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Act 250 & Environmental Hot Topics in Litigation

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Environmental Division Year in Review

October 13, 2017
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**Note: While these cases present a number of legal issues, the following summaries focus on discrete issues that we found to be most interesting.*

Atwood PUD – Jericho, No. 170-12-14 Vtec (Vt. Super. Ct. Envtl. Div. Feb. 4, 2016) (Walsh, J.); *rev'd and remanded by* In re Atwood Planned Unit Dev., 2017 VT 16 (Vt. Mar. 17, 2017)

- Neighbors appealing a Planned Unit Development ("PUD") permit filed a Statement of Questions asking, in a single question, whether the proposed PUD satisfied the requirements of the zoning regulations.
- The Environmental Division ordered Neighbors to amend the Statement of Questions to be more specific. Neighbors filed three new questions asking whether the project complied with requirements for PUDs in the regulations, whether the project qualifies for waivers, and whether the project complies with the town plan.
- After trial, the Environmental Division affirmed the approval of the permit application. In a merits decision, the Court explained that it would not address conditional-use review, subdivision review, or general development standards because neighbors' Amended Statement of Questions did not explicitly raise those issues.
- In its reversal of the trial court, the Supreme Court noted that the Statement of Questions asked whether the project complied with provisions of the zoning regulations controlling PUDs, and that those provisions, in turn, require compliance with provisions on conditional use, subdivision review, and general development standards. The Court therefore held that the Statement of Questions raised compliance with provisions on conditional use, subdivision review, and general development standards. Because these issues were raised and litigated, the Environmental Division had to address them.

Laberge NOV, No. 164-12-13 Vtec (Vt. Super. Ct. Envtl. Div. Oct. 15, 2015) (Durkin, J.), *aff'd by* In re LaBerge NOV, 2016 VT 99 (Sep. 2, 2016)

- Following up on a request by Neighbors, the Zoning Administrator issued an NOV that the Laberges' motocross riding violated zoning regulations § 5.12.1, which states: "Unreasonable noises are not permitted. A determination of 'unreasonable' shall include factors such as intensity, duration, and frequency (i.e., how often it occurs)." The ordinance exempts "usual and customary residential activities or property maintenance."
- Laberge appeals to DRB, which concludes that the motocross riding does not violate § 5.12.1.

- Neighbors appealed to the Environmental Division, filing a statement of questions asking (1) whether the motocross motorcycle riding violated § 5.12.1, (2) whether the riding is unreasonable noise under the regulations, and (3) whether the riding is a usual and customary activity.
- Before the Court, Laberge challenged the ordinance as unconstitutionally void for vagueness. The Environmental Division analyzed this issue and held the ordinance is not unconstitutionally vague.
- On appeal to the Supreme Court, Laberge again argued the ordinance is void for vagueness. Neighbors responded that this question was not properly preserved for appeal, because the constitutional issue was not presented in their own statement of questions, and Laberge did not cross-appeal and file its own statement of questions. Therefore, neighbors argued, the Environmental Division was without jurisdiction to consider the question.
- The Supreme Court determined that the constitutional issue is intrinsic to the question of whether the dirt biking and/or motocross use of the LaBerges' property violates § 5.12.1, since that question requires the Court to consider the meaning and reach of this ordinance.

Harrison Conditional Use, No. 49-5-16 Vtec (Vt. Super. Ct. Envtil. Div. Apr. 18, 2017) (Walsh, J.)

- Neighbor appealed a decision granting a conditional use permit for a rock and sand quarry.
- Two days before trial, neighbor filed a motion to amend the statement of questions. At trial, after permittee provided only limited information in opposition, the Environmental Division verbally granted the motion.
- After trial, permittee filed a motion to reconsider with more detailed information. The Court granted the motion to reconsider, holding that the motion to amend the Statement of Questions was brought at a late stage in the proceedings without justification for the delay, and that granting the motion would prejudice the other parties as they were not provided sufficient notice to prepare legal arguments or modify their application.

See also **Laberge Shooting Range JO**, No. 96-8-16 Vtec (Vt. Super. Ct. Envtl. Div. Jan. 4, 2017) (Walsh, J.) (explaining circumstances under which the Court will grant a motion to amend a Statement of Questions); **Korrow Real Estate, LLC Act 250 Permit Amendment Application**, No. 29-3-16 Vtec (Vt. Super. Ct. Envtl. Div. Feb. 15, 2017) (Durkin, J) (same).

Burns Two-Unit Residential Building, No. 120-8-14 Vtec, slip op. at 7 (Vt. Super. Ct. Envtl. Div. June 23, 2015) (Walsh, J.), *rev'd and remanded* by In re Burns Two-Unit Residential Bldg., 2016 VT 63 (Vt. May 27, 2016)

- In Burlington, neighbor submitted a zoning enforcement complaint alleging that property owner was converting a single-family home into two apartments without a permit.
- A zoning specialist from the city code enforcement office responded by letter stating that the building had been used as a duplex since before the zoning regulations were enacted,

and therefore no permit was needed. The letter stated that it was appealable to the development review board. No appeal was filed.

- The Environmental Division ruled on summary judgment that the letter was an appealable decision of an administrative officer under 24 V.S.A. § 4465 because the letter made clear that it was a legal determination subject to appeal; and because the zoning administrator gave the zoning specialist the power to issue such letters, and had personally reviewed and authorized the letter.
- The Supreme Court disagreed, explaining that under city ordinances and relevant statute, the Director of Planning and Zoning is the administrative officer, and the letter was not issued or signed by that official or by any assistant administrative officer with clearly delegated authority.

Bold Zoning Permit Amendment, No. 130-11-15 Vtec (Vt. Super. Ct. Envtl. Div. Dec. 16, 2016) (Durkin, J.)

- Village denies prior homeowner's application to remove shutters.
- Afterwards, in a separate case, the Environmental Division ruled that the same zoning regulations do not mandate that shutters remain on homes, since the regulations stated that architectural features such as shutters "shall be considered" by the DRB, but did not mandate that shutters must be required.
- In response to this decision, the Village amended the regulations to state that architectural features such as shutters "shall be retained where appropriate."
- New owner of the same home filed new application to remove shutters. The DRB rejected the application under the successive application doctrine.
- On appeal, the Environmental Division explained that:
    - The successive application doctrine bars a person from submitting a second application after a first application concerning the same property and same request has already been considered.
    - The doctrine allows a second application, however, if it addresses the concerns that prevented the first application from being approved, or if there has been a material change in the applicable law or regulation.
- Homeowner argued there were two changes here: the Court's interpretation of the regulations in the separate case, and the subsequent amendment of the regulations.
- The Court held, however, that because the changes made it less likely that the same application would be approved, the second application was still barred by the successive application doctrine.
- The Court effectively announced that for a second application to be considered, that application has to address the concerns that prevented the first application from being approved, or there has to have been a change in the regulations that benefits the applicant and makes it more likely that the application will be granted.

Shatney Home Occupation Denial, No. 43-4-16 Vtec (Vt. Super. Ct. Envtl. Div. Oct. 27, 2016) (Durkin, J.)

- Landowner filed permit application shortly after the town selectboard issued notice of proposed changes to the zoning regulations. The selectboard then rejected the proposed amendments. The Zoning Administrator denied the permit application without considering whether it should have been granted pursuant to the proposed amendments.
- The landowner appealed, arguing that the application should have been considered under the proposed amendments.
- The Environmental Division explained that under our vesting doctrine, a zoning permit application is reviewed under the zoning regulations that are in effect at the time the application is filed. An exception to this is set out in 24 V.S.A. § 4449(d), which requires a Zoning Administrator, under certain circumstances, to review zoning amendments under proposed regulations.
- The Court held that under § 4449(d), once notice of a public hearing on proposed zoning amendments is given, a zoning administrator must review permit applications under those proposed amendments until either 150 days pass, or the proposed amendment is rejected.
- Here, because the proposed amendment was rejected, there was no requirement to review the application under those proposed amendments.

N.E. Materials Group LLC A250 JO #5-21, No. 143-10-12 Vtec (Vt. Super. Ct. Envtl. Div. Apr. 28, 2014) (Walsh, J.), *rev'd and remanded by* 2015 VT 79, 199 Vt. 577

N.E. Materials Group LLC A250 JO #5-21, No. 143-10-12 Vtec (Vt. Super. Ct. Envtl. Div. Dec. 23, 2015) (Walsh, J.), *rev'd by* 2016 VT 87 (Vt. Aug. 12, 2016)

- A 1,000+ acre quarry that pre-dates Act 250 (and therefore operates without a permit) began a new rock-crushing operation. The parties disputed whether the new operation triggers Act 250 jurisdiction.
- Act 250 jurisdiction is triggered if the new rock-crushing operation is a "substantial change" from prior activity at the quarry. A substantial change occurs if: (1) there is a cognizable physical change; and (2) that change has the potential for significant impact under any of the Act 250 criteria.
- The Environmental Division held that the new operation was not a cognizable change because there was a long history of rock-crushing at the quarry. Because the first prong of the test was not met, the Court did not address the second prong.
- In a split 3-2 decision from the Supreme Court, the majority disagreed with the Environmental Division's analysis, in part because the rock crushing that had taken place on the quarry in the past had been at different sites than the site now proposed. The majority also called for the Environmental Division to consider impact, and the majority and dissent disagreed about whether this would effectively reverse or combine the two prongs of the substantial change test by taking impact into account under the first prong.

- On remand, the parties were given the opportunity to present new evidence, but did not do so. The Environmental Division again concluded that the rock-crushing operation would not be a substantial change, this time noting that rock crushing operations had moved from site to site on the overall tract in the past, and that the new operation in a new site was consistent with this historical practice.
- With the same 3-2 split, the majority again called for consideration of impact, and the majority and dissent again disagreed about whether doing so would comply with the two-part test.

In re B & M Realty A250 Application, no. 103-8-13 Vtec (Vt. Super. Ct. Envtl. Div. Nov. 12, 2015) (Walsh, J.) *rev'd by* 2016 VT 114 (Vt. Oct. 21, 2016)

- Regional plan limited "principal retail establishments" to town centers and designated growth areas to prevent sprawl and strip development, and maintain rural character.
- Environmental Division held that a mixed-use project encompassing 115,000 square feet, 40,000 of which was for retail space, was not a "principal retail establishment" under the regional plan, because "principal retail establishment" suggests that retail should be the chief, leading, or most important use.
- The Supreme Court reversed, explaining that a mixed-use development can have multiple primary or principal uses, and that retail was one of the principal uses proposed here. The Court further noted that the Environmental Division's interpretation would allow unlimited development outside of growth areas, frustrating the purpose of the regional plan to prevent sprawl and strip development.
- In reaching this conclusion, the Supreme Court explained that it reviews the Environmental Division's determination of conformity with a regional plan without deference, abrogating In re Chaves A250 Permit, 2014 VT 5, 195 Vt. 467.
- Notably, many other regional planning commissions from around the state, the Vermont Natural Resources Council, and Preservation Trust of Vermont filed amicus briefs in the Supreme Court, advocating for reversal.

Wagner & Guay Permit, No. 150-10-14 Vtec (Vt. Super. Ct. Envtl. Div. Apr. 2, 2015) (Walsh, J.); aff'd by In re Wagner & Guay Permit, 2016 VT 96 (Sep. 2, 2016)

- Neighbor appealed a town decision granting single-family home permit on a previously approved six-lot subdivision.
- Zoning bylaws § 2.4, titled the "General Purpose, Interpretation and Applicability," states in part that the bylaw "must not repeal, abrogate, or impair any other land use controls (including easements, deed restrictions, covenants, or similar devices)."
- Neighbor argued in part that the permit is inconsistent with covenants and restrictions for lots in the subdivision.
- The Environmental Division explained that this part of § 2.4 is general guidance for interpreting the bylaws, but is not by itself grounds for denying a permit application. The

Court went on to explain that it has no jurisdiction to adjudicate disputes over private property rights.

- The Supreme Court affirmed, explaining that this part of § 2.4 is not a specific zoning restriction, and that it does not mandate the town to enforce private contractual land use restrictions through the zoning bylaws.

ANR v. McGee, No. 94-8-15 Vtec, (Vt. Super. Ct. Envtl. Div. Oct. 9, 2015) (Walsh, J.) *aff'd by* 2016 VT 90 (Aug. 19, 2016)

- Landowner placed dredged fill into the wetland. Landowners had farming operations on other locations on their land, but used the area at issue only for occasional horse grazing. ANR issued NOV for violation of the Wetland Rules.
- Landowners appeal, arguing the land was subject to the farming exemption to the wetland regulations.
- The Environmental Division concludes that the activities of grazing and intermittent brush clearing did not meet the farming exemption to the Wetlands Rules. Even if these did meet the exception, there was evidence that these activities were not continuous over the years, as required by the Wetland Rules.
- The Supreme Court affirms on the basis that the activity was not continuous, and therefore does not reach the question of whether the activities would otherwise qualify under the farming exemption.

In re Costco Stormwater Discharge Permit Application (Permit No. 4114-9015.2), No. 75-6-12 Vtec (Vt. Super. Ct. Envtl. Div. Aug. 27, 2015) (Durkin, J.), *aff'd by* 2016 VT 86 (Aug. 5, 2016)

- Here, the Court coordinated five separate appeals of state and municipal permit determinations for trial. Discussed below is one discreet legal issue that was before the Court.
- Neighboring gas stations appealed permits granted to Costco for expansion of their store and additional gas station.
- One component of the stormwater treatment system – an underground pipe and outlet structure – was allegedly not fully disclosed to ANR or considered by ANR when ANR approved the permit application. Neighbors argued that the issue must be remanded to ANR for consideration.
- Environmental Division declined to remand, explaining that when a change to a permit application is minor, and there is no evidence that the change will implicate new review criteria or impact new neighbors, there is no need to remand.

Gould v. Town of Monkton, No. 97-8-16 Vtec (Vt. Super. Ct. Envtl. Div. Dec. 1, 2016) (Walsh, J.)

- Property owner filed a complaint in the Civil Division seeking a declaratory judgment that the town had adopted zoning regulations without following the appropriate statutory procedures. The Civil Division dismissed the claim for lack of subject matter jurisdiction. Gould v. Town of Monkton, No. 67-3-13 Ancv (Super. Ct. Civ. Div. Nov. 6, 2014) (Mello, J.), *aff'd* 2016 VT 84 (July 29, 2016).
- While the matter was pending in the Civil Division, property owner filed a zoning permit application with the town, which was denied. Property owner did not appeal the denial.
- Property owner filed a complaint in the Environmental Division, again seeking declaratory judgment that the zoning regulations had been adopted in violation of statutory procedural requirements.
- The Environmental Division explained that:
    - A party can file a case in the Civil Division alleging that a zoning regulation was adopted in violation of constitutional requirements.
    - A party can appeal a municipal regulatory decision to the Environmental Division where that decision was made pursuant to a zoning regulation that was adopted in violation of constitutional requirements or statutory requirements.
- The decision discussed whether or how a party can file a case such as the one here, which alleged that a zoning regulation was adopted in violation of statutory requirements without also appealing a specific municipal regulatory decision.

Leverenz Act 250 JO, No. 123-10-15 Vtec (Vt. Super. Ct. Envtl. Div. Sep. 30, 2016) (Durkin, J.)

- Act 250 permit was issued in 1993, for a term of 10 years, for a seasonal horse exhibition, including a parking area, riding ring, tent, barn, ticket booth, and bleachers. The permit required all structures to be removed each fall. In 1994, the legislature amended Act 250 to extend all permits issued before 1994 indefinitely.
- The property owners discontinued the horse shows prior to 2003 and removed all remaining structures. The only remaining improvements were a rough driveway (pre-dating the 1993 permit), power lines, two telephone poles, and a capped well.
- Property owners requested an opinion that Act 250 jurisdiction no longer attached to the property.
- The district coordinator held that the ten-year time limit of the original permit was extended by the legislative amendment, and Act 250 jurisdiction therefore continued to apply to the property. The NRB affirmed.
- The Environmental Division declined to apply the statutory extension to the permit, holding that the permit expired in 2003 and the property was no longer subject to Act 250 jurisdiction. The decision explains that jurisdiction is only extinguished in this way under a narrowly-defined set of circumstances.

Stanion NOV, No. 129-11-15 Vtec (Vt. Super. Ct. Envtl. Div. July 18, 2017) (Walsh, J.)

- Zoning Administrator issues a notice of violation alleging that homeowner's front yard fence violated zoning regulations because it was built without a permit and did not comply with height and setback requirements or a requirement that fences have an "open type construction." The Development Review Board ("DRB"), on appeal, affirmed violations.
- On appeal to the Environmental Division, homeowner argued that the fence is an exempt farm structure because it is used in support of beekeeping activities.
- The Environmental Division explained that 24 V.S.A. § 4413(d) exempts farm structures from zoning regulation, but requires compliance with setbacks approved by the Agency of Agriculture, Food and Markets. AAFM regulations require farm structures to either comply with local setback requirements, or obtain a variance from AAFM. Rules of the Agency of Agriculture, Food, and Markets, Rule 401, Code of Vt. Rules 2-3-401:9 (WL).
- In analyzing whether the fence qualified as a farm structure, the Environmental Division focused on the use of the fence, noted that a fence may serve more than one purpose, and held that "to be an exempt farm structure, the use of the fence in association with farming must be one of the fence's primary uses," and not just incidental or de minimus. The case was ultimately remanded to the DRB for additional fact finding.

POSTSCRIPT: SEVEN MORE YEARS OF ACT 250

This is a review of the most recent seven years of Act 250, supplementing "*The Evolution of Act 250: From Birth to Middle Age*."[1] During those years, Act 250 has been tested, amended, heralded, disdained, and reconstrued. During the 2017 session of the General Assembly, the Legislature challenged the Vermont Natural Resources Board to define the act for its second 50 years. This comes through the work and final report of the Commission on Act 250: the Next 50 years, chaired by Rep. Amy Sheldon, given the responsibility of reviewing the goals of Act 250, listening to Vermonters' views of the priority of maintaining the environment, and recommending improvements to the State's comprehensive land use law.[2]

This postscript to the *Evolution* essay follows the same chronological order, beginning in 2010, reviewing the legislative changes over the septenary, and the leading decisions of the Vermont Supreme Court on Act 250. A full review of how Act 250 is working requires an understanding of how the legislative and judicial branches are affecting the law's administration, but it is not within the scope of this study to discuss or analyze the work of the District Coordinators and Commissions, developers, neighbors, and the Vermont Environmental Division (on those decisions that have not been tested on appeal), on applications that are reviewed, granted, amended, denied, and challenged over those seven years. The focus is on legislative and appellate decisions, where the significant changes in how land use is regulated through Act 250 are found, examined, articulated, and converted into precedent.

The use of jurisdictional opinions is increasing, and represents the best administrative process to ensure compliance and clarity in Act 250. The VNRB still operates under the 2006 Rules of Procedure. The quasi-judicial role of the VNRB is in addition to its duty to administer Act 250 and enact rules for itself and for Act 250. The Act 250 Rules were amended in 2013 and 2015. The statutory authority for Act 250 has been the subject of many amendments. The ten criteria have been altered 19 times in Act 250's 47 years. The definition of "development" has been amended 29 times in those years. By comparison, Vermont Bill of Rights, the first chapter of the Vermont Constitution, have rarely been changed, and are generally regarded as untouchable.[3]

After nearly five decades, there are still many questions without good answers, to be decided in the courts.

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[1] Paul S. Gillies, "The Evolution of Act 250: From Birth to Middle Age," in *Uncommon Law, Ancient Roads, and Other Ruminations on Vermont Legal History* (Montpelier, Vt.: Vermont Historical Society, 2013), 280-303.

[2] "An act relating to the Commission on Act 250: the Next 50 Years," No. 47 (2016, Adj. Sess.)

[3] Since the Constitution of 1793, Chapter I has been altered only twice. In 1828 Article 1 was amended to require only natural and naturalized citizens of the state to vote in the general election to elect legislative, state or congressional officers. In 1924, Article 10th was amended to allow the accused, in prosecutions for any crime except those punishable by death or imprisonment in the state prison, to waive a jury trial in favor of trial by a judge..

Beyond Middle Age: 2010-2017

The composting industry has grown significantly in the era of recycling. In 2010, the General Assembly enacted a comprehensive regulatory system for composting, exempting small operations of no more than 100 cubic yards per year, compost principally produced or used on the farm, compost produced from manure on a farm, and compost on a farm that includes up to 2,000 cubic yards of food residuals as long as the total farm income exceeds that from composting and uses no more than 10 acres or 10% of the parcel, whichever is less. The act includes a curious feature authorizing the Chair of the District Commission to determine whether the owners or operators of a composting facility are trying to circumvent the law and to punish these attempts by vesting jurisdiction of Act 250 on these respondents, requiring a permit, as a penalty. The "involved land" rule does not apply to compost facilities governed by Act 250.[4]

Neighbors of a proposed solid waste facility in Williston sued the Town claiming that its agreement with the Chittenden County Solid Waste Management District compromised their rights, in *Gade v. Town of Williston* (2009).[5] The agreement promised that the Town would cooperate with the District in obtaining its necessary permits, and the neighbors argued this constituted an *ultra vires* compromise of the municipality's role in protecting the rights of landowners in land use decisions. Williston adopted a host town agreement (HTA) that included a recitation that the proposed uses of the site of the landfill full complied with the ten criteria and the town plan, leaving zoning compliance to the Town. Williston was a co-applicant for the Act 250 permit. The Supreme Court noted the statutory authority for an HTA, distinguishing this case from *Vermont Department of Public Service v. Massachusetts Municipal Wholesale Electric Co.* (1988), which dealt with illegal municipal delegation of authority. "Here, all that the Town did was promise to support CSWD in its permit applications and give its warranty of good faith with regard to the town plan. The HTA does not promise the success of these applications and explicitly leaves all independent permitting procedures intact. The Town's actions do not amount to a delegation of any legislatively derived power. Further, in contrast to the municipalities in *MMWEC* who were acting outside of any legislative mandate, the Town is exercising the very power that the Legislature explicitly intended it to exercise."[6]

The Act 250 permit for a residential retirement community project in Rutland was challenged by neighbors. *In re Eastview at Middlebury, Inc.*, 187 Vt. 208 (2009). Middlebury College owned a 384-acre tract, but intended to site the project on only 40 of those acres, adjacent to the local hospital and nursing home. The District Commission decided an additional 207 acres should be subject to Act 250 jurisdiction, and the conditions on the permit, and then inconsistently described the entire 384 acres, requiring an amendment for any material change on the parcel. On appeal, the Environmental Court limited coverage of Act 250 to the 40-acre portion of the lot, and the Supreme Court affirmed that decision.

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[4] "An act relating to the regulation of composting," No. 141 (2009, Adj. Sess.).
[5] *Gade v. Chittenden Solid Waste District*, 187 Vt. 7 (2009).
[6] Id., 187 Vt. at 18-19.

"Involved land," explained Justice Denise Johnson in the opinion, is a concept that relates only to initial Act 250 jurisdiction, not on the scope of the entire project, construing *In re Stokes Communications Corp.* (1996) narrowly and concluding that this question is ruled by the maxim that all permit conditions must be reasonable and that the definition of a "permitted project" must be "tempered by reason and reality," quoting the 2001 Environmental Board decision in *Stonybrook Condominium Owner's Ass'n*, D.R. #385. The high court looked to the Board's decision in *West River Acres, Inc.* (2004) as authority as well, where the Board extended jurisdiction only where there is a direct environmental impact on the extended parcel.

A former open-pit talc mine in Windham overflowed its banks, causing damage. The pit was subject to an Act 250 permit, and its owners sought a jurisdictional opinion on whether the pit, now closed, was still within the control of Act 250. The District Coordinator and the Environmental Court on appeal agreed it was, and the Vermont Supreme Court affirmed the decision. *In re Hamm Mine Act 250 Jurisdiction*, 186 Vt. 590 (2009). The owners claimed that as the permit had expired, they should be free of any restrictions. But the violation arose from a prior owner's failure to complete a sedimentation pond that was required by the permit, and the failure to complete the project as approved caused the overflow and justified enforcement. The present owner claimed that as subsequent amendments had been granted for the pit, the State was estopped from proceeding against it. The high court reiterated its policy of upholding the Environmental Court's legal conclusions if reasonably supported by the findings. The claim that the State should have known that the applicant had failed to construct the containment pound was denied by the high court. The District Commission is not required to visit the site and police its permits.

Taxpayers appealed the State Appraiser's decision to uphold the appraisal of two parcels of land in St. Albans, even though the land could not be sold at that time because it needed, and hadn't obtained, an Act 250 permit. *Zurn v. City of St. Albans*, 186 Vt. 575 (2009). The Supreme Court affirmed the decision of the State Appraiser, explaining that the mere existence of uncertainty in the regulatory process does not bar consideration of the development potential of land. No discount is available to such lots, as their value must be based on the highest and best use of the property. The lots weren't rendered useless by the need for a permit. Act 250 permits can enhance the value of properties, and the lack of permits might also play a role in valuation, but as the taxpayers never defined what discount they thought they deserved, the appeal was dismissed with no change from the decision below.

Act 250 had jurisdiction over an alpaca farm in Bondville, by order of the Environmental Court in 2009, a decision affirmed by the Vermont Supreme Court. *In re Eustance Act 250 Jurisdictional Opinion*, 185 Vt. 447, 455 (2009). Farming is exempt from Act 250, but this farm was on land already within Act 250's authority. The high court ruled that there is no exemption from subdivision jurisdiction in general, and that in this case there was an explicit condition requiring a permit amendment for development to occur, even if that involved farming. Chief Justice Paul Reiber dissented. In his view, the decision is a "misapplication of Act 250" and antithetical to the legislative intent.

Neighbors of a shooting club in Shaftsbury waged a long and unsuccessful effort, involving several appeals, to persuade the Environmental Board and Environmental Court to find the club had enlarged its size and increased noise levels, justifying the need for an Act 250 permit. *In re Hale Mountain Fish and Game Club, Inc.*, 185 Vt. 613 (2009). The Supreme Court affirmed, concluding that the club did not need an Act 250 permit. While there were some changes over time, they did not trigger the need for a permit.

The legislature amended the definition of "development" in 2009 to clarify the exemption for telecommunication facilities that have been issued a certificate of public good (CPG) under the newly-enacted 30 V.S.A. § 248a, also enacted this year. "The Vermont Recovery and Reinvestment Act of 2009," No. 54 (2009).

That session the fees for Act 250 applications were increased from $4.75 to $5.40 for each $1,000 for the first $15 million in construction courts, from $2.25 to $2.50 for each thousand above $15 million, and from $0.10 to $0.20 per cubic yard for extraction of earth resources, up to a maximum of $150,000, up from $135,000. "An act relating to executive branch fees," No. 134, Sec. 33 (2009, Adj. Sess.).

Performance-based regulation was the subject of "An act relating to implementation of challeges for change," No. 146 (2009). The new law authorized a District Commission to require any Act 250 permittee to file an affidavit or affirmation that the project is in compliance with an assurance of discontinuance or order or rule, on penalty of revocation of a permit if not filed or if it contains material misrepresentations. It established an Act 250 permit fund for portions of settlements attributable to the resolution of violations.

A subdivision in Bradford required an Act 250 permit, a fact discovered when one of the lots was set to be sold. The owner of the lot sued his attorney, claiming malpractice, saying that it was the attorney's duty to inquire whether the subdivision was in compliance with the state's land use law. The facts did not support a contractual obligation to do so, and the Supreme Court on appeal upheld the jury's decision finding no violation or liability. *Lefebvre v. Cawley*, unreported, January 15, 2010.

Primary agricultural soils are protected by Act 250, and off-site mitigation is an allowable offset for development that takes land out of agriculture. The developer of an affordable housing project in Colchester and Winooski challenged the calculation of mitigation fees by the District Commission, arguing that the fee did not properly reflect an offset for the cost of removing trees from the land, which had been farmed years ago but had grown into a forest of mature trees. The developer also faulted the trial court for not considering whether the land could actually be converted into a farm. The Vermont Supreme Court reversed the Environmental Court, holding that the process of deciding whether land containing primary agricultural soils that contained "limitations" such as wetness, steepness, rockiness, or is excessively treed, requires two steps to review. First, the limitations need to be established, and only then proof that the cost of overcoming the limitations cannot be easily overcome. Because the trial court did not consider the cost, the case was reversed and remanded. "The Legislature did not intend to protect every parcel of land that contained the physical and chemical characteristics of primary agricultural soil regardless of any logistical challenges to its agricultural use. Chief Justice Reiber dissented,

arguing that the majority was wrong in interpreting the legislation and that the developer had failed in carrying its burden to present sufficient evidence of the limitation. *In re Village Associates Act 250 Land Use Permit*, 188 Vt. 113 (2010).

The denial of a minor administrative amendment of an Act 250 permit to allow the creation of fifteen lots on a parcel of 368 acres at Killington triggered an appeal by the developer. The Environmental Court denied the amendment, reversing the decision of the District Commission, and on appeal the Vermont Supreme Court reversed the trial court. The project was not a minor change, and a full review under the ten criteria was required. Chief Justice Reiber dissented, on grounds that the issue was not raised below and so should not be available on appeal. *In re SP Land Company, LLC*, 190 Vt. 418 (2011).

The permit for the Wal-Mart store in St. Albans was appealed to the Environmental Court by neighbors opposed to this large retail project after the District Commission approved it. On appeal to the Vermont Supreme Court, the conflict of interest of the Commission's Chair was confirmed, but cured by the de novo nature of the Environmental Court trial. The right to reapply for a permit after one has been denied was clarified, and the project approved upon finding that it was compatible with adjacent uses in that area of the Town. *In re JLD Properties of St. Albans, Inc.*, 190 Vt. 259 (2011).

A 180-foot telecommunications tower in Hardwick was the subject of a challenge to its Act 250 permit in 2011, based on Criterion 8. *In re Rinkers, Inc.*, 190 Vt. 567 (2011). It would be visible from various points in the village and along the town highways, and "will be a more significant but not overwhelming presence as it would be frequently screened by roadside trees" on one highway. The Environmental Court concluded the tower had an adverse effect on the surroundings, but not an undue impact. The Supreme Court affirmed, first reiterating the familiar principle that it would defer to the trial court on the facts and on its legal conclusions if reasonably supported by the findings. The tower did not violate a clear, written community standard because the Hardwick town plan favored some telecommunications towers. To hold that any interruption of the rural skyline was a violation of the plan and would "create an absolute prohibition on disruptions" was unreasonable, according to the high court.

The "person-based jurisdiction" under Act 250 was challenged in 2011. *In re Shenandoah LLC*, 190 Vt. 149 (2011). A developer who sought a jurisdictional opinion on whether it had surpassed the 10 lot threshold for an Act 250 permit was disappointed by the conclusion that beneficial interest decided jurisdiction, not the titles of the business entities (in this case an irrevocable trust benefitting two minors, sons of the developer) on the applications. The actions of affiliated persons are attributable to each other in deciding jurisdiction, when there is a financial advantage involved. Justices Marilyn Skoglund and John Dooley dissented, arguing that the case should have been remanded to the trial court for additional evidence on the primary fact about deriving a benefit from the trust, rather than making a finding of act in an appellate venue.

The last decision of the Environmental Board to be reviewed by the Supreme Court was issued in 2011. The Board had been abolished in 2004, but it took seven years for the appeals to reach the high court. The case was *In re Times and Seasons*, 190 Vt. 163 (2011). The subject

was a large gift shop and deli in Royalton. The issue was primary agricultural soils and Criterion 9(B), which had been amended by the Legislature during the course of the litigation. The appeal was denied "because our vested rights doctrine prevents applicant on reconsideration from availing itself of the definition amended during the course of litigation and relying solely on the change to correct deficiencies causing its Act 250 denial." While 10 V.S.A. § 6087(c) authorizes reconsideration within six months of a denial, allowing the applicant to preserve the benefit of affirmative findings while obtain additional review of those that led to the denial, this is not a separate vesting event. An applicant cannot take advantage of the laws in effect when the application was filed and those at the time of the reconsideration application, which is a contradiction of the vested rights doctrine.

In *Times and Seasons*, the high court refused to recognize any precedental value to be drawn from *Eustance Act 250 Jurisdictional Opinion* (2009) or *In re Eastview at Middlebury, Inc.* (2009) "as we rely on our own analysis to reach this decision."

In April of 2011, Governor Peter Shumlin appointed Ron Shems as VNRB Chair, replacing Peter Young, who had served since 2006.

That spring the Legislature passed "An act relating to the application of Act 250 to agricultural fairs," amending the Act 250 exemption for agricultural fairs and exempting buildings from jurisdiction if constructed prior to January 1, 2011 and used solely for the purposes of the agricultural fair. The act also provides that such buildings shall not be subject to an Act 250 enforcement action for: (1) construction or any event at the building that occurred prior to January 1, 2011; and (2) any event or activity at the building on or after January 1, 2011 if the building is used solely for the purpose of an agricultural fair. "An act relating to the application of Act 250 to agricultural fairs," No. 18 (2011).

An act promoting cellular and broadband accessibility was passed by the legislature in 2011, exempting attachment of new or replacement cables or wires to existing distribution poles from the definition of "substantial change." "An act relating to the advancement of cellular, broadband and other technology infrastructure in Vermont," 2011, No. 53.

The Vermont Neighborhood Program was established in 1998 to promote high-density, smart growth principles and reduce the scope and cost of Act 250 jurisdiction by allowing towns to designate a "neighborhood," exempting development from Act 250, but few towns ever did so. In 2011, the Legislature authorized the Vermont Downtown Development Board to make the designation, upon application of a municipality or a landowner, following a local public hearing. "An act relating to job creation, economic development, and buy local agriculture," No. 52 (2011).

The next year, Act No. 161 increased fees for ANR permits and for Act 250 permits for reviews of projects involving the extraction of earth resources, exempting extracted material that is not sold or does not enter the commercial marketplace from the fee. The fee for amendments to Act 250 permit must be based solely on any additional volume of earth resources to be extracted. "An act relating to department of environmental conservation fees," No. 161 (2011, Adj. Sess.).

Aesthetics was the focus of a challenge to a wireless communication tower in Barton in 2012, based on noise and visual impacts. *In re Verizon Wireless Barton Act 250 Permit*, 191 Vt. 645 (2012). The area was developed, included a "highly visible high-power electric transmission line," and the tower would be disguised by elements suggesting it was a tall tree. The high court deferred to the trial court's findings, and affirmed the decision to authorize the tower.

The issue of whether the records of the District Commission or VNRB are public was settled in *Rueger v. Natural Resources Board*, 191 Vt. 429 (2012). Opponents of a gravel pit sought disclosure of notes and other communications covering a decision to transfer the case from one commission to another. The Superior Court denied them access and the Supreme Court affirmed. These records were protected from disclosure as deliberations of a judicial and quasi-judicial character.

The VNRB adopted its Environmental Citations Rule in October of 2013, establishing the minimum, maximum, and waiver penalty amounts for each violation for ANR enforcement actions, including Act 250 violations.[7]

Act No. 11 of the Laws of 2013 made a variety of changes to Act 250. It expanded the definition of "development" to apply to support structures for communication or broadcast purpose that extend 20 feet or more above the highest point on the building or 50 feet above the ground. and to bottling plants, when more than 340,000 gallons of groundwater is withdrawn per day. It eliminated the requirement that public auctions of land are per se governed by Act 250, relying on the other triggers for jurisdiction. It also exempted transfers of land to the State of Vermont or qualified organizations that conserve land. It set up a review by the VNRB of jurisdictional opinions as an interim step toward an appeal before the Environmental Court. It adopted a sunset of exemptions for the regulation of compost, and ethical standards for members of the VNRB and district commissions. "An act relating to various amendments to Vermont's land use control law and related statutes," No. 11 (2013).

The Act 250 Rules were amended by the VNRB in 2013. The amendments redefined "*principally produced*" relating to exemptions for farm operations that include retail components by allowing the calculation of 50% of the ingredients or materials contribution to a final agricultural produce are grown or produced on the farm. A procedure for reconsideration of jurisdictional opinions was added, implementing recent statutory changes, and the new rules allowed for electronic submission of applications and filings. They allowed for review of designated downtown projects, reflecting changes to 10 V.S.A. § 6086b, and simplified the way jurisdiction attaches to formerly grandfathered projects.

The Legislature amended the law on transportation impact fees in Act 250 in 2014. Recognizing that the "last one in" rule can leave the total cost of highway improvements to a developer whose project triggers the need for changes, although other prior developments contributed to congestion at an intersection or highway, the act established an equitable system to allocate the burden. A developer might pay for all of the improvements, but subsequent applicants would be required to contribute to that cost, reimbursing the first developer's costs

[7] http://nrb.vermont.gov/sites/nrb/files/documents/citationsrule.pdf

based on a formula to be adopted by the Transportation Agency. Money not spent on the project within 15 years may be recovered by a developer. "An act relating to transportation impact fees," No. 145 (2013, Adj. Sess.)

In 2014, the Legislature exempted "priority housing projects" with less than 275 units in a municipality of 15,000 people, and other projects in municipalities with a sliding scale based on population, from Act 250 jurisdiction. The act encouraged development in designated centers and existing settlements. It added "historic settlement patterns" to Criterion 9L to protect against strip development and ensure the efficient use of land, energy, roads, utilities, and other infrastructure. "An act relating to encouraging growth in designated centers and protecting natural resources," No. 147 (2013, Adj. Sess.)

Act 159 of 2014 redefined primary agricultural soils under Act 250, amended deadlines for forest management plans in current use, and liberalized the law on ecologically significant treatment areas (ESTAs) in managed forest land, repealing the former restriction that limited ESTAs to no more than 20% of conserved land. "An act relating to miscellaneous agricultural subjects," No. 159 (2013, Adj. Sess.).

Criterion 8 (aesthetics) was the subject of an appeal of an Act 250 permit for a woodchip heating system on the Goddard College campus. *In re Goddard College Conditional Use*, 198 Vt. 85 (2014). The Vermont Supreme Court affirmed the decision of the Environmental Court, affirming the grant of the permit. The neighbors had claimed the impact of the building containing the woodchip plant had an undue adverse impact. Neither the college nor the neighbors contested that the impact was adverse, but the neighbors claimed that the project failed the second part of the *Quechee* test. The high court found the neighbors had not met their burden, rejected the claims that consideration of alternative sites was material to resolving the question of Criterion 8, and affirmed the decision from below.

A sand and gravel operation in Londonderry received an Act 250 permit which was challenged by neighbors on several grounds. The claim that the project violated the town and regional plans was turned down by the Vermont Supreme Court on appeal, after concluding that neither plan created a specific, unambiguous policy prohibiting a project in the area of the pit, and that the plan was "broad and nonregulatory," without any legally enforceable authority. *In re Chaves Act 250 Permit Reconsider*, 195 Vt. 467 (2014).

Neighbors appealed an Act 250 permit for a dog breeding facility in Victory, arguing that the noise of 50 dogs would have an undue adverse impact. They lived in a neighborhood that included a kennel and other homes with multiple dogs. The Environmental Court imposed a condition that prohibited prolonged barking of longer than one hour during the daytime and 30 minutes at night, rather than applying the usual decibel limits for commercial and industrial operations. The VNRB attempted to persuade the Court to amend the condition to establish a set interval between barks of 90 seconds to help define "sustained barking," but the Court denied that request. It did amend its definition of improper noise to include howling, as well as barking. The applicant also appealed the ruling of the trial court. In an unpublished entry order, the Vermont Supreme Court affirmed the Environmental Court's decision on the condition, denying the claims of both the neighbors and the applicant, and acknowledging the trial court's authority to adopt a standard on noise based on the context and setting of the project, approving regulation

of barking and howling based on frequency and duration, rather than rigid decibel level. *In re Gregory Hovey Act 250 Permit*, 201 Vt. 647 (2015).

The Champlain Parkway, running from South Burlington to the City of Burlington's business center obtained an Act 250 permit after years of planning and controversy. A permit appeal focused on Criterion 5 (highways), and the congestion or unsafe conditions created by the development. *In re Champlain Parkway Act 250 Permit*, 200 Vt. 158 (2015). The permit challenge was denied and the permit's conditions affirmed, after the high court concluded that the mitigation measures compensated for the problems of congestion. A challenge to the Environmental Court's direction to the parties to proceed in good faith to resolve their differences at mediation was rebuffed as within the discretionary powers of the trial court.

Neighbors challenged a jurisdictional opinion that a rock-crushing operation at a quarry in Barre was a pre-existing use, exempt from Act 250. *In re North East Materials Group LLC Act 250 JO #5-21*, 199 Vt. 577 (2015). The Environmental Court concluded it was exempt, but on appeal the high court remanded the case to the trial court with instructions to revisit its findings on how the present activity fit with the pre-1970 development, particularly on rock-crushing. The high court reiterated its substantial change test, requiring that evidence must first show a cognizable physical change to a preexisting development and then answering whether the change has a potential for significant impact under one of the ten criteria. Justices Harold Eaton and Marilyn Skoglund dissented, arguing that the majority mistakenly placed the burden of persuasion on the developer, rather than the challengers and that precedents of the Environmental Board were disrespected in reaching the answer to whether there was a substantial change.

A Dollar General store in Chester obtained an Act 250 permit that was promptly challenged by neighbors, who argued that since the building was within the floodway of a brook, which would narrow the brook at two points, the project violated Criterion 1(D). *In re Zaremba Group Act 250 Permit*, 199 Vt. 538 (2015). The Supreme Court affirmed the Environmental Court's decision that mitigation measures proposed by the applicant sufficiently cured any offense to the criterion. The neighbors had not provided experts to rebut the applicant's and ANR's own expert's opinions, and so failed to carry their burden of proof. The high court also rejected the claim that the design of the building was inconsistent with the standards for the historic village center after finding that the project is not within the historic district.

The hangars for the Air National Guard base at the Burlington airport were exempt from Act 250, according to a jurisdictional opinion that was appealed and reviewed in 2015. *In re Request for Jurisdictional Opinion Re: Changes in Physical Structures and Use at Burlington International Airport for F-35A*, 198 Vt. 510 (2015). The real object of the appeal was the noise to be created by 18 F-35A aircraft, but the project—buildings and jets—was federal in nature and preempted Act 250 jurisdiction.

The ANR challenged operation of a gravel pit in Manchester, and the Environmental Court issued an emergency order requiring the closure of the operation. On appeal, the Supreme Court affirmed the order, finding that the operation of the pit had intruded into an area within the jurisdiction of Act 250, constituting a material change to the permit and requiring a permit. *Natural Resources Board Land Use Panel v. Dorr*, 198 Vt. 226 (2015). The pit owner claimed

that as the permit had expired, the project was exempt. But the violation had been upheld in a 2008 proceeding. The high court held that defense was barred by res judicata, as an attempt to relitigate matters decided in prior litigation, and upheld the emergency order.

The VNRB adopted amendments to the Act 250 rules at the end of 2015. The definition of "Rural Growth Areas" was deleted from the rules, and "cognizable change" was defined, as "any physical change or change in use, including, where applicable, any change that may result in a significant impact on any findings, conclusion, term or condition of the project's permit." Investigations conducted by District Commissions must be conducted in accord with the Vermont Administrative Procedure Act. The process of creating a Master Plan and of designating downtown development districts was improved.

In January of 2015, Gov. Shumlin appointed Jon Groveman as VNRB Chair.

In 2015, in "An act relating to promoting economic development," the Legislature directed the VNRB to conduct a public process to revise its procedures or implementing the settlement patterns criterion (9L), which had been added to Act 250 in 2014. "An act relating to promoting economic development," No. 51 (2015).

A multi-use development at Exit on I-89 in Hartford was denied an Act 250 permit on highway design and lack of conformity with the regional plan. The Environmental Court reversed the District Commission on the plan, finding its definition of "substantial regional impact" inapplicable and its definition of "principal retail establishment" unenforceable as applied to the project. On appeal, the Vermont Supreme Court reversed the trial court, concluding the plan was definite enough to justify a conclusion of nonconformity. *In re B & M Realty, LLC*, 2016 VT 114.

The *North East Materials Group* Act 250 returned to the Supreme Court in 2016, after the Environmental Court concluded that a rock-crushing operation at a quarry did not require an Act 250 permit. *In re North East Materials Group LLC Act 250 JO #5-21*, 2016 VT 87. The high court reversed, criticizing the trial court's findings about the location and volume of the operation as too limited and that its decision was "effectively a reconsideration without new findings of the rationale on which it had found no substantial change in the first instance." The Environmental Division "reaches the same result" as it did in the prior case "for the same reason." The quarry must have an Act 250 permit. Evidence of rock crushing at a different site is unavailing in showing no "substantial change." The focus must be site-specific. Justices Eaton and Skoglund dissented, worrying that under this decision every movement of a rock-crushing operation within a site would need an Act 250 permit.

The majority opinion in this case, authored by Justice John Dooley, has a tone of exasperation with the Environmental Court, as if to an employee who did not follow the boss's orders.

The Costco store in Colchester was expanding, including a new six-pump gas station, and applied and obtained an Act 250 permit for the changes. A rival convenience store operator appealed. *In re Costco Stormwater Discharge Permit*, 2016 VT 86. The high court affirmed the

Environmental Division's findings and conclusions granting a permit. It pointed out that with traffic, mitigation is not necessarily alleviation of congestion, and that conditions that offset the impact of additional vehicles are acceptable corrections. The ruling also addressed the *Daubert* test for expert testimony, and rejected arguments involving wetlands, a drainage pipe, and stormwater discharge.

Governor Peter Shumlin appointed Diane Snelling as VNRB Chair in May of 2016.

That July, the VNRB assumed a new statutory function, hearing appeals of energy compliance determinations made by the Commissioner of the Department of Public Service. Regional planning commissions are obliged to have the energy compliance portions of the regional plan approved by the Department. Municipalities who have submitted a plan before July 1, 2018, have the same obligation. When the Department declines to grant its approval, the VNRB hears the appeal. 24 V.S.A. § 4352. Approval of a plan gives the regional planning commission or municipality a larger role in the siting of renewable energy projects.

The difference between Criterion 8 reviews in Act 250 and in decisions of the Public Service Board under 30 V.S.A. § 248a was explained by the Vermont Supreme Court in 2016. *In re Rutland Renewable Energy, LLC*, 2016 VT 50. The PSB's "holding is a modification of the *Quechee* test because the test was created for Act 250 review, and such review does not generally supplant local zoning regulation. The Town and neighbors argue that the solar siting standards are 'clear written community standards' by any definition of those terms. We might adopt that view if we were dealing with Act 250, where state and local regulatory review coexist. Here, we are dealing with a situation where, under existing law, municipalities have a different role. The effect of the solar siting standards under the theory of the Town and neighbors is to enable the Town to control solar generation siting through the *Quechee* test. We agree with the Board that a modification of the *Quechee* test is necessary to give the Board the necessary regulatory power."

Act 250 Rule 34(E) has received regular attention by the courts. This rule sets standards for amendments, requiring satisfaction of a strict test to avoid attempts to relitigate already-resolved matters. Fifteen years after obtaining its permit, Burlington applied for an amendment to change the timing and frequency and sound levels of events at a city park. The amendment was granted, and affirmed by the Supreme Court. *In re Waterfront Park Act 250 Amendment*, 201 Vt. 596 (2016). Flexibility outweighed finality, because of the importance to the city's recreational and social life and its economic vitality. The neighborhood had changed, and the park had become a "dynamic resource" to the city in the intervening years.

An Act 250 permit for a residential development at Stratton Mountain included a provision that authorized the District Commission to impose additional conditions "as needed." The Supreme Court affirmed the Environmental Division's decision to treat this condition as invalid, as invading the proper province of the VNRB and ANR to enforce permit violations. *In re Treetop Development Company Act 250 Development*, 201 Vt. 532 (2016). Not only did the condition attempt to provide Commissions with authority not given by statute, but it prevented any finality of a permit review process, which the Court described as "an integral part of the land use permitting process."

Preliminary conclusions on the last seven years

Act 250 casts a spotlight on the issues that challenge Vermont. One season the light shines on big box retail. Then comes cell towers, ridgelines, solar arrays, where Act 250's criteria are interpreted by the Public Service Board. Neighbors continue to fight changes they feel will affect their property values and peaceful enjoyment of their land. Gravel pits, particularly those with rock-crushing as a part of their operations, invite appeals. Congestion of highways leads to challenges to plans to mitigate the problems of stacking. There will never be an end to appeals or challenges to development. Sustained barking is predictable.

Looking at the last septenary, Act 250 continues to be a mass of contradictions. It may be the most frequently amended piece of legislation in Vermont. The Legislature wants to use it to set environmental and development policies. It can't leave the act alone, and that has led to a growing belief that the law is at risk of becoming more political than legal. No law is helped by too constant reform. That offends the most important value of Act 250, the finality of its decision-making.

The tension between permitting and enforcement is keen. There is a persistent tension between developers and regulators. The most common objection of developers is their belief that regulators are expanding the jurisdiction of Act 250. The most common complaint against developers is that they actually try to avoid coming under the authority of the act. The 2010 act on regulating compost, for example, was intended to resolve questions that had not previously been clear to parties to the regulatory process. The addition of the punitive element for those who try to avoid jurisdiction is another expression of that tension. Much like how sentences and penalties are increased by a lack of evidence of remorse in criminal or professional misconduct cases, when defendants and respondents believe they are innocent, this new feature risks demonizing the efforts of developers who have an interest in not submitting to Act 250, which is a natural and usual ambition of entrepreneurs. The way this treats Act 250 as a punishment for bad behavior is as suspicious as the recent laws that award exemptions from the law for favored uses, such as housing, or places, such as downtowns.

If the law is to have any integrity, it should not used in these ways. Look at Section 6001, where "development" is defined. It was grown in size since it was first enacted in 1969, ever more elaborating what is regulated and what isn't. It is a living map of special interest lobbying and righteous environmental fervor, the fear that regulation will turn away jobs and investment, and the hope that the best part of Vermont won't be turned into the worst part of other places. No wonder the regulatory climate is a cloudy stew of frustration and disappointment.

Act 250 could do with a period of quiet repose, of being left alone. Just as muscles need time to recover, regular and significant changes in this law have left Act 250 torn and sore. A reprieve from reform is necessary.

The Environmental Court, since 2010 called the Environmental Division of the Superior Court, has become more efficient and more respected by the Supreme Court than in earlier years, and while it still is reversed from time to time, with one exception the tone of the decisions of the

high court has been respectful and supportive of the harder job of deciding critical questions by motion and trial. Lately there have been proposals to reestablish the Environmental Board and eliminate the jurisdiction of the Environmental Court over Act 250 matters. This will undercut the progress made in the evolution of land use law since the Court was first given the appellate role in Act 250 permit decisions, and contribute to the politicization of the process, which can only mean further disrespect for the rule of law. The District Commissions and the Coordinators are the first responders of Act 250, and their role is essential to ensuring that the process of applying for permits is fair and responsive to local concerns. An appeal from those decisions should be to a court, not a lay panel, which brings its own prejudices and polarities into the process. The Environmental Board leaned left, toward greater environmental sensitivity, in some years, and right, toward greater promotion of development, in others, depending on the constituency of the Board. By comparison, the Environmental Court has brought consistency and a level playing field to the playing fields of land use law.

Act 250 is a powerful tool and weapon. It has earned respect. But it is also extremely fragile, whenever the Legislature is in session. It does not need any more reform.

Paul Gillies, September 22, 2017