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OFFICE OF LEGISLATIVE COUNCIL

MEMORANDUM

To: Commission on Act 250: the Next 50 Years

From: Aaron Adler, Legislative Counsel

Date: October 13, 2018

Subject: Act 250: Supervisory Authority; Presumptions

This memorandum concerns the supervisory authority of the program created under 10 V.S.A. chapter 151 (Act 250) and the related issue of presumptions in Act 250 created by other permits. In summary:

- The Act 250 program was created as a supervisory authority in environmental matters, is not bound by other permits and approvals, and conducts an independent review.
- Other permits and approvals may be used to created presumptions of compliance with various Act 250 criteria. Presumptions take the place of evidence and typically may be rebutted by evidence contrary to the presumed fact. Current Act 250 rules place a high bar on a party seeking to rebut another permit.
- The statute allows a permit to be given presumptive weight in Act 250 if the permit on its face satisfies the applicable criterion. There is no required consideration of whether the program issuing the permit reliably achieves its goals. In addition, the statute requires that certain municipal approvals use court-like procedures in order for those determinations to have presumptive weight, but it allows other permits to be given presumptive weight without the use of similar procedures. Court-like procedures are typically employed to help ensure that determinations are reliable and free from outside influence.
- "Conclusive" or "irrebuttable" presumptions are not true presumptions but rather rules of law that require a proposition to be considered true whether or not there is evidence to the contrary. Enacting a conclusive presumption on a criterion would mean that Act 250 does not have supervisory authority on the criterion or conduct an independent review.

I. SUPERVISORY AUTHORITY

In the case of In re Hawk Mountain Corp., 149 Vt. 179 (1988), the Vermont Supreme Court, after reviewing the statutory scheme, determined that the Act 250 program:

- Has broad authority to review any factor related to the environmental impacts of a project before it.
- Has the powers of a supervisory body in environmental matters and is not bound by approvals issued by the Agency of Natural Resources (ANR) or any other agency.

- Is not required to accept ANR's interpretation of the law and must conduct an independent review.

The Court stated:

> [W]e note that the purposes of Act 250 are broad: "to protect and conserve the environment of the state." [Citation omitted.] To achieve this far-reaching goal the Environmental Board is given authority to conduct an independent review of the environmental impact of proposed projects, and in doing such *the Board is not limited to the considerations listed in Title 10*. See 10 V.S.A. § 6086(a)(1).
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> Act 250 sets up concurrent jurisdiction between the various state environmental agencies and the Environmental Board. See 10 V.S.A. § 6082. *However, the legislative scheme indicates that the legislature intended to confer upon the Board powers of a supervisory body in environmental matters*. For example, although 10 V.S.A. § 6082 provides that the permit required under Act 250 does not replace permit requirements from other state agencies, *10 V.S.A. § 6086(d) provides that the Environmental Board is not bound by the approval or permits granted by the other agencies*. Permits and Certificates of Compliance from other agencies create a presumption that the project satisfies the relevant 10 V.S.A. § 6086(a)(1) criteria; however, the Board *must conduct an independent review* of the proposed development and may deny the Act 250 permit if it finds the Certificate of Compliance or other required permits were improvidently granted.

Hawk Mountain, 149 Vt. at 184–85 (1988) (emphasis added).

In Hawk Mountain, the Court affirmed the Board's conclusion that a leachfield approval issued by ANR was rebutted because the leachfield would discharge domestic wastes containing pathogenic organisms into a river in violation of ANR rules. Hawk Mountain, 149 Vt. at 182.

The Court also affirmed the Board's conclusion that a water discharge permit was required from ANR even though ANR itself asserted that such a permit was not required. Hawk Mountain, 149 Vt. at 184. It did not require the Board to defer to ANR's interpretation of its own authority, instead concluding that the Board must conduct an independent review. Id. at 184–85.

For two reasons, the Hawk Mountain holding should continue to apply to the District Commissions notwithstanding the transformation of the Environmental Board to the Natural Resources Board (NRB) and the transfer of the appeals function to the Environmental Division of the Superior Court. See 2004 Acts and Resolves No. 115, Secs. 48, 58, 74.

First, the statutes on which the Court relied in Hawk Mountain applied equally to the Environmental Board and District Commissions and continue to apply to the District Commissions. See 10 V.S.A. §§ 6082, 6086(d).

Second, in the case, the Board and District Commission had the same scope of authority over the application because the Board was standing in the shoes of a District Commission, conducting a *de novo* hearing on the issues under appeal. Hawk Mountain, 149 Vt. at 181. On the issues under appeal, the Board's jurisdiction on a *de novo* appeal was coterminous with that of the District Commission. In re Taft Corners Assocs., Inc., 160 Vt. 583, 591 (1993).

The Court has cited and restated the principles of the Hawk Mountain decision in subsequent cases. One such case was In re Agency of Transp., 157 Vt. 203 (1991), in which the Court affirmed Act 250's ability to impose more stringent conditions than may be required by the Agency of Transportation or by a Superior Court in a transportation-related necessity proceeding. The Court stated: "*Act 250 itself explicitly proclaims its primacy* over, without preemption of, ancillary permit and approval processes." Agency of Transp., 157 Vt. at 208 (emphasis added), citing Hawk Mountain, 149 Vt. at 185.

Similarly, relying on Hawk Mountain for the proposition that Act 250 is an "independent regulatory body with supervisory authority in environmental matters," the Court held the Environmental Board may condition a permit for a radio tower on the installation of light shields. In re Stokes Comm. Corp., 164 Vt. 30, 38 (1995), citing Hawk Mountain, 149 Vt. at 185.

The federal district court for Vermont also has recognized the primacy of Act 250 in Vermont's environmental regulation, stating: "The [Environmental] Board sits as the final decision maker in environmental matters in Vermont." Southview Assocs., Ltd. v. Individual Members of Vermont Envtl. Bd., 782 F. Supp. 279, 283 (D. Vt. 1991), citing Hawk Mountain, 149 Vt. at 185, aff'd sub nom. Southview Assocs., Ltd. v. Bongartz, 980 F.2d 84 (2d Cir. 1992).

A recent case, however, suggests that the Court's case law may be evolving in a manner that undermines the supervisory authority that the General Assembly granted to the Act 250 program. Specifically, the Court held that the Environmental Division, acting on a *de novo* appeal from an Act 250 permit, was required to defer to ANR's determinations of what constitutes a "floodway" and "floodway fringe" because the Act specifically authorizes ANR to make these determinations, and the matter is a complex one within ANR's expertise. In re Korrow Real Estate, LLC Act 250 Permit Amendment Application, 2018 VT 39, ¶ 22; see 10 V.S.A. § 6001(6) and (7).

The Korrow decision does not discuss Hawk Mountain or whether the District Commission was required to give deference to ANR. In the case, the District Commission had agreed with ANR; it was the Environmental Division, on appeal, that did not. Id., ¶¶ 14, 15. Nonetheless, the reasoning of the two cases can appear contradictory. If the supervisory authority of Act 250 remains the General Assembly's intent, it may wish to provide clarity through legislation.

II. PRESUMPTIONS IN ACT 250

A key statute cited by the Court in Hawk Mountain is 10 V.S.A. § 6086(d), which provides that the NRB "may by rule" allow permits or approvals of State agencies or municipal governments to be used to satisfy certain Act 250 criteria in lieu of evidence by the applicant. Below, this memo discusses presumptions generally and the statute under which presumptions are used in

Act 250, explains the current Act 250 rules on presumptions, and discusses the concept of "conclusive" presumptions. Key points from this discussion include:

- The statute allows for rules authorizing acceptance of another agency's permit or approval if it "satisfies the appropriate requirements of" the Act 250 criteria. Such acceptance creates a "presumption" of compliance.
- Current Act 250 rules properly implement this authority as a rebuttable presumption of compliance and impose a high bar for rebutting the presumption.
- If a party seeks to rebut an ANR permit, current law requires the District Commissions to give "substantial deference" to ANR's "technical determinations." However, this statute does not state a requirement to defer to ANR interpretations of law or rule.
- Proposals to convert these presumptions to "conclusive" or "irrebuttable" would negate the supervisory authority and independence of the Act 250 program because they would require the District Commission to accept other permits and approvals without question.

A. Presumptions Generally

The term "presumption" typically means "a legal inference or assumption that a fact exists because of the known or proven existence of some other fact or group of facts." Black's Law Dict. (10th ed. 2014). Presumptions can be created by statute or case law.

An example of a presumption comes from the statutes on residential rental agreements. 9 V.S.A. § 4451(1) states that a notice is presumed to have been received within three days of mailing if "the sender proves that the notice was sent by first class or certified U.S. mail." In other words, if the sender testifies or provides proof that he or she mailed the notice first class, the decision-maker assumes that the notice was received within three days.

Like most presumptions, this statute provides that the presumption on receipt of notice is rebuttable, meaning that it can be defeated by introduction of contrary evidence (e.g., testimony that the notice was not in fact received). "Most presumptions are rules of evidence calling for a certain result in a given case unless the adversely affected party overcomes it with other evidence. A presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption." Black's Law Dict. (10th ed. 2014).

In the leading Vermont case on the issue, the Vermont Supreme Court adopted a similar view of presumptions, stating that a presumption takes the place of evidence, and when evidence contrary to the presumed fact is submitted, the presumption disappears, leaving a question of fact to be resolved.

> A presumption, of itself alone, contributes no evidence and has no probative quality. It takes the place of evidence, temporarily, at least, but if and when enough rebutting evidence is admitted to make a question for the jury on the fact involved, the presumption disappears and goes for naught. In such a case, the presumption does not have to be overcome by evidence; once it is confronted by evidence of the character referred to, it immediately quits the arena. The rule we now adopt applies to all disputable presumptions, including the presumption of innocence.

Tyrrell v. Prudential Ins. Co. of Am., 109 Vt. 6, 23–24 (1937).

The Vermont Rules of Evidence continue to follow the approach set forth in Tyrrell. VRE 301(a) states that:

> In civil actions and proceedings, except as otherwise provided by law, a presumption imposes on the party against whom it operates the burden of producing evidence sufficient to support a finding that the presumed fact does not exist, but a presumption does not shift to such party the burden of persuading the trier of fact that the presumed fact does not exist.

In explaining the rule, the Reporter's Notes cite Tyrrell and discuss at length its history and justification.

The Reporter's Notes to VRE 301(a) also describe the rule as embodying the "bursting bubble" theory of presumptions; that is, the presumption creates a "bubble" that "bursts" when contradictory facts are introduced. The Supreme Court has explained that: "By Vermont Rule of Evidence 301(a), we have now adopted the policy that all presumptions in civil cases are *Tyrrell* 'bursting bubble' presumptions 'except as otherwise provided by law.'" Chittenden v. Waterbury Ctr. Cmty. Church, Inc., 168 Vt. 478, 492 (1998).

B. The Statute Authorizing Presumptions in Act 250

10 V.S.A. § 6086(d) is the statute that authorizes presumptions for other permits in Act 250. It:

- Allows the NRB by rule to allow permits or approvals of State agencies and municipal government to be accepted instead of evidence under certain specified criteria.
- Requires that the permit or approval satisfy the requirements of the criterion for which it is used.
- Requires that the District Commission give substantial deference to the technical determinations of ANR.
- Requires that municipal determinations under a "local Act 250 review" provision of Title 24 be given presumptive weight, pro or con, as to the relevant criteria.

1. *Statutory Language*

The language of the statute is as follows:

> The Natural Resources Board may by rule allow the acceptance of a permit or permits or approval of any State agency with respect to subdivisions (a)(1) through (5) of this section or a permit or permits of a specified municipal government with respect to subdivisions (a)(1) through (7) and (9) and (10) of this section, or a combination of such permits or approvals, in lieu of evidence by the applicant. A District Commission, in accordance with rules adopted by the Board, shall accept determinations issued by a development review board under the

> provisions of 24 V.S.A. § 4420, with respect to local Act 250 review of municipal impacts. The acceptance of such approval, positive determinations, permit, or permits shall create a presumption that the application is not detrimental to the public health and welfare with respect to the specific requirement for which it is accepted. In the case of approvals and permits issued by the Agency of Natural Resources, technical determinations of the Agency shall be accorded substantial deference by the Commissions. The acceptance of negative determinations issued by a development review board under the provisions of 24 V.S.A. § 4420, with respect to local Act 250 review of municipal impacts shall create a presumption that the application is detrimental to the public health and welfare with respect to the specific requirement for which it is accepted. Any determinations, positive or negative, under the provisions of 24 V.S.A. § 4420 shall create presumptions only to the extent that the impacts under the criteria are limited to the municipality issuing the decision. Such a rule may be revoked or amended pursuant to the procedures set forth in 3 V.S.A., chapter 25, the Vermont Administrative Procedure Act. The rules adopted by the Board shall not approve the acceptance of a permit or approval of such an agency or a permit of a municipal government unless it satisfies the appropriate requirements of subsection (a) of this section.

2. *Permits Rebuttable under the Statute; ANR Technical Determinations*

Under this statute, presumptions in Act 250 are rebuttable because the statute uses the term "presumption" without specifying any departure from the usual rule of presumptions as expressed by the Supreme Court and set forth in VRE 301(a). The VRE apply in Act 250 proceedings through 10 V.S.A. § 6002 and 3 V.S.A. § 810.

The statute increases the difficulty of rebutting the presumption created by an ANR permit by directing that substantial deference be given to the "technical determinations" of that agency. In the context of an agency's exercise of technical expertise, the Supreme Court has stated that "substantial deference" requires a clear and convincing showing to the contrary: "We accord substantial deference to matters within the agency's area of expertise, and absent a clear and convincing showing to the contrary, a methodology chosen through that expertise is presumed correct, valid and reasonable." Travia's Inc. v. Dept. of Taxes, 2013 VT 62, ¶ 18.

Section 6086(d)'s substantial deference requirement applies to ANR's technical determinations and makes no mention of giving deference to ANR's interpretations of statute or rules. Under the principles of statutory construction, courts presume the legislature "chose its words deliberately." McGee v. Gonyo, 2016 VT 8, ¶ 20.

Moreover, while Act 250 does not define the term "technical determinations," the General Assembly has recently defined the term "technical review" for the purpose of ANR permitting as scientific, engineering, or other professional review of the facts rather than as interpretations of law. 10 V.S.A. § 7702(23) provides that "technical review" means "the application of scientific, engineering, or other professional expertise to the facts to determine whether activity for which a permit is requested meets the standards for issuing the permit under statute and rule."

3. *Eligibility of Permits Used for Presumptions*

The statute allows the use of a permit or approval as a presumption as long as the permit or approval "satisfies" the appropriate Act 250 criterion, regardless of whether the program issuing that permit or approval is reliably achieving its goals. Thus, for example, water quality permits issued by ANR can continue to receive presumptions of compliance without consideration of whether the permitting program is achieving water quality standards.

Further, in order to obtain presumptions, the statutory scheme requires that the "Act 250 review of municipal impacts" be conducted using court-like, contested case procedures but does not apply the same requirement to State permits and approvals.

In this regard, 10 V.S.A. § 6086(d) refers to 24 V.S.A. § 4420, which authorizes "local Act 250 review of municipal impacts" and requires a development review board conducting such review to use the procedures established in 24 V.S.A. chapter 36. 24 V.S.A. § 4420(b)(1).

24 V.S.A. chapter 36 is entitled "Municipal Administrative Procedure Act." It: (a) directs that all parties be given notice and an opportunity to respond and present evidence on all issues involved, (b) requires testimony under oath or affirmation and the use of the Vermont Rules of Evidence, (c) prohibits *ex parte* communications, and (d) requires that decisions be in writing with findings of fact based exclusively on the record and conclusions of law based on those findings. 24 V.S.A. §§ 1204, 1206, 1207, 1209.

These requirements attempt to ensure that decision-making is based on reliable information and that the process is fair, unbiased, and free from outside influence. They apply to some but not all permits that can create presumptions.

C. <u>The Standard for Permit Rebuttal in Act 250</u>

Under current rule and case law, the standard for rebutting a permit in Act 250 is a high bar, requiring a party to introduce evidence that the project is likely to violate the applicable criterion. The Act 250 rules adopted by the NRB state:

> In the case of presumptions provided in Rule 19(E), if the District Commission concludes, following the completion of its own inquiry or the presentation of the challenging party's witnesses and exhibits, that undue water pollution, undue air pollution, inadequate water supply, unreasonable burden on an existing water supply, or violation of the rules of the agency of natural resources relating to significant wetlands is *likely to result*, then the District Commission shall rule that the presumption has been rebutted. Technical non-compliance with the applicable health, water resources and Agency of Natural Resources' rules shall be insufficient to rebut the presumption without a showing that the non-compliance *will likely result in, or substantially increase the risk of*, undue water pollution, undue air pollution, inadequate water supply, unreasonable burden on an existing water supply, or violation of the rules of the agency of natural resources relating to significant wetlands.

Act 250 Rule 19(F)(2) (emphasis added.)

Under this rule and interpreting case law, a party in effect is required to produce affirmative testimony that the criterion is not met. A party cannot simply introduce or elicit through cross-examination problems or irregularities in the issuance of the permit. For example, the Supreme Court upheld a determination by the Environmental Division that a party had not rebutted a presumption created by an ANR discharge permit because it had not produced affirmative evidence showing that undue water pollution will result. The Court stated:

> Here, rather than producing affirmative evidence to rebut the presumption, Timberlake merely elicited evidence that the expected performance impact of ANR's design standards had not been validated by local field tests. Evidence that the design standards have not been proven to yield the expected performance outcomes is not the same thing as evidence that the design standards do not in fact yield those outcomes, and Timberlake's cross-examination is not enough to burst the presumption and shift the burden of proof back to Costco.

In re Costco Stormwater Discharge Permit, 2016 VT 86, ¶ 45.

D. "Conclusive" Presumptions

Proposals exist to turn Act 250's rebuttable presumptions into "conclusive" presumptions. The term "conclusive" or "irrebuttable" presumption embodies contradictory logic because it requires accepting a fact as true even if there is evidence to demonstrate that the fact is not true. A conclusive presumption is not actually a presumption but a rule of law. As one commentator has stated:

> The term presumption as used above always denotes a rebuttable presumption, i.e., the party against whom the presumption operates can always introduce proof in contradiction. In the case of what is commonly called a conclusive or irrebuttable presumption, when fact B is proven, fact A must be taken as true, and the adversary is not allowed to dispute this at all. For example, if it is proven that a child is under seven years of age, the courts have stated that it is conclusively presumed that she could not have committed a felony. *In so doing, the courts are not stating a presumption at all, but simply expressing the rule of law that someone under seven years old cannot legally be convicted of a felony*.

2 McCormick on Evid. § 342 (7th ed.) (emphasis added).

The Vermont Statutes Annotated currently do not contain provisions using the terms "conclusive" or "irrebuttable" presumption.

Enactment of conclusive presumptions on Act 250 criteria would remove the supervisory authority and independent review function allocated to the District Commissions. For example, if an ANR discharge permit creates a conclusive presumption that a discharge will not create undue water pollution, then neither the District Commission nor any party to the Act 250

application can dispute that fact, and the District Commission must issue an affirmative finding that the discharge will not create undue water pollution under 10 V.S.A. § 6086(a)(1). The District Commission would be unable as a matter of law to exercise independent judgment.

A conclusive presumption on an Act 250 criterion would maintain the appearance but not the reality of District Commission jurisdiction over the criterion. Substantively, the effect of enacting a conclusive presumption for a criterion would be no different from a provision that removes the jurisdiction of the District Commission to review and make findings on the criterion if another agency has issued a permit.