 6.1.11. One accessory use that could support small-scale agriculture is the Home Occupation accessory use, defined as "an accessory nonresidential use conducted entirely within a residential unit or on-site structure accessory to the residential unit. The intent of a home occupation is to give small, local businesses a place to start. Home occupations are intended to be at a residential scale; once they grow beyond a certain size they can no longer be characterized as home occupations." TETON COUNTY LDRS, *supra* note 153, art. 6, div. 6.1.11.D; JACKSON LDRS, *supra* note 154, art. 6, div. 6.1.11.D. Another potential for an accessory use to allow for small-scale agriculture is the Home Business accessory use, defined as "an accessory nonresidential use conducted in conjunction with a residential use, on the site of the residential use, in which employees are employed on-site. The intent of a home business is to give small, local businesses a place to start. Home businesses are intended to be at a residential scale; once they grow beyond a certain size they can no longer be characterized as home businesses." TETON COUNTY LDRS, *supra* note 153, art. 6, div. 6.1.11.E.1; JACKSON LDRS, *supra* note 154, art. 6, div. 6.1.11.E.1. However, none of the listed activities in each accessory use include food production. Further, the activity must be undertaken by a person residing within the dwelling which could eliminate alternative and small-scale agricultural production activities like land-sharing programs.

The third type of use is a "temporary use," which "is a use established for a fixed period of time."[181] As with accessory uses, there are no temporary uses that directly support small-scale agricultural production activities.[182]

The LDRs contain a catch-all provision, "Use Not Listed," which prohibits any use not explicitly listed in the Use Schedule unless there is a "similar use determination." [183] Similar use determination means the "Planning Director determines the proposed use is sufficiently similar to one of the uses defined in [Division 6.1 Allowed Uses]. . . . If a use is determined to be similar, it shall be an allowed use with the same permissions and restrictions as the use to which it was determined to be similar."[184] A similar use determination could be applied to a proposed small-scale agricultural production practice not explicitly found within the Agriculture Principal Use definition under Section 6.1.3.B.1. [185] Alternatively, the small-scale agricultural production practice could be assessed as similar to one of the listed accessory uses, specifically the Home Occupation or Home Business accessory use.[186] However, this determination is not guaranteed or available if these uses are not already listed on the zoning district's Use Schedule.[187]

The Teton County and Town of Jackson LDRs also present implications for small-scale agriculture in Article 4. Only two special purpose zoning districts in both LDRs have Use Schedules, each allowing agriculture as a principal use.[188] The remaining special purpose zoning districts have master plans. [189] These districts include Planned Resort Zones with a Planned Resort's Master Plan and Planned Unit Development (PUD) Zones with a PUD Master Plan.[190] The possibility of small-scale agricultural production in these Planned Resort Zones or PUD Zones would depend on the specific language within each master plan.

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181. TETON COUNTY LDRS, *supra* note 153, art. 6, div. 6.1.12.A.1; JACKSON LDRS, *supra* note 154, art. 6, div. 6.1.12.A.1.

182. TETON COUNTY LDRS, *supra* note 153, art. 6, div. 6.1.12; JACKSON LDRS, *supra* note 154, art. 6, div. 6.1.12.

183. TETON COUNTY LDRS, *supra* note 153, art. 6, div. 6.1.2.D; JACKSON LDRS, *supra* note 154, art. 6, div. 6.1.2.D.

184. TETON COUNTY LDRS, *supra* note 153, art. 6, div. 6.1.2.E; JACKSON LDRS, *supra* note 154, art. 6, div. 6.1.2.E.

185. TETON COUNTY LDRS, *supra* note 153, art. 6, div. 6.1.3.B.1; JACKSON LDRS, *supra* note 154, art. 6, div. 6.1.3.B.1.

186. TETON COUNTY LDRS, *supra* note 153, art. 6, div. 6.1.11.D, 6.1.11.E; JACKSON LDRS, *supra* note 154, art. 6, div. 6.1.11.D., 6.1.11.E.

187. TETON COUNTY LDRS, *supra* note 153, art. 6, div. 6.1.1.E; JACKSON LDRS, *supra* note 154, art. 6, div. 6.1.1.F.

188. TETON COUNTY LDRS, *supra* note 153, art. 6, div. 6.1.1.E; JACKSON LDRS, *supra* note 154, art. 6, div. 6.1.1.F.

189. TETON COUNTY LDRS, *supra* note 153, art. 6, div. 6.1.1.; JACKSON LDRS, *supra* note 154, art. 6, div. 6.1.1.F.

190. TETON COUNTY LDRS, *supra* note 153, art. 4, div. 4.3.1.A.3, div. 4.4.1.D; JACKSON LDRS, *supra* note 154, art. 4, div. 4.3.1.D.1, art. 8, div. 8.7.4.B.

Many uses—whether principal, accessory, or temporary—require use permits. A use permit is not required for an agriculture principal use in Teton County zoning districts.[191] However, the Town of Jackson zoning districts allowing agriculture as a principal use do require a "Basic Use Permit."[192] A Basic Use Permit "permits uses that are allowed by right, but require administrative review to ensure compliance with the standards of these LDRs."[193] A site can have multiple permitted uses, including an agricultural use, and "the entire site may be used to meet minimum site area requirements for each use."[194]

Regardless of permit requirements, all uses must comply with physical development standards.[195] Each zone provides standards for structure locations, floor area, structure height, fencing, and exterior materials.[196] The LDRs define a "structure" as "any building, bridge, fence, pole, tower, deck, liquid storage tank, gazebo, pier, dam, culvert, satellite dish, personal wireless telecommunication facilities, or other construction or erection greater than [four] feet in height."[197] Since small-scale agricultural production activities can utilize a variety of buildings and structures, like greenhouses or vertical gardens, to support production, it is important for agricultural producers to consider these standards.

Additionally, a zoning district's Use Schedule regulates structures.[198] The structure's use must fall within one of the principal, accessory, or temporary uses allowed in the zoning district.[199] If the small-scale agricultural production does not fit within one of the listed uses, the structure must be a common use that could qualify it as an incidental use to an allowed principal use.[200] Further, though the definition of incidental use would allow certain types of small-scale agriculture, such as home gardening for personal consumption, it could be inadequate for other types, especially agricultural

191. TETON COUNTY LDRS, *supra* note 153, art. 6, div. 6.1.1.E.

192. JACKSON LDRS, *supra* note 154, art. 6, div. 6.1.1.B, div. 6.1.1.F.

193. TETON COUNTY LDRS, *supra* note 153, art. 8, div. 8.4.1.A; JACKSON LDRS, *supra* note 154, art. 8, div. 8.4.1.A.

194. TETON COUNTY LDRS, *supra* note 153, art. 9, div. 9.4.4.D; JACKSON LDRS, *supra* note 154, art. 9, div. 9.4.4.D.

195. Some exemptions are provided for agricultural uses. TETON COUNTY LDRS, *supra* note 153, art. 3, div. 3.2.1.B.3; art. 5, div. 5.1.1.D; art. 6, div. 6.1.3.B.ii.; art. 7, div. 7.7.4.D.2; JACKSON LDRS, *supra* note 153, art. 5, div. 5.7.1.D.

196. TETON COUNTY LDRS, *supra* note 153, art. 5, div. 5.3.2.G.1; JACKSON LDRS, *supra* note 154, art. 1, div. 1.4.

197. TETON COUNTY LDRS, *supra* note 153, art. 9.5; JACKSON LDRS, *supra* note 154, art. 9.5.

198. Telephone Interview with K. Malone, Senior Long-Range Planner, Teton Cnty., Wyo. (Nov. 3, 2021).

199. *Id.*

200. *Id.*

practices that, though suitable for the unique spaces they occupy, might not be considered "commonly integrated into the operation of a principal use."[201]

Another physical development standard to consider is the ratio of developed land versus vegetated or landscaped areas. Some zones accomplish the ratio through the "site development amount," i.e., the maximum square footage allowed in a site.[202] Both LDRs define "Site Development" as "the area of the site that is physically developed . . . includ[ing] the area of the site that is covered by buildings, structures, impervious surfaces, porches, . . . and regularly disturbed areas such as corrals, outdoor storage, and stockpiles."[203] Notably, site development does not include the cultivation of soil for agricultural use.[204]

Other zones satisfy the development standard through a landscape surface ratio.[205] Both LDRs define "landscape surface area" as "the area of a site that is covered by natural vegetation, trees, or landscaped areas such as turf grass, planted trees and shrubs, mulch, or xeriscape. Any area of a site meeting the definition of site development is not landscape surface area."[206] This language means landscaped surface areas include the soil cultivated for agriculture use. However, the LDRs require that "[a]ll landscaped areas proposed for vegetation shall be planted with lawn, pasture, or native groundcover unless such vegetation is already fully established."[207] Pasture or native ground cover categories support agricultural uses like livestock grazing, but other agricultural products would not fit these limited vegetation types.[208] Currently, these three categories do not support small-scale agricultural production as edible landscaping.

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201. TETON COUNTY LDRS, *supra* note 153, art. 6, div. 6.1.2.B.2; JACKSON LDRS, *supra* note 154, art. 6, div. 6.1.2.B.2.

202. TETON COUNTY LDRS, *supra* note 153, art. 9, div. 9.4.4.A; JACKSON LDRS, *supra* note 154, art. 9, div. 9.4.4.A.

203. TETON COUNTY LDRS, *supra* note 153, art. 9, div. 9.5; JACKSON LDRS, *supra* note 154, art. 9, div. 9.5.

204. TETON COUNTY LDRS, *supra* note 153, art. 9, div. 9.5; JACKSON LDRS, *supra* note 154, art. 9, div. 9.5.

205. TETON COUNTY LDRS, *supra* note 153, art. 9, div. 9.4.6.D; JACKSON LDRS, *supra* note 154, art. 9, div. 9.4.4.B.

206. TETON COUNTY LDRS, *supra* note 153, art. 9, div. 9.5; JACKSON LDRS, *supra* note 154, art. 9, div. 9.5.

207. TETON COUNTY LDRS, *supra* note 153, art. 5, div. 5.5.4.A; JACKSON LDRS, *supra* note 154, art. 5.5.4.A.

208. TETON COUNTY LDRS, *supra* note 153, art. 5, div. 5.5.4.A; JACKSON LDRS, *supra* note 154, art. 5.5.4.A.

B. Other Community LDRs Supporting Small-Scale Agricultural Production

Many communities across the country support small-scale agriculture through their LDRs, also known as municipal zoning and land use codes. These communities often provide such support to small-scale agriculture by incorporating agricultural zoning districts where agricultural activities and associated structures are the only allowed use. Alternatively, communities will include agricultural activities as allowed uses in many different zoning districts.[209] The Teton County and Town of Jackson LDRs list agricultural activities as allowed uses.[210] The following analysis examines other communities that also permit agricultural activities as allowed uses.

Small-scale agricultural production activities include hydroponics, aquaculture, aquaponics, animal husbandry, and crop agriculture.[211] Crop agriculture includes categories of front yard gardening, community gardens, market gardens, urban farms, and season extenders.[212] Communities define these terms; list them as allowed uses in zoning districts; and mandate compliance with specific conditions, permits or licenses, and restrictions.[213]

Alternatively, communities may define small-scale agricultural production activity. Communities often use consistent terminology to define small-scale agricultural activities.[214] For example, communities will consistently use the term "aquaponics" or "beekeeping" without any interchangeable term.[215] However, communities may use differing terminology to describe similar activities. Communities may use unique terms to encompass activities involving small-scale cultivation of crops or animal products by an individual, organization, or business with the primary purpose of growing food for sale.[216] Examples include "urban farms," "market farms," or "small-scale entrepreneurial agriculture."[217]

Some communities distinguish activities through size limits. For example, the City of Detroit distinguishes "urban garden" and "urban farm"

209. TETON COUNTY LDRS, *supra* note 153, art. 6, div. 6.1.1.E; JACKSON LDRS, *supra* note 154, art. 6, div. 6.1.1.F.

210. TETON COUNTY LDRS, *supra* note 153, art. 6, div. 6.1.1.E; JACKSON LDRS, *supra* note 154, art. 6, div. 6.1.1.F.

211. *See infra* Table 2 (providing examples of small-scale agriculture).

212. *See infra* Table 2 (defining various methods of urban agriculture).

213. TETON COUNTY LDRS, *supra* note 153, art. 1, div. 1.4; JACKSON LDRS, *supra* note 154, art. 1, div. 1.4.

214. TETON COUNTY LDRS, *supra* note 153, art. 9, div. 9.5; JACKSON LDRS, *supra* note 154, art. 9, div. 9.5.

215. *See infra* Table 2 (providing some examples of strictly defined agricultural terms); *see also* Christopher Kelly et al., *Bees in Urban and Suburban Districts*, SUSTAINABLE DEV. CODE, https://sustainablecitycode.org/brief/bees-in-urban-and-suburban-districts/ (last visited Dec. 29, 2023) (discussing the various ways municipal codes govern beekeeping in developed areas).

216. *See infra* Table 2 (identifying the different ways communities define small-scale agriculture).

217. *Id.*

through acreage size, but both encompass cultivating food for commercial sale.[218] Some communities distinguish between non-commercial and commercial activities. For example, in Long Beach, California, the definition of "community garden" is "a plot of land where flowers, fruits, herbs, or vegetables are cultivated by individuals of a neighborhood (noncommercial activity)."[219] Sometimes communities do not provide definitions at all. Regardless of the specific approach, definitions are commonly provided for a given permitted small-scale agriculture practice. Table 2 provides examples of other communities' small-scale agriculture terms and definitions.[220]

Table 2 *Definitions of Small-Scale Agricultural Production Activities*[221]

Term	Definition	Source
Aquaculture	The cultivation of aquatic animals in a recirculating environment to produce whole fish that are distributed to retailers, restaurants and consumers.	Boston Zoning Code (2021)
Aquaponics	The symbiotic propagation of plants and fish in an indoor or outdoor recirculating environment that may result in the harvest of said plants and fish.	Zoning Ordinance of the City of Evanston (2021)
Aquaponics	The cultivation of fish and plants together in a constructed, recirculating system utilizing natural bacterial cycles to convert fish waste to plant nutrients, for distribution to retailers, restaurants and consumers.	Boston Zoning Code (2021)
Community Garden	An area of land managed and maintained by a group of individuals to	Zoning and Development

218. DETROIT, MICH., CODE § 50-16-421 (2019).

219. LONG BEACH, CAL., MUNICIPAL CODE § 21.15.605 (1995).

220. Most of the definitions provided in Table 2 are related primarily to plant-based agricultural production. However, these recommendations need not only focus on plant-based production methods. Definitions and standards (and all recommendations given in section C of this Article chapter) should apply to all relevant aspects of small-scale agricultural production, including animal husbandry, as relevant to Teton County stakeholders.

221. BOS., MASS., CODE § 89-2, (2021); EVANSTON, ILL., CODE OF ORDINANCES § 6-18-3 (2021); KANSAS CITY, MO., CODE § 88-312-02 (2021); PHILA., PA., CODE § 14-601(11) (2020); CLEVELAND, OHIO, CODE OF ORDINANCES § 336.02 (2021); SACRAMENTO, CAL. CODE, § 17.108.170 (2017).

	grow and harvest food and/or horticultural products for personal or group consumption or for sale or donation. A community garden area may be divided into separate garden plots for cultivation by one or more individuals or may be farmed collectively by members of the group. A community garden may include common areas (e.g., hand tool storage sheds) maintained and used by the group.	Code of the City of Kansas City, Missouri (2021)
Community Garden	An area managed and maintained by a group of individuals to grow and harvest food crops or non- food crops (e.g., flowers) for personal or group consumption, for donation, or for sale that is incidental in nature. A community garden area may be divided into separate garden plots or orchard areas for cultivation by one or more individuals or may be farmed collectively by members of the group. A community garden may include common areas (e.g., hand tool storage sheds) maintained and used by the group. Community gardens may be principal or accessory uses and may be located on a roof or within a building.	Philadelphia Code (2020)
Home Garden	A garden maintained by one or more individuals who reside in a dwelling unit located on the subject property. Food and/or horticultural products grown in the home garden may be used for personal consumption, and only whole, uncut, fresh food and/or horticultural products grown in a home garden may be donated or sold on-site. Row crops are not permitted in the	Zoning and Development Code of the City of Kansas City, Missouri (2021)

	front yard of a residentially zoned and occupied property, except property zoned R-80, if whole, uncut fresh food and/or horticultural products grown in the home garden are donated or sold onsite. "Row crops" shall be defined as grain, fruit or vegetable plants, grown in rows, which are 24 inches or more in height. "Row crops" shall not mean cultivated or attended trees or shrubbery and shall not include grain, fruit or vegetable plants that are part of the front yard's borders, that extend no more than 8 feet from the side property lines or from the front of the principal building.	
Hydroponics	The propagation of plants using a mechanical system designed to circulate a solution of minerals in water, for distribution to retailers, restaurants and consumers.	Boston Zoning Code (2021)
Market Garden	An area managed and maintained by an individual or group of individuals to grow and harvest food crops or non-food crops (e.g., flowers) for sale or distribution that is not incidental in nature. Market farms may be principal or accessory uses and may be located on a roof or within a building.	Philadelphia Code (2020)
Market Garden	Market garden means an area of land managed and maintained by an individual or group of individuals to grow and harvest food crops and/or non- food, ornamental crops, such as flowers, to be sold for profit.	City of Cleveland, Ohio Land Use Code (2021)
Neighborhood Garden	A principal use that provides space for people to grow plants for non-commercial purposes, such as	Zoning Ordinance of the City of

	beautification, education, recreation, or harvest, and is managed by a specific person or group responsible for maintenance and operations.	Evanston (2021)
Private Garden	A private food-producing garden that is accessory to the primary use of the site and which is located in the front yard, side yard, rear yard, rooftop, courtyard, balcony, fence, wall, windowsill or basement.	Sacramento City Code (2017)
Raised Bed	A method of cultivation in which soil is placed over a geotextile barrier, and raised and formed into three (3) to four (4) foot wide mounds. The soil may be enclosed by a frame generally made of untreated wood. Raised beds are not considered a Structure.	Boston Zoning Code (2021)
Vertical Agriculture	An exterior building wall or other vertical structure designed to support the growing of agricultural or horticultural crops.	Boston Zoning Code (2021)

In addition to definitions, a community's LDRs will list activities as an allowed use in all or some zoning districts. The activity can be a principal, accessory, or temporary use. A zone can allow the activity "by-right" or without special conditions or can limit the activity and require permits like a conditional use permit or special use permit.[222] For example, in Warrensburg, Missouri's Zoning Code, community gardens are permitted as principal uses by right in all residential districts and as a conditional use in the Central Business District.[223] Like Teton County and the Town of Jackson, other communities have physical development standards (e.g., maximum height for buildings and setback requirements) that apply unless exempted.[224]

Many communities set specific standards for small-scale agricultural production. For example, urban agriculture is a permitted use under every

222. ANDREA VAAGE & GARY TAYLOR, IOWA STATE UNIV., MUNICIPAL ZONING FOR LOCAL FOODS IN IOWA: A GUIDEBOOK FOR REDUCING LOCAL REGULATORY BARRIERS TO LOCAL FOODS 4 (2020).

223. WARRENSBURG, MO., CODE OF ORDINANCES art. IV, § 27-200 (2022).

224. VAAGE & TAYLOR, *supra* note 222, at 61, 71.

zoning district in the City of Fort Collins Land Use Code, but it is only permitted if it is part of an approved site-specific development plan or meets the urban agriculture supplementary regulations.[225] These supplementary regulations require an urban agriculture license from the City and set standards for urban agriculture.[226] These regulations set standards for mechanized equipment, chemicals and fertilizers, trash and compost, maintenance, water conservation and conveyance, hoop houses, and impact mitigation.[227]

Additionally, if the activity exceeds half an acre in size or if the Director of Planning and Zoning determines there could be significant impact from the urban agriculture use, the Director can schedule a neighborhood meeting with notice.[228] The City of Fort Collins Land Use Code governs the process for scheduling and providing notice for a neighborhood meeting.[229] The purpose of these standards is "to allow for a range of urban agricultural activities at a level and intensity that is compatible with the City's neighborhoods."[230]

Setting agriculture-related standards for PUDs provides some communities with another tool to support agriculture more generally. Typically, PUDs have not adequately protected agricultural lands and other greenspaces.[231] However, some communities have developed PUD standards through their zoning and land use codes to better support natural resources.[232] One common mechanism requires a PUD to retain a certain amount of agricultural land or greenspace. This retention of greenspace incentivizes higher development densities and disincentivizes developing in open spaces. For example, the Town of Hinesburg, Vermont's Zoning Regulations require PUDs to preserve a certain percentage of the site for greenspace, which includes agricultural land.[233] Another approach is including urban agriculture as a desirable amenity within the PUD project.[234] As an alternative to complying with applicable zoning regulations in a given district, Minneapolis allows noncompliant PUDs to provide certain site amenities.[235] Site amenities include green roofs, on-site growing areas, and living walls.[236]

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225. FORT COLLINS, COLO., LAND USE CODE art. 4, div. 4.28(B)(1)(a)(5) (2023).

226. *Id.* art. 3, div. 3.8.31(C)(1), (2).

227. *Id.* art. 3, div. 3.8.31(C)(2)(a)–(f), (j), (k).

228. *Id.* art. 3, div. 3.8.31(C)(3).

229. *Id.*; *see also id.* art. 2, div. 2.2.2(E); *see id.* art. 2, div. 2.2.6(A)–(C).

230. *Id.* art. 3, div. 3.8.31(B).

231. KEVIN NELSON ET AL., EPA, ESSENTIAL SMART GROWTH FIXES FOR RURAL PLANNING, ZONING, AND DEVELOPMENT CODES 13 (2012).

232. *See id.* at 15 (suggesting that strategically placed PUDs can protect natural features).

233. HINESBURG, VT., ZONING REGULATION CODE § 4.5.7(1)(a) (2023).

234. *See generally* NELSON ET AL., *supra* note 231, at 15, 41 (discussing PUDs and protecting agriculture).

235. MINNEAPOLIS, MINN., CODE OF ORDINANCES ch. 527, art. 1, § 527.120 (2023).

236. *Id.* tbl.527-1.

Another way some communities support small-scale agricultural production is through edible landscaping. Most regulatory frameworks that provide for edible landscaping, such as front-yard gardens and verges, target residential areas.[237] For example, for one-family and two-family residential front-yard landscaping requirements in Orlando, Florida, "[a]t least 40% of the pervious area of the front and street sideyards shall be landscaped with shrubs and groundcovers, or a combination thereof. The remainder may be planted with turfgrass, annuals[,] and vegetable gardens, up to a maximum of 60%."[238] The City also provides standards for plant selection and edge treatments.[239] The Los Angeles Municipal Code offers another example of language encouraging edible landscaping:

> No permit is required by the owner of property fronting the parkway portion of the street in an area zoned for residential use in order for the owner to remove existing shrubs and plants, but not trees, and replace the shrubs and plants with landscaping, including edible plant materials, provided the owner complies with the Residential Parkway Landscaping Guidelines adopted by the Board.[240]

Orlando provides an example of commingling landscaping design typically required by municipality codes, while Los Angeles allows fully edible landscaping. Each zoning code has some limitation in standards and location.

These are examples of how other communities support small-scale agricultural production through their municipal zoning and land use codes. Many communities identify and define specific small-scale agricultural production practices they want to support.[241] Providing clear terms and definitions ensures consistent regulatory implementation and oversight. Communities decide where each activity can occur, and some even provide specific standards for the practice. In addition to listed and defined allowed uses, communities have supported small-scale agricultural production by setting standards for PUDs and promoting edible landscaping. The above examples show some possibilities for the Teton County and Town of Jackson LDRs.

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237. Jesse P. Hsu, *Public Pedagogies of Edible Verge Gardens: Cultivating Streetscapes of Care*, 17 POL'Y FUTURES EDUC. 821, 823 (2019). A verge garden is a garden grown along sidewalks or footpaths, in an attempt to effectively utilize space. *Id.*

238. ORLANDO, FLA., CODE § 60.223(a)(2) (2023).

239. *Id.* § 60.223(a)(3).

240. L.A., CAL., MUNICIPAL CODE § 62.169(b) (2023).

241. *See supra* Table 2 (providing examples of different communities incorporating small-scale agricultural practices).

C. Recommendations to Better Support Small-Scale Agriculture Through the Teton County and Town of Jackson LDRs

This Section provides recommendations for how the Teton County and Town of Jackson LDRs can better support small-scale agriculture. These recommendations synthesize analysis from Section II(A), discussing the current framework and components of the Teton County and Town of Jackson LDRs supporting and challenging small-scale agriculture; and Section II(B), discussing how other communities use their LDRs to support small-scale agricultural production. These recommendations focus on three things: (1) the LDRs' definition of agriculture as an allowed use, use types, and permit types; (2) PUDs; and (3) edible landscaping.

1. Distinguish Agriculture as an Allowed Use into Categories Based on Recommendations for the Jackson/Teton County Comprehensive Plan

a. New Definitions and Standards for Agriculture as an Allowed Use

Two recommendations in the previous section for the Comprehensive Plan explicitly relate to the Teton County and Town of Jackson LDRs. First, Part I of this Article includes a strategy recommendation for Chapter 1 (Stewardship of Wildlife, Natural Resources[,] and Scenery): to *[e]valuate and update the Teton County and Town of Jackson Land Development Regulations to promote and allow small-scale agricultural practices and activities in Rural Area Character Districts, including but not limited to defining each agricultural activity, developing standards for each activity, and establishing guidelines for alternative agriculture best practices.*[242] Second, this Article recommended the same strategy for Chapter 3 of the Comprehensive Plan (Responsible Growth Management) for Complete Neighborhood Character Districts.[243]

As previously explained, the Teton County and Town of Jackson LDRs organize a majority of their zoning districts through Article 2 (Complete Neighborhood Zones) and Article 3 (Rural Area Zones).[244] Except for one zone (Mobile Park Home Zone), all Teton County and Town of Jackson Rural Area Zones allow agriculture as a principal use.[245] However, two Teton

242. *See* discussion *supra* Subsection I(C)(4).
243. *Id.*
244. *See* discussion *supra* Subsection I(C)(4) and note 164.
245. TETON COUNTY LDRS, *supra* note 153, art. 6, div. 6.1.1.E; JACKSON LDRS, *supra* note 154, art. 6, div. 6.1.1.F.

County Complete Neighborhood Zones and 12 Town of Jackson Complete Neighborhood Zones do not allow for agriculture as a principal use.[246]

Permitting agriculture only as a principal use potentially limits small-scale agricultural production. Further, the definition of agriculture as a principal use is limiting. The current definition for agriculture as an allowed use in the Teton County and Town of Jackson LDRs is "the farming or ranching of land," which includes: cultivation of the soil; production of forage, crops, or timber; growing of ornamental or landscaping plants; greenhouses; and rearing, feeding, and management of livestock.[247] Though this definition is broad, agriculture may be narrowly viewed as a tool for conserving large areas of open space, reflecting its role as discussed in the Comprehensive Plan.

Part I of this Article recommends that the Comprehensive Plan acknowledge the different settings where agriculture can take place, thereby recognizing a broader spectrum of small-scale agricultural production practices. Amending the definition found in § 6.1.3.B of both LDRs provides a first step for this recognition. Under § 6.1.3.B, all agricultural practices that Teton County and the Town of Jackson intend to support should be clearly defined with specific standards.[248] Table 2 in Section II(B) provides examples of definitions other communities use.[249] Further, many communities, like the City of Fort Collins, provide example standards for small-scale agricultural production, especially in more developed areas, that Teton County and the Town of Jackson can consider and develop in their LDRs.[250]

b. Identifying Which Agricultural Uses Are Allowed in Each Zone

Many communities list specific activities as allowed uses rather than using the general term "agriculture." However, given the structure of the Teton County and Town of Jackson LDRs, "agriculture" could remain the designated term in a zoning district's Use Schedule. A zoning district's Use Schedule is important because it impacts similar-use determinations and allowed structures. "Agriculture" should be an allowed use under more

246. TETON COUNTY LDRS, *supra* note 153, art. 6, div. 6.1.1.E; JACKSON LDRS, *supra* note 154, art. 6, div. 6.1.1.F.

247. TETON COUNTY LDRS, *supra* note 153, art. 6, div. 6.1.3.B; JACKSON LDRS, *supra* note 154, art. 6, div. 6.1.3.B.

248. TETON COUNTY LDRS, *supra* note 153, art. 6, div. 6.1.3.B; JACKSON LDRS, *supra* note 154, art. 6, div. 6.1.3.B.

249. *See supra* Table 2 (illustrating the variety of ways in which agricultural practices are defined by several communities in the U.S.).

250. FORT COLLINS, COLO., LAND USE CODE art. 3, div. 3.8.31(C) (2023). Standards should be developed based on a definition of "sustainable agriculture" as mentioned in the Introduction of this Article.

zoning districts. One approach the County could take is to allow "agriculture" as a principal use under every zone.

Because agriculture can cause nuisance or other issues with public health and safety,[251] regulatory oversight is necessary to address potential concerns. Specific-use permits are a regulatory tool that could address potential concerns related to agriculture.[252] Currently, zoning districts allowing agriculture as a principal use require either no use permit or a basic use permit.[253] If an agricultural production practice or activity might cause nuisance or public health or safety concerns in a Rural Area zoning district or Complete Neighborhood zoning district, Teton County or the Town of Jackson could require a permit with greater regulatory oversight and agency review.

Another way to encourage small-scale agriculture in the LDRs would be to include, under each Use Schedule, an asterisk under the "Permit" column for "Agriculture." A footnote could direct the reader to § 6.1.3.B. In § 6.1.3.B, a table under each agricultural practice could identify each zoning district and the permits that would be necessary for a given practice.

The Teton County and Town of Jackson LDRs offer a Conditional Use Permit as an alternative use permit. A Conditional Use Permit permits a use "that is generally compatible with the character of a zone but requires site-specific conditions to limit and mitigate" potential adverse impacts.[254] Under the LDRs, Conditional Use Permits contain a list of requirements, titled "Findings for Approval," that must be met for the permit to be granted.[255] The County could require agricultural activities that need more regulatory oversight in a specific zoning district to satisfy these elements. Alternatively, the LDRs could develop and include a conditional use permit specifically formatted for the activities found under § 6.1.3.B. This specific conditional use permit could be similar to the aforementioned permit process under the City of Fort Collins Land Use Code.[256] A well-planned and tailored permit process could help support more small-scale agricultural production practices

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251. *See* Bradley K. Rein, *Health Hazards in Agriculture – An Emerging Issue*, USDA (June 1992), https://nasdonline.org/1246/d001050/health-hazards-in-agriculture-an-emerging-issue.html (summarizing some agriculture-based health hazards).

252. *See* Steve Butler, *A New Approach for Dealing with Conditional Uses in Your Zoning Code*, MUN. RSCH. & SERVS. CTR. OF WASH. (Aug. 3, 2022), https://mrsc.org/stay-informed/mrsc-insight/august-2022/a-new-approach-for-conditional-uses (highlighting some drawbacks of conditional use permits and the potential advantages of attaching specific conditions).

253. TETON COUNTY LDRS, *supra* note 153, art. 6, div. 6.1.1.E; JACKSON LDRS, *supra* note 154, art. 6, div. 6.1.1.F.

254. TETON COUNTY LDRS, *supra* note 153, art. 8, div. 8.4.2.A; JACKSON LDRS, *supra* note 154, art. 8, div. 8.4.3.A.

255. TETON COUNTY LDRS, *supra* note 153, art. 8, div. 8.4.2.C; JACKSON LDRS, *supra* note 154, art. 8, div. 8.4.3.C.

256. FORT COLLINS, COLO., LAND USE CODE art. 3, div. 3.8.31(C)(2) (2023).

by addressing health and safety concerns, especially in Complete Neighborhood zoning districts, where issues will more likely arise.

c. Agriculture as an Accessory Use

Because the LDRs recognize agriculture only as a principal use, recommendations have thus far focused on principal-use concerns. However, agriculture might not be possible on a given site as a principal use. In those situations, agriculture could become an accessory use. As discussed in Section II(A) of this Article, whether existing accessory-use categories would allow small-scale agricultural production activities is ambiguous. Therefore, planners should include agriculture as a new accessory use. This Article's recommendations given for agriculture as a principal use could apply to agriculture as an accessory use, to be included in § 6.1.11 of the LDRs, where definitions and standards for current accessory uses exist. Because an accessory use is only allowed when one of its assigned primary uses is active on the site, all primary uses should be assigned to the agriculture accessory use for maximum flexibility.[257] Permit requirements for the accessory use could mirror the language for agriculture as a principal use.

2. Develop Standards in PUD and Planned Resort Master Plans Supportive of Small-Scale Agricultural Production

LDRs could also better support small-scale agricultural production by amending requirements for PUD master plans[258] and Planned Resort master plans.[259] For the Teton County and Town of Jackson LDRs, development of new PUD Zones is no longer available, so support for small-scale agriculture must come from existing master plans.[260] The Teton County and Town of Jackson LDRs require master plans to contain certain components.[261] To better support small-scale agricultural production, the LDRs could require that a certain amount of space within the zone be designated for this purpose, similar to the Hinesburg Zoning Regulations.[262] Additionally, the LDRs could recognize small-scale agriculture activities as amenities that must be

257. TETON COUNTY LDRS, *supra* note 153, art. 6, div. 6.1.11.A.2; JACKSON LDRS, *supra* note 154, art. 6, div. 6.1.11.A.2.

258. TETON COUNTY LDRS, *supra* note 153, art. 4, div. 4.4.1.C.2; JACKSON LDRS, *supra* note 154, art. 4, div. 4.4.1.C.2.

259. TETON COUNTY LDRS, *supra* note 153, art. 4, div. 4.3.1; JACKSON LDRS, *supra* note 154, art. 4, div. 4.3.1.

260. TETON COUNTY LDRS, *supra* note 153, art. 4, div. 4.4.1; JACKSON LDRS, *supra* note 154, art. 4, div. 4.4.1.

261. TETON COUNTY LDRS, *supra* note 153, art. 4, div. 4.4.1.C; JACKSON LDRS, *supra* note 154, art. 4, div. 4.4.1.C.

262. HINESBURG, VT., ZONING REGULATION CODE § 4.5.7 (2023).

incorporated into the existing design of the zone, much like the City of Minneapolis Code of Ordinances.[263]

For Planned Resort Zones, all elements of the Findings for Approval must be met.[264] Element seven, the "Land Use Element," states that "[t]he Planned Resort Master Plan promotes land uses that support and maintain the character of the resort as specified."[265] This land use element also provides "Permitted Uses," none of which currently support agricultural production.[266] The above recommendations for PUD Zones also apply to Planned Resort master plans. The LDRs could amend the Land Use Element by requiring Planned Resort master plans to preserve a certain amount of space within the zone for alternative and small-scale agriculture and to recognize these activities as amenities that must be incorporated into the existing design of the zone.

3. Support Small-Scale Agriculture Through Edible Landscaping

As discussed in Section II(A) of this Article, the LDRs' landscaping design provisions are limited in their ability to support edible landscaping. Vegetation categories are limited to "lawn, pasture, or native groundcover."[267] Some communities, like Orlando and Los Angeles, go beyond these categories, allowing landscaping design to include edible vegetation in residential areas on various scales.[268] The Teton County and Town of Jackson LDRs should expand vegetation categories to include edible landscaping. Adding the term *edible vegetation* to the list of vegetation categories would better support small-scale agriculture. Just like Orlando and Los Angeles,[269] Teton County could create planting standards that maintain visual appeal but allow for food production. Additionally, though Orlando and Los Angeles limit their edible landscaping to residential areas,[270] Teton County could allow edible landscaping in all zones where landscaping is present.

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263. *See generally* MINNEAPOLIS, MINN., CODE OF ORDINANCES ch. 527, art. 1, § 527.120 (2023) (permitting the City planning commission to approve alternatives to zoning ordinance standards where the PUD includes certain site amenities by creating a "points" system for potential developers).

264. TETON COUNTY LDRS, *supra* note 153, art. 4, div. 4.3.1.D; JACKSON LDRS, *supra* note 154, art. 4, div. 4.3.1.D.

265. TETON COUNTY LDRS, *supra* note 153, art. 4, div. 4.3.1.D.7; JACKSON LDRS, *supra* note 154, art. 4, div. 4.3.1.D.7.

266. TETON COUNTY LDRS, *supra* note 153, art. 4, div. 4.3.1.F; JACKSON LDRS, *supra* note 154, art. 4, div. 4.3.1.F.

267. TETON COUNTY LDRS, *supra* note 153, art. 5, div. 5.5.4.A; JACKSON LDRS, *supra* note 154, art. 5, div. 5.5.4.A.

268. ORLANDO, FLA., CODE § 60.223 (2023); L.A., CAL., MUNICIPAL CODE § 62.169(b) (2023).

269. ORLANDO, FLA., CODE § 60.223(a)(2) (2023); L.A., CAL., MUNICIPAL CODE § 62.169(b) (2023).

270. ORLANDO, FLA., CODE § 60.223 (2023); L.A., CAL., MUNICIPAL CODE § 62.169(b) (2023).

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Above, this Article offers recommendations developed by examining the Teton County and Town of Jackson LDRs along with other municipal zoning and land use codes. Recommendations build on suggested policies and strategies for the Comprehensive Plan in the previous Section and suggest updating the LDRs to better support small-scale agricultural production. The LDRs could do this by incorporating a more expansive definition of agriculture that recognizes the spectrum of production activities that can be supported in Teton County and the settings in which they can occur. The LDRs could list agriculture as an allowed use in more zoning districts and address any concerns with additional regulatory procedures and standards. Further, the LDRs could require PUD and Planned Resort Zones to better support small-scale agriculture in their master plans. Lastly, the LDRs could better support edible landscaping. These are targeted recommendations, however, and Teton County stakeholders should review the LDRs in their entirety to determine other opportunities for supporting small-scale agriculture.

As previously mentioned, "[t]he advisability of amending the text of these LDRs is a matter committed to the legislative discretion" of the Town Council and the BCC.[271] This discretion should be considered when undertaking any efforts to amend the LDRs based on these recommendations. However, any member of the public can propose an LDR text amendment through an application and review process.[272] The BCC and Town Council must consider, *inter alia*, whether and to what extent the proposed amendment "[i]mproves implementation of the Comprehensive Plan."[273] This could include considering new or amended policies and strategies in the Comprehensive Plan that support small-scale agricultural production.

CONCLUSION

This Article recommends specific strategies for amending or developing new components of the Comprehensive Plan, the Teton County LDRs, and the Town of Jackson LDRs to support aspects of a community food system through small-scale agricultural production. Many of the lessons learned in Teton County and proposed regulatory changes could apply to

271. TETON COUNTY LDRS, *supra* note 153, art. 8, div. 8.7.1.C; JACKSON LDRS, *supra* note 154, art. 8, div. 8.7.2.C.

272. TETON COUNTY LDRS, *supra* note 153, art. 8, div. 8.7.1.D tbl.; JACKSON LDRS, *supra* note 154, art. 8, div. 8.7.1.D.

273. TETON COUNTY LDRS, *supra* note 153, art. 8, div. 8.7.1.C.5; JACKSON LDRS, *supra* note 154, art. 8, div. 8.7.2.C.5.

geographically and socially similar counties in the West, especially those in the Greater Yellowstone Ecosystem.[274] Each Part first summarizes the organization of each respective framework and identifies the provisions that support or challenge small-scale agricultural production in Teton County. Then, each Part highlights the provisions of other community comprehensive plans and LDRs supporting small-scale agricultural production. Finally, each Part synthesizes these topics, making recommendations for adapting each Teton County planning and regulatory framework to better support small-scale agricultural production.

For the Comprehensive Plan, these recommendations include developing a new chapter dedicated to Teton County's community food system with a chapter goal, principles, policies, strategies, and indicators. Alternatively, existing chapters could be amended to support small-scale agriculture. In either approach, policies should recognize the different environments in which small-scale agricultural production can occur to better support specific agricultural practices. Any discussion of agriculture should recognize these categories, whether in principles, policies, strategies, Character Defining Features, Neighborhood Forms, or explicitly identified possible projects.

One recommendation for the Teton County and Town of Jackson LDRs includes incorporating a more expansive definition of agriculture. A more expansive definition of agriculture would recognize the spectrum of production activities that can be supported in Teton County. The LDRs could list agriculture as an allowed use in more zoning districts and address any concerns with additional regulatory procedures and standards. Further, the LDRs could require PUD and Planned Resort Zones to better support small-scale agriculture in their master plans. Lastly, the LDRs could better support edible landscaping.

The analysis and recommendations provided in this Article can support government officials, agencies, and other stakeholders as they advance small-scale agricultural production in Teton County. Other counties may also find the analysis and recommendations useful. Entities involved in developing, approving, and enforcing these frameworks in Teton County may adopt or pursue these recommendations to support small-scale agriculture. As other scholars have noted, "[t]he key to promoting urban agriculture within a community is to eliminate unnecessary barriers while ensuring safe practices and adequate protection for gardeners, farmers[,] and neighboring landowners."[275] Through their planning authority, government officials and entities can help alleviate some barriers to small-scale agriculture and encourage the growth of the community food system.

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274. *See supra* notes 6–11 and accompanying text (describing the benefits granted to Teton County and the Town of Jackson by LDRs that could apply to similarly situated counties and municipalities).

275. WOOTEN & ACKERMAN, *supra* note 16, at 20.

Many communities have created formal or semi-formal government bodies, such as the City of Madison's Food Policy Council, to help encourage and support small-scale agriculture.[276] A food policy council can increase community engagement; conduct research; and propose and facilitate support services, education programs, and regulatory and policy framework changes, including but not limited to those recommended in this Article. Background research and consultation with key Teton County stakeholders initially informed this analysis of the Comprehensive Plan, Teton County LDRs, and Town of Jackson LDRs. A Teton County food policy council could be comprised of these and similar stakeholders.

Although synthesized with analysis of Teton County's regulatory frameworks, the recommendations in this Article emerge from other communities' examples. Therefore, Teton County should consider and adapt these recommendations for its specific needs and context. Since the authors are not members of the Town of Jackson or Teton County communities, this Article likely contains gaps in understanding of nuances that are difficult for an outsider to assess. A food policy council could better address those gaps through more inclusive stakeholder expertise and involvement, which this Article largely lacked. A food policy council could consistently help advise the Town Council and the BCC when considering proposed amendments to the Comprehensive Plan and the LDRs aimed at supporting small-scale agricultural production.

Further, this research can contribute to broader scholarship and practice surrounding land use planning and regulatory frameworks to support the development of community food systems in other communities. This analysis, which first examined planning and regulatory frameworks in the community at hand and then investigated best practices in other communities, is an easily replicable approach. Other communities interested in small-scale agriculture can similarly look inwards, at their own community food system planning and regulatory frameworks, and then outwards, to find best practices suitable to their needs. Specifically, counties in the Greater Yellowstone Ecosystem may benefit from this Article because those communities are facing geographic, economic, and social challenges that are similar to those faced by Jackson and Teton County.[277]

This Article includes several limitations that point to the need for future research. Again, the recommendations in this paper narrowly focus on the production component of a community food system in Teton County.

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276. *Madison Food Policy Council*, MADISON, WIS., https://www.cityofmadison.com/mayor/programs/food-policy-and-programming/madison-food-policy-council (last visited Dec. 29, 2023).

277. *See supra* notes 6–11 and accompanying text (describing the challenges particular to the Greater Yellowstone communities).

Revisions to these and other regulatory frameworks, however, ultimately should be comprehensive and supportive of all components of a food system, which includes processing, distributing, consuming, and disposal. Another consideration for planners is equity and justice surrounding community food systems in Teton County. The Comprehensive Plan does address equity through its Workforce Housing Plan, but equity and justice merit greater consideration in all aspects of Teton County's policies and planning, including its food systems.[278] Some of the recommendations provided in Part I of this Article speak to food production equity by including language like *equitably allow and support* and *equitable access*. However, these recommendations do not address all aspects of food equity, and Teton County stakeholders should analyze how the Comprehensive Plan can more thoroughly support equity and connect with frameworks that have the force of law to implement it.

Background research additionally revealed many other regulatory and non-regulatory practices that warrant further investigation but were beyond the scope of this Article. For example, building codes and the impact they have on structures like high tunnels emerged as a barrier to the season extension necessary for small-scale agriculture in Teton County.[279] First, then, future research could explore what other communities have done to accommodate high tunnels and other agriculture-related structures. Second, future research could explore how land trusts around the country use conservation easement deeds, tax-benefit implications, and types of land ownership to support small-scale agriculture. Third, background research revealed one barrier for entering farmers in Teton County (and elsewhere) is land cost.[280] Future research could explore legal and regulatory aspects of land-sharing programs. These are only a few examples of future research into policy and regulatory frameworks in Teton County that could support alternative and small-scale agricultural production and broader community food systems.

Further, this Article does not analyze whether incorporating food policy into comprehensive plans and amending land development regulations is effective for supporting small-scale agriculture. Alternatively, there could be other planning and regulatory frameworks that might be more effective than comprehensive plans and land development regulations. Future research should explore which planning and regulatory frameworks would prove most

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278. JACKSON LDRS, *supra* note 154, art. 1, div. 1.3.2.C.1.

279. Billy Nunn & Kathy Clay, *Board of County Commissioners - Staff Report*, TETON CNTY., WYO. 62 (Jan. 17, 2022), https://www.tetoncountywy.gov/DocumentCenter/View/21083/020116-Building-Code-Amendments.pdf.

280. *Conservation Comes Full Circle*, TETON REG'L LAND TR., https://tetonlandtrust.org/conservation-comes-full-circle/ (last visited Dec. 29, 2023).

effective at supporting community food systems both in Teton County and in other communities.

Given the environmental, economic, and socially unsustainable attributes of the conventional food system and Teton County's broader sustainability and conservation goals, Teton County could benefit from efforts that support a community food system. Given that Ecosystem Stewardship is a Common Value of the Comprehensive Plan, the Teton County community already recognizes the supportive and conscientious role community members play in caring for wildlife and ecological systems.[281] These resources are significantly impacted by the ways in which community members produce, process, distribute, consume, and dispose of food. This Article encourages Teton County community members and stakeholders to develop and enhance planning and regulatory frameworks for a community food system in support of these common stewardship values and provides an example for other communities' planning and policy efforts.

281. COMPREHENSIVE PLAN, *supra* note 18, at CV-1-1.

A COMPARATIVE LOOK: APPLYING VERMONT'S ENVIRONMENTAL JUSTICE ACT IN TENNESSEE

K. Ashley Eshleman[1]

EXECUTIVE SUMMARY

This Article introduces a potential Environmental Justice (EJ) bill in Tennessee modeled after Vermont's Environmental Justice Act (the Act, or EJA). EJ communities face disparate impacts from environmental harm and need legal protection.[2] The EJ movement originated in the Southeast, building on the Memphis Sanitation Strike in Tennessee and strikes in North Carolina.[3]

The federal government took legislative action to address EJ by proposing the Environmental Justice for All Act to increase resources for impacted individuals and place pressure on states to create their own

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2. *Learn About Environmental Justice,* EPA, https://www.epa.gov/environmentaljustice/learn-about-environmental-justice (last updated Aug. 16, 2023).

3. *See Environmental Justice Timeline*, EPA, https://www.epa.gov/environmentaljustice/environmental-justice-timeline (June 27, 2023) (providing a brief history of EJ in the U.S.).

legislation.[4] The Environmental Protection Agency (EPA) recently released statements about its stance and created grants to aid EJ communities. All state governments receive federal funds that go toward EJ initiatives, and government agencies must comply with certain requirements in order to receive such funds.[5]

Vermont recently passed a comprehensive Environmental Justice Act that includes cumulative impact analyses, community engagement, and mandates the creation of a mapping tool.[6] This Act could serve as a general model for Tennessee to create an EJ bill because EJ concerns are universal. Tennessee legislators must define EJ in a way that pertains to Tennessee specifically and considers the unique qualities of different communities across the state.

Once EJ is defined, Tennessee may act based on this resulting bill. The bill would establish timelines for state agencies to create community engagement plans, cumulative impact analyses, and mapping catered specifically to Tennessee. Tennessee should also choose different threshold levels for populations based on the demographic and geographic differences between Vermont and Tennessee. Tennessee agencies should also address issues relating to low-income agricultural workers because of the state's large reliance on agriculture.

In today's political climate, an EJ bill may not pass immediately or on its face, so Tennessee legislators should start by focusing on areas in the state where EJ issues are prevalent. This would allow EJ laws to pass without explicitly referencing EJ to bring about change. Once a precedent for protecting these communities is established, an EJ bill may be successfully introduced.

INTRODUCTION

The environmental justice movement has long coincided with the civil rights movement, with a strike in Tennessee being one of the first EJ-type movements in the United States.[7] The 1968 Memphis Sanitation Strike concerned EJ and the unfair treatment of garbage workers.[8] EJ concerns arose here because the strike highlighted the need for economic equality and

4. *See H.R. 2021- Environmental Justice for All Act*, CONGRESS.GOV (2022), https://www.congress.gov/bill/117th-congress/house-bill/2021 (summarizing the various components of the bill).

5. H.R. 2021, 117th Cong. (1st Sess. 2021).

6. An Act Relating to Environmental Justice in Vermont, S.148, Act No. 154 (Vt. 2022) [hereinafter EJA].

7. *Environmental Justice Timeline*, *supra* note 3.

8. *Id.*

social justice.[9] The EJ movement then became a national movement protesting workers' treatment.[10] Fourteen years later, predominantly Black environmentalist and civil rights groups protested a landfill in Warren, North Carolina.[11] From there, the EJ movement gained traction, sparking various inquiries and the formation of groups such as the Indigenous Environmental Network.[12]

EPA defines EJ as "fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."[13] The Department of Energy (DOE) released a statement that included EPA's definition, but expanded on the terms "fair treatment" and "meaningful involvement":

> Fair treatment means that no population bears a disproportionate share of negative environmental consequences resulting from industrial, municipal, and commercial operations or from the execution of federal, state, and local laws; regulations; and policies. Meaningful involvement requires effective access to decision makers for all, and the ability in all communities to make informed decisions and take positive actions to produce [EJ] for themselves.[14]

By defining "fair treatment" and "meaningful participation," the DOE clarified these terms and made it possible to measure progress towards fair treatment. Without such a definition, the term is ambiguous and up to the interpretation of those attempting to enforce legislation.

State EJ bills have existed since the mid-1990s—the first, which passed in Florida, created the state's Environmental Justice Equity Commission.[15] The exact number of states that have implemented EJ policies is uncertain because some states may have plans that did not pass through legislation but may be implemented in other ways.[16] One example is in Hawaii, where no legislation has successfully passed, but where legislators have had a draft EJ

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9. *Memphis Sanitation Workers' Strike*, STAN. UNIV.: THE MARTIN LUTHER KING, JR. RSCH. & EDUC. INST., https://kinginstitute.stanford.edu/memphis-sanitation-workers-strike (last visited Dec. 19, 2023).

10. *Id.*

11 *Environmental Justice Timeline*, *supra* note 3.

12 *Id.*

13. *Environmental Justice*, EPA (2022), https://www.epa.gov/environmentaljustice.

14. *What is Environmental Justice?*, U.S. DEP'T OF ENERGY: OFF. OF LEGACY MGMT., https://www.energy.gov/lm/services/environmental-justice/what-environmental-justice (last visited Nov. 15, 2023).

15. Abby Blocker, *State Trends in Environmental Justice Legislation*, WASTE360 (June 8, 2021), https://www.waste360.com/legislation-regulation/state-trends-environmental-justice-legislation.

16. *Id.*

plan since 2015.[17] Instead, the Hawaii State Department of Health had set EJ as a goal and conducted trainings on EJSCREEN.[18] The Environmental Planning Office within the Department of Health has since closed.[19] As of May 2021, 17 states have passed EJ legislation,[20] including Vermont's unanimous passage in May 2022.[21] Several other states, such as Georgia and Arizona, have proposed EJ bills that have yet to pass.[22]

EPA released a draft plan in 2022 highlighting several goals that states can pursue to expand EJ.[23] These goals include strengthening compliance with environmental statutes and civil rights laws, incorporating EJ considerations in the regulatory development process, improving community engagement, and implementing the Justice40 initiative.[24] States such as Tennessee that have no current or proposed legislation could use EPA's 2022 draft plan goals to maximize engagement and compliance, developing a strong and effective EJ bill.

This paper introduces Vermont's EJA to serve as guidance for Tennessee to hopefully introduce a similar bill. Part I examines federal EJ actions, which can create causes of action. Part II identifies aspects of Vermont's EJA that should apply to Tennessee law. This includes considerations for protected groups and future changes that will stem from the bill. Part III explores the background of Tennessee and what the state has done to address EJ issues thus far. Part IV examines how different aspects of Vermont's EJA would work in Tennessee and compares the two states to determine what may or may not work. Lastly, Part V provides policy recommendations for Tennessee policymakers and the Tennessee Department of Environment and Conservation (TDEC) based on the factor analysis from Part IV.

I. FEDERAL ACTIONS TOWARDS ENVIRONMENTAL JUSTICE

In 1994, Executive Order 12,898 became the first federal action to address EJ in minority and low-income populations.[25] This Order was issued

17. *Id.*

18. *See Environmental Justice*, HAWAII.GOV, https://health.hawaii.gov/epo/ej/ (last updated Oct. 24, 2022) (providing an overview of EJ initiatives in Hawaii).

19. *Id.*

20. *Id.*

21. *S.148 (Act 154)*, VT. GEN. ASSEMB., https://legislature.vermont.gov/bill/status/2022/S.148 (detailing the legislative history of Act 154 in the 2021-2022 Session for the Vermont General Assembly).

22. *See* Blocker, *supra* note 15.

23. *See Environmental Justice Update*, O'MELVENY & MYERS, LLP (Jan. 31, 2022), https://www.omm.com/resources/alerts-and-publications/alerts/environmental-justice-update-january-2022/ (highlighting significant elements of EPA's draft plan).

24. *Id.*

25. *State and Federal Environmental Justice Efforts*, NAT'L CONF. OF STATE LEGS., https://www.ncsl.org/research/environment-and-natural-resources/state-and-federal-efforts-to-advance-environmental-justice.aspx (last updated May 26, 2023).

by President William J. Clinton to focus attention on federal impacts on environmental and human health.[26] Under this Order, federal agencies were required to identify EJ communities, create strategies for remedying issues that these communities face, and develop more comprehensive plans in the future that include public participation.[27] The Council on Environmental Quality developed the 1997 Guidance Under the National Environmental Policy Act (NEPA).[28] In 2010, EPA released the Interim Guidance on Considering Environmental Justice During the Development of an Action.[29]

EPA states that EJ occurs when everyone has the same degree of protection from environmental hazards and equal access to the decision-making process for achieving EJ.[30] EPA mandates EJ considerations when setting standards, permitting facilities, awarding grants, issuing licenses, promulgating regulations, and reviewing actions proposed by federal agencies.[31] Thus, for decisions going forward, EPA must consider these at-risk EJ communities and will expose itself to potential lawsuits by failing to follow through on its commitment.

In September 2022, EPA also amended the Environmental Justice Thriving Communities Technical Assistance Centers Program (EJ TCTAC) to increase funding, extend the deadline, and extend coverage for applicants.[32] EJ TCTAC is a program designed to increase community capacity for technical support, learning, and funding.[33] This funding is available to aid communities facing EJ issues[34] and would be especially helpful for communities in states where there are no laws addressing EJ issues, such as Tennessee.[35]

A proposed act in Congress called the Environmental Justice for All Act seeks to bring federal agencies into compliance with Executive Order

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26. *Summary of Executive Order 12898 – Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, EPA, https://www.epa.gov/laws-regulations/summary-executive-order-12898-federal-actions-address-environmental-justice (last updated July 3, 2023).

27. *Id.*

28. *See* NAT'L CONF. OF STATE LEGS., *supra* note 25.

29. *Id.*

30. *See* EPA, *supra* note 13.

31. *Learn About Environmental Justice*, EPA, https://www.epa.gov/environmentaljustice/learn-about-environmental-justice (last updated Aug. 16, 2023).

32. *Request for Applications (RFA) Amendment*, EPA: OFF. OF ENV'T JUST. (Sept. 2, 2022), https://www.epa.gov/system/files/documents/2022-09/EPA-I-OP-OEJ-22-02_amendment_9.2.22.pdf.

33. *The Environmental Justice Thriving Communities Technical Assistance Centers Program*, EPA, https://www.epa.gov/environmentaljustice/environmental-justice-thriving-communities-technical-assistance-centers (last updated Dec. 21, 2023).

34. *Id.*

35. *Environmental Justice Frequently Asked Questions (FAQs)*, TENN. DEP'T OF ENV'T & CONSERVATION (Aug. 2022), https://www.tn.gov/content/dam/tn/environment/policy-planning/documents/title-vi-ej/opp_ej_faqs.pdf.

12,898.[36] This bill addresses federal agencies' responsibilities, access to outdoor spaces, EJ training, cosmetic alternatives, and grants, among other EJ considerations.[37] Another stated purpose of the bill is to correct environmental injustices because people have a right to "share the benefits of a prosperous and vibrant pollution-free economy."[38] Even though Congress has not passed this bill yet, the language is there for states to mirror in their own EJ legislation.

The Environmental Justice for All Act also seeks to strengthen Title VI of the Civil Rights Act of 1964 (Title VI).[39] This would increase the capability of Tennessee residents to file EJ lawsuits. It would also require federal agencies to include community involvement under NEPA, especially for EJ communities and Indigenous tribes.[40] This bill was introduced in the House of Representatives in March 2021.[41] The latest action on the bill was an amendment by the Committee on Natural Resources.[42]

II. BACKGROUND ON VERMONT'S ENVIRONMENTAL JUSTICE ACT

Vermont's first EJ bill was introduced in April 2021 by Senator Kesha Ram Hinsdale.[43] It was first referred to the Committee on Natural Resources and Energy, and after several rounds of amendment proposals and committee reviews, the Governor signed the bill in May 2022.[44] The final Act has five sections: Findings; 3 V.S.A. chapter 72 addition; Spending Report; Appropriations; and Effective Date.[45] This Act went into effect on May 31, 2022.[46] This Article examines the addition of Chapter 72 in 3 V.S.A. and the spending report.

Chapter 72 defines environmental benefits, environmental burdens, and EJ, respectively.[47] This Act defines EJ to mean that:

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36. CONGRESS.GOV, *supra* note 4.
37. *Id.*
38. CONGRESS.GOV, *supra* note 4.
39. *See* Memo to House Committee on Natural Resources Republican Members re: Full Committee Hearing on *H.R. 2021 the "Environmental Justice for All Act,"* SUBCOMM. ON ENERGY & MIN. RES. REPUBLICAN STAFF (Feb. 14, 2022), https://naturalresources.house.gov/uploadedfiles/02-15-22_fc_leg_hrg_memo.pdf.
40. *Id.*
41. CONGRESS.GOV, *supra* note 4.
42. *All Actions H.R. 2021 – 117th Congress (2021-2022)*, CONGRESS.GOV (2022), https://www.congress.gov/bill/117th-congress/house-bill/2021/all-actions?overview=closed#tabs.
43. EJA, Vt. S.148.
44. VT. STAT. ANN. tit. 3, § 6004 (2023).
45. *No. 154, An Act Relating to Environmental Justice in Vermont*, VT. GEN. ASSEMB. (2022), https://legislature.vermont.gov/Documents/2022/Docs/ACTS/ACT154/ACT154%20As%20Enacted.pdf.
46. *Id.*
47. VT. STAT. ANN. tit. 3, § 6002(1)–(3) (2023).

> [A]ll individuals are afforded equitable access to and distribution of environmental benefits; equitable distribution of environmental burdens; and fair and equitable treatment and meaningful participation in decision-making processes, including the development, implementation, and enforcement of environmental laws, regulations, and policies. Environmental justice recognizes the particular needs of individuals of every race, color, income, class, ability status, gender identity, sexual orientation, national origin, ethnicity or ancestry, religious belief, or English language proficiency level. Environmental justice redresses structural and institutional racism, colonialism, and other systems of oppression that result in the marginalization, degradation, disinvestment, and neglect of Black, Indigenous, and Persons of Color. Environmental justice requires providing a proportional amount of resources for community revitalization, ecological restoration, resilience planning, and a just recovery to communities most affected by environmental burdens and natural disasters.[48]

Vermont's EJ definition is more comprehensive than the EPA's because it emphasizes the need for fairness and equity in decision-making. Like EPA's, Vermont's EJ definition also considers race, color, income, and English language proficiency.[49]

Vermont's EJA further says the state policy shall not cause communities to bear disproportionate impacts of environmental burdens, and such communities shall not be denied access to an "equitable share of environmental benefits."[50] When implementing policy, state agencies must consider the cumulative environmental burdens and access to benefits.[51] State agencies must also adopt a community engagement plan that gives communities meaningful participation.[52] Both cumulative impact statements and community engagement plans are essential to implementing an EJ act, no matter where it is.

The Vermont EJA also created several committees, such as the Environmental Justice Advisory Council and the Interagency Environmental Justice Committee (the Committees).[53] Establishing these Committees is extremely useful and important when considering EJ because they provide advice and recommendations to state agencies that implement the law.[54] The

48. *Id.* § 6002(3).
49. *Id.* § 6002(4)(A)–(C).
50. *Id.* § 6003.
51. *Id.* § 6004(b).
52. *Id.* § 6004(c).
53. *Id.*
54. *Id.* § 6004(d).

analyses developed by these Committees are essential to implementing a just transition.[55]

Another aspect of the Act and addition to 3 V.S.A. chapter 72 is the requirement to develop an EJ mapping tool.[56] Such a mapping tool could be similar to and incorporate EJSCREEN and the Vermont Social Vulnerability Index.[57] Vermont has until January 1, 2025 to develop this tool before it will be used to identify these at-risk communities.[58] Tennessee is geographically and demographically different from Vermont, so the state would benefit from using a similar tool to identify specialized community needs.

Within the Act, protected groups consist of Black, Indigenous, and People of Color (BIPOC), as well as individuals considered low-income and those with limited English proficiency.[59] These recognized groups need protection because they disproportionally bear the burdens of environmental harm and lack adequate access to food and healthcare.[60] Only when protected groups are fully recognized can they access the protection they are owed under the Act.

Vermont has made several of the changes required by the Act and will continue to do so over the next few years. The call for "meaningful participation" requires state agencies to change the way they include communities in decision-making.[61] The agencies covered by this Act are currently obligated to adopt community engagement plans, but they will likely not do so for several years.[62] The first definitive action required by the Act was the creation of the EJ Advisory Council and Interagency Environmental Committee.[63] Members were appointed to these Committees

55. *Id.* § 6006(A)(1)(3).

56. *Id.* § 6007(a).

57. EJSCREEN is an Environmental Justice mapping and screening tool developed by EPA. *EJScreen: Environmental Justice Screening and Mapping Tool*, EPA, https://www.epa.gov/ejscreen (last updated Nov. 14, 2023). The tool combines environmental and demographic indicators, such as a census block's English proficiency, along with environmental hazards based on things such as proximity to designated Superfund sites. *Id.* The combination of such factors allows the user to identify Environmental Justice communities in which to implement state and federal government action. VT. STAT. ANN. tit. 3, § 6007(b). The Vermont Social Vulnerability Index is produced by the Vermont Department of Health and consolidates 16 measures of vulnerability into a single index. *Social Vulnerability Index: A User's Guide*, VT. DEP'T OF HEALTH, (Dec. 2015), https://www.healthvermont.gov/sites/default/files/documents/2016/12/ENV_EPHT_SocialVulnerabilityIndex.pdf.

58. VT. STAT. ANN. tit. 3, § 6007(c) (2023).

59. *Id.* § 6002(4)(B).

60. Michael Gochfeld & Joanna Burger, *Disproportionate Exposures in Environmental Justice and Other Populations: The Importance of Outliers*, 101 AM. J. PUB. HEALTH S53, S53 (2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3222496/.

61. VT. STAT. ANN. tit. 3, § 6002(6).

62. VT. GEN. ASSEMB., *supra* note 21.

63. VT. STAT. ANN. tit. 3, § 6006(a)(2).

in December 2022.[64] Most actions and first reports, however, are not due until 2024 and 2025.[65]

The spending reports from individual agencies will include information on "where investments were made," the affected census block groups, and the quantified environmental benefits that such groups received.[66] The quantified environmental benefits need only be described and quantified if it is practicable to do so.[67] Additionally, these spending reports must be publicly available to keep the agencies accountable and facilitate community engagement.[68]

As of December 2023, there are no lawsuits resulting from the Act's enactment. That is not to say there will not be any resulting litigation; the Act is relatively new, and there could be lawsuits with respect to future actions.

III. BACKGROUND ON TENNESSEE

Tennessee currently does not have any EJ legislation.[69] As of December 2023, some of the only mentions of EJ in Tennessee's state code are statements released by the Tennessee Department of Health (TDH) and TDEC.[70] The TDH references definitions from EPA, Centers for Disease Control and Prevention, and TDEC, citing reasons why EJ should be pursued.[71] While these statements can be considered a step in the right direction, no affirmative action has been taken. Even the "Additional Resources" portion of the TDH webpage is blank.[72] This demonstrates that, despite its acknowledgment of EJ, the state has taken no action towards addressing such concerns.

As of the 2020 U.S. Census, Tennessee's population was just over 6.9 million.[73] As of 2022, 7.8% of Tennesseans spoke a language other than English at home.[74] That same year, 13.4% of the population lacked either a computer or broadband subscription at home, and the median household

64. *Id.*
65. VT. GEN. ASSEMB., *supra* note 21.
66. VT. STAT. ANN. tit. 3, § 6004(g)(1)(A).
67. *Id.* § 6004(g)(1)(B).
68. *Id.* § 6004(j).
69. TENN. DEP'T OF ENV'T CONSERVATION, *supra* note 35.
70. *Environmental Justice*, TENN. DEP'T OF HEALTH, https://www.tn.gov/health/cedep/environmental/healthy-places/healthy-places/health-equity/he/environmental-justice.html (last visited Nov. 28, 2023).
71. *Id.*
72. *Id.*
73. *Tennessee*, U.S. CENSUS BUREAU, https://data.census.gov/profile/Tennessee?g=0400000US47 (last visited Nov. 28, 2023).
74. *Id.*

income was $65,254.[75] Of the state's population, there were approximately 28,000 American Indian and Alaska Native residents, 135,600 Asian residents (1.9% of the state's population), 1.1 million Black residents (15%), 479,000 Hispanic or Latino residents (6.9%), 4,000 Native Hawaiian and Pacific Islander residents, 246,000 who identify as some other race, and 413,000 who identified as two or more races.[76]

Comparatively, Vermont's population was about 643,000 in 2020.[77] Of these 643,000, about 5.5% spoke a language other than English at home in 2022.[78] Roughly 13.7% of Vermont's population lacked either a computer or broadband at home that year—about the same as Tennessee's.[79] The median 2022 household income in Vermont was $73,991, about $8,700 more per year than in Tennessee.[80] Of Vermont's 643,000 residents, there were approximately 2,000 American Indians and Alaska Natives, 11,500 Asian residents (1.7% of the state's population), 9,000 Black residents (1%), 15,500 who identified as Hispanic or Latino (2.4%), 181 Native Hawaiian and Pacific Islander residents, about 5,000 who identified as other, and 37,000 who identified with two or more races.[81]

After the Trail of Tears in 1838, Indigenous people were forced out of Tennessee completely, and to this day, no tribe has reserved land in Tennessee.[82] Nonetheless, six tribes in Tennessee gained recognition status in 2010.[83] Currently, the Eastern Band of Cherokee Indians is reacquiring land through the Community Forest Program with the U.S. Department of Agriculture in the Great Smoky Mountains.[84] Gaining recognition is an important step towards achieving EJ, but there is further action the state can take.

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75. *Id.*; *Digital Equity Act Population Viewer: Tennessee*, U.S. CENSUS BUREAU, https://mtgis-portal.geo.census.gov/arcgis/apps/webappviewer/index.html?id=c5e6cf675865464a90ff1573c5072b42 (last visited Dec. 3, 2023).

76. *Digital Equity Act Population Viewer: Vermont*, U.S. CENSUS BUREAU, https://mtgis-portal.geo.census.gov/arcgis/apps/webappviewer/index.html?id=c5e6cf675865464a90ff1573c5072b42 (last visited Dec. 3, 2023).

77. *Vermont*, U.S. CENSUS BUREAU, https://data.census.gov/profile/Vermont?g=0400000US50 (last visited Nov. 28, 2023).

78. *Id.*

79. *Digital Equity Act Population Viewer: Vermont*, *supra* note 76.

80. U.S. CENSUS BUREAU, *supra* note 77.

81. *Id.*

82. *About*, NATIVE AM. INDIAN ASS'N OF TENN., https://naiatn.org/about/ (last visited Nov. 28, 2023).

83. Travis Snell, *Tennessee Commission of Indian Affairs Recognizes 6 Clubs as Tribes*, CHEROKEE PHOENIX (Jun. 23, 2010), https://www.cherokeephoenix.org/news/tennessee-commission-of-indian-affairs-recognizes-6-clubs-as-tribes/article_c846f1ac-496d-5137-bfd3-45da48f5300c.html.

84. *Land Back: How Two Tribes Are Re-Acquiring and Leveraging Community Forests*, FIRST NATIONS DEV. INST., https://www.firstnations.org/stories/land-back-how-two-tribes-are-re-acquiring-and-leveraging-community-forests/ (last visited Nov. 28, 2023).

Tennessee is known for its strong agricultural economy, with farms covering 41% of the state's land.[85] As of 2017, 310,544 farm workers were listed on payroll in the state.[86] Of these, just over 5,000 were listed as migrant workers.[87] These statistics, developed by the Trump Administration, heavily promoted deportation policies for non-U.S. citizens.[88] As a result, the listed number may be lower than the actual number of migrant workers within the state, and many more may not have been on the payroll.

Tennessee's Migrant and Seasonal Farm Worker Program is designed to help farm workers find employment.[89] The problem with the program is that it is time-consuming and expensive. To be eligible, the individual must be "struggling to secure a job or education due to personal challenges," which may include having no reliable transportation.[90] Yet to enter the program, the individual must meet with a case manager, which is difficult without reliable transportation.[91]

According to EPA's website, there are 29 total Superfund sites[92] in Tennessee.[93] Of these, 19 are on the National Priority List of Superfund sites and approximately 10 are in reuse, located across the state, with two in Collierville and two in Chattanooga.[94] According to EJSCREEN, in Knoxville, both government-owned housing and private housing subsidized by government vouchers are consistently in close proximity to Superfund

85. *USDA National Agricultural Statistics Service, Tennessee Field Office: About Us*, USDA, https://www.nass.usda.gov/Statistics_by_State/Tennessee/About_Us/index.php (last modified Nov. 15, 2019).

86. USDA, 1 2017 CENSUS OF AGRICULTURE: TENNESSEE COUNTY LEVEL DATA 333 (2017), https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_2_County_Level/Tennessee/ (under row "Table 7," follow "PDF" hyperlink).

87. *Id.*

88. *President Trump's Executive Orders on Immigration and Refugees*, CTR. FOR MIGRATION STUDS. (Jan. 29, 2017), https://cmsny.org/trumps-executive-orders-immigration-refugees/.

89. *Migrant and Seasonal Farm Workers Program (MSFW)*, VIRTUAL AM. JOB CTR. OF TENN., https://www.tnvirtualajc.com/MSFW-program (last visited Dec. 19, 2023).

90. *Id.*

91. *Id.*

92. *What Is Superfund?*, EPA, https://www.epa.gov/superfund/what-superfund (last updated Oct. 30, 2023). Superfund sites are generally abandoned hazardous waste sites that are created by dumping hazardous waste, leaving hazardous waste out in the open, or improperly managing toxic materials. *Id.* When a party is responsible for the contamination, the Comprehensive Environmental Response, Compensation and Liability Act may force that party either to conduct a cleanup of the contaminated site or reimburse the government for cleanup work that EPA has conducted. *Id.* If no party is found responsible, EPA is tasked with the cleanup. *Id.*

93. *National Priorities List and Superfund Alternative Approach Sites*, EPA, https://www.epa.gov/superfund/search-superfund-sites-where-you-live#map (last updated Oct. 30, 2023).

94. *National Priorities List (NPL) Sites – by State*, EPA, https://www.epa.gov/superfund/national-priorities-list-npl-sites-state#TN (last updated Oct. 23, 2023); *Superfund Sites in Reuse in Tennessee*, EPA, https://www.epa.gov/superfund-redevelopment/superfund-sites-reuse-tennessee (last updated Dec. 22, 2023).

sites.[95] Without any state statute in place, these communities are offered no protection except on the federal level.

Another EJ concern is water quality throughout the state.[96] The Upper Tennessee River Basin has a high concentration of fecal coliform indicators due to the large number of agricultural areas.[97] This pollution is also caused by leaky and faulty sewage systems.[98] Old, deteriorating wastewater treatment plants are also known to leak bacteria into the river during storm events.[99] This pollution harms EJ communities by impacting the quality of their drinking water sources.[100] These communities are particularly vulnerable because they are often next to industrial facilities or face the consequences of other poor zoning decisions, increasing their exposure to chemicals, microplastics, and bacteria.[101] With poor water quality comes a concerning increase in health issues.[102]

Over the past few years, the frequency of flooding has noticeably increased across the state.[103] The floods are becoming increasingly catastrophic and leave little time for residents to evacuate once water levels start rising.[104] BIPOC and low-income communities face increased risk every time there is an intense rain event because they are often located in flood plains.[105] Additionally, 7.8% of Tennessee's census tracts are areas of high flood risk that are densely populated with mobile homes.[106] People in these areas are most at risk during severe storms and have the most difficulty making repairs and recovering.

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95. *EJScreen: EPA's Environmental Justice Screening and Mapping Tool,* EPA, https://ejscreen.epa.gov/mapper/ (last visited Dec. 19, 2023) (view proximity to Superfund sites using the "Environmental Justice Indexes" and "Pollution and Sources" tabs).

96. *What's in the Water? Tennessee's Water Pollution Problems Are Becoming More Widespread*, NEWSCHANNEL 5, https://www.newschannel5.com/news/whats-in-the-water-tennessees-water-pollution-problems-are-becoming-more-widespread (Dec. 21, 2020, 10:03 PM).

97. P.S. HAMPSON ET AL., U.S. GEOLOGICAL SURVEY, WATER QUALITY IN THE UPPER TENNESSEE RIVER BASIN, TENNESSEE, NORTH CAROLINA, VIRGINIA, AND GEORGIA 1994–98 (2000), https://pubs.usgs.gov/circ/circ1205/major_findings.htm.

98. *Id.*

99. *Id.*

100. *The Right to Clean Water*, S. ENV'T L. CTR., https://www.southernenvironment.org/topic/the-right-to-clean-water/ (last visited Dec. 3, 2023).

101. *Id.*

102. *Id.*

103. Yaron Miller & Kristiane Huber, *After Devastating Storms, Tennessee Coalition Calls for State Policy to Address Pervasive Flooding*, THE PEW CHARITABLE TRS. (Oct. 12, 2021), https://www.pewtrusts.org/en/research-and-analysis/articles/2021/10/06/after-devastating-storms-tennessee-coalition-calls-for-state-policy-to-address-pervasive-flooding.

104. Michael Levenson, *At Least 22 Dead and 50 Missing in Tennessee Floods, Officials Say*, N.Y. TIMES (Aug. 24, 2021), https://www.nytimes.com/2021/08/21/us/tennessee-flash-floods.html.

105. Kris Smith, *Mobile Home Residents Face Higher Flood Risk*, HEADWATERS ECON. (Feb. 10, 2022), https://headwaterseconomics.org/natural-hazards/mobile-home-flood-risk/.

106. *Id.*

In addition to mobile homes, some cities within the state also have high risks of flooding, with 42% of the local properties in Chattanooga being at risk.[107] Redlined areas see the most damage and predominantly Black neighborhoods are often in low-lying neighborhoods that are more prone to flooding.[108] Climate change is intensifying and increasing the frequency of these devastating storms, harming those who are least able to protect themselves.[109] Without protective laws in place, the harm will only worsen.

IV. HOW THE BILL WOULD WORK IN TENNESSEE

Tennessee needs an EJ bill to protect the communities most at risk. Broadly speaking, something like Vermont's EJA would work in Tennessee simply because it would prompt EJ action where none already exists. In general, individual aspects of Vermont's Act that would work are the cumulative impact analyses, community engagement plans, and language access objectives.

The bill would first work by defining what EJ in Tennessee means. This definition would include identifying all the protected groups and the EJ harms they face. EJ definitions are usually unique to individual states, and for each, it is important to define who needs to be protected by such action.[110]

The cumulative impact analysis would function similar to Vermont's by requiring certain government agencies to conduct reports through different processes. An example of this could be examining drinking water quality of a particular water source and the demographics of the populations that use that drinking water source. This would be most applicable during agency permitting processes, such as examining permits for wastewater treatment facilities or other pollution-creating facilities.[111] Such an analysis would

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107. *Top Cities That Flood in Tennessee*, AFS: A GROUNDWORKS CO., https://www.afsrepair.com/resources/top-cities-that-flood-in-tennessee/ (last visited Dec. 19, 2023).

108. Thomas Frank & E&E News, *Flooding Disproportionately Harms Black Neighborhoods*, SCI. AM. (June 2, 2020), https://www.scientificamerican.com/article/flooding-disproportionately-harms-black-neighborhoods/.

109. *See* KATE MARVEL ET AL., FIFTH NATIONAL CLIMATE ASSESSMENT: CHAPTER 2. CLIMATE TRENDS § 2.2 (2023), https://nca2023.globalchange.gov/chapter/2/.

110. *See* VT. L. SCH. ENV'T JUST. CLINIC, *Environmental Justice State by State Directory*, ENV'T JUST. STATE BY STATE, https://ejstatebystate.org/directory (last visited Nov. 19, 2023) (compiling the definitions of "environmental justice" and "environmental justice communities" for each state); *see also* KEN KIMMELL ET AL., A USER'S GUIDE TO ENVIRONMENTAL JUSTICE: THEORY, POLICY, & PRACTICE, NE. UNIV. SCH. OF PUB. POL'Y & URB. AFFS. § 2 (2021), https://cssh.northeastern.edu/policyschool/wp-content/uploads/sites/2/2021/07/Users-Guide-to-Environmental-Justice-6.22.21-clean.pdf (explaining that "[d]efining EJ communities is an essential first step" because "[w]ithout a clear and comprehensive definition, policymakers are likely to continue to overlook or make assumptions about certain communities").

111. EPA, EPA LEGAL TOOLS TO ADVANCE ENVIRONMENTAL JUSTICE: CUMULATIVE IMPACTS ADDENDUM 15–16 (2023), https://www.epa.gov/system/files/documents/2022-12/bh508-Cumulative%20Impacts%20Addendum%20Final%202022-11-28.pdf.

examine communities surrounding the sites and determine whether they are EJ communities and the consequences if the permit were approved.

Massachusetts has taken a similar approach to its EJ act and requires cumulative impact analyses to be performed, but it limits the analysis to air quality.[112] The reason for this limitation is that the statute only requires the air quality analysis and expanding the analysis may complicate review.[113] The Massachusetts Department of Environmental Protection (MDEP) developed a draft cumulative impact analysis.[114] As of November 2023, the draft is available publicly, and the analysis portion is open for public commenting.[115]

However, given the condition of the Tennessee River, Tennessee should take a broader approach and examine impacts on drinking water and water quality.[116] Given the state's agricultural focus,[117] examining impacts on soil should be another consideration. Soil health is important to the viability of crops and thereby the livelihood of individuals who rely on that soil.[118] Soil health impacts EJ communities because soil carries pesticides and toxicities, thereby impacting safe drinking water.[119] Soil has an overarching impact on every individual,[120] which is why it is so important to study and consider.

Community engagement plans are a crucial part of allowing communities to be heard when considering decisions that may impact them. Community engagement encourages community members to participate in decision-making processes by voicing their values and concerns.[121] Agencies frequently impact communities, such as by allowing certain permits or rezoning and redistricting. By changing the review process to hear the opinions of impacted communities, the governing agency may become aware

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112. Microsoft Teams Interview with Marilyn Levenson, Senior Counsel, Mass. Dep't of Env't Prot. (Dec. 1, 2022).

113. *Id.*

114. Brook Detterman et al., *MassDEP Releases Proposed Cumulative Impact Analysis Regulations for Air Permits*, BEVERIDGE & DIAMOND (Jan. 9, 2023), https://www.bdlaw.com/publications/massdep-releases-proposed-cumulative-impact-analysis-regulations-for-air-permits/.

115. Margaret Renkl, *Tennessee's Dangerous Waters*, N.Y. TIMES (Oct. 28, 2019), https://www.nytimes.com/2019/10/28/opinion/tennessees-dangerous-waters.html.

116. *USDA's National Agricultural Statistics Service Tennessee Field Office*, USDA (Nov. 15, 2019), https://www.nass.usda.gov/Statistics_by_State/Tennessee/About_Us/index.php.

117. *Soil Health*, USDA, https://www.farmers.gov/conservation/soil-health#:~:text=Healthy%20soil%20is%20the%20foundation,resiliency%20of%20their%20working%20land (last visited Nov. 19, 2023).

118. Janaki Jagannath, *Healthy Soil is Ground Zero for Environmental Justice in Farm Communities*, CIV. EATS (Aug. 17, 2018), https://civileats.com/2018/08/17/healthy-soil-is-ground-zero-for-environmental-justice-in-farm-communities/.

119. USDA, *supra* note 117.

120. *Id.*

121. Sally Hussey, *Why is Community Engagement Important?*, GRANICUS, https://granicus.com/blog/why-is-community-engagement-important (last visited Dec. 19, 2023).

of situations not previously considered. Hearing the opinions of impacted communities "increases the visibility and understanding of issues" and gives people a say in decisions that will affect their lives.[122]

When creating a community engagement plan, it is extremely important to consider the needs of community members that the agency plans to engage with.[123] Oftentimes, members of these communities lack basic necessities and face situations that make it difficult to take hours out of their day to provide feedback to an agency.[124] While providing feedback is beneficial in the long run, taking time to provide input can create short-term difficulties for these communities. To help mitigate this problem, community members should be meaningfully reimbursed for giving their time. This means more than just $20 for each community meeting; it means providing an equitable compensation that correlates to the time these community members give.

Other ways to facilitate community engagement include providing childcare for the day, offering transportation to and from the meeting, and providing food throughout the engagement process. One way to look at this is to envision the person who needs the most assistance; provide that, and a government ensures that all are sufficiently supported. To assist agencies in promptly creating a comprehensive and meaningful engagement plan, the state may implement a compliance deadline for agencies.

Another critical element for community access plans is language access. If residents cannot communicate their opinions and needs with those who are doing the decision-making, then they have effectively been silenced. The Centers for Medicare and Medicaid Services have created a guide for developing a language access plan.[125] The guide is aimed at healthcare providers, but the concepts effectively apply to government agencies. To do this, Tennessee should start with identifying the number of individuals with limited English proficiency in the area.[126] The state must keep in mind the difference between benefits provided by oral and written translation and the availability of each within a community.[127] As Vermont did, Tennessee should examine the number of languages spoken within the state, particularly examining settlement sites, because large groups of people in these areas

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122. *Id.*

123. *Creating a Community and Stakeholder Engagement Plan*, U.S. DEP'T OF ENERGY 2 (Aug. 2022), https://www.energy.gov/sites/default/files/2022-08/Creating%20a%20Community%20and%20Stakeholder%20Engagement%20Plan_8.2.22.pdf.

124. *Id.* at 15.

125. *See generally Guide to Developing a Language Access Plan*, CTR. FOR MEDICARE & MEDICAID SERVS., https://www.cms.gov/About-CMS/Agency-Information/OMH/Downloads/Language-Access-Plan-508.pdf (Aug. 2023) (providing a template for community language access programs).

126. *Id.*

127. Telephone Interview with Kesha Ram Hinsdale, Senator, Vt. Senate (Dec. 12, 2022).

speak the same language, and language access has a direct correlation with EJ.[128]

In conjunction with improving language access, community engagement plans should be supported by staff with adequate support and assistance. The state should interpret the support prong to include training so that the staff may appropriately handle different situations. This is relevant to language access because with the correct support, language barriers will not be a problem. Different communities will have different needs, and staff should provide and use accessible language to handle these differences.[129]

Currently, Tennesseans may find relief from discriminatory environmental acts under Title VI of the Civil Rights Act of 1964.[130] Title VI prohibits intentional discrimination as well as "procedures, criteria or methods of administration that appear neutral but have a discriminatory effect on individuals because of their race, color, or national origin."[131] This means that facially neutral actions, including permitting a facility that creates high levels of pollution to be constructed in a primarily Black neighborhood, may be held to violate Title VI. While this may offer some protection, seeking damages is expensive and time-consuming, which discourages people with limited resources from pursuing legal relief.[132] Another issue with finding a remedy only in Title VI is that some communities may not realize they are facing an injustice and that their situation could change; community members may have accepted their situation for what it is because they do not know any differently.[133]

Title VI provides funding for agencies and institutions under the U.S. Department of Education.[134] Once these agencies and institutions receive funding, they must operate in a non-discriminatory manner.[135] This applies to a whole array of programs and activities, including housing and employment, which are both significant EJ components.[136] For Tennessee residents to lodge complaints for Title VI violations, they must file a

128. *Id.*

129. CTR. FOR MEDICARE & MEDICAID SERVS., *supra* note 125.

130. 42 U.S.C. § 2000(d).

131. *Civil Rights Requirements - A. Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq. ("Title VI")*, U.S. DEP'T. OF HEALTH & HUM. SERVS., https://www.hhs.gov/civil-rights/for-individuals/special-topics/needy-families/civil-rights-requirements/index.html (last visited Dec. 19, 2023).

132. *Initiating Legal Action*, UNIV. OF KAN., https://ctb.ku.edu/en/table-of-contents/advocacy/direct-action/legal-action/main. (last visited Dec. 19, 2023).

133. *Id.*

134. *Education and Title VI*, U.S. DEP'T OF EDUC.: OFF. FOR CIV. RTS., https://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html (last visited Dec. 19, 2023).

135. *Id.*

136. *Id.*

complaint with the Office for Civil Rights.[137] Additionally, someone may complain on behalf of another person or group of people.

Different measures should be taken to ensure public policy goals are achieved. These measures should be taken through a combination of cumulative impact analyses and community engagement. This can be done by surveying stakeholders and community members after implementing a program or action to see how they have been affected and whether they believe the goal was achieved. Measuring progress toward achieving public policy goals is important because doing so can not only assess program satisfaction, it can also determine whether changes need to be made.

Parts of the Vermont EJA that could be successfully implemented in Tennessee include the aforementioned reports,[138] studies, and analyses within the state.[139] This is because geography would not change the implementation of such a program; it would only potentially change the implementation and focuses therein. Similarly, the Act's creation of the Committees is replicable and would be beneficial for Tennessee.[140] Since Tennessee is much larger than Vermont, it would be possible and may be necessary for Tennessee to increase the size of these councils or add an additional council.

Another aspect that would succeed in Tennessee is the identification of households where the annual median household income is less than 80% of the state's.[141] Using 80% as the benchmark would make sense because even the average household income in Vermont is higher, so is its cost of living.[142] The annual income adjusted for the cost of living in Vermont is $38,857, while in Tennessee it is $36,854.[143] This means that the average Vermont household retains about $2,000 more even though income is about $12,000 more, so 80% of the household income is functionally comparable between the states. If anything, Tennessee should increase this standard to 85% to make up the difference and be more inclusive of low-income households.

Parts of Vermont's EJA that would not work in Tennessee or may need to be changed include identifying focus populations that have households with 1% or higher limited English proficiency.[144] A 1% benchmark is intended to increase inclusivity and reach community members, but it may be unattainable for a state as large as Tennessee. A more realistic standard

137. *Id.*

138. *See supra* Part II.

139. *See* VT. STAT. ANN. tit. 3, § 6006(a)(3) (2023).

140. *Id.* § 6006(a)(1)(A)–(B).

141. *Id.* § 6002(4)(A).

142. *Id.*; Nathan Yau, *Income in Each State, Adjusted for Cost of Living*, FLOWINGDATA, https://flowingdata.com/2021/03/25/income-in-each-state-adjusted-for-cost-of-living/ (last visited Dec. 19, 2023).

143. Yau, *supra* note 142.

144. VT. STAT. ANN. tit. 3, § 6002(4)(C).

for Tennessee may be to expand this to 5% to begin with and then increase the number of consulted communities as they are identified.

Other disparities may arise through the implementation of cumulative impact analyses. The MDEP performed a test scenario with an actual permit in an EJ community.[145] The MDEP looked at different characteristics within the community and found that there cannot be too many indicators for the analysis.[146] To perform an effective analysis, the agency must look at the rational characteristics of that community.[147] Vermont has not released which characteristics are to be used, but the differences in geography and needs of communities between Vermont and Tennessee mean that the appropriate EJ indicators may vary greatly between the two states.

Some EJ bills have legally challenged industries that overburden EJ communities by utilizing the court system to file—or threaten to file—lawsuits.[148] For example, New Jersey has one of the strongest EJ laws, which was used to file a series of lawsuits in August 2022.[149]

Before any explicit EJ laws were passed, there was *Bean v. Southwestern Waste Management Corporation*.[150] This 1979 case arose because the Texas Department of Health granted a permit that allowed for the operation of a solid waste facility.[151] The plaintiffs claimed racial discrimination in the selection of facility sites because the sites would be in areas that primarily housed people of color.[152] While the plaintiffs failed to obtain their preliminary injunction in the end,[153] that case showed that it is possible to sue on the basis of EJ-related harms.

CONCLUSION

In sum, Vermont's EJA would theoretically work if implemented in Tennessee with minor adjustments to account for unique differences between the two states. The requirements for different committees, cumulative impact analyses, and community engagement are all strong elements that can be seen

145. Microsoft Teams Interview with Marilyn Levenson, *supra* note 112.
146. *Id.*
147. *Id.*
148. VT. STAT. ANN. tit. 3, § 6004(d) (2023).
149. Steven Rodas, *N.J. Officials File Lawsuits to Address 'Historic Injustices' of Pollution*, NJ.COM, https://www.nj.com/news/2022/08/nj-officials-file-lawsuits-to-address-historic-injustices-of-pollution.html (Aug. 26, 2022, 8:35 PM).
150. Bean v. Sw. Waste Mgmt. Corp., 482 F. Supp. 673, 673 (S.D. Tex. 1979).
151. *Id.* at 675.
152. *Id.* at 678.
153. *Id.*

in many other states' EJ acts.[154] While these individual features may be implemented differently, these features, overall, have been successfully implemented in various states, leading to the conclusion that they would work in Tennessee. The EJ mapping tool that Vermont is creating would be another useful instrument for Tennessee to identify communities most at risk, should it choose to develop a mapping tool.

Recommended changes between Vermont's EJA and a potential bill in Tennessee include expanding the threshold for identifying communities where a relatively large proportion of households have limited English proficiency. Vermont uses the 1% figure as a threshold, but Tennessee should use 5% for identification.[155] Tennessee is much larger than Vermont and has a higher concentration of households that speak a language other than English, with about 2% more across the state.[156] Since 5% is the federal standard, this simplifies compliance and still helps identify EJ communities.[157]

Another recommended change is to widen the focus of low-income households to identify households below 85% of the state's median household income, compared to Vermont's 80% threshold.[158] This is because Tennessee has a lower per capita average income than Vermont. The more inclusive standard would also increase protections for those in at-risk communities and residents who work in the agricultural industry.

Before policymakers can pass any sort of EJ bill in Tennessee, they need information to prove that EJ-related disparities exist.[159] This would include examining home ownership, renewable energy, and social justice across the state in general.[160] Tools should be in place to identify EJ communities and factors such as flooding and heat vulnerability.[161] This reemphasizes the importance of creating a mapping tool for Tennessee so that policymakers may identify those who are most at risk and the state's capacity for assisting those communities.

Several implementation methods should be created to further aid Tennessee in identifying and aiding EJ communities. One way to help EJ

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154. *See* MASS. DEP'T OF ENV'T PROT., CUMULATIVE IMPACT ANALYSIS (CIA) FRAMEWORK FOR AIR PERMITS: DRAFT FOR DISCUSSION – APRIL 25, 2022, 1 (2022) (unpublished draft for discussion) (available at https://www.mass.gov/doc/draft-cumulative-impact-analysis-framework-april-25-2022/download).

155. *See* VT. STAT. ANN. tit. 3, § 6002(4)(C) (2023).

156. *Tennessee*, U.S. CENSUS BUREAU, https://data.census.gov/profile/Tennessee?g=040XX00US47 (last visited Dec. 19, 2023); *Vermont*, U.S. CENSUS BUREAU, https://data.census.gov/profile?g=0400000US50 (last visited Dec. 19, 2023).

157. Telephone Interview with Kesha Ram Hinsdale, *supra* note 127.

158. *See* VT. STAT. ANN. tit. 3, § 6002(4)(A).

159. Telephone Interview with Kesha Ram Hinsdale, *supra* note 127.

160. *Id.*

161. *Id.*

communities is to create projection mapping.[162] This means creating a mapping tool that uses data to determine community demographics and harms that may impact those communities in the future.[163] State-specific mapping tools could, like EJSCREEN, aid in identifying EJ communities and creating awareness of the harms that these communities are facing.[164]

When considering its Indigenous population, Tennessee should incorporate certain actions in its EJ bill. First, the state should assist Indigenous people in "Land Back" movements and recognize tribal lands because there is no state-recognized land as of this writing. Tribes are taking Land Back initiatives on their own with forest land, but the state should ease this process.[165]

On the other hand, this could be contentious because, historically, tribes shared some lands with other tribes; full ownership by just one tribe restricts the others from their historical lands.[166] There are also local concerns about the sovereignty of the land and concerns over gambling in the area.[167] To address these concerns, the state could establish cultural centers.[168] Cultural centers provide preservation and generation of Indigenous culture and a safe space for community members to gather.[169] Tennessee has the discretion to implement such a program. Research should be done to determine which would be best for Indigenous people and the state in conjunction with an EJ provision.

Within Tennessee's proposed EJ bill, the community engagement plan should include equity considerations such as monetary incentives. Community members who participate in the process should be reimbursed a fair wage for providing their time. It is important that EJ stakeholders be included in the process, and income will incentivize them to donate time. Childcare should also be provided so that people with children who cannot otherwise afford childcare may still participate. By accommodating those in the community who are worst off and providing them the assistance they need, agencies can ensure that everyone who is there will receive the assistance they need. Lastly, to ensure that agency community engagement

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162. Class Lecture with Xusana Davis at Vt. L. & Graduate Sch., Exec. Dir. of Racial Equity, State of Vt. (Nov. 23, 2022) (on file with author).

163. *Id.*

164. Bryan Davidson, *Advancing Environmental Justice with the Latest Technology*, 58 TENN. BAR J. 5 (2022), https://www.tba.org/?pg=TennesseeBarJournal&pubAction=viewIssue&pubIssueID=19125&pubIssueItemID=84660.

165. FIRST NATIONS DEV. INST., *supra* note 84.

166. Class Lecture with Judy Dow, Educator, Vt. L. & Graduate Sch. (Aug. 31, 2022).

167. Telephone Interview with Kesha Ram Hinsdale, *supra* note 127.

168. *Id.*

169. *Cultural Spaces in Indigenous Communities Program*, GOV'T OF CAN., https://www.rcaanc-cirnac.gc.ca/eng/1628786076040/1628786094489 (last modified Oct. 25, 2023).

plans are created within a reasonable time, the state should enforce a compliance deadline.

With almost half of Tennessee's land being used for farming and 23% of the employed population working in the agribusiness sector, considerations should also be made for Tennesseans in these sectors.[170] Farming is considered one of the most dangerous businesses in the U.S., and individuals in this line of work should be offered protections that their employers, such as Tyson Foods, may otherwise not provide.[171] These considerations should include a focus on migrant and seasonal farmworkers to help them achieve equity and equality, especially those who may not be identified on payroll for safety reasons.[172] Studies of agricultural communities would identify those communities at risk of EJ-related harms. Using community engagement, these studies would find ways to best provide assistance to vulnerable communities.

It is important to define EJ in a way that pertains to Tennessee and protects underserved communities. In Massachusetts, community groups, industry people, and all sorts of stakeholders were involved in providing input on what the definition should be.[173] For the definition to be meaningful, it must resonate with and educate people about what exactly EJ is in Tennessee.[174] Tennessee could also look at what other states have done, using those to formulate the definition. This could include focusing on other southeastern states such as Virginia, North Carolina, and Georgia, because these states share demographic similarities[175] and share similar histories of environmental injustice. As in Vermont, this definition could also examine factors, such as thresholds established by New Jersey and environmental costs and benefits established by Massachusetts.[176]

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170. D. Alan Barefield & George F. Smith, *Tennessee's Agriculture*, THE UNIV. OF TENN.: AGRIC. EXTENSION SERV. 3, https://www.shelbycountytn.gov/DocumentCenter/View/1262/Tennessee-Agriculture?bidId= (last visited Dec. 19, 2023).

171. *Farming: The Most Dangerous Job in the U.S.*, MORNING AGCLIPS (Sept. 14, 2022), https://www.morningagclips.com/farming-the-most-dangerous-job-in-the-u-s/#:~:text=%E2%80%93%20Each%20year%2C%20more%20people%20die,the%20national%20average%20for%20workers.

172. Telephone Interview with Kesha Ram Hinsdale, *supra* note 127; *Facts About Farmworkers*, NAT'L CTR. FOR FARMWORKER HEALTH, INC. 3–4 (Aug. 2012), http://www.ncfh.org/uploads/3/8/6/8/38685499/fs-facts_about_farmworkers.pdf.

173. Microsoft Teams Interview with Marilyn Levenson, *supra* note 112.

174. Telephone Interview with Kesha Ram Hinsdale, *supra* note 127.

175. *Consumer Spending by State*, BUREAU OF ECON. ANALYSIS: U.S. DEP'T OF COM., https://www.bea.gov/data/consumer-spending/state (last modified Dec. 15, 2023); *Regional Economic Accounts*, BUREAU OF ECON. ANALYSIS: U.S. DEP'T OF COM., https://www.bea.gov/data/economic-accounts/regional (last modified May 17, 2022); *Arts and Cultural Production Satellite Account, U.S. and States*, BUREAU OF ECON. ANALYSIS: U.S. DEP'T OF COM., https://www.bea.gov/data/special-topics/arts-and-culture (last modified Aug. 4, 2023).

176. Telephone Interview with Kesha Ram Hinsdale, *supra* note 127.

Since 2011, the Governor and a majority of the Senate and House of Representatives in Tennessee have been Republican.[177] In this current political climate, an EJ bill is unlikely to pass on its face, particularly one with specific language referencing EJ. What other states have done—and what Tennessee could do—is pass other bills addressing EJ concerns without calling out EJ by name.[178] Nashville, which is currently majority Democratic, and Chattanooga, which has a high risk for flooding, could be potential starting points. In Chattanooga, policymakers should determine what EJ framework would help communities that face flooding by determining why those homes are impacted and then using that information to assist communities across the state.

Overall, Tennessee policymakers should take action to protect EJ communities because they face disparate treatment: these communities face the greatest environmental harms and have the least capability to address those harms. The definition of EJ in Tennessee must include language that identifies specific communities and groups the bill would seek to protect. Defining EJ is only one step to creating an effective and meaningful bill for Tennessee. Even without any EJ legislation, Tennessee still has an affirmative duty to protect its citizens.

177. *Party Control of Tennessee State Government*, BALLOTPEDIA, https://ballotpedia.org/Party_control_of_Tennessee_state_government (last visited Dec. 19, 2023).

178. Telephone Interview with Kesha Ram Hinsdale, *supra* note 127.

GIVINGS AND TAKINGS: CHALLENGES TO REGULATION UNDER VERMONT'S ACT 250

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INTRODUCTION

John McGill never wanted to become a litigant in a decades-long fight over Vermont environmental regulation. With his passion for mountain biking and can-do attitude toward building new trails, the affable 59-year-old could often be found with a rake or shovel in his hand scratching in new lines amidst a crisscross of old skid roads on the southeast side of Umpire Mountain.[2] In 2007, McGill and his wife purchased 1,100 acres of forestland in Victory, Vermont, enrolling it in current use to harvest timber, remedy erosion problems from prior logging operations, and build a new network of mountain bike trails.[3] Umpire Mountain, with a steep-but-not-too-steep slope pitch and a topsoil layer that allowed bike tires to stick in turns between jumbles of granite, was a perfect spot for McGill's recreation vision. By early 2019, McGill and his collaborating trail builders had created over 20 miles of winding singletrack on the mountainside and built a reputation for mountain bike trails worth travelling to from many states away.[4] Then, Vermont's District Seven Act 250 Environmental Commission called.

Unbeknownst to McGill or his trail-building partners, the Victory town clerk had inquired with the local environmental administrators as to whether McGill's trail project, known to all as the Victory Hill Sector (VHS), needed further permitting under state law.[5] The Environmental Commissioner for District Seven, based in nearby St. Johnsbury, is empowered to issue Jurisdictional Opinions (JOs) as to whether certain land uses fall under the purview of Act 250, Vermont's omnibus environmental statute.[6] When the Commissioner passed down the JO, McGill and company were shocked and distressed to find out that, because they had charged visiting mountain bikers a small fee and hosted multiple yearly mountain bike races, their trail work "qualifie[d] as a 'development' pursuant to" Act 250.[7] Prior to the JO, no trail builder in Vermont had considered that their trail project might qualify for heightened environmental regulatory scrutiny.[8] If trails *did* trigger such

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2. Justin Trombly, *Victory Hill Sector Shuts Down Trails After Act 250 Permit Ruling,* VTDIGGER (June 24, 2019, 7:29 PM), https://vtdigger.org/2019/06/24/victory-hill-sector-shuts-down-trails-after-act-250-permit-ruling/.

3. Victory Hills Trails, Victory Hill Sector, Conservation Collaboratives, LLC, Carol Easter, JO #7-286, § II Facts and Documents, VT. NAT. RES. BD. DIST. NO. 7 ENV'T COMM'N (May 3, 2019).

4. Trombly, *supra* note 2.

5. *Id.*; Trombly, *supra* note 2.

6. Act 250 empowers District Commissions to issue a type of advisory opinion about jurisdiction over affected projects, parcels, and land uses that may be in an ambiguous regulatory zone. VT. STAT. ANN. tit. 10 § 6007(c); CINDY CORLETT ARGENTINE, ACT 250: A GUIDE TO STATE AND REGIONAL LAND USE REGULATION, 22–23, 54 (2008). If an applicant is displeased with the JO, they may appeal to the Vermont Environmental Court. ARGENTINE at 54.

7. Victory Hills Trails, JO #7-286, § II, VT. NAT. RES. BD. DIST. NO. 7 ENV'T COMM'N.

8. Lisa Lynn, *Should Act 250 Apply to Trails?*, VT. SPORTS (Aug. 29, 2019), https://vtsports.com/should-act-250-apply-to-trails/.

scrutiny, every trail system of a certain size, no matter how environmentally oriented or community-minded, would need to file complex permitting paperwork and potentially expose itself to years of litigation concerning any ecological effects it might have. If the court upheld the Victory Hill Sector JO on appeal and compelled McGill to apply for an Act 250 permit, it would stymie trail development and halt recreational use of a renowned resource until McGill completed the permitting—which might take several years.[9]

One of the few, if any, legal pathways available to McGill would have been a regulatory takings challenge to the state environmental law claiming that the regulation was unconstitutional. The concept of takings begins with the Fifth Amendment to the United States Constitution. The Takings Clause focuses the question of government land takings on two matters of law: (1) the "public use" of the land taken; and (2) the "just compensation" given to the land's private owner.[10] With any legal taking, a court must query both elements: valid public utility for the land and adequate compensation for the transfer.[11]

The idea of public utility supports a variety of durable restrictions on private land use. Restrictions imposed on private landowners, the logic goes, benefit the public as a whole. In Vermont, the comprehensive environmental legislation enshrined in 1970's Land Use and Development Law—known to all as Act 250—has spawned an arcane web of land use regulations and restrictions that have far-ranging and controversial implications for development advocates and conservation-minded citizens alike.[12] With Act 250 recently turning 50 years old, Vermont is due to reassess the legal principles behind the legislation and to engage in thorough Act 250 revision.[13]

The intersection of Vermont's environmental regulations and Fifth Amendment takings jurisprudence demonstrates the need for reform. The overlap of Act 250 and takings also highlights conflicting values—statewide consistency against local control; entrenched interests against emergent needs; and economic growth against ecological preservation—to address in the reform process. This Note will focus especially on the connections

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9. *See Act 250*, VICTORY HILL TRAIL CLUB, https://victoryhillmtb.com/act-250-2/ (last visited Dec. 21, 2023) (summarizing the Club's uncertain future pending the resolution of Act 250 jurisdiction).

10. U.S. CONST. amend. V.

11. *See generally* Kelo v. City of New London, 545 U.S. 469, 479–83 (2005) (defining public utility under the Takings Clause); *see also* Penn Cent. Transp. Co. v. N.Y.C., 438 U.S. 104, 124 (1978) (defining "compensation").

12. VT. STAT. ANN. tit. 10, ch. 151; Emma Cotton, *In Towns with No Zoning, Reopened Supreme Court Decision Has Big Implications for Act 250*, VTDIGGER (Nov. 23, 2021, 1:39 PM), https://vtdigger.org/2021/11/23/in-towns-with-no-zoning-reopened-supreme-court-decision-has-big-implications-for-act-250/.

13. *History of Act 250*, VT. NAT. RES. BD., https://nrb.vermont.gov/act250-program/history (last visited Dec. 21, 2023).

between these regulatory takings claims and the outdoor recreation industry in Vermont. Ski-area development forms an ideal case study for Act 250's regulatory application because the ski industry sits at the crossroads of the Act's twin intentions—to be economically oriented, yet conservation-minded. Understanding how regulations are—and have been—applied to ski-area development helps frame the discussion of Act 250's impact. Equally relevant is the question of whether future recreation projects, such as the Victory Hill Trails system, will trigger Act 250 jurisdiction.[14] And the weight of Act 250 goes far beyond the recreation resources in and of themselves. The application of Act 250 regulation to housing and development projects in ski-area towns and outdoor recreation hotspots[15] provides a lens on the potential incongruities of the regulatory scheme and opportunities for revision.

This Note investigates the constitutional land use framework, which can undergird the Act 250 conversation in Vermont. By applying federal takings doctrine to Act 250 regulatory questions in Vermont and examining cases in which the two have overlapped, this Note will illuminate a constitutional framework for analysis. One way to look at progressive land use policy is as an adjudication between "the conflicting interests of the parties,"[16] dependent on a balancing of needs between individual actors. In Vermont, this policy often surfaces as conflicts between private landowners and state or local regulation.[17] In a takings context, courts have decided where private land use rights end, where an effective regulatory regime begins, and how to decide

14. *See* Lynn, *supra* note 8 ("While the Victory Hill decision may seem like an isolated incident, it fueled something of a firestorm in the trail building community.").

15. Ski-area towns, more broadly referred to as "mountain towns," are generally defined by their proximity to existing alpine-ski infrastructure. *See* BLISTER Podcast, *Reviewing the News & Mountain Sex w/ Cody Townsend (Sept. 2022) (Ep.229)*, BLISTER REVIEW, at 46:59 (Oct. 5, 2022), https://blisterreview.com/podcasts/reviewing-the-news-mountain-sex-w-cody-townsend-september-2022-ep-229 (defining the proverbial "mountain town" as a locale where the "economy, culture, and community is completely centered around the mountains," especially with respect to alpine-ski resorts); *see also* Lynn, *supra* note 8. What defines a "recreation hotspot" that is not also a ski-area town is less clear. One way to define such places in Vermont is to consider funding allocated through the Vermont Outdoor Recreation Economic Collaborative (VOREC) to municipalities and local nonprofits for trails and outdoor-infrastructure projects. *Vermont Outdoor Recreation Economic Collaborative*, VT. AGENCY OF NAT. RES.: DEP'T OF FORESTS – PARKS & RECREATION, https://fpr.vermont.gov/VOREC (last updated Dec. 13, 2023). In 2022 alone, VOREC awarded $4.5 million to 24 separate local projects around the state, including projects in the Mad River Valley, the Killington area, and the Northeast Kingdom. *See Congrats to the 2022 VOREC Community Grant Recipients!*, VT. MOUNTAIN BIKE ASS'N (Mar. 28, 2022), https://vmba.org/congrats-to-the-2022-vorec-community-grant-recipients/.

16. *See* Joseph William Singer, *The Ownership Society and Takings of Property*, 30 HARV. ENV'T L. REV. 309, 313 (2006) (contrasting land use policy as "guidance in choosing between the conflicting interests of the parties" with policy that "adopt[s] conceptions of what ownership means" prior to "apply[ing] a decision procedure").

17. *See* Richard O. Brooks, *Legal Realism, Norman Williams, and Vermont's Act 250*, 20 VT. L. REV. 699, 713 (1996) (discussing the effect of "legal realism" on Environmental Board and Environmental Court decision-making processes under Act 250).

when regulations overreach.[18] A reinvigorated public conversation and legislative effort to reform Act 250 must involve a similar dual purpose, centered around both environmental conservation and economic development. Vermonters must agree on what regulatory limits on private property to condone and promote. They must also agree on an economic framework that justifies the restrictions posed by Act 250.[19] This Note will explore theoretical approaches to regulatory takings in relation to Act 250 and the potential for regulatory reform. Analytically, this Note will examine cases where takings challenges and Act 250 have intersected to frame a discussion about the meeting of landowners' rights and state interests, as well as a discussion about the role of Vermont's outdoor-recreation economy.

Part I of this Note will approach land use regulation in Vermont from a historical and ecological angle, discussing the genesis of Vermont's unusual approach to regulating private land ownership and commercial development. One question that Act 250 raises is how to stop commercial development from outstripping efforts for ecological protection; equally important is the question of how to make protection and conservation a matter of public interest, not just a regulatory hurdle for developers to clear. Looking at the background of Act 250 also requires understanding the legal theory of its foundations alongside the development history of the Vermont ski industry. Because this Note addresses takings jurisprudence as it intersects with Act 250, Part I glosses the history of takings jurisprudence to provide context for challenges to Act 250 regulation under the theory of regulatory takings. Part I provides a foundation to understand Act 250 as a product of historical need and regulatory importance and to consider how the underpinnings of the Act may look different 50 years after its passage.

In Part II, this Note will discuss Act 250's past and present statutory application as it has intersected with the twin poles of the Takings Clause, analyzing decisions about permissible private uses of land and those concerning the economic value of legally restricting certain uses. To analyze Act 250 legal decisions as they pertain to landowners' rights to challenge overreaching regulations, this Note will focus on cases in the Vermont court system where the regulatory application of Act 250 became the basis for a takings claim. Vermont was the first state to enshrine a takings provision in its state constitution, which declares that "whenever any person's property is taken for the use of the public, the owner ought to receive an equivalent in

18. *See* discussion *infra* Section II(D).

19. *See* Fred Bosselman, *Four Land Ethics: Order, Reform, Responsibility, Opportunity*, 24 ENV'T L. 1439, 1441 (1994) (suggesting that "only a pluralistic process in which multiple land ethics are debated will be a satisfactory basis for the resolution of many of the current bitter conflicts over land in America").

money."[20] Thus, takings in Vermont are at the heart of the state's constitutional legal framework. With Act 250 standing tall as Vermont's foremost environmental law, the intersection of takings and environmental regulation speaks to the state's deepest-held legal ambitions and priorities.

Vermont's legal restrictions on development of recreational resources and development that would affect recreational resources intersects with Takings Clause jurisprudence when landowners seek out a method to challenge regulations that may have overstepped their bounds. On balance, Act 250 chooses to protect entrenched environmental values over emergent economic demands, and outdoor recreation is an example of an economy constrained by such regulation.[21] According to eminent Act 250 scholar Richard O. Brooks, to recognize this choice in relation to takings challenges requires viewing "judicial decision-making as part of a normative realm requiring reasoned ethical choice among conflicting values and principles."[22] With continued development pressures on wild lands and recreation hotspots, Vermont courts will likely hear more takings challenges that emerge as a result of Act 250's broad regulatory scope. The effort toward Act 250 reform rightly involves a review of Takings Clause jurisprudence as applied to state regulation, with a close eye on the resolution of prior cases. This Note argues that the state needs added regulatory specificity to move forward with Act 250, and that those involved in the regulatory process must learn the lessons of past takings challenges to address the friction between private land rights and the state regulatory regime.

I. BACKGROUND

A. Historical Background: Act 250 at 50 Years Old

Act 250 is the legislative product of the bureaucratic tension between economic growth and "smart" development. At the heart of that tension was an ongoing conversation at the gubernatorial level about three major issues that were becoming more and more visible at midcentury: "[t]he decline of Vermont's farming, the growing dependence on tourism, and the spread of the "delights" of modern urbanization. . . ."[23] When officials in the administration of then-Governor Deane C. Davis began discussing the passage of comprehensive environmental regulation in the late 1960s, the

20. VT. CONST. ch.1, art. II; John Echeverria, *From a "Darkling Plain" to What?: The Regulatory Takings Issue in U.S. Law and Policy*, 30 VT. L. REV. 969, 969–70 (2006).

21. *See* VT. STAT. ANN. tit. 10, § 6042(a)(6)(A)(2015) ("[E]conomic development should be pursued selectively so as to provide maximum economic development with minimal environmental impact.").

22. Brooks, *supra* note 17, at 718.

23. *Id.* at 709.

goal was to "ensure quality change" as part of the Vermont landscape.[24] Prior to Act 250, Vermont lacked comprehensive land use regulation at the state level, leaving it vulnerable to the depredations of development.[25] At the same time, certain regions or counties were poised to become hotbeds of development—for instance, the ski-area towns of Wilmington and Dover in southern Windham County.[26] Other areas in the less-developed northeast region of the state would presumably retain a more "rural" character, lacking the economic drivers that tourism and the ski industry offered (and continue to offer). Different areas of the state varied substantially, not just in the *need* for developmental land use regulation, but also in the potential *application* of the regulatory system in practice. Recognizing the variety of needs and applications within the state, Governor Davis and the architects of Act 250 decided that "the power to review projects and grant permits [should] be vested more locally, in a group of regional commissions."[27]

Act 250 has a dual structure, with nine District Commissions serving as the primary regulatory bodies reviewing development applications that fall under the purview of Act 250.[28] The District Commissions have historically approved over 98% of the applications submitted; if denied at the Commission level, the landowner may appeal the application to the Vermont Environmental Board, which became a sub-function of the state Environmental Court in 2005.[29] The District Commissions satisfy the local-control element, while the appeal function at the state level allows for broader oversight of individual projects by those beyond the immediate community.[30] Typically, the parties filing appeals are developers whose project applications were denied at the Commission level; however, other parties, such as municipalities and environmental groups, can also bring challenges at the state level.[31]

Not all developmental projects fall under Act 250 jurisdiction, and not all land uses involve obtaining an Act 250 permit.[32] Most projects that fall under Act 250 require applications because they are for a "commercial

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24. VT. NAT. RES. BD., *supra* note 13.

25. *Id.*

26. *Id.*

27. VT. NAT. RES. BD., ACT 250: A GUIDE TO VERMONT'S LAND USE LAW 3 (2000) https://townofwoodstock.org/wp-content/uploads/2016/02/act250brochure.pdf.

28. *Id.* at 11–15. In applying for an Act 250 permit, landowners must demonstrate to the District Environmental Commission that the proposed development meets ten "criteria." *Id.* The criteria range in type from water and air pollution (Criterion 1) to "Aesthetics, Historical Sites, and Rare or Irreplaceable Natural Areas" (Criterion 8). *Id.* The burden of proof for most—though not all—criteria and sub-criteria is on the applicant. VT. STAT. ANN. tit. 10, § 6086(a)(1–10); ARGENTINE, *supra* note 6, at 57.

29. VT. NAT. RES. BD., *supra* note 13.

30. ARGENTINE, *supra* note 6, at 54.

31. *Id.* at 29–32 (participating in Act 250 Hearings); KEVIN KENNEDY, ACT 250: PROBLEMS AND PERSPECTIVES 2–3 (1993).

32. ARGENTINE, *supra* note 6, at 3.

purpose," and they involve more than ten acres total.[33] Other projects subject to Act 250 review include the construction of housing developments with ten or more units, subdivision into ten or more lots, building roads to house developments, upper-elevation construction of any kind (defined as above 2,500 feet of elevation), and any governmental project over ten acres that involves construction of any kind.[34] Act 250's jurisdiction is not comprehensive, but it covers a remarkable breadth of land use ventures. Moreover, the most visible, significant, and controversial projects—e.g., new housing developments, commercial zones in once-rural areas, and ski-area expansion—trigger Act 250 and direct community attention to the review process as a bulwark against unwanted development.[35]

B. Economic Background: Outdoor Recreation-Industry Concerns in Vermont

One of the most topical ways to assess Act 250's impact is to look at how the courts have decided issues concerning ski-area expansion. In Vermont, the ski industry and environmental regulation go hand in hand. Concerns over the development pressures that popular ski areas create were a major impetus for enacting Act 250.[36] Outdoor recreation, a significant economic driver in Vermont,[37] depends as much on the scenic beauty of the Green Mountain State's forested uplands and bucolic valleys to draw visitors as it does on continued development and expansion of ski-area infrastructure and trails systems.

Vermont's first rope tow, a predecessor to the modern chair lift, was installed in Woodstock in 1934, heralding the start of a major industry.[38] By

33. *Id.* Although "commercial purpose" has been expanded within the statutory definition since the 1970s, it is sufficient to understand that most projects deemed "commercial" in nature are owned by businesses or LLCs and charge a fee for a service of some kind.

34. *Id.* Act 250 jurisdiction is itself a contentious topic, especially when it comes to outdoor recreation and the seemingly *de minimis* impacts of certain projects. *See* VT. STAT. ANN. tit. 10, § 6001(3)(a) (defining "development" to include three separate jurisdictional terms, regardless of other circumstances shaping the developmental context); *see also* Bradford R. Farrell, *Riding the Trail to Expanding Vermont's Economy: The Case for Simple Recreational Trail Regulation*, 23 VT. J. ENV'T L. 413, 420 (2022) (noting that § 6001(3)(a) does not "define the triggering [jurisdictional] language" itself but instead relies on the Natural Resource Board's agency rules). More scholarship is needed to determine the historical development of the present jurisdictional issues and the best path forward for jurisdictional reform.

35. *See* 2 RICHARD O. BROOKS, TOWARD COMMUNITY SUSTAINABILITY: VERMONT'S ACT 250 3 (1997) ("Vermont's Act 250 has sought the sustainable development ideal in its . . . permitting of a community's development conditional upon protecting natural resources.").

36. VT. NAT. RES. BD., *supra* note 13.

37. *See* Vt. Exec. Order No. 04-20 (Oct. 5, 2020) (noting, in part, that outdoor recreation in Vermont brings in "$2.5 billion in consumer spending").

38. Jeremy Davis, *The History of Vermont Skiing: 100 Years of Growth*, VERMONTER.COM, https://web.archive.org/web/20061017063409/http://www.vermonter.com/skihistory.asp (last visited Dec. 10, 2022).

1940, Stowe Mountain Resort, already a hub for winter recreation of other kinds, had built a chair lift to ferry skiers over a mile up Mount Mansfield at previously unimaginable speeds; in the 1950s, dozens of ski areas, including Mount Snow, Okemo Killington, and Sugarbush, began operations.[39] Vermont's list of ski areas peaked at 81 total in 1966, only to decline over the subsequent decades due to inconsistent snow, the high costs of trail expansion and infrastructure maintenance, and the accelerating market capitalization by corporate ski-area conglomerates.[40] Those resorts that have weathered the intervening decades, however, have prospered and made a name for themselves among northeastern ski enthusiasts.[41] Vermont ski resorts received skier traffic of 3.8 million skier days during the winter of 2021-22, making alpine skiing a $1.6 billion industry that season.[42] As the ski industry in Vermont has grown from its humble beginnings to its present position as an economic behemoth earning billions of dollars every winter, Act 250 has both shaped the industry's development and guided its environmental perspective.[43]

Legal scholars have described Act 250's permissive attitude toward ski-area development as "an anomaly in the allowance of land use permits under Act 250."[44] Indeed, the rapid growth of the ski industry in the 1960s, spurred on by the opening of Interstates 89 and 91, largely motivated the passage of comprehensive environmental legislation.[45] This conflict—between a growing local ski industry and an environmental anti-development agenda—partly indicates that comprehensive land use planning requires "a consensus on goals and policies which even a relatively homogenous state like Vermont could not achieve."[46] In the case of the ski industry, the high water demands of human-made snow (requiring river and stream diversion or artificial ponds) often generates conflict borne of the "contrary demands" for water resources.[47] Lacking a standard of stricter compliance, however, those

39. *Id.*

40. *Id.* Arguably, increased environmental oversight has also bogged down the ski industry since Act 250's passage.

41. *Id.*

42. *Vermont's Ski Industry Reports 6.5% Business Rebound for 2021-22 Winter Season*, VERMONTBIZ (June 15, 2022, 8:36 AM), https://vermontbiz.com/news/2022/june/15/vermonts-ski-industry-reports-65-business-rebound-2021-22-winter-season.

43. *See generally* Jonathan Isham & Jeff Polubinski, *Killington Mountain Resort: A Case Study of Green Expansion in Vermont*, 26 VT. L. REV. 565 (2002) (discussing the evolution of Killington Mountain Resort through the "Permit Chronology" of its Act 250 applications).

44. James Murphy, *Vermont's Act 250 and the Problem of Sprawl*, 9 ALB. L. REV. ENV'T OUTLOOK 205, 227 (2004).

45. VT. NAT. RES. BD., *supra* note 13.

46. Brooks, *supra* note 17, at 709.

47. BROOKS, *supra* note 35, at 5.

opposing development can use permit hearings, both at the local and regional level, as recourse to or a stopgap against the proposed ski-area expansions.[48]

Understanding Act 250, a regulatory scheme with a significant economic effect on Vermont, requires an analysis of case law concerning challenges to ski-area development. Some of these cases involve corporate ski areas litigating development and expansion issues related to snowmaking, trail cutting, and resort expansion.[49] Regulatory judgments about ski-area development also apply to recreation projects of other types.[50] Ski resorts typically operate as for-profit entities under larger out-of-state corporate ownership.[51] However, more economically modest recreational resources also fall under Act 250 jurisdiction, including newly built recreation trails for Nordic and backcountry skiing, mountain biking, and hiking; existing trail corridors expanding onto public land or threatened by private development; and recreational facilities deemed to interfere with the "viewshed" of a scenic area.[52]

Recreation functions as a critical part of Vermont's tourist economy. Tourism as an economic driver has increased beyond what Vermont legislators could have imagined in the 1960s, when the state was just beginning to transition away from a natural resources-based economy.[53] Act 250's jurisdictional control over for-profit ski areas and not-for-profit recreational trails alike means that engaged citizens must consider regulatory reform a make-or-break issue for Vermont's recreational resources and the "recreation economy" in the 21st century.[54]

C. Theoretical Background: Vermont's Landscape as "Contested Commodity"

Vermont's demographic history and Town Meeting-based form of local government make it an ideal state to analyze land use through the theoretical

48. *See* Robert F. Gruenig, *Killington Mountain and Act 250: An Eco-Legal Perspective*, 26 VT. L. REV. 543, 549 (2002) (discussing how "Act 250's substantive criteria are supplemented by citizen participation").

49. *See generally* Isham & Polubinski, *supra* note 43 (surveying the litigation within the ski industry arising from apparent or real violation of Act 250 requirements).

50. *See* Killington, Ltd. v. State, 668 A.2d 1278, 1284 (Vt. 1995) (noting that a takings claim brought by a ski area is analogous to a claim brought by a non-commercial "property owner").

51. *Who Owns Which Mountain Resorts*, NAT'L SKI AREAS ASS'N, https://www.nsaa.org/NSAA/Media/Who_Owns_Which_Mountain_Resorts.aspx (last visited Dec. 21, 2023).

52. Dover Valley Trail, 2007 Vt. Envtl. LEXIS 77 (Vt. Env't 2007); *In re* Kisiel, 772 A.2d 135 (Vt. 2000); *In re* Free Heel, 2007 Vt. Envtl. LEXIS 36 (Vt. Env't 2007).

53. BROOKS, *supra* note 35, at 20.

54. Farrell, *supra* note 34, at 439.

lens of neo-prudentialist legal theory,[55] recognizing (per Richard O. Brooks) that "the reality on which law works is itself a reality shaped by human perceptions and concepts."[56] Prior to Act 250, Vermont's piecemeal approach to environmental protection led to a wide variety of regional discrepancies in handling critical planning issues—water quality, zoning, development controls, and highway layout, to name a few.[57] The legislative success in passing an omnibus bill for environmental protection and land use regulation in 1970 demonstrates an unusual legislative consensus—one that would be even rarer today.[58] Understanding how Vermont's consensus-building worked then—and works now—requires a discussion of the state's numerous local participative democratic institutions, as they intersect with the deep roots of American private-property concerns and post-industrial theories of land as both environment and commodity.[59]

How then, to build a new community consensus around land use for a "new" and far different Vermont than the state that Act 250 initially regulated? Two distinct principles for legal analysis would help lawyers, judges, and community leaders build a new consensus. First is the neo-prudentialist understanding of the law, which eloquently argues for the importance of "recogniz[ing] judicial decision-making as part of a normative realm requiring reasoned ethical choice among conflicting values and principles."[60] Critically, a neo-prudential viewpoint on Act 250 would allow decision-makers in the legislature to see reform not as a mechanical "updating" of a regulatory agenda, but instead as an active negotiation between the "conflicting values" that will shape Vermont.[61] Second, such active negotiation must be grounded in the contradictions or conflicts that it seeks to inhabit and thus resolve: for example, the ski-area investor who needs additional water resources opposed by the local environmentalist who opposes stream diversion. Neo-prudential thinking about Act 250 would recognize the tension between water in the form of human-made snow, as a

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55. Neo-prudentialism, a theoretical continuation of mid-20th-century legal realism, emphasizes the interplay between the established legal structure of human communities and the "decision-making context" of policy-making. Brooks, *supra* note 17, at 718.

56. *Id.*

57. VT. NAT. RES. BD., *supra* note 13.

58. Peter Hirschfeld, *Vt. Legislature Adjourns, But Vetoes on Budget and Other Bills Likely Await*, VT. PUB. (May 12, 2023, 11:36 PM), https://www.vermontpublic.org/local-news/2023-05-12/vt-legislature-adjourns-but-vetoes-on-budget-and-other-bills-likely-await.

59. *See In re* Interim Bylaw, Waitsfield, 742 A.2d 742, 743–44 (Vt. 1999) (analyzing democratic institutions regarding land use in Vermont and the effect of a temporary zoning-board bylaw on a landowner's ability to develop); *see also* Bosselman, *supra* note 19, at 1455–57; Singer, *supra* note 16, at 313–15; MARGARET RADIN, CONTESTED COMMODITIES (1996) (discussing, *inter alia*, land use theories).

60. Brooks, *supra* note 17, at 718.

61. *Id.* at 718–19 (describing how the neo-prudentialist position moves from an understanding of each party's position—for instance, in an Act 250 appeals hearing—to a "search for mutual support among competing positions").

monetizable, saleable commodity, and an untrammeled brook as part of Vermont's natural landscape.[62] Only regulation borne of consensus can adequately square the monetizable with the nonmonetizable and the economic with the ecological.

D. Takings Background: Can Act 250 Go "Too Far"?

"…[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." – Oliver Wendell Holmes[63]

Takings are arguably one of the most complex issues in land use theory and practice. This Note does not provide a comprehensive depiction of takings law from the origin of takings jurisprudence—usually attributed to Oliver Wendell Holmes's seminal opinion in *Pennsylvania Coal*[64]—through the Supreme Court's recent reconsiderations, as in *Koontz v. St. John*s.[65] For the purposes of this Note, it is sufficient first to distinguish the nature of a regulatory takings claim from other takings challenges; and second, to understand the regulatory takings test that the Vermont state courts distilled from previous federal takings cases.

Regulatory takings differ from physical takings in that they do not involve a physical appropriation or permanent physical occupation of the land in question.[66] Instead, a regulatory takings claim succeeds or fails based on whether the challenged regulation has such negative economic effects on an owner's rights to property that the regulatory action is "substantively equivalent to an eminent domain proceeding."[67] Regulatory action that overreaches as such is sometimes referred to as *inverse condemnation*, given its similarities to loss of property through eminent domain.[68] In such a case, a landowner must bring a regulatory takings challenge against the government body administering the regulation.[69] The central question a court must consider in determining whether the regulation constitutes a taking is,

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62. RADIN, *supra* note 59, at 107 ("Society as a whole recognizes that things have nonmonetizable participant significance. In legal culture this social recognition may be reflected in regulating (curtailing) the free market.").

63. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

64. *See, e.g.*, Southview Assocs., Ltd. v. Bongartz, 980 F.2d 84, 105 (2d Cir. 1992) ("In determining what constitutes a taking, I would begin with the classic, if vague, formulation provided by Mr. Justice Holmes. . . .").

65. Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 599 (2013).

66. *Takings*, CORNELL LEGAL INFO. INST., https://www.law.cornell.edu/wex/takings (last updated Dec. 2022).

67. VT. NAT. RES. BD., ENVIRONMENTAL CASE NOTES (E-NOTES): ANNOTATIONS OF VERMONT SUPREME COURT, ENVIRONMENTAL BOARD, ENVIRONMENTAL COURT, AND ENVIRONMENTAL DIVISION ACT 250 DECISIONS 52 (2019), https://nrb.vermont.gov/sites/nrb/files/documents/E-NOTES.pdf.

68. CORNELL LEGAL INFO. INST., *supra* note 66.

69. *Id.*

in Justice Holmes's inimical phrase, whether the regulation has gone "too far."[70] Or, rephrased for the Act 250 land use context, has the regulation exceeded what a governmental body can rightly decide about a private landowner's ability to develop their land as they see fit?[71]

As controlling precedent for Vermont courts, the most comprehensive application of regulatory takings jurisprudence to an Act 250 appeal involved the permit denial of a 1980s-era development plan to build a 78-unit subdivision near Stratton Mountain.[72] In *Southview v. Bongartz*, the Second Circuit held that, under applicable federal takings law, the plaintiff-developer did not have a valid physical-takings claim against the Vermont Environmental Board.[73] The Board had denied Southview's appeal after the District Environmental Commission turned down their original permit application on grounds that the 78-unit subdivision would further fragment a 280-acre deer-wintering area and thus "imperil necessary wildlife habitat" under Act 250 criteria 8(A).[74] The claim that the Second Circuit reviewed was a physical-takings claim, but the court provided guidance on regulatory takings issues all the same:[75]

> A regulation will not effect a compensable taking if it "substantially advance[s] legitimate state interests" and leaves the "owner [with an] economically viable use of his land." By contrast, a taking will generally be deemed to have occurred if the regulation authorizes a permanent physical occupation . . . or, in the "extraordinary circumstance" when regulation "deprives land of *all economically beneficial use*."[76]

In the *Southview* analysis, regulatory takings issues only arise in "'extraordinary circumstance[s],'" and only when regulation "'deprives land

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70. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

71. This is undoubtedly a simplistic formulation of regulatory takings law as a broad and complex body of jurisprudence. With legal challenges to Act 250, however, the fundamental question of law hews close to the *Pennsylvania Coal* test. When deciding questions of fact, the Vermont Supreme Court looks to subsequent takings cases to provide an analytical framework. For instance, the *Penn Central* test allows a court to conduct ad hoc fact-finding to determine whether a regulation has deprived a property owner of economic value of their land. *See* Southview Assocs., Ltd. v. Bongartz, 980 F.2d 84, 105 (2d Cir. 1992) (discussing the tension between the legal question of "'where [land use] regulation ends and taking begins'" and ad hoc fact-finding); *In re* Interim Bylaw, Waitsfield, 742 A.2d 742, 743–44 (Vt. 1999) (holding that property owners failed to present adequate facts to support their argument of economic deprivation).

72. Southview, 980 F.2d at 89–90.

73. *Id.* at 84.

74. *Id.* at 90.

75. *Id.* at 100 (clarifying that the *Southview* opinion's discussion of takings "represents only [Judge Oakes's] views and not the opinion of the [Second Circuit] panel").

76. *Id.* at 105–06 (citations omitted).

of all economically beneficial use.'"[77] With *Southview* as precedent, the bar for a valid regulatory takings claim is high. Yet a high bar need not dissuade plaintiffs who feel that Act 250 has unconstitutionally infringed upon their private property rights. This Note assesses two post-*Southview* regulatory takings challenges that were not successful.[78] Nevertheless, both cases provide insight on Act 250's constitutional dimensions and future challenges that may yet succeed, and how, in certain instances, Act 250 regulation may go "too far."[79]

II. ANALYSIS: ACT 250, REGULATORY TAKINGS, AND VERMONT'S OUTDOOR-RECREATION ECONOMY

A. Act 250 Jurisdiction, Recreation Projects, and a (Climate-)Changing Vermont

Act 250 is a creature of Vermont's outdoor-recreation industry through and through. Born of Governor Davis's concern over burgeoning ski area-related development, the Act's jurisdiction over alpine skiing and other forms of outdoor recreation—hiking and mountain biking especially—applies to all forms of recreation infrastructure proposed at elevations above 2,500 feet.[80] For the Green Mountains, this is a mid-elevation point above which most ski areas build lifts and hiking trails wend their way to higher ridges.[81] As a result, a large proportion of new recreation infrastructure involves the high-elevation Act 250 jurisdiction.[82] But the relationship between Act 250 and outdoor recreation is much broader than permitting applications for trail networks themselves. How a community or municipality chooses to institute its land use controls often affects Act 250 hearings on development permits, which then forces the community to ask questions about their common values around development and preservation. Meanwhile, the permitting processes themselves are far from simple.

Lengthy regulatory processes within the state's purview effectively maintain the status quo of recreation development—whether that involves protecting access to beloved hiking spots or limiting the potentially lucrative expansion of a major ski area. Act 250 can effectively protect recreation

77. *Id.* at 106 (citations omitted).

78. *In re* Interim Bylaw, Waitsfield, 742 A.2d 742 (Vt. 1999); Killington, Ltd. v. State, 668 A.2d 1278 (Vt. 1995).

79. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

80. 10 VT. STAT. ANN. tit. 10, § 6001(3)(a)(vi) (2023).

81. *Elevation Data*, VT. CTR. FOR GEOGRAPHIC INFO., https://maps.vermont.gov/vcgi/html5viewer/?viewer=vtmapviewer (check box for "Elevation" filter layer and use plus/minus toggles to zoom in on central Green Mountains; areas in pink are above 2,500 feet) (last visited Dec. 21, 2023).

82. *See* Farrell, *supra* note 54, at 433.

assets and access to mountain trails, as in *In re Kisiel*, where the Town of Waitsfield used Act 250 review to prevent development from impeding local access to a municipal forest in the eastern uplands of the Mad River Valley.[83] However, Act 250 can also stand as both a roadblock to future recreation development and a procedural hurdle for complex upper-elevation development.[84] *Killington, Ltd. v. State*, involving a proposed ski-area expansion that encroached on sensitive black-bear habitat, is an example of Act 250 as a complex review process that raises potential takings questions.[85] *Killington* also makes it clear how negotiations between parties outside of an Act 250 review context can be more effective than litigatory challenges.

Cases around Act 250 and takings provide high-level guidance on future development and regulatory practice, especially as one looks into the climate-change future. The influx of new homeowners and renters in Vermont during the Covid-19 pandemic made effective development planning in real-estate hotspots an urgent item on the agenda of many municipalities.[86] Regulating future housing developments involves a close understanding of Act 250's jurisdictional authority across the state. Areas hit hard by the housing boom are often the same areas with well-established and popular recreation infrastructure, such as alpine-ski resorts and trail systems.[87]

Maintaining a strong recreation economy in Vermont depends on the long-term viability of the alpine-ski industry. Alpine resorts depend on robust snowmaking to keep operations going through increasingly frequent warm spells, thaws, and snowless droughts.[88] Increasing snowmaking capacity at resorts will almost always invoke Act 250 jurisdiction for elevation-related reasons.[89] As such, Vermont's outdoor-recreation development future—as it relates to housing, trail networks, open space, ski-area sustainability, recreation infrastructure, and more—is intimately tied to how courts handle Act 250 and how its regulatory scheme can be adapted and improved at multiple levels of the process.

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83. *In re* Kisiel, 772 A.2d 135, 137 (Vt. 2000).

84. JULIA LEMENSE ET AL., MOUNTAIN RESORTS: ECOLOGY AND THE LAW 271 (2009).

85. Killington, Ltd. v. State, 668 A.2d 1278, 1280 (Vt. 1995).

86. Anne Wallace Allen & Colin Flanders, *Nowhere to Go: Vermont's Exploding Housing Crisis Hits Moderate Wage Earners*, SEVEN DAYS, https://www.sevendaysvt.com/vermont/nowhere-to-go-vermonts-exploding-housing-crisis-hits-moderate-wage-earners/Content?oid=33532880 (Nov. 2, 2021, 4:26 PM).

87. *Id.*

88. Alan J. Keays, *Resorts 'Bounce Back' with 3.9 Million Skier Visits, Up 21 Percent,* VTDIGGER, (June 15, 2017, 6:41 PM), https://vtdigger.org/2017/06/15/resorts-bounce-back-3-9-million-skier-visits-21-percent.

89. ACT 250: A GUIDE TO VERMONT'S LAND-USE LAW, *supra* note 27.

B. Case Study: Waitsfield, the Mad River Valley, and Conflicts in Local and Regional Planning

The two cases discussed below—*In re Kisiel* and *In re Interim Bylaw*—demonstrate some of the manifold development pressures that the Mad River Valley underwent during the 1990s. Ski-industry expansion and increased recreation-related visits to the area represent two of the associated pressures, along with increased interest among real-estate developers to capitalize on the housing boom.[90] An area with popular recreation opportunities can easily become a victim of its own success, with the popularity of the area putting pressure on housing stock and driving up prices beyond sustainable levels.[91] As the hub of the Mad River Valley, Waitsfield's land use regulations and growth—or anti-growth—intentions came to the fore as landowners proposed different projects in undeveloped areas in the surrounding uplands, especially in the Northfield Range.

The Northfield Range exemplifies the multiple overlapping uses for an area that create the "contrary demands" that Richard O. Brooks argues must provide the baseline understanding for Act 250 reform at the state or local level.[92] The Range runs north-south along the eastern edge of the Mad River Valley and forms the upland portion of the towns of Moretown, Waitsfield, and Warren.[93] The Northfield Range is largely undeveloped and, though traversed by hunters during deer season and intrepid hikers and skiers, is rarely discussed as a place for outdoor recreation.[94] By contrast, the mountains to the west of the Mad River, which form a ridge approximately 1,500 feet higher than the Northfield Range, are the home of Sugarbush Resort's two ski areas—Lincoln Peak and Mt. Ellen—and Mad River Glen's trails, which descend from Mt. General Stark.[95] Many hikers' favorite section of Vermont's Long Trail, the so-called Monroe Skyline, runs from Lincoln Gap to Appalachian Gap across the alpine summits of Mts. Abraham, Lincoln, Ellen, and the Starks.[96]

The ski areas, hiking trails, and roadway access to Lincoln and Appalachian Gap that make the Mad River Valley an outdoor-recreation hotspot also define and form the character of the Valley as a whole. The

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90. *See generally* WAITSFIELD PLAN. COMM'N & WAITSFIELD SELECTBOARD, HISTORIC DEVELOPMENT, WAITSFIELD TOWN PLAN 21–23, 25 (2005) (discussing demographic changes and increased development pressures).

91. *Id.*

92. BROOKS, *supra* note 35, at 5.

93. *See infra* Appendix 1, *Mad River Valley Recreation Map*, GAIA GPS (2003).

94. Kara Sweeney, *Note: What's on the Horizon? Takings Jurisprudence and Constitutional Challenges to Ridgeline Zoning in Vermont*, 26 VT. L. REV. 221, 247–48 (2001).

95. *See infra* Appendix 1, *Mad River Valley Recreation Map*, GAIA GPS (2003).

96. *Long Trail: Monroe Skyline*, BACKPACKER MAG. (Sept. 20, 2013), https://www.backpacker.com/trips/long-trail-monroe-skyline/.

massive popularity of skiing at Sugarbush, which was acquired by the national ski-area conglomerate Alterra Resorts in 2020, is an enormous recreation asset to the Mad River Valley and a substantial draw to visitors and second-home owners.[97] With more undeveloped land across the Valley in the Northfield Range uplands, town planners and community members alike would reasonably look to the east as an escape valve for some of the pressures on the Valley as a whole. Setting a plan in motion to do so, however, would require the "consensus on goals and policies" that Richard O. Brooks has noted as difficult to achieve.[98]

The Town of Waitsfield, in crafting a municipal plan and setting forth intentions for upland development (or non-development) in the 1990s, would have had to consider three possibilities. One, the Northfield Range could have been considered primarily as a potential zone for recreation: in 1991, the Town received a donation of a 360-acre parcel on the eastern slopes and summit of Scrag Mountain (one of the higher points in the Northfield Range, at 2,911 feet).[99] By expanding town assets that were already bringing a small number of hikers and skiers into the Valley's eastern uplands, Waitsfield could have leaned into the recreation opportunities of the Scrag Mountain parcel.[100] Two, the Town could have seen the Northfield Range as an undeveloped upland that should remain as free from human interference as possible.[101] By maintaining such an undeveloped area, Waitsfield could have laid the groundwork for continued wildlife habitat and wild land in relatively close proximity to a fast-growing town center. Three, the Town could have indicated its preference that the Northfield Range become a logging hotspot by writing provisions into the Town Plan that encouraged the sale of timber leases.[102]

Did Waitsfield signal its interest to assure that land use in the Northfield Range would take one of the three forms? In the two cases this Note will discuss, Waitsfield grappled with the competing demands on the Range without expressing a distinct conclusion or consensus preference on the use

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97. Anne Wallace Allen, *After a Dismal 2020-21 Ski Season, Ski Areas Report Strong Early Sales*, SEVEN DAYS, https://www.sevendaysvt.com/vermont/after-a-dismal-2020-21-season-ski-areas-report-strong-early-sales/Content?oid=34217422 (Dec. 14, 2021, 2:40 PM).

98. Brooks, *supra* note 17, at 709.

99. WAITSFIELD PLAN. COMM'N & WAITSFIELD SELECTBOARD, WAITSFIELD TOWN PLAN 11-12 (2017).

100. *See id.* (describing the history of the Scrag parcel, which would later form the basis for the Scrag Mountain Forest).

101. *See generally* RICHARD O. BROOKS ET AL., LAW AND ECOLOGY: THE RISE OF THE ECOSYSTEM REGIME 325–64 (Richard O. Brooks & Ross A. Virginia eds., 2002) (discussing wildlife preservation and habitat conservation as an increasingly important planning objective during the second half of the 20th century).

102. *See* ARGENTINE, *supra* note 6, at 3. Logging is an activity usually exempt from Act 250 jurisdiction, meaning that the Town would not have run afoul of the Environmental Commission in encouraging further timber harvest in the Northfield Range. *Id.*

of the eastern uplands.[103] Indeed, *In re Kisiel* (as a strict Act 250 case) and *In re Interim Bylaw* (as a takings case) demonstrate that the Town was going through the ad hoc process of deciding on land use issues as they cropped up.[104] If the municipality had clearly decided on how development would proceed, it was primarily in the negative, in assuring that development would not infringe on the recreation opportunities in the newly created Scrag Mountain Forest. In both Mad River Valley cases that this Note will discuss, the Vermont Supreme Court decisions ultimately privilege an entrenched idea of outdoor recreation, holding out the community's enjoyment of designated (and non-designated) open space as a vaunted form of land use planning.[105] This is hardly an obvious or one-sided decision. Other ski area-centered municipalities, such as Killington/Pico (the town of Sherburne) and Stratton/Bromley,[106] have consistently looked to expand the housing stock in the immediate ski-area vicinity to provide visitor lodging and year-round workforce housing.

Whether certain regulations are constitutionally sound and further a legitimate local or state interest, the broader efforts to protect the Northfield Range implicit in both cases demonstrate how, at times, Act 250 protects only one type of recreation-related land use. While local Waitsfield landowners can access their favorite local trails without additional development marring the landscape, a town regulatory scheme that discourages upland development without providing suitable alternatives is bound to encounter resistance.

1. *Kisiel* and Act 250 Criteria 10

In re Kisiel is an example of how local regulations and Act 250 review sometimes run at cross-purposes in a manner detrimental to local authority and landowners looking to develop their properties. In 1997, the District Five Act 250 Environmental Commission reviewed and authorized subdivision development on a property owned by Mark and Pauline Kisiel at the upper end of Bowen Road, which runs from East Warren Road in Waitsfield up to the Northfield Range.[107] Bowen Road is the main access point for the municipal Scrag Mountain Forest.[108] The Kisiels had received prior approval

103. *See* WAITSFIELD PLAN. COMM'N, *supra* note 99, at 11-1. Again, the Town's multi-faceted understanding of how land use in the Northfield Range would proceed during the 1990s followed the formula set out in later Town plans. *Id.*

104. *In re* Kisiel, 772 A.2d 135, 135 (Vt. 2000); *In re* Interim Bylaw, Waitsfield, 742 A.2d 742, 743 (Vt. 1999).

105. Brooks, *supra* note 17, at 709.

106. *See In re* Eustance Act 250 Jurisdictional Opinion, 970 A.2d 1285, 1296 (Vt. 2009) (concerning a subdivision near Bromley Ski Area that was unopposed by the municipality).

107. *In re* Kisiel, 772 A.2d at 136–37.

108. *Id.* at 142.

from the Waitsfield Planning Commission to upgrade the road to suit additional vehicle traffic needed to access the subdivision.[109] However, the Planning Commission conditioned the approval on maintaining hiking access to the Forest via a public right-of-way trail that the Kisiels would construct next to Bowen Road.[110] Concerned that the Environmental Commission's Act 250 permit approval would allow the landowners to circumvent the conditions imposed by the town Planning Commission, the town of Waitsfield, in effect, withdrew the conditional approval and appealed the Act 250 approval to the Environmental Review Board.[111]

The Act 250 Environmental Review Board's assessment of the permit as appealed hinged on two interpretive issues concerning the application of the Waitsfield Town Plan to the Kisiels' proposed development. The first issue on appeal was whether the permit granted by the District Five Act 250 Environmental Commission undermined the Town Plan's intent to "maintain[] the 'status' of class 4 roads" and how the plan applied to Bowen Road, where the Kisiels' proposed development would be built.[112] The second issue concerned the Plan's "goal of precluding development on 'steep' slopes," and whether the site of the Kisiels' development on a mountain hillside fell within that purview.[113] The Review Board concluded that the Kisiels' proposal to make Bowen Road passable "was not in compliance" with the roadways-related intentions of the Town Plan, and that the Kisiels' development proposal ran afoul of the steep-slope criteria in the Plan.[114] Thus, the Review Board found that the Kisiels' proposal failed to "conform[] with any duly adopted local . . . plan" under Act 250 Criterion 10.[115]

The Vermont Supreme Court's decision in *Kisiel* hinged on the issue of whether the language of the Waitsfield Town Plan should be given controlling authority when reviewing Act 250 cases under Criterion 10. The Court found that the Town Plan would not control the Act 250 review process if not implemented in accordance with a reasonable construction of the language in the Plan.[116] As a matter of interpretation, Justice Dooley articulated a "plainly erroneous" standard of review for future cases where Act 250 and local planning would seem to conflict:

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109. *Id.* at 137.
110. *Id.*
111. *Id.* at 137–38.
112. *Id.* at 137.
113. *Id.*
114. *Id.*
115. *Id.*; VT. STAT. ANN. tit. 10, § 6806(a)(10) (2022).
116. *In re* Kisiel, 772 A.2d at 143.

> Although Act 250 gives to the [Act 250 Environmental Review] Board, and this Court on appeal from the Board's decisions, the power to override a town's implementation of its own plan, this power should be exercised only when the local construction of the town plan is *plainly erroneous*. No other policy will maintain local control of land use planning and promote fairness and consistency in state and local regulatory review.[117]

Justice Dooley's defense of "local control" in *Kisiel* speaks as much to the procedural issues inherent in Act 250 decisions as to the constitutional issues implicated in the conflict between local decision-making at the town level and Review Board-level fact-finding. In *Kisiel*, the Town of Waitsfield's appeal of the District Five Environmental Commission's Act 250 permit ended up back in Act 250 jurisdiction with the Act 250 Environmental Review Board.[118] Subsequently, after the Review Board denied the Act 250 permit initially granted by the town planning commission, the Kisiels appealed the decision to the Vermont Supreme Court, bringing the issue out of the land use-specific legal regime and into the realm of statutory interpretation.[119] Such a shift of venues sets up one of the inherent conflicts of a Criterion 10-based Act 250 judicial decision: can a court adequately use statutory interpretation as a form of decision-making about a local or regional plan?

Kisiel, as a case that was "tried and appealed as a straightforward issue of textual interpretation," stands for the proposition that specific language within a town or regional plan can carry the force of law.[120] The *Kisiel* Court distinguished the ambiguity around "'steep' slopes" and lack of "any specific standards" in the Waitsfield Town Plan from the uncertainty presented by a prior case, *In re Green Peak Estates*, where a regional plan had specified that "'[o]n slopes greater than 20%, residential development should not be permitted.'"[121] Even though the town plan at issue in *Green Peak Estates* did not specify a maximum grade for building lots, the specificity of the regional plan meant that denying an Act 250 permit to build on a "slope exceeding 20[%]" was "'consistent with the overall approach to use of the region's intermediate uplands.'"[122] The alignment of a general provision in a town plan with a specific provision in a regional plan meant that the town plan

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117. *Id.* (emphasis added).

118. *Id.* at 137 ("Notwithstanding the earlier permits granted by the Town, the Town appealed the Commission's decision to the Board, which received extensive pre-filed testimony, conducted a site visit, and held an evidentiary hearing.").

119. ARGENTINE, *supra* note 6, at 203–04.

120. *In re* Kisiel, 772 A.2d at 145 (Amestoy, C.J., dissenting).

121. *Id.* at 138–39.

122. *Id.* at 138.

could have the force of law and carry regulatory authority—an authority that the court in *Kisiel* denied to the Town of Waitsfield.

Following in the steps of *Kisiel*, Vermont courts can enforce such specific language through Act 250 Criterion 10, but only if the plan or plans are adequately specific in their provisions. The Court criticized Waitsfield for enacting an unenforceable town plan: "The town plan sets forth an abstract policy against development on steep slopes, but provides no specific standards to enforce the policy."[123] The Court found no issue with a "policy against development on steep slopes," but only with the abstractions baked into the plan itself, holding that "in the absence of pertinent zoning bylaws" that had been voted on and approved through the municipal process, "the [Act 250 Review] Board may not 'give nonregulatory abstractions in the Town Plan the legal force of zoning laws.'"[124] If a town plan's provision does not provide numerical specificity of the type exemplified in *Green Peak Estates*, it may be a "nonregulatory abstraction[]" that is not legally relevant to an Act 250 decision.[125] Enforceability thus hinges on specific provisions in a town plan, which can subsequently become part of an Act 250 review process under Criterion 10.

Returning to Dooley's "clearly erroneous" standard of review, however, towns have some flexibility to maintain authority not delegated to the Act 250 Review Board. *Kisiel* contains strict language precluding nonregulatory elements in town plans from carrying the legal force of zoning laws, but the clear-error standard gives municipalities the latitude to enact and enforce a town plan without oversight from the Review Board. Such a standard of review creates a fine-line distinction between the local control codified by Vermont statutes and the statewide review and appeals process enabled by the multi-tiered Act 250 jurisdictional system.

2. Takings Issues in the Mad River Valley

Kisiel also raises the question of elevation-dependent zoning in the Green Mountain uplands. As development pressures increase on potentially buildable land high above scenic valleys, including the Mad River Valley, towns must respond to development pressure by restricting where new housing will be located. In the late 1990s, as *Kisiel* was making its way toward the Vermont Supreme Court, Waitsfield was taking action to codify development restrictions on residential housing built above 1,700 feet of elevation, first in a patch-through bylaw passed in 1997 and then in a

123. *Id.* at 140.
124. *Id.* (quoting *In re* Molgano, 653 A.2d 772, 775–76 (1994)).
125. *Id.*

subsequent Town Plan.[126] Whether the Waitsfield Selectboard's adoption of the interim bylaw was partly motivated by the Kisiels' earlier suit is not clear. But the mounting development pressures on the Northfield Range—which could be considered a town recreation hub, an undeveloped upland, or a potential timber-harvesting zone—meant that the Town had to make regulatory choices that would be codified as zoning law. The Town, in challenging the Kisiels' permit and passing the later bylaw, made a tacit set of decisions about permissible land use in the eastern uplands, favoring certain entrenched uses and disfavoring others.

To disfavor certain productive uses—especially housing development—put the Town in the line of fire for a legally justified accusation of regulatory takings. Edmund and Deborah Stein, who owned 130 Northfield Range acres above the 1,700-foot threshold when the bylaw was passed, challenged the interim bylaw as a facially unconstitutional taking of their property.[127] When the trial court dismissed their initial challenge, the Steins appealed to the Vermont Supreme Court—the same court that would pass down judgment on *Kisiel* just a few months after deciding the Steins' appeal.[128] The Court considered two potential avenues for the plaintiffs to display the facial unconstitutionality of the bylaw—two species of takings, as it were: "To prevail under such a [facial takings] challenge, plaintiffs must show either that the ordinance in question does not substantially advance a legitimate state interest or that it denies an owner an economically viable use of his land."[129] The Steins' argument that the bylaw constituted a taking would have needed to show either a deficit on the Town's side—that the bylaw did not further a "legitimate state interest"—or a deprivation of the Steins' economic interests as landowners.[130]

First, under the avenue of "legitimate state interest," the Court held that the Town was within its powers to pass and enforce the bylaw as a function of its ecological goals, finding that "the town has a legitimate interest in resource protection and preservation."[131] As legal onlookers commented at the time, it was an unusual step for the Court to introduce a defense of the

126. WAITSFIELD PLAN. COMM'N & WAITSFIELD SELECTBOARD, supra note 90, at 121–23.

127. *In re* Interim Bylaw, Waitsfield, 742 A.2d 742, 743 (Vt. 1999).

128. *Id.*

129. Penn Cent. Transp. Co. v. N.Y.C., 438 U.S. 104, 104 (1978). A regulatory action that merely denies the property owner *an*—but not all—economically viable use of their land would constitute a taking if the regulation also carries other implications for the property owner, such as by "interfer[ing] with distinct investment-backed expectations." *Id.* at 124. Subsequent cases have clarified that a regulation that "denies *all* economically beneficial or productive use of land" would constitute a *per se* taking. Palazzolo v. R.I., 533 U.S. 606, 617 (2001) (emphasis added).

130. *In re* Interim Bylaw, 742 A.2d at 744.

131. *Id.*

town's action *sua sponte*.[132] The Town's interest in protecting the Northfield Range uplands had not received comprehensive examination by the Selectboard or codification in the Town Plan in the preceding decade. The persistent ambiguity of the Town's hopes for the Northfield Range—should it be a recreation hotspot? Should it remain undeveloped? Should the Town encourage logging?—meant that the *Interim Bylaw* Court had to make something of a *sua sponte* decision about which interest, precisely, the bylaw in question was furthering.

Second, under the avenue of "denial of . . . economically beneficial use," the Court again made a *sua sponte* determination of how the Town could effectively argue that the bylaw did not constitute a regulatory taking: "the interim bylaw allows for several uses above 1,700 feet, including . . . agricultural and forestry purposes."[133] Here, the Court appeared to misunderstand how "economically beneficial use" could rightly be construed in the Mad River Valley context. Forestry and timber harvest, though not economically valueless, are not what the Town of Waitsfield had—or has—in mind as an economic driver: "Our resource-based economy, founded on agriculture and forestry, is now built on recreation and an enviable quality of life."[134] The *Interim Bylaw* Court, it seems fair to say, understood the "investment-backed expectations" of the Steins as being premised on a resource-extraction economy. The Court did not consider the Steins' investment in light of the Mad River Valley's status as a recreation hotspot and development-pressured area with limited space to expand.[135]

A future case challenging an anti-development regulation, in the Mad River Valley or elsewhere, would need to analyze whether the regulation constituted a taking based on the agreed-upon metrics for economically viable future growth in the area.[136] The *Interim Bylaw* decision appeared to pick out certain aspects of the Town of Waitsfield's development goals

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132. Sweeney, *supra* note 94, at 246; *see also Sua Sponte*, BLACK'S LAW DICTIONARY (11th ed. 2019) (explaining that a court makes a determination *sua sponte* when it does so of its own accord, rather than as a result of a challenge, motion, or party assertion).

133. *In re* Interim Bylaw, 772 A.2d at 744.

134. WAITSFIELD PLAN. COMM'N, *supra* note 99, at 1-1.

135. Penn Cent. Transp. Co. v. N.Y.C., 438 U.S. 104, 124 (1978); *In re* Interim Bylaw, 772 A.2d at 744. The additional irony of the *Interim Bylaw* Court suggesting, tacitly, that the Steins turn to logging and timber extraction as a way of drawing income from their 130 acres is that the bylaw in question was passed partly in response to a large and unsightly clearcut in the southern Northfield Range. *Id.* The clearcut, visible from the center of Waitsfield and frequently remarked upon by Waitsfield residents, was located in the town of Warren and was largely permitted due to the laxer land-use standards in Warren. Sweeney, *supra* note 94, at 223–24. Needless to say, Waitsfield would have gone to great lengths to prevent the Steins from clear-cutting—or perhaps even selectively harvesting—their property. *In re* Interim Bylaw, 772 A.2d at 743–44.

136. Indeed, a revised Criterion 10 could include a sub-heading defining the regulatory force of a local economic-development plan that had been adopted by a town, county, or regional development cooperative.

without considering the character of the region and its future direction. A successful future challenge to a local ordinance prohibiting a type of development critical for the profitable use of land in a spatially constrained, high-growth area could also rely on the *Kisiel* Court's discussion of "nonregulatory abstractions," which should not be given legal weight. The Steins could have argued that although the Selectboard passed the bylaw that prevented development above 1,700 feet, the bylaw should be held void because it was abstract in its purpose, if not in the text itself. A nonregulatory abstraction, per *Kisiel*, cannot be determinative of a development application. If a future landowner hoping to develop property were otherwise discouraged by the Town Plan, such a landowner could challenge the regulatory schema as void for vagueness, arguing that the nonregulatory abstraction fails to reach the level of legal authority.[137]

Interim Bylaw established that in a takings context, the Town of Waitsfield's goal to keep land at or above certain elevations undeveloped constituted "a legitimate interest in resource protection and preservation."[138] An onlooker can presume that the Vermont Supreme Court would go through a similar analysis when confronted with other *facial* challenges to development limitations at the town level. But the story might be different if a plaintiff presented the Vermont courts with a challenge to such regulatory limitations *as applied*. Onlookers concerned with the holding of *Interim Bylaw* noted at the time that the Court decided the case on summary judgment, even though, under *Penn Central* and subsequent takings cases, the issue of whether a property owner suffered an economic burden should rightly be considered a question of fact.[139]

Interim Bylaw might have been a very different case if the plaintiffs were challenging the constitutionality of Act 250 regulations made and decided at the state level, rather than local regulations in the form of an interim bylaw passed by the Waitsfield Selectboard. As Section II(D) further discusses, takings jurisprudence changes form depending on the regulatory environment in which a taking may occur. As such, a state-level Act 250 decision raises different constitutional questions than a local decision. Such a state-level decision also raises the question of who a regulation's beneficiaries are. When a community decides to put forth a bylaw that limits development, the town's adoption of such a bylaw benefits those who appreciate access to open space, as in the case of access to the Scrag Mountain Forest in *Kisiel*. But such a bylaw disadvantages those who would rather see the housing stock in the area continue to grow in proportion to

137. *Void for Vagueness*, CORNELL LEGAL INFO. INST., https://law.cornell.edu/wex/void_for_vagueness (last visited Dec. 21, 2023).

138. *In re* Interim Bylaw, 772 A.2d at 744.

139. Sweeney, *supra* note 94, at 253.

demand, even if it meant expansion to higher elevations and the piecemeal elimination of some undeveloped spaces.

C. Case Study: Killington Mountain Resort and Snowmaking for Vermont's Climate-Change Future

If the Mad River Valley is the prototypical Vermont community reliant on ski areas as a local economic driver, then Killington Mountain Resort—located 50 miles south along the spine of the Green Mountains—is the model of a ski area reliant on the community for infrastructure, developable land, and workforce housing. In 1956, a group of local skiers leased property on the north aspect of Killington Peak—the second-highest mountain in Vermont—and developed four lifts and seven down-mountain trails.[140] At the time, resort-based alpine skiing was a relatively recent arrival to North America from Europe, and resort development in Vermont had mostly been confined to the area around Mount Mansfield and Stowe.[141] Located at the high point of Vermont Route 4 between the towns of Mendon and Sherburne, the minimal land-development pressures on the Killington area allowed the resort to grow quickly in the 1960s and 1970s, even after the passage of Act 250 focused scrutiny on such ski-area development and its local effects.[142] The ski area's rapid development in the early years set the stage for Killington as Vermont's prototype of the modern mega-resort. In a state that records upwards of five million annual skier days, Killington has established itself as the forerunner for skier visits and ski infrastructure alike.[143] With almost 2,000 acres of developed, skiable terrain, Killington's physical size alone would subsume a dozen smaller Vermont resorts.[144]

To grow from its humble roots to its current megalithic size, Killington had to acquire additional land—to increase skiable acreage—and find a way to keep the skier visits coming by generating artificial snow that would support the resort through Vermont's fickle winter weather patterns and

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140. *The History of Killington Ski Resort and Our Surrounding Town*, THE KILLINGTON GRP., https://www.killingtongroup.com/the-history-of-killington-ski-resort-and-our-surrounding-town/ (last visited Dec. 22, 2023).

141. LEMENSE ET AL., *supra* note 84, at 271.

142. *See id.* at 275 ("The passage in 1970 of . . . Act 250[] initially did little to impede Sherburne Corporation's rapid development and grandiose plans for expansion at Killington Resort into the 1980s."). Vermont ski-area lore is full of discussion of the heady early days of Killington: "Killington expanded like no other ski area had. . . . Peak after peak was opened, with a high variety of runs and lifts." Davis, *supra* note 38.

143. Exact numbers on skier days are hard to come by, since they are usually considered industry proprietary information, but the Vermont Ski Areas Association has confirmed that Killington outpaces other resorts in the state for skier days. Keays, *supra* note 88. Killington recorded near or above one million skier days per winter in the early 2000s, though resort visitation may have declined in the intervening years. LEMENSE ET AL., *supra* note 84, at 275.

144. THE KILLINGTON GRP., *supra* note 140.

periods of thaw. In 1986, a reorganized Killington ownership coalition began to develop additional skiable terrain on the southeast side of Killington Peak in the Madden Brook drainage, which descends through the unincorporated location of Parker's Gore to the town of Mendon.[145] The development plan involved combining leased and owned land in Parker's Gore and Mendon to create a new "wilderness" ski area, disconnected by elevation and aspect from the rest of the resort.[146] To make the Parker's Gore expansion a reality, the ownership coalition initially applied for an Act 250 development permit that, if approved, would have allowed the resort to dam Madden Brook to create a multi-acre snowmaking pond.[147] The initial damming-for-snowmaking permit application did not discuss the plans for future trails, but Mendon residents had heard of the resort's intentions for Parker's Gore, which would involve a significant amendment to the Mendon Town Plan in addition to an Act 250 permit.[148] The District Environmental Commission denied the permit, reasoning that the application was incomplete in light of the larger development project affecting Parker's Gore and the Town of Mendon.[149] Indeed, as Killington applied for—and subsequently appealed—the Madden Brook snowmaking-pond permit, the resort had also applied for an Act 250 permit to log sections of Parker's Gore, which would turn a timber-sales profit and pave the way for subsequent ski-trail development.[150]

There is no requirement within Act 250 that an Environmental Commission reviewing an Act 250 application need consider the cumulative impact of a ski area's multi-stage development project.[151] The Commission, which had denied the snowmaking-pond permit on an incompleteness basis, reused the initial fact-finding process in hearing the application to log sections of Parker's Gore, concluding that both applications violated Act 250 Criterion 8(a), which concerns sensitive wildlife habitat.[152] Because Parker's Gore contained sensitive black-bear habitat, the Commission reasoned, Killington had the burden as applicant to demonstrate that the proposal as a

145. "Gore," derived from the Old English word for "triangular piece of ground," is the Vermont designation for unincorporated land that was left over after formal surveying. Most of Vermont's gores are high-mountain redoubts slotted between valley towns on all sides. Mark Bushnell, *Then Again: A Use for Vermont's Leftover Bits and Pieces*, VTDIGGER (Mar. 26, 2017), https://vtdigger.org/2017/03/26/then-again-a-use-for-vermonts-leftover-bits-and-pieces/.

146. LEMENSE ET AL., *supra* note 84, at 288.

147. Anecdotal evidence suggests that the proposed snowmaking pond was unusually large for the era: most of the major snowmaking infrastructure now present at Vermont's ski resorts was absent as of the mid-80s.

148. LEMENSE ET AL., *supra* note 84, at 290.

149. *Id.* at 290–91.

150. Although timber harvests do not typically trigger Act 250, the elevation (above 2,500 feet) of the proposed logging meant that the proposal underwent Act 250 scrutiny. *Id.* at 291.

151. *Id.*

152. *Id.* at 290–91.

whole did not "imperil necessary black bear habitat."[153] When Killington appealed the Commission's decision to the Vermont Environmental Board, however, the Board considered both the snowmaking pond and the logging together in relation to the Criterion 8(a) issue.[154] The Board reasoned that both proposals would take away from sensitive black-bear habitat, both by encroaching on hibernation ground and by cutting stands of beech trees that provided an ursine food source.[155] The Killington ownership coalition, believing that they had exhausted administrative remedies within the Act 250 appeals system, appealed the Board decision to the Vermont Supreme Court. There, the coalition alleged a regulatory taking of the Parker's Gore land owned by the resort.[156]

The ensuing case, *Killington, Ltd. v. State*, demonstrated the complexity of bringing a takings challenge following a lengthy Act 250 review process. The state Supreme Court deemed the takings appeal unripe because the resort had not made the "mitigation undertakings" that would allow completion of the Parker's Gore project without damaging the black-bear habitat and violating Act 250 Criterion 8(a).[157] The proposed mitigation, emerging from the Act 250 appeals process, involved eliminating the proposed—and likely necessary—snowmaking pond and limiting skier traffic in the Parker's Gore bear habitat after April 1 each year.[158] Killington argued that, because the mandated mitigation efforts would render the Parker's Gore project infeasible, the Act 250 decision had stopped the resort from "using the land for its only reasonable, economically viable use—skiing."[159] The Court did not consider the merits of this argument because it deemed the takings case unripe: "Killington has prematurely filed a takings claim before a definitive final decision has been rendered determining allowable property uses."[160] In essence, to satisfy the ripeness verdict, Killington would have had to continue working on the Parker's Gore project for years at a time—without recouping any economic benefit in the form of ski-area expansion—to prove the impossibility of mitigation in accordance with Act 250.

Killington, Ltd. suggests that future takings cases involving Act 250 jurisdiction will only be ripe for appeal on constitutional grounds once all "mitigation undertakings" are completed.[161] This is equally problematic law for ski areas and surrounding communities alike: it suggests that developers

153. *Id.* (quoting a 1989 Environmental Board hearing).
154. *Id.* at 290.
155. *Id.*
156. Killington, Ltd. v. State, 668 A.2d 1278, 1281 (Vt. 1995).
157. *Id.* at 1283.
158. *Id.* at 1281.
159. *Id.*
160. *Id.* at 1284.
161. *Id.* at 1283–84.

may be subject to decades of appeal before finding resolution on potential subsequent projects. Though the Court used *Penn Central* to provide takings-law backing for the judgment on ripeness, the analogy between a legendary New York City high-rise and an undeveloped drainage off of a high ridgeline in the Green Mountains is hardly exact.[162] Though Parker's Gore would have been, by all accounts, a fantastic recreational addition to Killington's suite of terrain,[163] it was hardly the only option for resort development and expansion. The resort thrived, and continues to thrive, irrespective of the abandoned Parker's Gore project.[164] An improved review process for ski-area projects would create an efficient system for appeals to undergo Environmental Commission and Review Board analysis and reach final verdicts without asking for extensive, time-sapping mitigation efforts. Once the Review Board reached a final decision on the Act 250 issues of a ski area's proposed development, it would be clear to all involved whether the restrictions on the project constituted a regulatory taking. The lack of ripeness in *Killington, Ltd.* only served to extend the appeals process without providing a clear regulatory imperative.

The functional benefits that did emerge from the abandoned Parker's Gore project suggested that Act 250 is more effective than regulatory appeals litigation at promoting community consensus. Following the unsuccessful result in *Killington, Ltd.*, the resort ownership coalition began negotiations with the state Agency of Natural Resources (ANR), local landowners and land-trust organizations, and the Town of Mendon to donate the Parker's Gore land to the state in exchange for developable land elsewhere on Killington Peak.[165] In 1996, the resort filed a Memorandum of Agreement to allow the land swap to take place and for the resort to use a different water source, Woodward Reservoir, for its snowmaking needs.[166] Over 3,000 acres in Parker's Gore that Killington had owned became part of the Coolidge State Forest, which encompasses most of the range south of Killington Peak.[167] In return, the state gave the resort 1,000 acres to add to the base and summit area on the already-developed north aspect of Killington Peak.[168]

Negotiation between opposing parties in the Parker's Gore dispute led to better results. The process of negotiating the Memorandum and the land swap brought in conservation organizations, who had been granted party status during the hearing process in order to oppose Killington's proposed Parker's Gore development, as part of a broader conversation about land use in the

162. *Id.* at 1284; Penn Cent. Transp. Co. v. N.Y.C., 438 U.S. 104, 124 (1978).
163. THE KILLINGTON GRP., *supra* note 140.
164. *See* Keays, *supra* note 88 (discussing long-range statistics on skier usage at Killington Resort).
165. LEMENSE ET AL., *supra* note 84, at 294–95.
166. *Id.*
167. *Id.* at 295.
168. *Id.*

area.[169] This manner of deliberation between parties proved much more effective than the initial review process had been.[170] Killington could address community concerns while drafting the Memorandum and retain the ability to expand the resort and increase skiable acreage without intruding on bear habitat. Those opposed to development in Parker's Gore could effectively use the bear-habitat issues under Act 250 Criterion 8(a) as leverage for an important land swap without relying on protracted litigation in the state courts. Because Killington no longer possessed the land that had been subject to Act 250 regulation, the takings issue of *Killington, Ltd.* was essentially rendered moot: the parcel that could not provide an economically viable use was swapped out for parcels that could be of use.[171]

The out-of-court conclusions of the Parker's Gore dispute also contribute to better future planning for the resort as a whole. As part of the Memorandum, Killington agreed to use a "growth center concept" as part of future resort planning.[172] Future resort expansions, the parties agreed, would revolve around a "concentrated" area of development on the north side of Killington Peak, while the resort would preserve "large areas of open space" on other aspects.[173] Given the state of Killington today, with a hyper-developed base area and base access road standing in stark contrast to the vast Coolidge Range and Coolidge State Forest beyond, the growth-center concept seems to have been a substantial success. Taking a longer view, the Memorandum thus not only protected the black-bear habitat defined during the Parker's Gore hearings, but effectively protected a variety of other sensitive high-elevation animal and plant communities.[174]

D. Making Act 250 Review Compliant with Takings Jurisprudence

Act 250, both as a bulwark against development and a process of legal review, is only as effective as it is constitutionally sound. The process of appealing an Act 250 decision on regulatory-takings grounds has established precedent in Vermont.[175] But there is little clarity on how, or in what land-use and development contexts, plaintiffs could bring such a challenge in the future. Moreover, there is minimal clarity for real-estate developers,

169. *Id.*

170. *See* VT. STAT. ANN. tit. 10, § 6085(c)(1) (outlining hearing procedures and defining party status before Act 250 District Commissions); ARGENTINE, *supra* note 6, at 29; Gruenig, *supra* note 48, at 549–50 ("Act 250 provides citizens with a forum to advocate mitigation efforts for those proposed developments having adverse ecological impacts.").

171. LEMENSE ET AL., *supra* note 84, at 295.

172. *Id.*

173. *Id.*

174. *Id.* at 288, 290 (discussing elevation-dependent ecology in the Coolidge Range).

175. *Act 250 Program*, VT. NAT. RES. BD., https://nrb.vermont.gov/act250-program (last visited Dec. 21, 2023).

recreation-infrastructure proponents, town selectboard members, and other interested parties on where Act 250 and related regulation ends and Takings Clause issues begin. Lessons from *Kisiel*, *Interim Bylaw*, and *Killington, Ltd.* may help guide future Act 250 review and determine where future limitations on development may create inherent takings issues.

1. Limiting "Nonregulatory Abstractions" per *In re Kisiel*

The issue of "nonregulatory abstractions" denoted by Justice Dooley in his *Kisiel* opinion merits further analysis for municipalities and communities subject to the complexities of Act 250 review processes. Following *Kisiel*, town planners and zoning boards should be well apprised of the limits to legally binding language in town plans and should know to draft plans that are sufficiently specific to have the force of law. Moreover, parties challenging language in a town plan during the Act 250 review process should take from Dooley's opinion the distinction between nonregulatory abstractions and controlling language that is relevant to local review processes as well as Act 250 hearings and appeals. Critically, to maintain local control over the regulatory process and not turn every development project into a tangled web of Act 250 appeals, local land-use leaders must limit nonregulatory abstractions and make sure that they give town and regional plans adequate force of law.

2. Promoting Growth-Center Development in Recreation Hotspots

The "growth center concept" at the heart of the Killington Memorandum is worth examining at a broader level as a potential solution for other land-use conflicts in Vermont. Indeed, though this Note's analysis focuses on recreation hotspots such as Killington and the Mad River Valley, which experience development pressures due to visitors, second-home owners, and area transplants, the growth-center concept could be used effectively in many different contexts.[176] For example, to transplant one of the lessons of Parker's Gore and the Memorandum to the Mad River Valley, an updated Waitsfield Town Plan for the 2020s and beyond might include specific language to encourage cloistered growth near Irasville, on Route 100, and to bolster developers' abilities to introduce proposals for high-density workforce housing and affordable rental properties.[177] The town could draft specific proposals to increase housing stock and availability of workforce housing without promoting development in upland areas that need greater protection,

176. *See* LEMENSE ET AL., *supra* note 84, at 295 (discussing other implementations of the growth-center concept in Vermont).

177. WAITSFIELD PLAN. COMM'N, *supra* note 99, at 12-11.

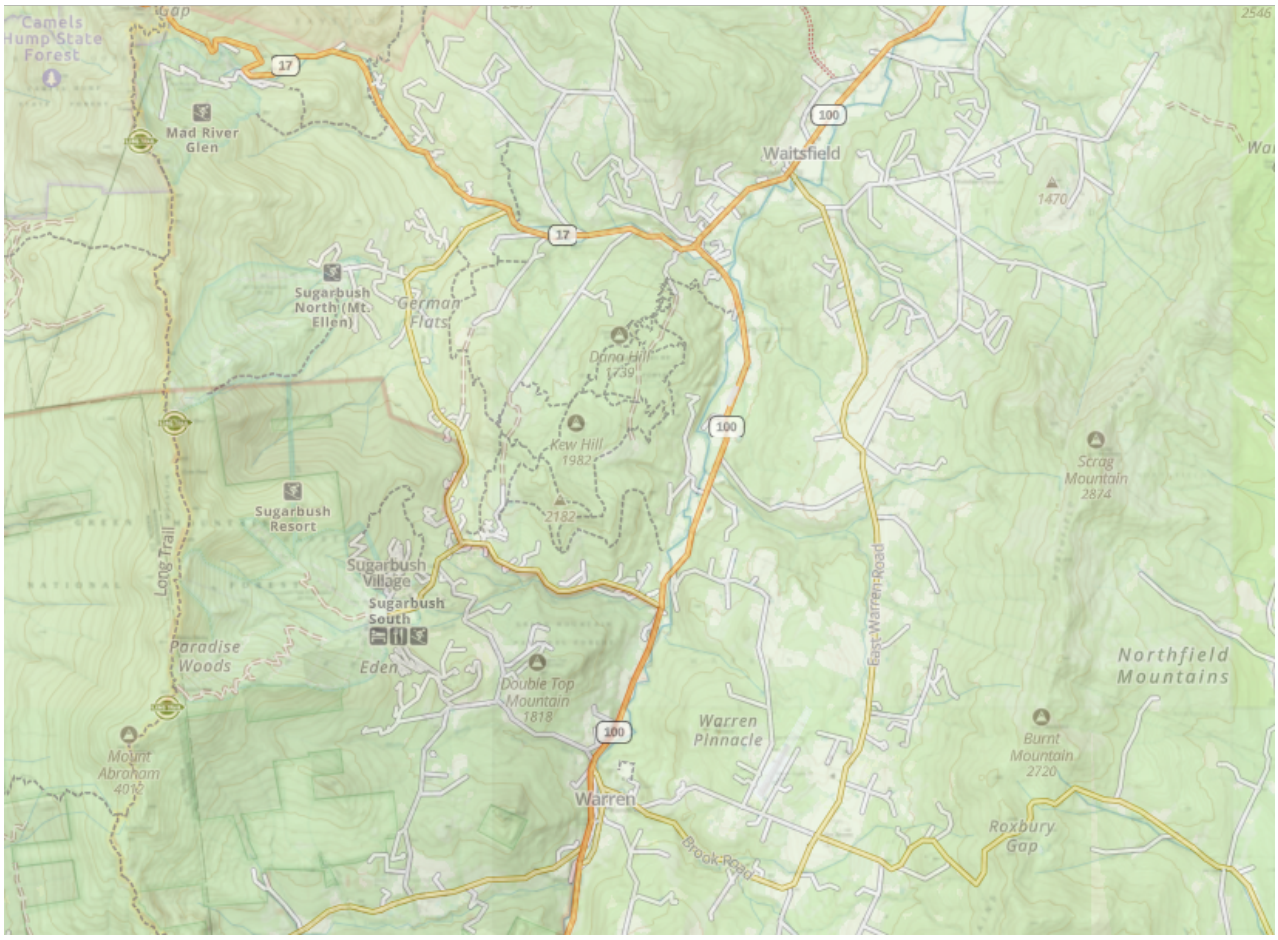
both for their recreational and ecological value. Waitsfield could get out in front of the housing-pressure problem, which has been causing development conflicts for decades, by agreeing on a durable growth-center concept for the area. Such a concept would help to shape policy and avoid future *Kisiel*-like disputes in which housing demand, local regulations, and Act 250 collide.

CONCLUSION

The aim of this Note has been to examine takings challenges to Act 250 regulation as a lens on effective reform and the contradictions contained therein. This Note proposes Takings Clause jurisprudence as an important tool for improving Act 250 and allowing parties on both sides of the regulatory coin a different perspective on the mandates of the regulatory process. A takings challenge to state regulations manifests the contradictions inherent in maintaining local control—something that Vermonters fiercely value, yet sometimes mismanage. Regulators, local officials, community members, and private landowners can all benefit from a reassessment of how Act 250 can protect entrenched values and satisfy emergent needs. By reviewing how Vermont courts have treated past cases involving outdoor recreation-related development demands, stakeholders can rethink the divide between economic development and ecological preservation.

Moreover, a solid understanding of takings jurisprudence and of Fifth Amendment issues around private property and development must inform the reconfiguration of Act 250 as a tool for conservationists and regulators. Those looking to reform Act 250 should consider the areas of tension between valid regulatory restrictions and landowners' rights that crop up during takings challenges. Such a reform effort can use the lessons of development-pressured communities that have successfully negotiated between the needs of conflicting parties and found economically viable paths forward. Ultimately, a hopeful view of a wisely reformed Act 250 sees Governor Davis's vision expanding to fit the legal needs of communities across Vermont as they meet the climate-change future head on.

Appendix 1. Mad River Valley Recreation Map[178]



178. *Mad River Valley Recreation Map*, GAIA GPS (2003).