

**LAW OFFICE OF  
MARC D. NEMETH, PLC**

---

1011 North Main Street, Suite 29  
White River Junction VT 05001  
(802) 763-2227  
marc@royaltonlaw.com

June 28, 2017

Mayor John Hollar  
City Hall, 39 Main Street  
Montpelier, VT 05602

RE: Proposed Zoning By-Law &  
Adoption of Natural Community Municipal Ranking

Dear Mr. Mayor,

This office represents Mr. Alan Goldman. We have been asked by Mr. Goldman to respond to the adoption of a Natural Community Ranking System under the proposed zoning by-laws. Please accept the following as an initial discussion of the issue. I am currently out of town and would be appreciative if I could be provided with some time at the upcoming meeting on July 12 to address the Council and answer any questions regarding this matter.

The protection of environmental resources is an essential, if not the most critical, element of the municipal planning process. Montpelier residents truly understand, recognize and prioritize their mandate to protect the City's natural communities and biological assets. The City's 2010 Master Plan established environmental conservation as a primary goal and expressly adopted the following principal:

*Montpelier is rich with intact ecosystems and their diverse natural communities. We protect and restore our natural heritage, rare and endangered species and communities, wildlife corridors, and the overall biodiversity of the city. There are strong links to larger ecosystems surrounding the city, and we are mindful of our regional and global assets and impacts.*

Master Plan, Montpelier, Vermont, Pg. 65. Adopted September 8, 2010.  
Retrieved on June 27, 2017, at <http://www.montpelier-vt.org/DocumentCenter/Home/View/1227>

In confirming Montpelier's "complete rewrite" and adoption of a "dense and ambitious" plan in 2010, the Central Vermont Regional Planning Commission specifically commended the City's "statement of policies on the preservation of rare and irreplaceable natural areas, scenic and historic features and resources".

*Chapter 3 "Natural Environment" contains numerous goals, targets, and strategies designed to protect Montpelier's natural resources... The Plan contains numerous maps depicting its natural resource base, including: Conservation Lands, Biodiversity Conservation Areas, Important Views and Vistas, Wildlife Habitat, Wetlands and Waterbodies, and Natural Communities.*

CVRPC Approval Letter, pg. 4. November 18, 2010. Retrieved on June 27, 2017, at <http://www.montpelier-vt.org/DocumentCenter/View/1228>.

The City's Natural Resource Inventory Map, and the proposed zoning regulations that implement the map, are almost entirely based on a professional study entitled "A Natural Community Inventory of the City of Montpelier, Vermont". The study was developed and performed by Brent Engstrom and John DeLeo under contract with the City. Mr. Engstrom is, or was, an independent ecologist/biologist of Marshfield, Vermont. Mr. DeLeo is, or was, a Full Professor tenured faculty at Lyndon State College.

The environmental policies and regulations set forth in the proposed zoning by-laws draw almost exclusively from this particular study and the following documents:

- A Natural Community Inventory of the City of Montpelier, Vermont (referred to below as the "NC Study"). Brent Engstrom and John DeLeo. May 2, 2007.

- Natural Communities in the City of Montpelier (referred to below as the “NC Map”). Brett Engstrom and John DeLeo. May, 2007.
- City of Montpelier Master Plan, Figure 14 – Natural Communities. Brett Engstrom & City of Montpelier GIS Dept of Planning & Community Development. July, 2008. Retrieved on June 27, 2017, at <http://www.montpelier-vt.org/DocumentCenter/Home/View/1211>.
- Montpelier, Vermont. Natural Resources Inventory Map. Retrieved on June 27, 2017, at <http://www.montpelier-vt.org/DocumentCenter/View/3581>
- Montpelier, Vermont. Natural Resources Inventory Map. Draft 3/10/17.
- Montpelier, Vermont. Natural Resources Inventory Map. Draft 9/12/16

Both the NC Study and the NC Map were compiled in 2007 and represent data that is now almost a decade old. The report is preliminary in nature and specifically states that substantial groundwork must be conducted before the existence and location of potential natural communities can be confirmed. Any initiative by Montpelier to undertake its conservation mandate must first be based upon sound scientific principles and verifiable data. The authors of the NC study contemplated follow up groundwork and verification of the potential conservation sites identified on the NC Map. It appears that the follow up work has not yet been performed. Despite not having performed the necessary groundwork as contemplated by Mr. Engstrom and Mr. DeLeo, the proposed zoning by-laws restrict the development of potential conservation sites without first acquiring necessary data to confirm the study’s specific site recommendations.

The proposed zoning by-laws effectively ignore repeated indications that more fieldwork is necessary to verify the significance and reliability of the authors’ conclusions and recommendations. This in turn led to numerous discrepancies that exist between the NC Study and the Montpelier Natural Resource Inventory Map (referred to below as “NRI Map”) as drafted into the City’s proposed zoning by-laws.

The NC Study expressly indicates that many of the City's identified natural community sites would require additional groundwork before their specific municipal designations could be confirmed and subsequently adopted. This is a critical point because the City apparently failed to undertake necessary site visits and related fieldwork before considering the implementation of extraordinarily restrictive regulations relating to designated natural communities. As if to underscore the preliminary and incomplete nature of the proposed designation system, the NC Study expressly flagged vulnerabilities in the following classifications:

- Rich Northern Hardwood Forest “need to be visited to determine whether rich woods are present”. (NC Study, P.15.)
- Riverside Outcrops require additional groundwork. “Only one of the three units was surveyed, and it was in very weedy condition. The other two units need survey.” (NC Study, P.16.)
- Red Maple Black Ash Swamp was not visited. “Field surveys are required to verify their classification and condition”. (NC Study, P.17.)
- Since Sedge Meadow “all occur in open areas that were formerly pastures, their status as a ‘natural community’ is held in question”. (NC Study, P.18.)
- River Sand or Gravel Shore are identified as shore communities. “Only one of these shore communities was visited during the inventory. More field work needs to be done on this natural community in order to assess their biodiversity significance.” (NC Study, P.18.)
- River Cobble Shore finding that “more field work is needed on this natural community”. (NC Study, P.19.)
- Alluvial Shrub Swamp finding that “more field work is needed on this natural community”. (NC Study, P.19.)
- Alder Swamp “site was not visited”. (NC Study, P.19.)
- Sloping Seepage Forest “occurrences are believed to be significant for biodiversity conservation on the municipal level, but need more field survey to determine the community’s municipal rank.” (NC Study, P.19.)
- A major omission in the inventory and map of biodiversity conservation areas is the rivers themselves. (NC Study, P.23.)

The treatment and consideration of Vernal Pools in the NC Study is particularly relevant in this discussion. “Vernal pools might be state significant, but could not be evaluated for their use for breeding by vernal pool obligates since visited in the autumn.” (NC Study, P.8.) The study additionally indicates that vernal pools “must be assessed during the spring and the early summer to determine their significance as breeding habitat for amphibians, which, in turn, is a criteria in determining the significance of Vernal Pools on the state level”. (NC Study, P.18.)

Vernal Pools may represent one of the most troubling natural community designations because they will be subjected to a much stricter regulation than the State standard. Even though there is insufficient groundwork and data to warrant the designation of at least ten of the City’s Vernal Pools as identified so far, the proposed zoning by-laws will effectively restrict development within a 500-foot buffer zone surrounding every Vernal Pool that is identified by the NRI Map. A decision by the City implement a 500-foot buffer zone around Vernal Pools will exceed a standard 50-foot buffer zone that is typically applied by State regulatory agencies.

The adoption of an unreasonably expansive buffer zone, one that may exceed the State standard by a factor of 10, is inconsistent with the provision of Goal B: Natural Communities & Biodiversity in the 2010 master plan. Goal B provides that “when a standard evaluation of services has been established and adopted by the State of Vermont, the City uses the values to inform the value of the natural assets into infrastructure and utility decisions”. (Master Plan, P.66.)

It is also important to note that many other Vernal Pools in the City have been overlooked, under-evaluated or actively excluded (possibly due to a perceived negative impact on a contemplated development project) from designation on the NRI Map without the benefit of any qualified review. The proposed regulation of specifically targeted Vernal Pools, absent a scientifically established classification process, inequitably places the burden of protecting a questionable natural resource upon a handful (but not all) landowners who have potential Vernal Pools on their property.

A review of the progression of the NRI Map reveals that the map has been modified substantially since its original development by Engstrom and DeLeo in 2008. While it may be unclear as to who actually undertook the modification of the NRI Map over the past ten years, public records confirm, or at least suggest, that the changes were not considered or confirmed by the authors of the NC Study or other qualified personnel.

Notwithstanding the questionable qualification of persons who undertook the subsequent determination of municipal classifications within the City, the latest version of NRI Map clearly identifies numerous areas as “M1” and “M2” natural communities. These designations are another active departure from the State classification system and will ultimately subject the designated areas to higher standard of regulation.

It ultimately appears that the most troubling problem, if not the fatal flaw, is the potential decision to enforce a municipal classification system that is untested and unverified. The authors of the NC Study took care to indicate that their municipal ranking methods were newly created for the City of Montpelier. “[The rankings] may represent the first municipal ranking methodology devised for any municipality in Vermont. As a first attempt, they are provisional and need more testing”. (NC Study, P.6.) Despite the express disclaimer of the authoring proponents, a preliminary and untested system of municipal rankings now appears to have been adopted and wholly incorporated into the City’s proposed by-laws. When asked the question as to whether the City will undertake the steps necessary to eventually validate its municipal ranking system, the Montpelier Planning Commission apparently responded by suggesting that landowners may ultimately be tasked with the responsibility and obligation of proving that a particular parcel should not fall within a particular municipal ranking.

The adoption and enforcement of a proposed municipal ranking system represents an unfair and unreasonable burden to place upon landowners given the preliminary status and untested methodology contemplated by the NC Study. As such, the Montpelier leadership has faltered in its continuing effort and obligation to meet the conservation goals and environmental mandates established by the City’s Master Plan.

The City must first undertake the task of validating the municipal classification of local natural communities (as directed by the authors of the NC Study) before we can reliably consider effecting by-laws that regulate specific environmental assets. The City should take pause to recognize that it may once again be “placing the cart before horse” as it considers the adoption of regulations without first establishing a proper system or plan to inform their regulatory scheme.

Regards,

*Marc D. Nemeth /s/*

Marc D. Nemeth  
Attorney for Alan Goldman