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Brownell's Departure

John McClaughry

The October issue of *Behind the Times*, a monthly paper published in Bradford, informs us of the impending departure from Vermont of attorney Jonathan Brownell of Corinth. After almost 30 years in Vermont, starting as Deputy Attorney General under James Oakes in 1967, Brownell is headed for Cambridge, England, to take part in something called the Global Security Project.

Those of us who served in the legislature in the early 1970s saw a lot of Jonathan Brownell. He was the much lauded co-author of Act 250, which was passed in 1970 to almost unanimous approval. But storm clouds gathered in 1972, when Vermonters began to realize that Brownell's environmental control program included more than mere permit requirements for larger developments.

The Act required two further steps.

One was to have been a "capability and development plan," which would generally indicate the environmental carrying capacity of the various parts of the state. Then there was the "State land use plan." This document was to be, as outgoing Gov. Deane Davis candidly described it, a state zoning scheme, indicating where every human activity would hereafter be allowed or disallowed by the all-powerful Environmental Board.

Jonathan Brownell, whose reputation as co-author of Act 250 brought him an enormous amount of high-priced legal business, became the counsel, chairman and chief lobbyist for the Vermont Natural Resources Council. He was an ever-present figure at the state house, volunteering his services to draft anything related to Act 250, and making sure that the legislature did not stray from the path he had decided upon as best for the state. As I well remember, the normally mild mannered Brownell could summon great patrician scorn when confronted by any mere commoner who dared to disagree with his insistence that Act 250 would come crashing down without a supporting land use plan.

To Brownell's dismay, the legislature strayed from his true path. The C&D Plan evaporated, to be replaced with additional permit requirements. After tumultuous public hearings around the state, the land use plan came crashing down in early 1974. A weakened version failed in 1975. An empty shell of a plan failed in 1976. In 1977 its chief Senate promoter, Sen. Arthur Gibb, introduced legislation to repeal the requirement that there even be such a plan. (It was quietly passed in 1984.)

What had become apparent to the people of the state was that much more was at stake than preventing pollution, poorly built roads, and sudden fiscal burdens on small communities. Those concerns had served to enact the permit requirements of Act 250, but Brownell's VNRC saw the opportunity to push far beyond -- to the complete control of every square inch of Vermont by state government. The state government would be controlled in all relevant respects by the VNRC, with its tax exempt status, half-million dollar budget, three registered lobbyists, and dream of converting the annoying human right of private property ownership into state directed stewardship.

That battle is still going on. Act 200, passed by the narrowest of margins in 1988, was a renewed attempt by the land use plan forces of 1974 to create a state land use plan, by stitching together plans approved by regional planning commissions. But in the years since the defeat of the 1974 land use plan, Jonathan Brownell's thinking began to shift. He never gave up the idea, at least so far as I can tell, that the better sort of people needed to control and direct the actions of the thoughtless multitude, for the Greater Good. But he started to have doubts about whether the scheme he had crafted was workable, fair, and even constitutional.

In a law journal article in the spring of 1974, Brownell expressed serious doubts that clear judicial standards could be found to define the limits of government's regulatory power over private land. He doubted that government commissions could ever develop the ability to fairly decide things like "undue adverse effect" and "net benefit," and speculated that whoever ended up with the burden of proof would likely lose.

Now, in his interview with *Behind the Times*, Brownell goes further. "What we missed back then in the early 70s," he observed. "was the importance of building a structure that could not be manipulated by those who had personal rather than community objectives," surely a curious revelation from one trained in the adversary process at Yale Law School.

"I've been increasingly skeptical about zoning," Brownell now says, "because it is the result of the majority imposing its will on a minority". He believes that there is some magic way that the "community as a whole" will see what the right thing is, and do it. "That is what I had, very crudely, in my head back in 1970." Had he and the VNRC only been open to discussion on that issue 25 years ago, when the opponents of the land use plan offered numerous alternatives to deal with precisely the questions he now raises, the state might have been spared much bitter and costly controversy.

Brownell now says that the obsession with winning and losing has polluted Vermont's community and politics, and that some new process is needed for resolution of environmental and growth controversies. What shape will that process have? "I have no idea," Brownell said as he relit his pipe.

In England, Brownell will explain all this to young leaders from Third World countries. In Vermont, perhaps we should revisit the issue he now so ably raises.

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