ACT 47
COMMISSION ON ACT 250
The Next 50 Years

VERMONT

Materials from the Natural Resources Board/Act 250

Commission on Act 250: The Next 50 Years

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1 HISTORY

1.1 CHRONOLOGY

A Compilation of Significant Legislative, Executive and Judicial
Events in the History of Act 250[i]
(Geoffrey W. Green, District Coordinator)

"In the 1960s Vermonters realized that their world was changing. A report published in 1968, *Vision and Choice*, declared that, the traditional rural scene in Vermont ... is disappearing. The sharp distinction between village and countryside is blurring throughout the state. Highways between towns are becoming ribbons of residential and commercial development. Where strip development has become intense, particularly on the outskirts of the larger towns and in the most popular ski and recreation areas, the effects have been highly detrimental." (Vermont. *Central Planning Council, Vision and Choice: Vermont's Future, the State Framework Plan. A Statement by the Vermont Planning Council,* 1968[n.p.], 31.)

1967 **Act 334** Vermont Planning and Development Act, No. 334, 1967 Vt. Acts & Resolves 356. This Act delegates police power to the state's municipalities in order to enable local land use regulation.

1968 Governor Deane Davis creates the Governor's Commission on Environmental Control, chaired by State Representative Arthur Gibb. The Commission issued its report, the "Gibb Report" in January 1970. The Commission made a series of recommendations including statewide zoning of higher elevations; statewide zoning of flood plains; and the creation of an environmental control officer to supervise the private use of water. The Commission's subcommittee on open space recommended the purchase by the State of critical open space, purchase of development rights for less than fee, and easements; and land use regulations, such as zoning specific areas for conservation and open space. The report was followed by no less than nine major pieces of environmental legislation adopted between March 24 and April 9, 1970 and recommended Act 250.

1970 **Act 250 (H.417).** An act "to Establish an Environmental Control Commission to Supervise, Regulate and Control Land Use and Development within the State and to Formulate and Publish Plans to Promote the Proper Use of [Vermont's] Land and Development." Governor Deane Davis signed into law Act 250 and appointed the first chair of the Environmental Board Benjamin Partridge, Jr. (a retired Navy Captain and attorney served until 1974)

1970 June 1, Environmental Board adopted its interim rules and began the conversion of an idea into a program reality.

1972 *In re Preseault*, 130 Vt. (1972). *Act 250's first important judicial test came 1972. A Burlington developer hoped to develop a large residential subdivision in Burlington. After he appealed the*

district commission's denial of a permit to the Environmental Board, adjoining property owners were denied party status by the board. The Supreme Court reversed the board calling its interpretation unreasonable and contrary to the intent of the legislature. The adjoiners were allowed to participate in the hearings before the board to the extent the project would have a direct effect on their property.

1972 Legislature looks at its first proposals for a State land use plan.

1973-
1974 **H.326.** The First Major Amendments to Act 250 are passed by the Legislature and included:

- incorporated the capability and development plan in Act 250 and adding 11 new sub-criteria in preparation of the adoption of the State Land Use Plan;
- prohibited granting permits contrary to any duly adopted local plan, capital plan or municipal bylaw, unless there is a substantial impact on region;
- permitted adjoining property owners to participate before the commission and board but not to appeal to the Supreme Court;
- modified Criterion 1 to include headwaters, waste disposal, water conservation, floodways, streams and shorelines. Definitions were added for endangered species, floodway, floodway fringe, forest and secondary agricultural soils, historic site, necessary wildlife habitat, primary agricultural soils, shoreline and streams; and,
- expanded Criterion 5 highways to include highways, waterways, railways, airports, and airways and other means of transportation.

1973 **Act 256 (S.209).** This act required land sold at public auctions in excess of five parcels to come under Act 250.

1973 **H. 326**. Although not directly related to Act 250, in 1973 the Legislature passed the land gains tax to discourage the quick purchase and resale of Vermont land. This was done in an effort to slow down the conversion of Vermont land into residential subdivisions.

1974 Governor Salmon approved a draft State Land Use Plan and sent it to the legislature but the plan lingered in the committee rooms. The plan placed all land into seven districts – urban, village, rural, natural resources, conservation, shoreline or roadside and mandated the type of uses and minimum sizes for lots within those districts.

1974 Environmental Board amends rules authorizing Coordinators to issue advisory opinions.

1974 *In re Great Eastern Building Co., Inc.*, 132 Vt. (1974). *Neighbors one quarter of a mile- away from a proposed residential subdivision were denied party status before the district commission. The Supreme Court affirmed this denial, assuring the parties that their concerns over traffic were protected by the municipality. Act 250 was not intended to serve as a civil court for the resolution of disputes among neighbors. It was designed to rely on towns, through their plans and local processes, to represent the public interest. (The Evolution of Act 250: From Birth to Middle Age, 35-Fall Vt. B.J. 12)*

1975 Environmental Board amends rules to redefine a "development" to include the construction of a road greater than 800 feet to provide access to or within a tract of land to require an Act 250 permit.

1979 **H. 327**. The Legislature required Act 250 approval for any prospecting, mining or processing of ores for nuclear fission fuels and amended the definition of "development" to include exploration for fissionable source materials.

1980 At the tenth anniversary of Act 250, then Environmental Board Chair Leonard U. Wilson remarked only 2.6% of all applications had been rejected in the first decade after Act 250. Wilson wrote, Act 250 "has been remarkably successful in promoting development compatible with the environmental quality and with the quality of life in Vermont." Act 250, works because "the overwhelming majority of decisions are made at the district level by lay persons who live and work in the district where the proposed development will take place." (The Evolution of Act 250: From Birth to Middle Age, 35-Fall, Vt. B.J. 12)

1981 In 1981, Governor Richard Snelling called for a thorough review of Act 250 and other state permits. The report of the Permit Process Review Committee concluded Act 250 was blameless, but that the State could do a better job coordinating various permit programs and providing more assistance to those seeking business in Vermont. (The Evolution of Act 250: From Birth to Middle Age, 35-Fall, Vt. B.J. 12)

1982 *In re Agency of Administration, 141 Vt. 68, 76, 444 A.2d 1349, 1352 (1982). This case established that the concept of a "development" is triggered at the time construction activity is about to commence—"as if there is a shovel hovering above the ground about to plunge into the land." The decision presents significant portions of Act 250's legislative history and sets out the complicated relationship which the three branches of government have over land use development.*

1982 **H.602** amended Criterion 9E to include a natural gas and oil provision in Act 250 as a criterion for review by District Commissions.

1984 **Act 114 (H.82).** "An Act Relating to Subdivision Regulations." This act eliminated the 10-acre Act 250 loophole and thereby removed the exemption for lots larger than 10 acres and amended the definition of a lot. A "subdivision" under Act 250 was triggered when a person created 10 or more lots, regardless of the size of the lot.

1984 Legislature officially deletes the requirement for a State-wide land use plan.

1984 *In re Baptist Fellowship of Randolph*, 144 Vt. (1984). *The Supreme Court upheld the board's decision to require the Baptist Fellowship of Randolph to obtain an Act 250 permit, defining "commercial purpose" to include any venture that involves an exchange of things of value for services, including churches, and avoiding an attempt to carve out a public, pious, or charitable exemption to Act 250. (The Evolution of Act 250: From Birth to Middle Age, 35-Fall, Vt. B.J. 12)*

1985 Legislative Amendments:

- **H.29.** The act requires all land use permits, permit amendments and revocations to be recorded in the town clerk's office;
- **H.299.** The act required District Commission appeals to be heard by the Environmental Board and not the superior court; and ratified the Environmental Board Rules which effectively gave the Board rules the force of statutes.
- **H.80**. The act increased the penalty for civil violations.
- **H.393**. The act defined farming purposes to ensure that the operation of greenhouses, maple syrup productions, and the onsite preparation and sale of agricultural products principally produced on the farm and of fuel or power from agricultural wastes were exempt from Act 250.

1985 *In re Quechee Lakes Corp., 154 Vt. 543 (1990). This case was decided by the former Environmental Board in 1985, has become the dominant decision of all land use law in Vermont. It is impossible to practice and use law in Vermont without having studied this decision. It goes beyond mere aesthetics, it goes to the vision of Vermont as a special place worthy of protection. (The Evolution of Act 250: From Birth to Middle Age, 35-Fall, Vt. B.J. 12)*

1986 **S.95**. This bill enacted Criterion 1(G) Wetlands as a new Act 250 Criterion. The purpose of the wetland bill was "to protect wetlands of state significance by restricting activity which has not been authorized by state permit."

1987 Governor Kunin appointed the Commission on Vermont's Future, called the Costle Commission. The Commission was charged with the duty "to assess the concerns of Vermont citizens on the issue of growth, to establish guidelines for growth, and to suggest mechanisms to help plan Vermont's future.

1987 **H.383.** "An Act Relating To Act 250 Jurisdiction Over Certain Controlling Persons And To Increase The Land Gains Tax With Respect To Resale Within 6 Months of Acquiring Title." This legislation amended the definition of a "Person" to include "an individual, partnership, corporation, association, unincorporated organization, trust or other legal or commercial entity, including a joint venture or affiliated ownership."

1987 **S.145**. "An Act Relating To Expediting Of the Permit Issuing Process in Two State Agencies and the Environmental Board." The purpose of the bill was to improve the process of issuing permits by establishing specific performance deadlines for issuing permits.

1987 *Pratt's Propane, Inc.*, #3R0486-EB (1/27/87). [EB #311M]. *This case was decided by the former Environmental Board in 1987, and explained in the context of a motion for summary decision, that, even in the absence of an opponent, a district commission's denial of permit application would not be summarily reversed simply because there was no opponent in opposition to the developer appellant. Rather, because the burden of proof in Act 250 consists of both the burden of production and the burden of persuasion, the applicant had to provide sufficient evidence to meet its burden of production that the proposed project complied with Criterion 8. The principle that the burden of proof consists of the burden of production and burden of persuasion controls each Act 250 application that is filed, and each Act 250 hearing that is held. (Young Lawyers Division, Mid-Winter Thaw Seminar Materials. Act 250: The Good, The Bad, and The Ugly. January 14, 2017, Le Sheraton Montreal.)*

1988 **S.143**. "An Act Relating To Authorizing A District Environmental Commission To Direct A District Coordinator to Issue Permits To Applicants For Minor Projects."

1988 **H.681.** The bill, as first proposed, would have taken waste-to-energy facilities and wood chip generators out of the PSB and put under the district environmental commission. As a compromise, the final bill proposed that the Act 250 criteria (except for criterion 10) would be included in review by the Public Service Board (PSB) but that jurisdiction would remain with the PSB.

1988 **Act 200.** An Act "Relating to Encourage Consistent Local, Regional and State Agency Planning," Act 200 was a comprehensive rewrite of Chapter 117 as it related to planning, provided funds for the development of municipal plans through an increase in the property transfer tax, and set up a system of reviews and approvals of town and regional plans. The object of the law was in part to fill the hole left in Act 250 by the loss of the state land use plan. (The Evolution of Act 250: From Birth to Middle Age, 35-Fall, Vt. B.J. 12). Act 200 also created the Housing and Conservation Trust Fund for the purpose of encouraging the development of low income housing and preserving farmland and other significant lands.

1988 *In re Hawk Mountain Corp.*, 149 Vt. 179, 184 (1988). *The Vermont Supreme Court affirmed the Environmental Board's decision to deny a permit for a large sewage system that the board concluded would pollute a nearby river. The Court deferred to the judgment of the board in requiring the applicant to obtain a water discharge permit, even after the Agency of Natural Resources ruled none was needed. In the decision, the Court stated that the legislature "intended to confer upon the Board powers of a supervisory body in environmental matters." (The Evolution of Act 250: From Birth to Middle Age, 35-Fall, Vt. B.J. 12)*.

1989 The Environmental Law Division was first created in 1989 to hear appeals from enforcement decisions of the Agency of Natural Resources. This act was adopted to encourage diligent enforcement of violations of Act 250 and other environmental laws. To ensure that the judge was not diverted from this duty, the legislation prohibited assignment to other judicial functions.

1989 **S.54**. "An Act Relating to Administrative Enforcement of Specified Environmental Laws." The legislation standardized and enhanced administrative enforcement powers of the secretary of the agency of natural resources and the environmental board.

1990 Legislative Amendments:

- **S.356**. The bill exempted from Act 250 segments of the Long Trail and exempted lots for the purpose of land conservation from the word "subdivision" in Act 250.
- **H.195**. The bill provided for municipalities to opt for stricter jurisdictional triggers even if municipality has permanent zoning and subdivision regulations.
- **H.778**. The bill combined Environmental and Land Use Review Process for solid waste facilities and creates solid waste facility panel of the environmental board to hear appeals of solid waste management decisions.
- **H.441**. Permitted Act 250 Criteria 9 and 10 may be taken out of order for district commission review.
- **H.901**. Exempted certain municipal projects from Act 250.

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- **S.378**. Authorized environmental board to adopt rules that would allow a local permit to be given a presumption that Criterion 9 has been met.
- **H.733.** Ensured any facility generating low level waste was a development requiring an Act 250 permit, regardless of acreage.

1991 Legislative Amendments

- **S.121**. Applicant required to send notice to owner of the land, if not applicant.
- **S.132**. Authorized governor to appoint alternatives to Environmental Board; extended the length of time permit must be used to two years; requires and defines substantial construction; provides in cases of non-compliance with 9B, that applicant may obtain a permit by purchasing conservation easements on other land, or makes specified payment to Vermont housing and conservation trust fund for the preservation of primary agricultural soils;
  - Requires seller or subdivider of land to prepare disclosure statement; and
  - Authorizes board to publish or to contract to publish its decisions.

1992 Legislative Amendments

- **H.951**. Earth extraction operations associated with landfill closures are required to get a zoning permit or an Act 250 permit if requested by the town to its respective district commission or town does not have zoning bylaws, application must be treated as a minor.

1992 In re Southview Associates 153 Vt. 171 (1989). *This case was decided by decided by the former Environmental Board in 1987, was upheld by the Vermont Supreme Court and held constitutional by the United States Court of Appeals, Second Circuit, 980 F.2d 84 (2d Cir.1992). The case pertained to a developer's proposal that would have eliminated a deer yard. In denying the project, the Board established definitively that habitat and endangered species would be protected as a matter of localized populations, within the context of state-wide protection. This mode of analysis is common to the natural resources criteria.*

1993 The National Trust for Historic Preservation placed Vermont on the list of the eleven most endangered places in America.

1993 Legislative Amendments

- **H.357**. Approved payment for Board and Commission members under provisions of general law. (H. 357)
- **H.216**. Removed jurisdiction from Act 250 involving private sector role in solid waste management and requires secretary of ANR to certify compliance with the criteria of Act 250. (H. 216)
- **H.356**. Authorized an Act 250 permit fund. (H 356)

1994 The Senate Natural Resources and Energy Committee refused to recommend the reappointments of three members of the Environmental Board, including its chair Elizabeth Courtney.

1994 *In re Molgano*, 163 Vt. 25, 27 and 32-33 (1994). *When the board ruled against a Manchester developer's plan to build two office buildings, concluding the development was inconsistent with*

the town plan, the Supreme Court reversed the decision, finding no specific policy in the plan to prohibit the project. Using language that would be recited frequently in the years to come, the Court refused to give "nonregulatory abstractions'' the weight of law. (The Evolution of Act 250: From Birth to Middle Age, 35-Fall, Vt. B.J. 12)

1994 Legislative Amendment

- **Act 232** (adj. Sess. 1993). Defined adjoining property owner and solid waste district; changed procedure for jurisdictional opinions; provided for appointment of hearing officers; required notice to municipality, planning commission and solid waste district; established procedure for commission determination of party status; promoted non-adversarial resolution of issues; provided for final comments by all parties; allowed commissions to review criteria out of order; authorized interlocutory appeals under criterion 10; authorized an eligible municipal review board to assess the local impact on municipal, educational services and conformity with town plan under criteria 6, 7, and 10 to serve as presumptions; extended permits indefinitely except for mineral resources, solid waste facilities and logging above 2500 feet, and required the board to set requirements for completion of permitted developments.

1995 The legislature exempted ancillary slate mining activities from Act 250, granting unused quarries exemptions from the usual rules of abandonment as long as slate was taken from the quarries before June 1, 1970, and the quarries' owners registered with the State.

1995 On the 25th anniversary of the enactment of Act 250, board chair John Ewing issued a progress report. He announced the development of performance standards for the administration of Act 250, which set timelines for the production of decisions and permits, prepared a standard hearing day schedule for commissions, and suggested other improvements designed to make the process speedier and simpler. He promised greater enforcement and showed the result of the board's success in reducing its backlog. In his introduction, Ewing stated emphatically, "Act 250 is not an anti-growth law: In fact, most feel that it protects our most valuable assets and, with its long term focus, will ensure Vermont's future." (The Evolution of Act 250: From Birth to Middle Age, 35-Fall, Vt. B.J. 12)

1996 *In re Stowe Club Highlands*, 166 Vt. 33, 36-37 (1996). Decision sets out test for when a permit amendment may be sought and lays out foundation for Environmental Board Rule 34(E).

1998 **Act 120 (H.278)**. "An act Relating to Downtown Community Development." The act is intended to preserve and encourage the development of downtown areas of municipalities of the state; to encourage public and private investment in infrastructure, housing, historic preservation, transportation including parking facilities, and human services in downtown areas; and to reflect Vermont's traditional settlement patterns, and to minimize or avoid strip development or other unplanned development throughout the countryside on quality farmland or important natural and cultural landscapes.
http://www.leg.state.vt.us/DOCS/1998/ACTS/ACT120.HTM

2001 Reacting to criticisms that the process took too long, a new act authorized any statutory or prospective party to file a request for recorded hearings, to be taped at the commission level and available for use by the board, eliminating the *de novo* hearing previously a central feature of Act 250 reviews. The program was repealed by operation of law on September 1, 2004, and

was not revived. The experiment failed. No one ever made such a request. (The Evolution of Act 250: From Birth to Middle Age, 35-Fall, Vt. B.J. 12)

- The act also amended the mechanism for reviewing projects under Criterion 10 by authorizing the board or commission to look to zoning bylaws for assistance in determining the meaning of a town plan, "but only to the extent that they implement or are consistent with those provisions, and need not consider any other evidence." This part of the act was a direct reaction to the Vermont Supreme Court's holding in *In re Kisiel*. The effect of this act was to give liberty to the board to make rulings on Criterion 10 in spite of the decision of the local planning commission. (The Evolution of Act 250: From Birth to Middle Age, 35-Fall, Vt. B.J. 12)
- The 800-foot rule, previously adopted in 1978 was abolished by the 2001 act, at the request of the board. The rule had encouraged spaghetti lots and strange-shaped parcels to get around the rule. At the same time, the threshold for Act 250 jurisdiction in towns without zoning and subdivision bylaws was lowered from ten lots to six.

2001 *Stonybrook Condominium Owners Association, DR #385, FCO (5/18/01).The Environmental Board issued its decision in Re: Stonybrook Condominium Owners Association. This case recognized the right of an applicant to limit the boundaries of a permitted project to an area smaller than what was owned, and avoid having to obtain an amendment for a material change for changes on that part of the tract not within the scope of the project. Material changes of the original permitted project, however, are still subject to jurisdiction.*

2002 The legislature passed the Downtown Development Act, limiting the Act 250 review of projects located in downtown development district. The act expanded the threshold for review of mixed use or mixed-income housing, depending on the population of the municipality and thereby allowing projects that would formerly have been reviewed by Act 250 to avoid jurisdiction. (The Evolution of Act 250: From Birth to Middle Age, 35-Fall, Vt. B.J. 12)

- This act also provided greater exemptions for farming under Act 250. In deciding whether Act 250 applied, farm land could not be considered "involved land" within the one-acre or ten-acre jurisdictional threshold unless it was actually involved in any activity that triggered jurisdiction.

2002 *In re Vermont Verde Antique International, Inc.*, 174 Vt. 208 (2002). *The Supreme Court struck down Environmental Board Rule 3(C)) to the extent that it authorized district coordinators to issue opinions without a formal request, finding that the rule exceeded the scope of the board's rulemaking powers as granted by the statute, and invalidating a jurisdictional opinion made by the district coordinator on a quarrying operation*

2003 The definition of "development" changed again in 2003, temporarily exempting the improvement or maintenance of any portion of any statewide system of snowmobile trails, providing that the changes follow acceptable management practices. The exemption applied only to snowmobiles and hiking trails, but not other motorized recreational vehicles. Agricultural fairs and equine events were also exempted in this act.

2004 *In re Real Audet,* 2004 VT 30, ¶10 (4/1/04). There is no *de minimis* exception to whether a "development" has occurred. But see, Act 250 Rule 2(C)(3)(c) (created de minimis exception after Court decision issued).

2004 **Act 115 (H.175)**. "An Act Relating to Consolidated Environmental Appeals and Revisions of Land Use Development Law." The act abolishes the Vermont Environmental Board and Water Resources Board and assigns appeals to the Vermont Environmental Court. The act establishes the Vermont Natural Resources Board (VNRB). The act created a project scoping process for applicants, which required the Department of Environmental Conservation or district commission to issue a project review sheet, naming all of the permits each applicant will need to file, holding a scoping meeting where parties, including adjoiners, may learn the basics of the project, and where the applicant answers questions from the public. The process was voluntary.

Rights of appeal

2004 *In re Huntley, 2004 VT 115 Vt. 596 (2004). Once Act 250 jurisdiction has attached, it does not "detach" from a parcel unless the permit has expired.*

2006 Appointment of Peter Young as Chair of the Environmental Board by Governor Jim Douglass.

2006 **Act 183 (S.142).** An act designed to assist communities in accommodating growth and development while supporting the economic vitality of the state's downtowns, village centers, and new town centers and maintaining the rural character and working landscape of the surrounding countryside. To accomplish this purpose, the act expands upon the existing program that offers incentives for communities that undergo the process of becoming designated "downtowns," "village centers," or "new town centers" by creating a new category of "designated growth centers."
http://www.leg.state.vt.us/docs/legdoc.cfm?URL=/DOCS/2006/ACTS/ACT183.HTM

2009 **Act 54 (H.313).** An act designed to foster economic development in Vermont. Legislature amended definition of a "development" to clarify the exemption for telecommunication facilities that have been issued a certificate of public good by the Public Service.
http://legislature.vermont.gov/assets/Documents/2010/Docs/BILLS/H-0313/ACT0054%20As%20Enacted.pdf

2009 *In re Hamm Mine Act 250 Jurisdiction, 186 Vt. 590 (2009). Jurisdiction does not expire where a project was not in compliance at time of permit expiration and material changes were made without a permit amendment.*

2009 *Eastview at Middlebury. In re Eastview at Middlebury, Inc., 187 Vt 208 (2009). This decision clarified the doctrine of "involved land" to apply only to determinations of original jurisdiction, not to scope of permit or permitted project.*

2010 *In re Big Spruce Road Act 250 Subdivision*, No. 95-5-09 Vtec, Decision on Multiple Motions at 6 (4/21/10). Sets out standard of review for obtaining party status in Act 250 appeals.

2010 *In re Village Associates Act 250 Land Use Permit, 188, Vt. 113 (2010). The cost of removing forest cover is considered in the analysis under the first ("limitations") component of 10 V.S.A. § 6001(15), although the USDA-NRCS, Farmland Classification Systems for Vermont Soils (2006) at 10 states that "[n]ormally, the cost" of installing corrective measures to overcome limitations "should not be considered" deciding a soil's rating.*

2010 **Act 141 (H.614).** "An Act Relating to the Regulation of Composting." Comprehensive regulatory system for composting with several exemptions and new authority granted to Chair of District Commission to determine whether owners of composting facility are circumventing law. http://legislature.vermont.gov/assets/Documents/2010/Docs/ACTS/ACT141/ACT141%20As%20Enacted.pdf

2011 **Act 18 (H.411).** "An Act Relating to the Application of Act 250 to Agricultural Fairs." This act amends the existing Act 250 permitting exemption for agricultural fairs to provide that an improvement at an agricultural fair that is a building is exempt from the Act 250 permit requirement if the building was constructed prior to January 1, 2011 and the building is used solely for the purposes of the agricultural fair. The act also provides that a building constructed prior to January 1, 2011 in accordance with the Act 250 agricultural fair exemption 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. The act also defines the term "agricultural fair" as that term is used in Act 250. http://legislature.vermont.gov/assets/Documents/2012/Docs/ACTS/ACT018/ACT018%20As%20Enacted.pdf

2011 **Act 53 (S.78).** "An Act Relating to the Advancement of Cellular, Broadband and other Technology Infrastructure in Vermont." The act established policies and programs to achieve statewide cellular and broadband deployment in Vermont by the end of 2013. Such changes include exemptions from Act 250 and local land use bylaws for certain improvements associated with communications lines. http://legislature.vermont.gov/assets/Documents/2012/Docs/ACTS/ACT053/ACT053%20As%20Enacted.pdf

2011 *In re JLD Properties of St. Albans, Inc., 190 Vt. 259 (2011) Wal*Mart. In determining whether to consider a revised application for a project that has already been denied an Act 250 permit, the Environmental Court has noted that a "substantial change in circumstances can occur when there have been changes to the application itself, to address concerns that caused the previous denial, a change in the physical surroundings of the property, or a change in the governing regulations." An applicant cannot, however, "merely seek to introduce additional evidence . . . that could have been presented in the earlier proceeding."*

2011 *In re Shenandoah LLC, et al., 2011 Vt 68. "Since Rule 2(C)(1)(a) includes as a person 'any other beneficial interest derived from the development of the land,' the rule's definition encompasses a trust for one's minor children, absent evidence to the contrary. This is because any financial benefit to the minor children constitutes a financial advantage to the parents ordinarily responsible for their support."*

2011 *In re Times and Seasons, 190 Vt 163 (2011). Where Applicant sought Supreme Court review and Supreme Court affirmed non-compliance with Criterion 9(B), such affirmation became Applicant's obligation not to disturb the site's primary agricultural soils such that statutory amendment to 9(B) definition could not be applied to Application for Reconsideration.*

2011 Appointment of Ron Shems as VNRB Chair by Governor Peter Shumlin.

2013 **Act 11 (S.159).** “An Act Relating to Various Amendments to Vermont’s Land Use Control Law and Related Statutes.” This act makes various amendments regarding 10 V.S.A. chapter 151 (Act 250), including the reorganization of jurisdictional provisions; requiring persons seeking review of jurisdictional opinions to seek consideration by the Natural Resources Board before appealing to the Environmental Division; adopting ethics requirements for Natural Resources Board members and district commissioners; and amendments regarding environmental enforcement. The act also repeals a sunset that was placed on various exemptions to Act 250 related to composting. (Paul Gillies, Postscript: Seven More Years of Act 250).

2014 **Act 145 (H.740).** “An Act Relating to Transportation Impact Fees,” (2013, Adj. Sess.) This act establishes a mechanism under which the District Commissions through permits under 10 V.S.A. chapter 151 (Act 250) and the Agency of Transportation through State highway access permits may assess fees to fund improvements to address the transportation impacts of development projects. The Legislature Recognized 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. Money not spent on the project within 15 years may be recovered by a developer. (Paul Gillies, Postscript: Seven More Years of Act 250).

2014 *In re Chaves Act 250 Permit Reconsider, 195 Vt. 467 (2014). 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 non-regulatory,” without any legally enforceable authority. (Paul Gillies, Postscript: Seven More Years of Act 250).*

2014 **Act 147 (2013) (H.823).** “An Act Relating to Encouraging Growth in Designated Centers and Protecting Natural Resources.” The act encouraged development in designated centers and existing settlements and discourages strip development outside areas through amendments to the jurisdiction and the criteria of Act 250. The Legislation 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. This act led to the VNRB adopting a guidance document on evaluating settlement patterns under Criterion 9L, State of Vermont, Natural Resources Board, “Act 250 Criterion 9L Guidance.” (Paul Gillies, Postscript: Seven More Years of Act 250).

2014 **Act 118 (S.100).** “An Act Relating to Forest Integrity.” Although not directly related to Act 250, this act finds that forests provide important ecological and economic benefits and that the fragmentation of contiguous forestland reduces its value. The act requires the Commissioner of Forests, Parks and Recreation to submit a report on or before January 15, 2015 assessing the effects of fragmentation on Vermont’s forests and making recommendations for how to protect their integrity.

2014 **Act 159 of 2014 (H.869).** This Act expands the one-to-one off-site mitigation ratio for primary agricultural soils to apply in downtown development districts, new town centers and

neighborhood development areas associated with downtown development districts. The act also redefines primary agricultural soils under Act 250.

2015 Appointment of Jon Groveman as VNRB Chair by Governor Peter Shumlin.

2015 **Act No. 51 (S.138).** "An Act Relating to Promoting Economic Development," No. 51 (2015) directed the Vermont Natural Resources Board to conduct a public process to revise its procedures for implementing the settlement pattern Criterion 9L.

2015 The Act 250 Rules were amended to delete the definition of "Rural Growth Area."

2016 Appointment of Diane Snelling as Vermont Natural Resource's Board Chair by Governor Peter Shumlin.

2016 24 V.S.A. § 4352 (f). Vermont Natural Resource's Board authorized to hear appeals of energy compliance determinations made by the Commissioner of the Department of Public Service.

2016 *In re B & M Realty, LLC, 2016 VT 114. 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. (Paul Gillies, Postscript: Seven More Years of Act 250).*

2016 *In re North East Material Group LLC Act 250 JO #5-21, 2016 VT 87. This case came before the Vermont Supreme Court following the Environmental Division's decision on remand that a rock-crushing operation by North East Materials Group, LLC, (NEMG) was exempt from Act 250 as a preexisting development. The Environmental Division reached the same conclusion in its first decision, but the Supreme Court reversed and remanded, holding that the court used the wrong legal standard in deciding that the rock-crushing operation did not constitute a cognizable physical change to the preexisting development and that one of the main factual findings in support of the decision was clearly erroneous. Appellants, a group on thirteen neighbors to the operation, appealed, arguing that the Environmental Division erred in applying the Supreme Court's instructions on remand. After review a second time, the Supreme Court concluded that, even assuming that crushing operations were part of the preexisting quarrying development, findings on the location and volume of the crushing operations were too limited to support a conclusion that the present operations did not constitute a cognizable change to the existing development. Accordingly, the Court reversed and remanded for further proceedings. (Justica Opinion Summary)*

2016 *In re Waterfront Park Act 250 Amendment, 201 Vt. 596 (2016). Act 250 Rule 34(E) 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. 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. (Paul Gillies, Postscript: Seven More Years of Act 250).

2017 **Act 47 (H.424).** "An Act Relating to the Commission of Act 250: the Next 50 years." This act creates the Commission on Act 250: the Next 50 Years, a six-member legislative committee to examine and report by December 15, 2018 on a broad list of issues relating to the State land use law known as Act 250, originally passed in 1970 and codified at 10 V.S.A. chapter 151. The act includes the appointment of advisors to the Commission. The act divides the Commission's activities into three areas:

- a preliminary meeting phase, during which the Commission is to become informed on the history, provisions, and implementation of Act 250, including its current permitting and appeals processes;
- a public discussion phase to engage Vermonters on their priorities for the future of the Vermont landscape, including how to maintain Vermont's environment and sense of place, and to address relevant issues that have emerged since 1970; and following completion of the public meeting phase, a deliberation and report preparation phase.

[1]References:

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.

Paul S. Gillies, "Postsript: Seven More Years of Act 250", September 22, 2017. (unpublished)

Richard Oliver Brooks with K. Leonard and Student Associates, "Toward Community Sustainability: Vermont's Act 250," Volume 1 and 2, with 1996 Update, 1997.

Cindy Corlett Argentine, "Vermont Act 250 Handbook, A Guide to State and Regional Land Use Regulation," 3rd edition (2008).

Young Lawyers Division, Mid-Winter Thaw Seminar Materials. "Act 250: The Good, The Bad, and the Ugly." January 14, 2017, Le Sharaton Montreal.

Vermont Natural Resources Board, "Environmental Case Notes." Annotations of Supreme Court, Environmental Board, Environmental Court, and Environmental Division, Act 250 Decision, April 30, 2014.

Vermont Statutes Annotated.

1.3 RICHARD BROOKS (LEGAL 1970-1995)

CHAPTER I: Introduction

This treatise is a study of Vermont's premiere nationally-renowned environmental law --"Act 250" -- and its related environmental and land use laws. Modelled after Montesquieu's L'esprit des Lois, it studies the natural setting, history, culture, and public values of this unique law, as well as the myriad of cases decided under the law. At the same time, despite its scope and depth, this study, in the American pragmatic tradition, seeks to be useful to the lawyers and citizens of Vermont in their efforts to promote and protect Vermont's sustainable environment, and to the citizens and lawyers of other states and nations who are interested in sustainable development.[1]

Six central principles guide my design of both the form and the content of the treatise:

- Law, and environmental law in particular, can only be understood in its community context, as part of a place, both natural and social;
- The community can only be understood by interpretation of its past, present, and projected future practices; consequently, the law must be understood in light of historical changes in a specific community, as well as its plans for the future;
- Vermont's Act 250 is best understood in terms of ideals implicit in Vermont's past and current law: the "intimations" of preservation, conservation, pollution prevention, and the socially sustainable development of communities. The intimations of these historical practices color the way in which the modern environmental ideal of sustainability is pursued in Vermont;
- Law must be designed to encourage democratic management in the face of modern science and the growth of modern bureaucracies. Vermont's Act 250 is designed to facilitate the democratic management of environmental protection;
- A flexible citizen-oriented management raises fundamental questions about the modern role of the lawyer and the nature of law in guiding the decision making of citizen-based boards;
- In post-modern jurisprudence, law in general and Act 250 in particular is to be understood through recognition of a necessary pluralism in the history, community context and values of modern life.

A. The Vermont Community Setting.

Vermont is a naturally beautiful state, with green wooded mountains, open fields, picturesque river valleys, and for the most part, compact villages. One is led naturally to inquire to what extent nature, custom, and law have contributed to this state of affairs.[2] Vermont is reputed to be a leader in the adoption of progressive environmental laws. Act 250 is known to be one of these laws.

The small size of Vermont enhances its capacity to be studied. The "miniaturization" of Vermont makes possible the study of the interaction of government, law, custom and nature in the study of Act 250.[3] The in-depth study of the law of a specific state is important to a more general understanding of environmental law. Many environmental law treatises describe the law in depersonalized terms, abstracted from the natural environment and the community which adopts it. Yet where environmental law "takes place," its natural and community settings; these settings give the law its meaning. Not only are the natural ecosystems are often locally unique,[4] but the cultures[5]

which affect them are also special.

These cultures re-create the meaning of the natural environment; Vermont's environment has been recreated throughout its history,[6] building "a place" which is neither a Edenic nature nor a modern denatured city, but a "working natural environment" to be sustained. In short, "the place" for Act 250, Vermont, is a setting with a nature all its own shaped by a special history and culture as well. Vermont's natural setting, history and culture gives meaning to Act 250 and its specific provisions.

The ancient Greeks called the meaning of law in its historical and community context "nomos," standing for a blend of culture, law and ideals.[7] More recent legal scholars have called such an approach to the law "the living law." Without claiming historical accuracy for its use here, I envisage the study of Act 250's "nomos" to be a study of the meaning of law as expressed not only in the positive law of cases, but in the kind of justice reflected in the day-to-day decisions which reflect the ways of life of the community--ways of life which take into account the natural setting of the community. *This* treatise is a study of Vermont's "nomos." The central assumption of this treatise is that law can only be understood as part of nature and the patterns of custom and justice in a community.

The study of Vermont's law as part of nature as community is made possible by recent intellectual and political developments of the past quarter century. The "communitarian revolution" and the "invention" of cultural geography provide the foundation for this study. The communitarian vision of Vermont's Act 250 is part of the global movement away from reliance upon the nation-state and toward the creation of a civil society, an associative state or a nation of communities.[8] The quiet secession from the nation-state seeks the resolution of public problems through more tightly integrated self-managing autonomous communities. Vermont's effort to manage its own land uses and environment is an experiment in communitarian governance.

There is in Vermont, however, an ambiguity in the word "community." Community can refer to the towns, villages and small cities of the state or to the state itself. This ambiguity in the meaning of community is reflected in the ambivalence of loyalty of Vermonters to town or state and tensions between state and local government. We shall see that this tension runs throughout the workings of Act 250.

Vermonters share a particular vision of Vermont's landscape. To understand a landscape vision, the fields of cultural geography and historical ecology are necessary. Historical ecology explores how the apparently "natural" landscape has been shaped by past natural and human history.[9] Cultural geography seeks to understand how the images of nature in our minds -- images which guide our actions toward the environment -- are shaped by earlier cultural forces.[10] Act 250 begins with a Vermont landscape already shaped by history. And the Environmental Board and commissions making decisions under Act 250 operate with the image of a given landscape, the product of a Vermont culture.

An understanding of this culture can only derive from the author's being part of the Vermont community. To understand the meaning of law one must possess "a sense of the place" of the laws.

Since the environmental ideals which inform and guide Act 250 are closely linked to Vermont's history and present community life, participating in that history and community life contributes to the understanding of the law. [Hence, we marvel when any mere visitor, like de Toqueville, can understand our laws]. For the past eighteen years, I have lived, worked and participated in the community life of Vermont. Out of my office window is a view of the White River, the arc of the Green Mountains, and the South Royalton school playground. This is "my place" and the story of a law which governs it.[11]

B. The Changes in Vermont

In the past century before Act 250 was adopted and in the past quarter century since Act 250 was adopted, Vermont has undergone significant changes. Since 1970, the national environmental movement and the state bureaucracies it has spawned have altered the way environmental protection is carried out. The working economy of Vermont, an economy underlying Vermont's scenic beauty, has shifted since 1970. The natural resource economy of agriculture and forestry has declined. A relatively large number of new affluent migrants have arrived in the state, and the state has been slowly "urbanized." Major new developments, highways, shopping malls, and radio towers have arrived in the state. To understand the history of Act 250 over the past twenty-five years, the role which these changes have played in the Vermont way of life must be explained.

Different narratives may be given to "explain" these changes. These narratives may tell the story of the decline of Eden, or the abuse of a Jeffersonian polity, or the necessary modernization of a backward rural state. Different narratives lie in the recesses of the different minds of Vermont citizens. These different narratives lead to vastly different evaluations of what Act 250 has done or should do.

C. The Ideal of Community Sustainable Development[12]

In recent years, both environmentalists and developers have sought a common ground in the promotion of sustainable development and scholars have sought to define sustainability.[13] "Sustainable development" is a new term for an old ideal. Among its many meanings is the societal use of resources at a rate that does not reduce real incomes in the future nor diminish the ecological diversity of natural systems or their regenerative capacity.[14] In more prosaic terms, sustainable development respects these past practices which sustain the environment and the community, while adapting others to meet the needs of future generations. Vermont's Act 250 has sought the sustainable development ideal in its recognition of carrying capacity, its commitment to conservation of farm, forest lands, energy and wildlife resources, its preservation of natural diversity, its limits placed upon extinction of non-renewable natural resources and its permitting of a community's development conditional upon protecting natural resources.

At the same time, Act 250 is a "reactive" law which authorized citizen boards to issue, deny, or condition permits to proposed developments. One of the conclusions of this book is that such a reactive law is not sufficient to support a sustainable environment. For example, Act 250 and its farmland protection criteria did not stem the recent precipitous decline of farming in Vermont. Other

customs and laws in addition to Act 250 are needed to achieve the sustainable development of Vermont and its communities. Act 250 can coordinate with these other customs and laws to more affirmatively support sustainable development.

By seeking to promote sustainable development rather than concentrating only upon preservation or pollution control, Vermont's Act 250 expresses the aspirations of Vermont citizens but also the citizens of other states, developing countries, as well as other nations which are committed to both development and environmental protection policies. As a consequence, Vermont's Act 250 is a law whose principles have application far beyond the confines of Vermont.

D. Democratic Management

Act 250 is a relatively simple law, which stresses the importance of citizen participation. As a law in a relatively small state, Act 250 is affected only indirectly by the complex body of U.S. federal environmental law.[15] This simplicity enhances democratic management: citizen participation in the administration of environmental law. Vermont's history of commitment to community as exemplified in her town meetings requires such a law.

Act 250 is decentralized, administered by nine citizen-based district commissions and a state appeals Environmental Board. Other citizens have relatively open access to participating in the decisions of the commissions. This legal structure encourages a form of participatory democracy.[16] "Participatory democracy," "civic society" and "associative democracy" are all words for recent efforts to reform western democracies.

Unfortunately, the growth of scientific expertise, and bureaucratic organization can impede the achievement of these recent reform efforts and the democratic management of Act 250 in particular. The determination of some environmental impacts under Act 250 requires science-related measurements, which other state agencies, especially Vermont Agency of Natural Resources, must supply.

The Vermont Agency of Natural Resources is not the only bureaucracy. The District Commissions receive many applications for development. The rapid processing of these applications necessarily requires the assistance[17] of District Office staff. Many decisions pertaining to these applications are necessarily "low visibility" decisions made by staff to help the applicant; this staff help may be unsupervised by citizen boards. Both before and after the application is complete, each project must be carefully evaluated in terms of its environmental impact. This evaluation can result in delays and what is perceived to be "red tape." How to achieve the right amount of necessary "bureaucratization" to service the applicant and still insure independent citizen participation in the review and approval of the project is a central problem in the administration of Act 250.

These bureaucracies must also produce relevant and valid information, in a form comprehensible to the citizen members of the district commission and the Environmental Board. Yet these contributions of science and bureaucracy must not crush the workings of this citizen-based law. In

this sense, Act 250 is a test as to whether science and bureaucracy can be conjoined with participatory democracy.[18]

If Act 250 can be successful in this test, it may be particularly suited to the new democracies of the world, where citizens are struggling to learn how to govern themselves. Since the law is relatively simple, administered in a decentralized, non-legalistic way, and encourages citizen participation, citizens who participate in it learn how to protect the environment and permit development in the course of the administration of the law. *Such an approach can encourage the learning of a "culture of sustainability" in which people learn to encourage one another to engage in sustainable ways of life.*

In short, if successfully carried out, Act 250's ideals of sustainability, its commitment to democratic management, its flexible administration, and its promotion of citizen participation leading to the learning of a culture of sustainability make it a highly transferable environmental law.[19]

E. The Nature of Post-Modern Law

Law can help or impede the democratic management of environmental protection and the protection of citizens from bureaucracy. The Constitution, statutes, and regulations can help to control the bureaucrats and guide elected officials. By structuring public hearings, some of which are adversary proceedings, the law and lawyers can supply and contest the scientific information employed by the citizen boards.

Unfortunately, as law grows complex, the role of lawyers increases. deToqueville saw lawyers as the "natural aristocrats" of American democracy; however, he failed to recognize or predict the extent to which many of them come to serve commercial interests, adopt an exaggerated, rights-oriented advocacy stance on behalf of those interests,[20] and abuse their power through the multiplication of legal arguments and lawsuits. To control this abuse, Act 250 seeks to limit the proper role of law and lawyers in the land development and environmental protection process, and must continue to do so.

Given that law can either help or harm democratic management, what function does this "technical" legal treatise perform? Will such a legal treatise introduce more technical legal considerations, making the process even less accessible to the public? *The classic treatises claimed to offer a comprehensive statement of preexisting laws, seeking to draw an organized portrait of principles, statutes and common law rules and their corresponding doctrines. Such treatises were based upon the assumption that the law was a coherent body of principles, an assumption criticized by modern legal realism.*[21]

This treatise seeks to benefit from the insights of the legal realists,[22] and respect the informal nature of much Act 250 decisionmaking. While continuing to recognize the important role of formal statutes and court rulings, the treatise focuses upon the Environmental Board decisions: the myriad of decisions by the key state board of Act 250.[23] The underlying facts of some of the key Environ-

mental Board decisions are described. The materials upon which the Environmental board depends are fully identified and described. The operation of the District Commissions of Act 250 and their relationship to the Environmental Board is described. The background state policies which influence the law and the Board decisions are identified and described. The legislative history of Act 250, only parts of which were hitherto available in Vermont, is outlined. The kinds of plans and their role within the law are set forth. The Board's reaction to different kinds of development are described. The historical developments of Board decisionmaking is traced. *All of these materials are described in a way to make them accessible to non-lawyers as well as lawyers.*

F. Post-Modern Jurisprudence

A deeper jurisprudential question is posed by the unique quality of decisionmaking under Vermont's Act 250: whether these specific Environmental Board opinions establish a rule of "law," traditionally defined as uniform, predictable, and specific standards which specify measurements of impacts, control those impacts, and guide future developments. *In short, to what extent does the Board promulgate a positive law?* The Board's administration of impact standards, without the use of legal precedent or stare decisis, even with the use of technical documents and procedures, raises fundamental questions about the nature of law itself.[24]

To answer these questions requires more than the legal realism of the mid-twentieth century. The legal realists were primarily critics of the old formal law ideal, viewing law as what legal officials do. After the legal realists, the new jurisprudence arose and has been under development for the past quarter century.[25] While the prior jurisprudence of positivism and legal realism viewed law as an object to be studied either as a deductive system or as the actions of law officials to be predicted, the new jurisprudence views law as part of a set of social norms, shaped by broad social forces, guided by a community's pluralism of policies, all of which are to be understood by reflective interpretation. My account of Act 250 does not claim to review all the community norms, social forces and policies influencing Act 250, nor does it assume they are inevitably in conflict, but it does seek to identify and interpret many of these norms, forces and policies which shape how Act 250 works. In other words, this study of Act 250 seeks to illustrate how the new post-modern jurisprudence informs an understanding of this particular law.

1. I am indebted to Celia Campbell-Mohn, my colleague, who has sensitized me to the field of sustainable development. She has co-authored Sustainable Environmental Law (1993).

I believe that Act 250 has been, in part, a law enhancing "sustainable development" before the current articulation of that public policy. Sustainable development was first officially promulgated by the Bruntland Commission. (The World Commission on Environment and Development, Our Common Future, 1987).

My study of Act 250 is meant to be useful to the citizens of Vermont and others who seek to establisha citizen-based decisionmaking structure for community sustainability. Such a study creates a tension between the pragmatic purposes of the book and its scholarly agenda. I have tried to manage that tension by relegating some scholarship and some practical information to footnotes.

2. This inquiry into the relationship of the natural conditions of a country and its laws is exemplified in C. Montesquieu's The Spirit of Laws (1952). Several modern books seek to study the relationship of law to nature and culture. One of the best authors is Thomas Schoenbaum, Islands Capes and Sounds (1982) and The New River Controversy (1979).

3. Obviously, the size and nature of Vermont raises questions about its "representativeness" as an example of other jurisdictions. Despite Vermont's rural appearance, it is an urbanized state in many ways, and has, to some degree, many of the environmental problems of other states. The form of Vermont laws resemble the laws of other states. Thus, many states have environmental impact laws. Many of the legal problems encountered in the administration of Act 250 are similar to problems in other states. Problems of jurisdiction, judicial review, and enforcement are some examples of similarity.

Despite these similarities, there are also important differences; therefore, this case study is necessarily an exploratory and hypothesis-generating inquiry~not the establishment of general empirically valid laws on all states.

4. This book will comment on Act 250's approach in light of ecosystems asan object of study in ecology. See Chapter XVI.

5. Although this book does not adoptsystematically the insights into culture offered by legal anthropology, its author has been influenced by the writings in this field. See S. Moore, The Law as Process (1978).

6. Law can only be understood as the product of history. Oliver Wendell Holmes recognized this clearlyin The Common Law and The Other Writing, (Republished Legal Classics Library, 1982). A jurisprudential school has been built upon this understanding. I have not, however, followed a rigorous methodology of historical study here.

7. The study of "nomos" as part of modern law was given a boostby R. Cover, "Nomos and Narrative," 97 Harvard L. Rev. 4 (1983). Studies of classical nomos can be found in M. Ostwald, From Popular Sovereignty to the Sovereignty of Law (1986). The history of nomos is traced in Kelley, The Human Measure (1990). A full understanding of law as nomos leads to the conclusion that law can only be understood by those whoparticipate in it to a lesser or greater extent. The very understanding of social phenomena requires at least minimal participation in the law's culture. Nevertheless, in order to achieve a necessarily culture-bound objectivity, techniques to insure validity and reliability are necessary. In this study, I have sought to document decisions carefullyand have circulated drafts of chapters to other observers to at least increase reliability.

8. See Jean Cohen and Andrew Arato, Civil Society and Political Theory (1994), pp. 1-29.

9. Carole Crumley, ed., Historical Ecology: Cultural Knowledge and Changing Landscapes (1994).

10. Simon Schama, Landscape and Memory (1995). This book is an important foundation for this study, although it was published several years after I began work. Schama sets out how tacit cultural assumptions can shape our views of the environment in general and the places we live in particular.

11. The concept of "place" is important both in scientific literature an in ethical and nature writing. See: Wallace Stegner, The Big Rock Candy Mountain (1938); John Hanson Mitchell, Ceremonial Time; Fifteen Thousand Years in One Square Mile (1984); Edward Casey, Getting Back to Place: Toward a Renewed Understanding of the Place World (1993)

The philosophy of law which animates this study views law as a distinct product of a community such as Vermont. The workings of Vermont's law, in turn, shape and structure the community over time. Since Vermonters hold in common a unique natural setting, a common history which, overtime, shapes the sharing of public values, and certain shared public and private institutionswhich participate in the application and interpretation of Vermont's laws. At the heart of the workings of this law is social justice--a fundamental reciprocity which helps to bind the community. Thus in Vermont, each developer and each subdivider whose project haseffects external to his property may be permitted to take a share of nature's and the public commons -- its air, water, road and school capacity, and

view sheds. Vermont's history and current practices and laws define the relevant public commons. In return, the developer must limit the amount taken from the commons or contribute to the community in some other way. If the developer cannot limit the external effects of the development and/or subdivision nor properly compensate the community for its external effects, he cannot enter int the reciprocal relationships necessary for social justice and should not be permitted to undertake the projects. The courts, the Environmental Board and the district commisions, in their decisions, are identifying the specific external consequences of development, determining whether those consequences can be limited, and assessing the developer's capacity to limit them.

12. The study of ideals as part of legal study may be seen as controversial. The prime spokesmen of the philosophy of law in modern times have distinguished law from ideals. See L. Fuller, The Morality of Law 3-32 (1964), and H.L.A. Hart, The Concept of Law 181-207 (1981).

Perhaps ideals in law should be seen as "intimations." See M. Oakeshott, Rationalism in Politics and Other Essays (1991); See also, Oakeshott, The Voice of Liberal Learning 22-23 (1989). Intimations are the implied principles of our practices.

13. J. VandenBergh, J. vander Straaten, eds., Toward Sustainable Development (1994).

14. For an extensive economics discussion of sustainability, see D. Pearce and R. K. Turner, Economics, Natural Resources and the Environment (1990).

15. This treatise does not seek to weigh precisely the relative contributions of federal law, Vermont's other environmental laws, and Act 250 to environmental protection in Vermont. However, in the discussion of the interaction of Act 250 permits and the Agency of Natural Resources permitting, one can derive some insights into their relative contributions.

16. There are different definitions of participatory democracy. for a discussion of the concept and its implementation, See C. Pateman, Participation and Democratic Theory (1970). For one view of participation in Vermont's town meeting, see J. Mansbridge, Beyond Adversary Democracy (1980).

17. Some readers will take exception to labeling the District Offices as "bureaucratic," as I often do throughout the text. This term is not meant in a derogatory fashion, but serves to link the study of the workings of these offices to the well developed theory of bureaucracy. See J. Wilson, Bureaucracy (1989).

18. The relationship between science and political decisionmaking has been explored by S. Jansanof, The Fifth Estate (1990).

19. One must be careful not to overstate its applicability. For example, Act 250 assumes a system of private property which, of course, many countries are now struggling to establish.

20. A central issue much discussed in Vermont is whether or not the Act 250 process is becoming more "advocacy oriented." Lawyers and law schools are currently questioning whether "advocacy" defines the central role of the lawyer.

A very revealing history of workman's compensation laws which originally were not advocacy-oriented, but became so over time is offered by P. Nonet, Administrative Justice (1969).

21. For a discussion of the classical treatise, and its demise, see C. Stone, "From a Language Perspective," 90 Yale L. Jou. 1149 (1981).

22. Modern legal scholars, especially the recent school of legal realists, [See W. Twinning, Karl Llewellyn and the Realist Movement (1973)] criticized the formalistic premises of classic treatises. The realists found formal statements of law incomplete and misleading. For realists, laws require judicial and administrative creativity in the use of a variety of legal materials, guided by informal practice and policy rather than formal legal rules, concepts, and extended legalistic reasonings. Karl Llewelyn, one of the preeminent legal realists, found stability and predicta-

bility of the law, not in statutes and appellate court cases, but in agency rules and practices, shared plans, policies and work materials, a continuity of agency personnel, a shared culture, a stability of political context, and common key facts, including underlying economic customs and other considerations [K. N. Llewellyn,The Common Law Tradition Deciding Appeals (1960)].

Although the commissions and Board must determine whether a project has a given impact, the criteria of the impact are broadly stated. As a consequence, the Commissions and Boards must not only measure the impact but also specify or define what impacts fall wi thin the broad criterion. To do so, these boards and commissions must make substantive judgments about these developments. Onequestion which this treatise will seek to answer is: How does the Board go about the definition of the policies of Act 250?

Act 250 does not grant unlimited discretion to the Board and Commissions. Act 250 incorporates substantive standards from other Vermont environmental statutes through the use of permits issued under those statutes. These permits operate as evidence of prima facie compliance under Act 250. Also, the District Commissions and Environmental Boards rely upon other key "technical" documents to measure amounts of "acceptable" soil erosion, traf-fic impacts, etc. The permits from other agencies and the technical documents are the major ways in which science is introduced into the decisionmaking process, and in which substantive ethical judgements are constrained. The Board opinions also have adopted systematic procedural approaches to many of the criteria. These other permits, key technical documents and systematic procedures offer a degree of predictability to the Board's decisions and offer a body of "rules" studied in this treatise, but make the Board's decisionmaking more complex, especially for citizens. This complex source of rules within Act 250 gives another meaning to Act 250 as "nomos," embodying a broad range of relevant materials to guide action. This treatise seeks to explain this complexity of Vermont's "nomos."

23. These opinions are not the opinions of a court, and their mode of reasoning is different from court opinions. [For a theoretical discussion of precedent legal reasoning, See R. Cross, Precedent in English Law (1977). For a context-bound study, see P.S. Atiyah and R.S. Summers,Form and Substance in Anglo-American Law (1991)]. Although the Environmental Board opinions are drafted by lawyers seeking to apply general rules to specific situations, and even occasionally citing previous opinions, [I have detected an inceased amount of citation of precedent in more recent Environmental Board opinions]. there is rarely the court-like generation of rules or doctrines through comparison among previous cases, and the case at hand.

Instead, Act 250 is an "impact" statute. [For a discussion of impact statutes in environmental law, see R. Brooks, "State and Local Environmental Impact Requirements," P. Rohan, ed., Ch. 28, 5 Zoning and Land Use Controls (1988)]. The substantive criteria by which projects are judgedare stated in broad terms: the project's impact on, e.g., "adverse undue water and air pollution;" "undue adverse effect on the scenic or natural beauty." Such an impact approach requires focus upon the facts of each case. By adopting an impact approach, Vermont's Act 250 appears to be the paradigm of a modern instrumental statute. Each criterion embodies an objective, e.g., scenic protection, which the law then seeks to protecteither by denying or issuing the permit, or conditioning the permit to require the development to be carried out in a certain way. The statute does not offer specific, carefully-calibrated substantive legal doctrines or rules to determine which impacts are "adverse" or "unreasonable." A relatively few court cases interpret Act 250's language to formulate such rules. The legislative policies are too broadly stated in the Act to determine any specific level of acceptable impact. For the most part, the Act 250-related plans have been vague. Legislative history and its technical exposition have not been readily available to help determine the amount of the impact. The Board has not adopted substantive rules to establish levels of impact. Instead, the Board makes specific decisions seeking to apply the broad language of the law to specific situations. This instrumental impact approach of Act 250 makes it readily accessible to the citizen. [Such aninstrumental orientation is part of the nature of modern law. See R. Simmons, Instrumentalism in American Legal Theory (1982)].

24. The central issue of law in an administrative system has been explored by B. Mashaw, Due Process in the Administrative State (1985).

25. Although the definitions of "post modern" are many, I am content to join Albert Borgmann [Crossing the Post Modern Divide, 1992] in identifying it as attacking the realism, universalism and individualism of modernism. Post modern jurisprudence in one form has been explicatedin feminist jurisprudence, critical legal studies, critical race studies, and legal deconstructionism. In another form, it has been part of a new movement which emphasizes the centrality of interpretation in legal understanding. The foremost practitioner of this branch of jurisprudence is

description, see Gary Mindor, Postmodern Legal Movements: Law and Jurisprudence at Century's End (1995). See also Joel Hanler, Law and the Search for Community (1990).

CHAPTER II: "Act 250" and Vermont's Environment

A. Introduction

The famous 18th-century philosopher Baron de Montesquieu, in his legal classic The Spirit of Laws,[1] sought to demonstrate how the laws of nations reflect their climates and soil conditions. If he had studied Vermont, he would have found that Vermont's "Act 250" is a reflection of her ecology--her cold climate, her mountains and valleys, lakes and streams, forests and open lands. This environment shapes and contains her clustered villages and hills and valley farmlands, as well as the character of her people. This social ecology of Vermont helps to determine their recent responses to the myriad of continuous threats to this environment.

Vermont is a state of great natural beauty~green forested mountains, hilltop and valley farms, and pristine rivers and lakes.[2] Until the present, Vermont's location, her geography, and her hard winters have protected her landscape, but at the historical price of near-poverty for many of her citizens. Act 250 was adopted to protect Vermont's environment, while permitting environmentally-appropriate development to continue in order to better sustain her citizens. In the language of the 1990's, Vermont's law is seeks to enable *sustainable development*, while preserving selected natural environments and protecting Vermonters from air and water pollution. To understand this law, the reader should have a basic understanding of Vermont's environment. Some of us who live and work here, along with sympathetic ecologically-minded visitors, have that understanding, but new arrivals, outside developers, and their lawyers may not. They may fail to realize that behind Act 250 is a shared cultural image of Vermont, a rugged pastoral ideal originally informed and shaped by farming and logging in a beautiful natural environment. An understanding of this image, its components of myth and reality, and the actual natural environment which lies behind the image will not only provide a context for comprehending the discussions of specific provisions of Act 250 and the court and Environmental Board decisions. Such an understanding will also shed light upon the history and structure of Act 250 itself and its niche within Vermont.

B. The Natural Resources

.01--The Geography of Vermont. Vermont is a northern New England state, 9,609 square miles bordering Canada to the north, New York to the west, New Hampshire to the east, and Massachusetts to the south. Along with New Hampshire, it provides the open space within the expanding urban triangle of Boston, Springfield/Hartford and Montreal. Lake Champlain runs along much of its western border, while the Connecticut River hems in its eastern border.

Vermont's climate is relatively cold, with a long winter and a short spring, summer and autumn.[3] The growing season is short. The winter snow cover, especially in the colder, high-altitude areas, is often continuous and relatively thick. The snow and cold affect the farming, building and tourist seasons, and have discouraged large-scale population migration to the area. The snow pack influences the plant and animal life and even water and air quality. Sparsely settled, the state has six physiographic regions:

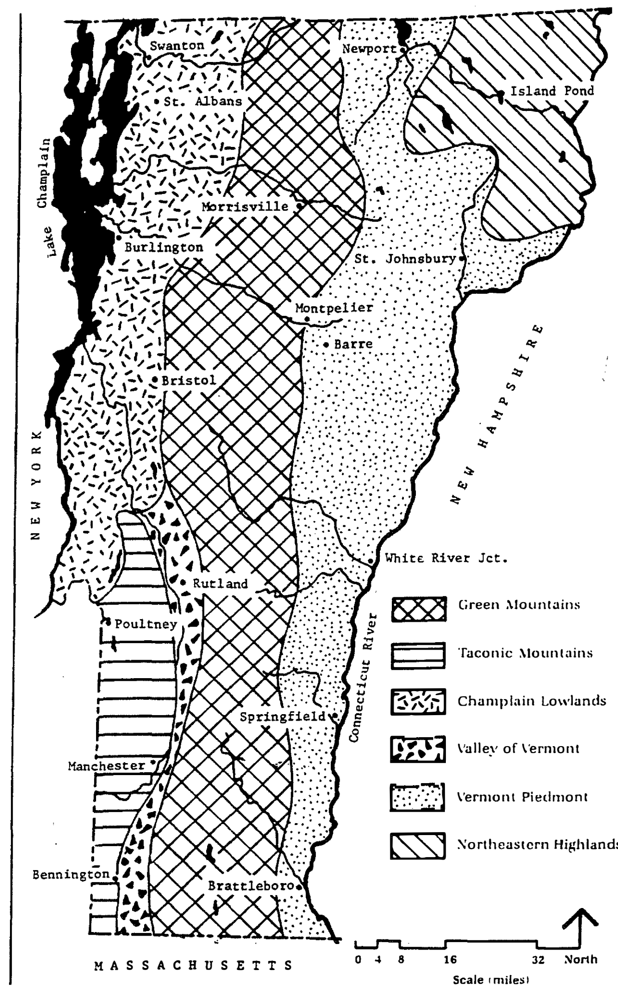


Fig. #1, Source: The Nature of Vermont, Charles W. Johnson (1980)

.02--The Green Mountains. The Green Mountains, rounded by the glaciers of the last ice age, run down the center spine of Vermont, creating both a psychological and physical barrier between the Champlain lowlands and the eastern Connecticut river valley and Northeast Kingdom. Act 250's District Offices, discussed below, consequently work in broadly different sub-environments. Because her mountains and foothills are low, making green-pastured hill farms and forest cover feasible, these mountains are aptly named the Green Mountains, whose higher alpine areas are limited to a few small tundras and cliffs. Charles Morrissey, in Vermont: A History, described her mountains in this way:

> Vermont is aptly called the Green Mountain State because 420 named peaks rise within its land area of 9,608 square miles. The Green Mountains are part of the Appalachian chain which runs from the Gaspe Peninsula in Canada to northern Alabama, and they provide

> Vermont with a sturdy backbone which varies from twenty to thirty-six miles in width. Parallel ridges also dominate most of the state; only 15 percent of Vermont is classified as flat and fertile. Admittedly, these elevations are not spectacular like the Rocky Mountains or the Sierra Nevada in California; the Green Mountains are older, geologically, and more rounded than their western counterparts. But eons ago the Green Mountains soared 15,000 feet and higher in the sky--almost like the mighty Himalayas. [Millions of years later] there occurred the earth-shaping action of a mile-high sheet of ice, advancing and retreating across Vermont at the rate of a few inches each year, planing the summits and gouging lakes and ponds. It redirected the flow of water between the rock-hard hills, and scattered glacial debris [in many parts of] the terrain. The consequence of geologic action is evident everywhere in today's Vermont: boulders in the fields, scratches on exposed rock surfaces. The oldest fossil coral reef in the world on Isle La Motte in Lake Champlain [marks an earlier geologic time]. People who love Vermont aren't annoyed by westerners who exult in the soaring majesty of the Rockies and the Sierra; they would rather smile than argue the matter. But if piqued (and be warned that Vermont humor includes a lot of punning) they might remark that a mountain, like a woman, can express her beauty more by her personality than by her measurements. When the ice sheet receded to Greenland about 10,000 years ago it left only eighty peaks in the Green Mountains rising 3,000 feet or more above sea level, and only seven higher than 4,000 feet. Those aren't impressive statistics, but nevertheless the Green Mountain state exudes its own distinctive charm.[4]

Vermont's steep slopes and higher altitude areas create a "mountain" ecology, and perhaps one of the best popular descriptions of Vermont's mountain ecology is Peter Marchand's North Woods.[5] Marchand recognizes that since Vermont's mountains are relatively low, they are largely forested. The balsam fir and black spruce can survive in organic, wet and nutrient-poor soils, while white spruce requires deeper soils. Hemlock can occupy less fertile soils. Red, some black spruce and balsam fir form the upper forest limit.

In Marchand's Life in the Cold, he reports that, on the average, air and soil temperatures decrease by about three degrees F. for every 1,000-foot increase in elevation. Along with this decrease goes an increase of eight inches of annual precipitation per 1,000 feet. The effect of the lower temperatures is a reduction of chemical and biological reaction rates. Life processes slow. Slower chemical reactions mean reduced weathering of rock and slower releases of mineral nutrients. Reduced microbial activity in colder soils means slower decomposition and nutrient turnover. The increased precipitation leaches the soil of its more soluble elements, leaving higher forests nutrient poor. Trail erosion, the product of intense frost wedging, is a common sight in these sub-alpine forests. Windthrow, the impact of the slow creep downward of several feet of accumulated snow avalanches, landslides, the impacts of crystallized rime ice, all have detrimental impacts on vegetation, which seeks to adapt to these conditions. As one moves into the few tundra areas of Vermont's Green Mountains, plants are miniaturized to minimize wind impacts and to exploit the warm microclimate of the rocks. [Act 250 offers special protection for these high altitude areas].

.03--Vermont's Forests. Vermont's forests are lands with different images--boreal forests in the north, tourist forests, industrial forests; all are complex ecosystems. Vermont's boreal forests, a coniferous forest of spruce and fir, dominate the Northeast Kingdom, the Northern Piedmont and the high elevations further south. Occupying land below the 2,500 foot spine of the state is a

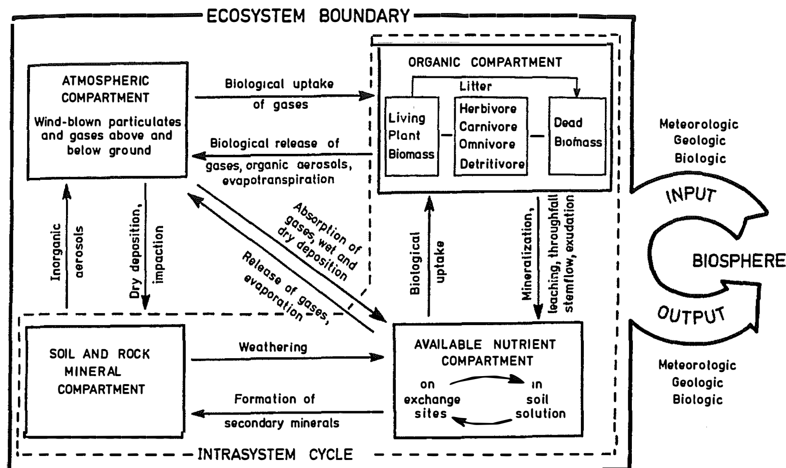
northern hardwood forest of hemlock, sugar maple, white ash, black cherry, basswood, some red oak, yellow birch, and American beech ~the forest of "fall color, picture postcards, and maple syrup" ~in short, the tourist's forest. Part of this forest is contained within the boundaries of the Green Mountain National Forest.

Some of Vermont's forests have been shaped by human hands and could be described as "industrial" forest, managed to produce timber. Although Vermont's forests, unlike Maine, are not dominated by large land owners and timber developers, Vermont has its share of timber land, especially in the northeastern Essex and Caledonia Counties. Spruce, fir, pine and hardwoods are all important for wood products of various kinds. Lloyd Irland describes the industrial forest as follows:

> Several key characteristics distinguish the industrial forest. First, it is the region where forest structure and composition have been least affected by past farming, planting, development, and other human action. Second, it is a forest largely owned by sizable corporations and wealthy individuals. Many of the owners are not living or headquartered in the states where the land lies. Thus, the industrial forest is the lead example of the absentee land ownership so prominent in New England. Third, the industrial forest is a region consciously managed for renewable wood crops to support wood-processing industries.[6]

The industrialized forests are sometimes subject to rough treatment at the hands of man. The advent of new "machines in the garden"~the chain saw, skidder, and chipper-saw systems have revolutionized forestry, making possible more rapid cutting and removal, sometimes leaving environmental damage from clear-cutting and skidder ruts. [Some of the pulp mills and woodchip plants proposed to process the increased supply have been vigorously resisted by many local communities and welcomed by others! Some of the Act 250 cases reviewed below are symptoms of this battle].

Vermont forests are not perceived by some as forbidden northern wilderness, nor sources for scenic recreation and industrial production, but they are also viewed through the eyes of scientists and environmentalists as complex ecosystems. Perhaps one of the most detailed descriptions of the forest ecosystem comes from the 30-year study of the Hubbard Brook forest in New Hampshire, not far from Vermont. The authors of the study, Bormann and Likens, describe the forest ecosystem with the following chart:[7]



A model depicting nutrient relationships in a terrestrial ecosystem. Inputs and outputs to the ecosystem are moved by meteorologic, geologic, and biologic vectors. Major sites of accumulation and major exchange pathways within the ecosystem are shown. Nutrients that, because they have no prominent gaseous phase, continually cycle within the boundaries of the ecosystem between the available nutrient, organic matter, and primary and secondary mineral components tend to form an intrasystem cycle. Fluxes across the ecosystem's boundaries link individual ecosystems with the remainder of the biosphere.

Fig. #2, Source: Bormann and Likens, 1967; Likens and Bormann, 1972)

Although somewhat forbidding, this abstract model shows the chemical and energy flux between (1) the atmosphere; (2) living and dead organic matter; (3) available nutrients; and (4) primary and secondary material (soil and rock). This scientific ecological view of the forest is an important contribution to understanding the impact of developments on the forest ecosystem. [A variety of developments proposed under Act 250 can affect the biogeochemical cycling of the forest ecosystem. Act 250 indirectly reviews these developments and their forest impacts, as described below. As we shall discover, however, Act 250 does not manage ecosystems].

.04--Vermont's Rivers. The glaciers in Vermont's history both gouged out and blocked old drainages, thereby creating lakes and shallow ponds, marshes, bogs and swamps throughout Vermont. The lakes were one of Vermont's first tourist attractions at the turn of the century, and, as we shall see below, were identified as the locus of fragile areas in the early Act 250 planning process.

The glaciers and their retreat performed another service for Vermont, leaving river valleys with rivers fed by mountain streams. [Environmentalists seek such to preserve their pristine water and ski developers seek to tap them for snow making. These contrary demands sometimes result in hard-fought Act 250 cases]. With few exceptions, Vermont's valleys are neither broad nor long. Many of the valley rivers themselves were often not large enough to support the large textile mills which settled in the rest of New England. Hence much of Vermont escaped the early Industrial Revolution. A pattern of small towns resulted. [This pattern of decentralized small towns helps to explain why Vermont, unlike other New England states, adopted a state land use and environmental law which provides for decentralized regional administration. The pattern also helps to explain the

frequent vigorous opposition to state "dictates."]

Although it is beyond the scope of this introduction to describe all of the important natural systems of Vermont, a brief description of the river ecosystem will exemplify the nature which Vermont seeks to protect or conserve. Most of the Vermont valleys with the exception of the Connecticut River were sculpted by rivers flowing within them. These rivers, adjusting to the Appalachian mountain system, run north/south. A few of the tributaries of both Lake Champlain and the Connecticut River superimposed themselves after the mountains were created; these run east and west through the Green Mountains. The Lamoille, Winooski, part of the Battenkill and White Rivers exemplify these "superimposed rivers." This river valley system affects development patterns. To avoid the mountains and take advantage of the valleys, Vermont's major interstate highway followed the north/south Connecticut River Valley and then heads west along the White River and Winooski River valleys to the Champlain valley and north.

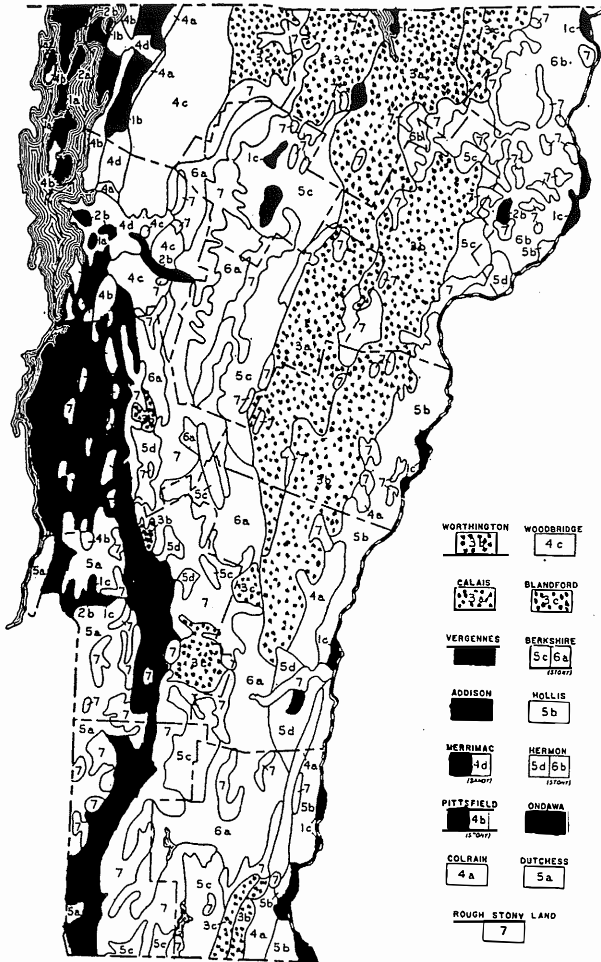
.05--Vermont's Soils. Vermont has generally poor soils for farming.[8] Her soils tend to be acidic and lime must be added for farming. Vermont's soils are also deficient in necessary minerals. Strong leaching has removed soluble minerals leaving silica, iron and aluminum behind. As a consequence, soluble minerals--nitrogen, potassium and phosphorous have to be added. Natural manure only supplies the nitrogen. Another problem with Vermont's soils is a relative lack of organic material, humus. Finally, drainage problems from the heavy clays, especially in the Champlain basin, delay planting times. Seventy percent of the state is covered with rough and rocky glacial till. The following is a table indicating Vermont's soil capability:

Agricultural Land Capability

Area	Class I	Class II	Class III	Classes IV-VIII
U. S.	2.1%	12.7%	13.1%	72.1%
Vermont	.7%	9.9%	9.2%	80.2%
Iowa	11.3%	39.9%	26.9%	21.9%

Source: Calculated from the U. S. Soil Conservation Service

Not only is Vermont a land of river valleys, but despite its poor soils, a land of farmlands, both valley and hill. These farms contribute to the economy of the state, the health of its inhabitants and the unique beauty of its ambience. Approximately 20% of Vermont land is being farmed. The following is a map of the soils ranked high for farming purposes:



An early ranking of Vermont soils in terms of agricultural capability. Class I and Class II soils are shown as black, Class III soils by a dot pattern. Source: *Soul Survey Reconnaissance of Vermont*, U.S. Dept. of Agriculture, Bureau of Chemistry & Soils, Series 1930, No. 43

Fig. #3, Source: Harold Meeks, Vermont's Land and Resources (New England Press, 1986)

.06--Vermont's Air Quality. Vermont has been blessed with relatively clean air in a modern, urbanized world. The relative lack of urbanization, limited industrialization, a small population with less energy needs than the populated states, and relatively less traffic results in air pollution levels which are significantly lower than the national standards and the larger cities of other states. Particulates from wood burning stoves and dirt roads, as well as sulfates, ozone, and acid rain imported from the middle west and the urbanized east coast, are the only major air pollutants.

.07--Vermont Wildlife. With the mountains, forests, lakes and rivers, combined with Vermont's sparse population, settled in clusters, it is not surprising that Vermont harbors a rich northern animal and plant wildlife. Black bear, whitetail deer, and a variety of fish, birds, and a variety of wetland, forest and even some alpine plants is the result. Protection of this wildlife has come to play a major role in some of the deliberations of Act 250's Environmental Board and Commissions.

One setting for this wildlife is Vermont's river life. Vermont river wildlife is rich with aquatic vegetation and thick mudflats. Aquatic insects, fresh water clams and crayfish and other bottom dwellers can be found in abundance. The brown and rainbow trout of the colder waters give way to smallmouth bass and pike, whose eggs are preyed upon by yellow perch, crappie, pumpkinseed, pickerel and others. The deeper waters of the state's northern rivers contain muskellunge. Salmon and shad, anadromous fish, were once common. Disappearing in the 1800's, due in part to the dams and pollution of that industrial age, they are now being restored to the state. A variety of animals, the raccoon, mink and beaver, are part of the river's "economy." At least one river, the Otter River, was named after the historical prevalence of the now seldom-seen large river otter. The rivers and lakes also attract many birds--the great blue heron, kingfisher, spotted sandpiper and ospreys are some of the more spectacular citizens of the water.

Vermont's other water ecosystems: lakes, marshes, and bogs, each support a rich plant, insect, bird and mammal life, which is to be protected in the issuance of Act 250 permits for developments affecting these ecosystems.

C. Vermont's Ecosystem Community and Pastoral Culture

Vermont's mountains, forests, lakes and rivers, soils, air, and wildlife are organized and interrelated within natural ecosystems, but also within a pastoral culture of small communities which make up a "Vermont aesthetic." Vermont's George Perkins Marsh, in the late 1800's, was one of the first environmental thinkers to recognize nature as an interrelated ecosystem which was part of a larger economy.

Vermont's nature underlaid an economy dominated by farming and logging. In the 1800's grain crops, sheep raising, and dairying were the agricultural activities of choice. In 1870, there were 33,827 Vermont farms. At the time of the enactment of Act 250, there were 4,000 farms. Maple sugaring, and apple production began in earnest at the end of the nineteenth century.[9]

In the early 1800's, sawmills cut softwoods for home consumption. With the opening of the Champlain Canal in the 1840's, a wider market for lumber was available to the Vermont logger. By 1973, 258,417,000 board feet of logs, pulpwood, bolts, posts and poles were cut; most were shipped to out-of-state factories.[10]

These traditional activities, along with tourism and the ski industry, both of which are heavily dependent upon the Vermont environment, have led to most Vermonters' acceptance of the principle of a "working environment"~ an area whose natural beauty has been historically supported by complementary economic activities.[11] The Vermont aesthetic~hill and valley farms, mountain vistas, and beautiful forest land with clustered and compact villages~has shaped Vermont's "nature" and resulted in major new tourist and recreation industries.

Vermont is a community of small communities. A small state with a readily accessible state government, its citizens are linked together by its environment, which yields to each a sense of identity. Its small towns make possible a working together on common problems, and personal interaction with neighbors. Despite the flux of population in and out of some towns and cities, many

citizens live out their entire lives in Vermont and carry with them Vermont's traditions and values. Unfortunately, at the same time that this working texture of Vermont community life was formed in the 18th and early 19th centuries, major forces were tearing at its fabric, and have continued to erode the strength of local communities, at the same time linking many of its residents to new kinds of communities.

D. The Forces of Change

Environmental theorists have claimed to find the roots of environmental problems in population growth, industrialization, the spread of technology, and the growth of the market economy the increase of affluence, and the alleged exercise of "corporate greed."[12] Vermont has experienced the impact of all of these forces.

Vermont's population in 1970 was 444,732; in 1980, it was 562,758. This 25% increase took place in the lifetime of a rough measure of urbanization. Vermont's metropolitan population increased from 99,000 in 1970 to 131,000 in 1990, a 33% increase.[13]

The economic change in Vermont[14] began with the establishment of marble quarries and copper mining in the late 1700's. Although Vermont's machine tool industry began in the early 1800's, the establishment of the railroads and steamboats in mid-century allowed for the expansion of Vermont's textile and logging industries. In the late 1800's, it was the Springfield machine tool industry that expanded. With the coming of the automobile, electrification and the highways in the mid-twentieth century, tourism and recreation became a dominant industry. Vermont had now begun to attract electronics and other service-related activity. The environmental effects of each of these major economic development activities will be discussed below.

The increase in affluence of Vermonters and her visitors can be documented by the increases in annual incomes of Vermonters,[15] the growth of tourism, the ski industry, and vacation homes. Jefferson, in his Notes on Virginia, was concerned with the immigration of settlers with monarchial characters, rather than those with the democratic virtues required for self-rule.[16] Similarly, the large number of "flatlanders" moving into the state, may bring very different environmental attitudes and habits than the nature.

An understanding of Vermont's place in the history of the Northeastern megalopolis is important to an understanding of her past, present and future. As Jean Gottman has pointed out,[17] Vermont is on the periphery of a growing megalopolis extending from Boston to Washington, D.C. Circled by Montreal, Hartford-Springfield and Boston, Vermont, along with western New Hampshire, represents an "open space" area between three spreading urban places. Much of Vermont's economic growth and especially its commercial tourist and recreation areas serve the megalopolitan population. This growth places pressures upon Vermont which are expressed in residential and commercial development.

Frank Bryan and John McLaughry, the authors of The Vermont Papers,[18] argue that modern computer technology may permit the next generation of Vermonters to live and work in the small towns of Vermont, while linked to businesses elsewhere. Whether such a future is possible or even

desirable, and whether such technology would foster democracy in the towns of Vermont, there is little doubt that the new information technology may affect the next generation of Vermonters.

E. The History of Vermont's Changes and New Environmental Problems[19]

Despite an awareness of the historical focus of change, Vermont's present environment can easily leave the impression of a static nature to be preserved. But as Betty Flanders Thompson has documented in The Changing Face of New England,[20] and Harold Meeks in Time and Change in Vermont,[21] Vermont's environment has been altered drastically over the centuries. In another new well-regarded portrait, Changes in the Land,[22] William Cronon has described how the New England settlers and their followers created a world of "fence and field," which has only slowly given way to new "second growth" forests since the late 19th century. Photographs of Vermont of the 1860's show hills denuded by Merino sheep, and rivers clogged with logs and the effluent from mills. Portraits of Vermont's early "built" environment, the towns, are not pretty pictures: the now-picturesque town commons of the 1800's were often filled with cow manure and building materials. [*Such a history creates interesting problems for current efforts to protect an "historical Vermont" which in some ways never existed.*][23]

Vermont's farms, forests, mountains and clustered towns now create a Vermont aesthetic which is indistinguishable from these natural and cultural resources. The romantic pastoral landscape, open meadows, seasonal changes in forest and the panoramic views, the compact villages echoing English rural towns of modest scale, often circling a town green, offer a natural beauty at every turn. Act 250, along with other aesthetic control laws, seek to protect much of this beauty.

When Montesquieu studied the impact of nature on laws, he found the impact of soils and climate to be on the character of a nation's inhabitants and hence only indirectly upon the laws they adopted. In a similar way, Vermont's environment does not only shape Vermont's Act 250 directly, but indirectly as well, through the heritage of her resourceful and frugal farm people who had to cope with a demanding environment of an often impoverished soil, rocky hills, a short growing season and cold winters. As a consequence, Vermont's Act 250 was the product of a people who believed in self-rule based upon the common sense knowledge, of people who work daily with nature, and who consequently respect nature but do not idealize it. The law reflects the common sense of its people. Those who have sought to describe the character of Vermonters through history have identified their belief in a person's right to live life in his or her own way, a rough sense of equality, and a strong sense of local community.[24] According to Charles Morrissey, many Vermonters had a "hillside mentality."

> The hillside mentality was a natural development in Vermont. The early settlers first cleared the upper slopes because morning fog tended to envelop the valleys in white cocoons, while the uplands were basking in sunlight. After heavy storms, the valleys were more likely to be flooded, and in hot spells which spawned mosquitoes, the danger of sickness seemed greater. In the winters the valleys often were colder than the hilltops because, as every Vermonter knows, cold air is heavier than warm air and can bring frosts to the lowlands while the highlands are spared. Vermont farmers often built their barns to fit the contours of their hillsides; different entrances at different levels meant that hay could be stored on

upper floors and raked through trap doors to cattle on lower floors. But a wise farmer never built a barn above his house site because spring water flowing downward on a gravity course would be contaminated by his stock if it flowed through the barnyard to the house. Hillside living instills an awareness of such constraints and the need to comply with the natural shape of things.[25]

However, Vermont is also the product of newly-arrived, often more affluent Vermont citizens who had witnessed the urbanization of other parts of our nation and hoped to avoid a repeat performance in Vermont. These new residents brought with them strong environmental values buttressed, perhaps, with a touch of escapism. They have also brought the expectations of the affluent urbanites and suburbanites of our nation.

Since 1950, Vermont has undergone a relatively large population increase. In 1950, Vermont's population was 444,732. As of 1990, her population reached 562,758. Accompanying that increase in population has come a precipitous decline in farms:

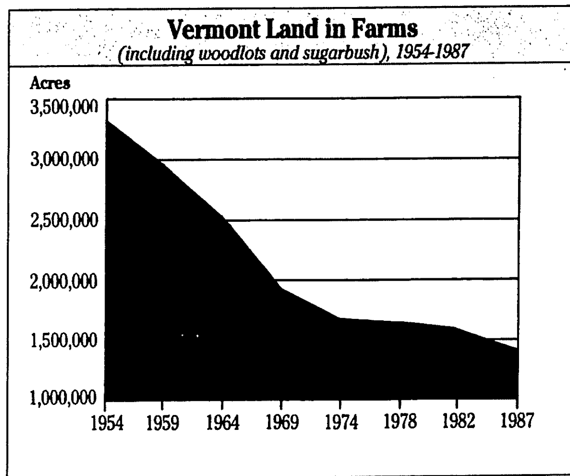


Fig. #4, Source: U.S. Dept. of Commerce, Bureau of the Census, 1988, "1987 Census of Agriculture," Vol. 1, Part 45, Gov't Printing Press, Wash. DC

The population growth of Vermont has been uneven throughout the state. Vermont's Champlain and Connecticut River Valleys, which has the best farmland also offers the best land for building subdivisions, malls, and just about anything else. Although these areas offer advantages for farming, since they boast a longer growing season than the rest of the state and harbor the remains of some protected southern vegetation abandoned from a warmer bygone era, they also invite development pressures. The following map documents these "growth areas":

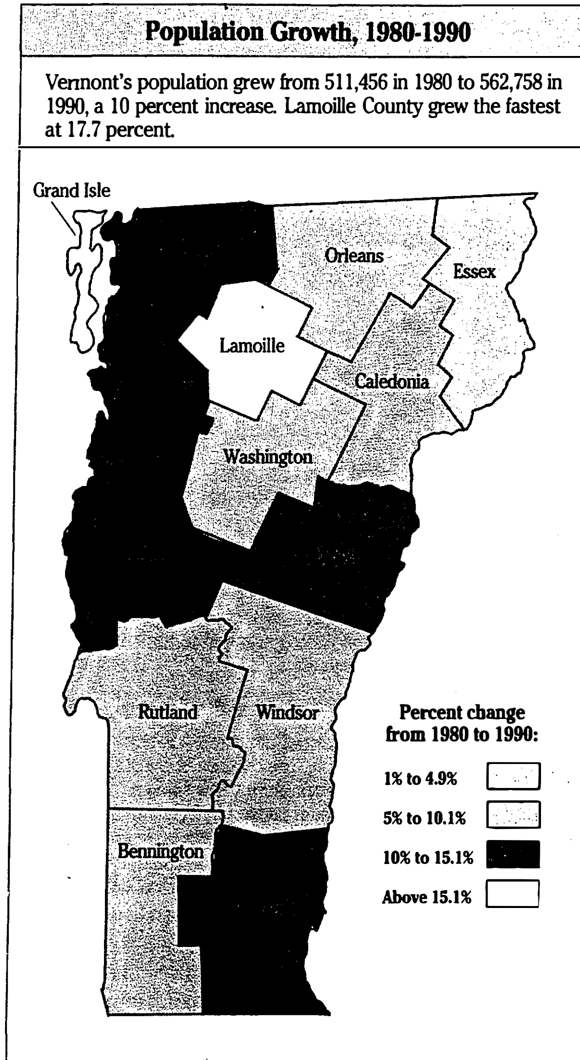


Fig. #5, *Source:* U. S. Dept. of Commerce, Bureau of the Census, Washington, DC, 1990

As might be expected, many of the Act 250 cases emerge from the districts of these areas. For example, in the 1880's, Orange County in the middle of the state had a very diversified agriculture. About 11,000 acres of grain crops were grown and fed to a variety of livestock. The agricultural emphasis slowly switched to butter production, which was the main farming product until the 1930's. It then became more profitable to ship fluid milk to urban markets. Fluid milk is still the chief product of Orange County farms. Dairy enterprises produce approximately 80 percent of the gross farm income in the county at the present time. Most of the farmland in the county is used for hay, pasture, and corn grown for silage. These crops are fed to dairy animals. *[Orange*

County farmers have the lowest number of cows per farm of any county in Vermont, but they produce more milk per cow than any other county in the state]. Some minor farm enterprises are forest products, maple syrup, horses, beef, sheep, poultry, apple orchards, and truck crops. Many family farms are transferred from father to son and continue to be cultivated. In recent years, the trend has been toward fewer farms that have more acreage per farm and that have a larger number of cows per farm. Many farms that go out of business are combined into larger units by neighboring owners. This trend is expected to continue.

Since most farmers have a limited number of tillable acres, they have had to use good management and conservation practices. Many Orange County farmers have about one animal unit per tillable acre. Because small farms have become difficult to operate and unprofitable, many small farms have been absorbed by a neighboring farm, become sites for vacation homes, or returned to forest lands. In the future, it is likely that farming will be mostly along valleys, and on nearly level to gently sloping ridges where large areas of good tillable land can be farmed economically. The prospects for the beautiful Vermont hilltop farms are dim. The continuing conversion of family farms to residential development is reflected in the number of Act 250 cases raising issues of proposed developments and their impacts on agricultural land.

Despite its rural heritage, Vermont is becoming an urban or at least a suburban or exurban state camouflaged in green. Like everywhere else, more Vermonters are driving cars, producing garbage and consuming land for housing. Both before and during this suburbanization, Vermont has lost some species.

Vermont's Disappearing Species	
Extinct:	2 species formerly found in Vermont are no longer living on Earth. o Passenger pigeon o Robbin's milk-vetch
Extirpated:	5 plant and 5 animal species formerly found in Vermont no longer occur in the state. o Elk o Alpine milk-vetch o Gray wolf o Mountain hairgrass o Wolverine o Purple crowberry o Arctic char o Northern toadflax o Woodland caribou o Alpine smartweed
Missing:	74 plant species in Vermont, including the early buttercup and spurred gentian, were formerly found in the state but have not been observed in the last 25 years. The term is not commonly used for animal species.
Endangered:	24 plant and 16 animal species in Vermont, including the common loon and beach heather, are considered endangered because there are typically three or fewer viable reproducing populations, or 100 or fewer reproducing individuals.
Threatened:	91 plant and 11 animal species in Vermont, including the spiny softshell turtle and wild lupine, are considered threatened because there are typically 10 or fewer viable reproducing populations, or 300 or fewer reproducing individuals.

Fig. #6, Source: Vermont Agency of Natural Resources, Fish & Wildlife Division, Nongame & Natural Heritage Program, Waterbury, VT, 1990

Foreign plants have been invading Vermont's lakes, partly as a result of the residential growth around the periphery of these lakes.

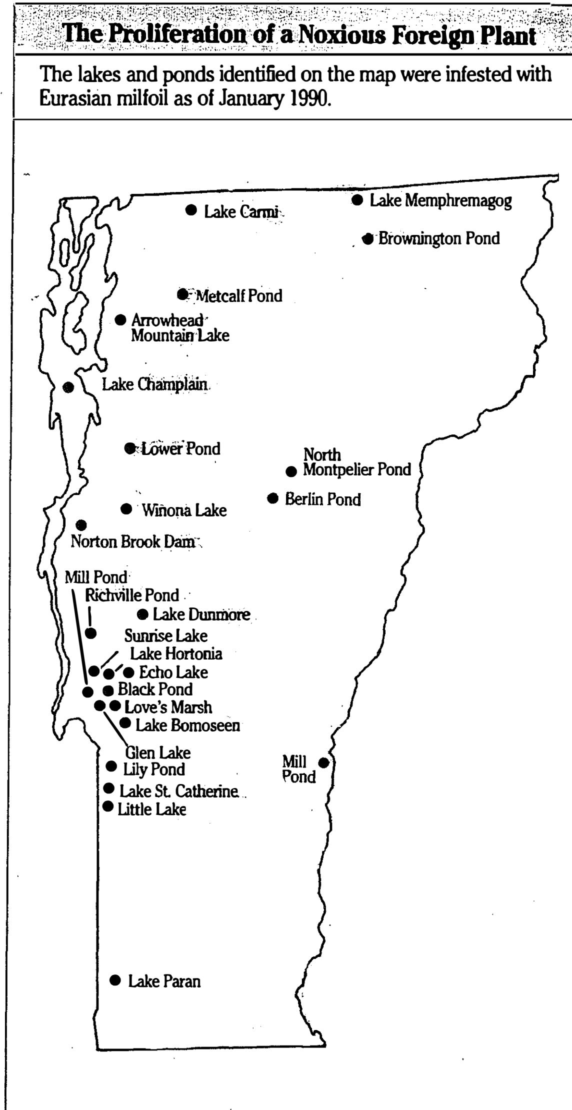


Fig. #7, *Source:* Vt. Agency of Natural Resources, Dept. of Environmental Conservation, Water Quality Division,"1990 Water Quality Assessment, 305(b) Report," Waterbury, VT, p. 107

More ominous recent studies conclude that 18 percent of Vermont's stream miles and 22 percent of Vermont's lake and pond acres could be considered "impaired" or polluted. One dramatic example of this pollution is the "greening" of Lake Champlain.

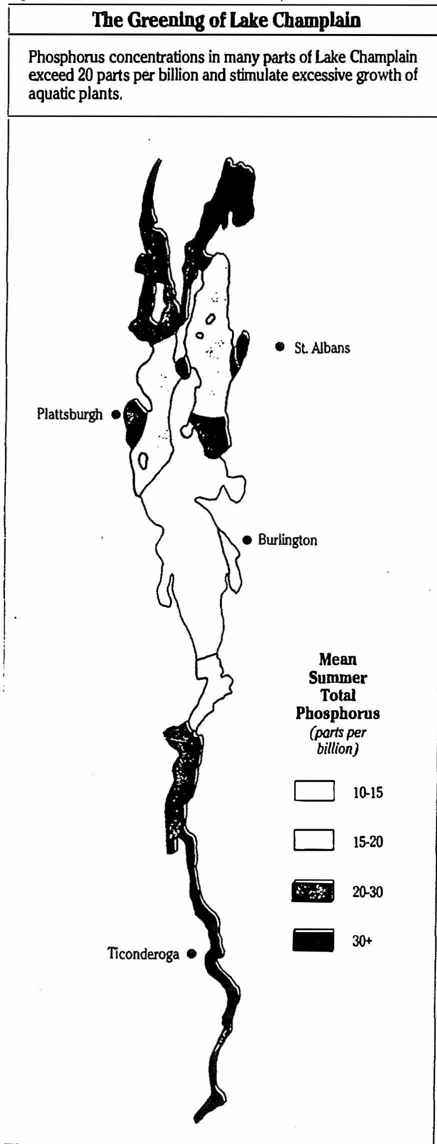


Fig. #8, Source: Lake Champlain Committee, March 1990, "State of the Lake: A Lake Champlain Advisory" Burlington, VT

Boil-Water Orders

(As of February 1, 1991)

Users of many water systems occasionally have to boil their water after storms. The users of the systems listed here, however, have to boil their drinking water year-round because of constant bacterial problems. The dates in parentheses show when the Vermont Department of Health issued the boil-water orders.

- Allen Point, South Hero, (1987)
- Alpine Haven, Westfield/Montgomery Center (1988)
- Aqua-Haven, East Haven (1990)
- Arrowhead Utilities Inc., Georgia (1988)
- Bolton Water Supply, Bolton (1990)
- Danby-Mount Tabor Fire District, Danby (1989)
- Deep Rock Water Co., Barre (1988)
- East Haven Water System, East Haven (1989)
- East Highgate Water System, Highgate (East) (1982)
- Fox Meadow, West Dover (1990)
- Franklin Fire District #1, Franklin (1983)
- Gleason Road Water Works, Rutland Town (1971)
- Glover Water Co., Glover (1989)
- Greensboro Fire District #1, Greensboro (1989)
- Guilford Trailer Park, Guilford (1990)
- Keeler's Bay Fire District #3, South Hero (1981)
- Lunenberg Fire District #1, Lunenberg (1988)
- Morristown Corners Cooperative, Morrisville (1987)
- North Thetford Water, Thetford (1990)
- Passumpsic Aquatic System, Barnet (1977)
- Pownal Tannery Reservoir, Pownal (North) (1973)
- Pownal Water Co., Pownal (1975)
- Rolling Meadows Water, Newfane (1990)
- South Hero Fire District #2, South Hero (1980)
- Stowe Lower Village, Stowe (1986)
- Sunset Acres, Rutland Town (1988)
- Vernon Hall, Vernon (1989)
- Washington Fire District, Washington (1983)
- Wheelock Water Co., Wheelock (1988)
- Wilmington Water District, Wilmington (1990)
- Windy Hill Acres Mobile Home Park, Springfield (1990)

Systems on Partial Boil Orders:

- Orleans Water System, Barton (1989)
- Proctor Water Department, Proctor (1990)
- Swanton Village Water, Swanton (1987)

Fig. #9, Source: Vermont Agency of Human Services, Dept. of Health, Division of Environmental Health, Burlington, VT, Feb. 1, 1991

Vermont's water pollution is not only an aesthetic phenomenon, but a matter of public health. The above list of recent boil water orders, dramatic evidence that all is not pure in Vermont.

These orders are, in part, the consequence of groundwater pollution from private septic systems, agricultural fertilizers and pesticides, road salt and runoff as well as landfills, hazardous waste sites and leaking underground tanks. It is precisely such "undue water pollution" that Vermont's Act 250 seeks to prevent.

With the growth in its population and increasing affluence and economic activity, more solid and hazardous waste is generated. A large amount of solid waste in Vermont is landfilled. As of 1987, 69% was landfilled, 1% incinerated, 7% exported, 12% recycled and 11% composted or dumped. An embarrassing (for an "environmental" state) amount of hazardous waste is shipped out of state:

Hazardous Waste Exports From Vermont, 1987

Vermont's large producers of hazardous waste have nowhere to dispose of it in the state, so they ship it to other states for processing or storage.

Receiving State	Amount (in tons)
Alabama	250
Arkansas	8
(Canada)	25
Connecticut	960
Illinois	17
Indiana	10
Kansas	180
Kentucky	711
Louisiana	16
Massachusetts	1816
Maryland	1
Maine	63
Michigan	3
New Hampshire	273
New Jersey	2163
New York	2145
Ohio	225
Pennsylvania	112
Rhode Island	11
South Carolina	8
Wisconsin	158
Total	**9155**

Figure #10, Source: Vt. Public Interest Research Group (VPIRG), May 1989, "Toxics Released: An Inventory of Toxic Chemicals Released in Vermont," Appendix E, Montpelier, VT, derived from data submitted by companies to the U.S. EPA and the VT Dept. of Health in accordance with Title III of the Superfund Amendments and Reauthorization Act of 1986.

Such an export of Vermont's waste contradicts her long heritage of self reliance and her reputation as an environmental leader. Some of the most recent extensive Act 250 cases involve Vermont's solid waste problems.

Even Vermont's vaunted air is under assault from numerous sources:

Vermont's Air Polluters: Emissions From Cars, Houses, and Other Sources

Emmission Source	Quantities (in tons)		
	SO_2	NOx	VOC
FUEL COMBUSTION	**5,724**	**4,514**	**16,337**
Residential	**1,666**	**1,674**	**15,612**
Coal	26	0	8
Oil	1,569	931	36
Natural Gas	0	214	10
Wood	71	529	15,558
Electrical Generation	**1,211**	**1,478**	**624**
Coal	1,127	202	1
Oil	18	8	0
Natural Gas	0	26	0
Other	66	1,242	623
Industrial	**1,646**	**767**	**90**
Coal	275	122	0
Oil	1,319	351	5
Natural Gas	0	149	2
Other	52	145	83
Commercial/Institutional	**1,201**	**595**	**11**
Coal	747	251	8
Oil	454	259	1
Natural	0	82	2
Other	0	3	0
INDUSTRIAL PROCESS	**0**	**0**	**1,077**
Solvent Evaporation Loss	0	0	1,077
SOLID WASTE DISPOSAL	**64**	**358**	**2,527**
Residential	49	336	2,493
Other	15	22	34
TRANSPORTATION	**1,539**	**20,294**	**17,292**
Gasoline Vehicles	752	13,665	14,866
Diesel Vehicles	711	6,066	858
Rail	39	244	60
Aircraft	26	244	300
Vessels	11	75	1,208
ADDITIONAL SOURCES	**0**	**12**	**15,255**
Structural Fires	0	12	100
Solvent Evaporation Loss	0	0	11,467
Gas Station Evaporation	0	0	2,332
Bulk Terminals	0	0	1,037
Other	0	0	319
GRAND TOTAL	**7,329**	**25,180**	**52,488**
Point Sources	2,543	1,928	1,736
Non-point Sources	4,786	23,252	50,702

Figure #11, Source: U. S. EPA, November 1988, "Anthropogenic Emissions Data for the 1985 NAPAP Inventory," prepared for the National Acid Precipitation Assessment Program (NAPAP) by Air & Energy Engineering Research Lab, Research Triangle Park, NC, EPA-600/7-88-022

Ground level ozone in Vermont is on the increase:

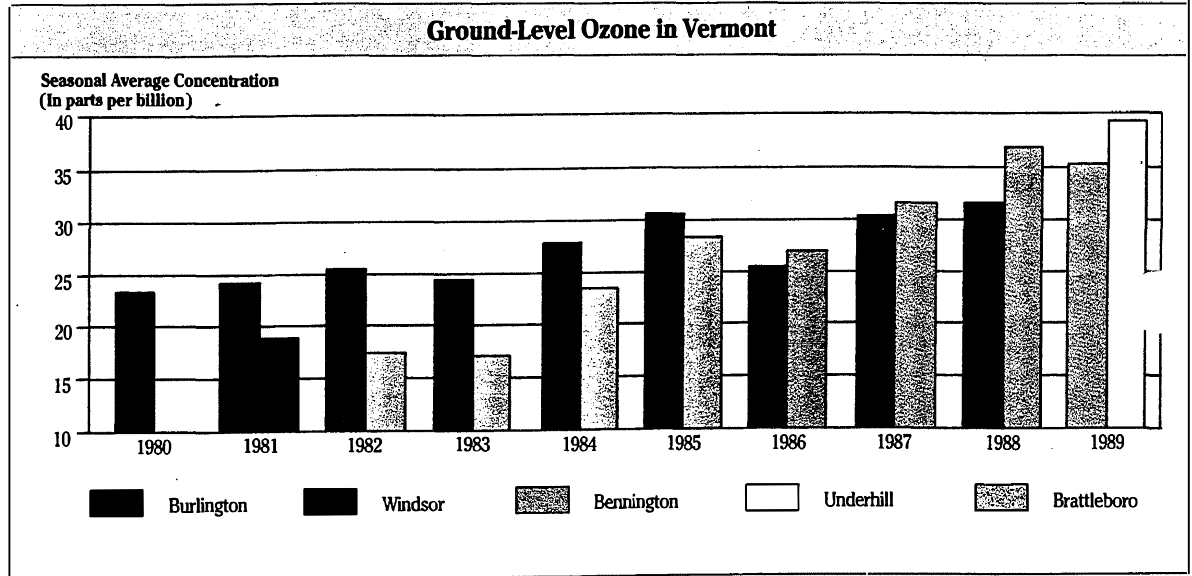


Figure #12, Source: Vt. Agency of Natural Resource's Dept. of Environmental Conservation, Air Pollution Control Div., and Vt. Agency of Transportation, Central Garage Div., July 10, 1990, "Alternative Fuels of the Future: Feasibility Study for Conversion of the State Vehicle Fleet," Waterbury, VT, fig. 2, p. 2.

This ozone, partly blown in from other states, seriously impairs visibility, tarnishing the clean air of which Vermont is so proud. As a consequence, Vermont is now adopting even more stringent controls on cars and other sources of ozone. Act 250 has sought to help reduce this problem, primarily through controls on developments resulting in traffic congestion.

To all of these insults to Vermont's natural environment is added a variety of everyday land use problems of traffic and overburdened state and town services. These social problems are an important part of the everyday life of Vermonters. Inadequate funds for education, sewer and water services, improperly maintained roads, strip commercial developments, and even traffic congestion are real problems in Vermont. Understanding these problems is important to understanding the failures and successes of Act 250 as a land use law.

F. The Resultant Shape of Act 250

This Vermont environment and heritage~and the modern threats to them~leave their indelible imprint, not only on its "dwellers of the land" and visitors, but upon its laws. Act 250 is no exception. The immediate origin of the law (which will be described in detail below) occurred when a ski area development was improperly built upon the poor soils of steep mountain slopes. The size of proposed development and its assault upon Vermont's environment aroused its citizenry and the subject of this book was born. But the expression of the history of Vermont's environment and its traditional values can be found throughout Act 250. Because Vermont's environment was perceived

to be varied and often fragile, the implementation of the Act began in 1972 by authorizing an interim land capability plan adopted by the Environmental Board and the Governor. The plan described the physical limitations to development~the state's "capability for agriculture, forestry and mineral extraction," and unique or fragile areas. This interim plan was initially to guide the Environmental Board in issuing permits for development and provide the basis for the capability and development plan. In 1973, the legislature, pursuant to Act 250, adopted the capability and development plan. This plan sets forth a series of policies (described below) both for the development of Vermont's natural resources and the protection of its headwaters, watercourses, forests, agricultural lands, wildlife habitat, endangered species, fragile areas and scenic resources.

However, when preparing the policies of Act 250's capability and development plan, the planners did not seek to simply preserve Vermont's environment. The policies explicitly endorse, in common sense terms, *a sustainable environment policy*--"to make reasonable use of the state's resources and to minimize waste or the destruction of irreplaceable values." Natural resources were to be used, as well as admired, but used in a way so that their productivity was to be conserved and parts of nature preserved. A balance of public and private capital investment consistent with planning for growth and the protection of the environment was envisioned. Selective economic development was to be promoted and decent housing for every citizen was recognized as a basic need. Proper community facilities were to be provided for communities.

The heritage of Vermont's small towns and their location in river valleys throughout the state explains much about the way in which Act 250 is put together. The central administrative structure for Act 250 is not an environmental bureaucracy, but a statewide citizen board and a series of scattered district commissions, peopled by Vermont citizens. Such a structure expresses the long-held Vermont tradition of the Town Meeting, and more importantly, recognizes that Vermont's citizens have to make their own decisions about their environment. A limited staff assists these citizens, and the state's environmental bureaucracy offers indirect assistance.

Thus, it is not only the content of Act 250, and its many explicit references to aspects of Vermont's environment, but also its form and style which reflect Vermont's environment and culture. Rather than adopting elaborate and technical standards, the drafters of Act 250 authorized the citizen boards to issue or deny permits for development based upon ten criteria which measure the impacts of proposed developments and subdivisions. The criteria are broadly phrased, e.g., "...not resultant in undue water or air pollution..." or "...adverse effect on scenic or natural beauty..." The fundamental assumption behind these criteria is that Vermont's citizens know what's important about their environment and know how to protect it and permit development within its environmental constraints.

It is no accident that there are decentralized district commissions with districts roughly coterminous with the different physiographic features of the state. Just as Vermont's topography encourages decentralized clusters of villages, and its Town Meeting form of government, the decentralized District Boards were to promote accessibility to citizens and offer the tacit message that at least first-round decisions regarding proposed developments will be made close to home.

Perhaps the most characteristic of Vermont's Act 250 is its apparent simplicity. Act 250 is a short law, clearly and simply written. Its brevity resembles those short laws carved in stone to rule

Vermont and the character of her people may be subtle, not easily addressed by law.

The population increase and its urbanized affluence also multiplies the possible diffuse detrimental impacts upon Vermont's environment, impacts from high consumption rather than production. Thus, rather that a factory's pollution impact, Act 250 will have to cope with the secondary growth impact of a shopping mall.

This transformation of Vermont also has brought rather startling changes in the levels of Vermonters' affluence over the past quarter century. This transformation, partly the result of immigration, means that many Vermonters are living better than ever before. However, many Vermonters associated with the old resource economy--farmers, loggers, and quarry workers--have not benefitted from the transformation. Many less educated Vermonters have been economicallly "left behind." As a consequence, there are two Vermonts, and the progression of environmental regulation looks very different to each Vermont!

The transformation in Vermont's economy places an especially heavy burden upon Act 250. No longer can this law depend upon the natural working environment of farm and forest~a natural resource economy~to assist in the protection of Vermont's nature. One way of looking at Act 250's performance during this period is to ask what role the transformation from a natural resources economy to an affluent urbanized full-service economy played in the workings of Act 250. Have the kinds of problems Act 250 has faced changed over time? Are certain diffuse environmental problems resulting from tourism (i.e., air quality) and urbanized (e.g., cumulative commercial and residential development) now the major problems which escape Act 250's juris- dictional net? Is there a change in the kinds of problems confronting the District Commission and the Environmental Board over time? The answer to some of these questions depends upon currently unavailable statistics. However, a qualitative portrait of the evolution of the Act emerges through an examination of the myriad of court and Environmental Board decisions in the following study.

H. Conclusion

For purposes of protection, other environmental statutes, the Clean Water Act, the Clean Air Act, divide the environment into discrete media, air, water. Such a division may be a practical necessity. As a consequence of this division, Vermont's environmental problems are often not seen in the context of interrelated ecosystems and the culture of the working environment, nor are they treated as the product of the broader forces of historical population growth and change, economic growth and affluence. Act 250 embodies the recognition of Vermont's culture and working environment. The consequence of such an approach to Vermont's environment will be discussed below.

In summary, Vermont's natural environment and her resulting natural history and social values are reflected in the structure, language and purposes of Act 250. Understanding and appreciating Vermont's nature is an absolute necessity to comprehension of Act 250. Helpful as well is an understanding of the early environmental legal history of Vermont, set forth in the next section.

1. Charles de Secondat, Baron de Montesquieu, The Spirit of Laws, Great Books, Encyclopedia Britannica Vol. 38 (1952).

2. The subject of this treatise is the specific relationship of a law--Act 250--to nature, Vermont nature. As such, it is a specific example of the broader topic of the relationship of law and nature--a complex topic of more than 2,000 years of jurisprudence.

In this treatise I suggest several aspects of the relationship. In this section, I describe the natural setting of Vermont--a setting which undoubtedly contributes to shaping the structure of Act 250. In the next section, I describe how Vermont's nature is reflected in the background history of Vermont's environmental ideals. In other chapters, I describe how environmental constraints shape some Act 250 related plans, and the specific decisions of Act 250.

3. H. Meeks, Vermont's Land and Resources (1986) [*offers an overview of Vermont's environment*]. See also J. Burk, M. Holland, Stone Walls and Sugar Maples (1979).

4. C. T. Morrissey, Vermont: A Bicentennial History, 3-4 (1981).

5. P. Marchand, North Woods: An Inside Look at the Nature of Forests in the Northeast (1987). P. Marchand, Life in the Cold: An Introduction to Winter Ecology (1987).

6. L. Irland, Wildlands and Woodlots: The Story of New England's Forests, 27 (1982).

7. G. Likens, F. Bormann, R. Pierce, J. Eaton, N. Johnson, Biogeochemistry of a Forested Ecosystem (1977).

8. This discussion is based upon H. Meeks' Vermont Land and Resources, (The New England Press, 1986).

9. For a brief summary of the history of Vermont's agriculture, see Perry Merrill, Vermont Under Four Flags: A History of the Green Mountain State 1635-1975 at 186-203 (1975).

10. Id. at 153-158. For more extensive treatments of Vermont's agricultural history, see H. Meeks, Vermont's Land and Resources (1986). For a more general history, see Charles T. Morrissey, Vermont: A History (1981).

11. For an account of "the working environment," see David Donath, "Agriculture and the Good Society: The Image of Rural Vermont," at 213-218 of M. Sherman and J. Versteeg, eds., We Vermonters: Perspectives on the Past (1992).

12. For an overall assessment of the contributing factors in the environmental crisis, see A. Schnaiberg, The Environment: From Surplus to Scarcity (1980).

13. E. Horner, ed., Almanac of the 50 States: Basic Data Profiles With Comparative Tables at 363 (1992).

14. J. Versteeg, "The Evolution of Economic Identity," pp. 195-213, in M. Sherman and J. Versteeg, eds., We Vermonters: Perspectives on the Past (1992).

15. 1991 The Vermont Almanac, at 248-251.

16. T. Jefferson, "Notes on Virginia," pp. 215-219, A. Koch & W. Peden, The Life and Selected Writings of Thomas Jefferson, (1944).

17. J. Gottmann, Megalopolis: The Urbanized Northeastern Seaboard of the United States (1962).

18. F. Bryan, J. McLaughry, The Vermont Papers (1989).

19. For an excellent source of information on Vermont's environmental problems, see Environment 1991--Risks to Vermont and Vermonters: A Report by the Public Advisory Committee, The Strategy for Vermont's Third Century.

20. B. Flanders Thompson, The Changing Face of New England (1958).

21. H. Meeks, Time and Change in Vermont: A Human Geography (1986).

22. W. Cronon, Changes in the Land: Indians Colonists and the Ecology of New England (1983).

23. Norman Williams, Jr., Edmund Kellogg, Peter Lavigne, Vermont Townscape (1987).

24. For accounts of the character of Vermonters, see M. Sherman & J. Versteeg, We Vermonters: Perspectives on the Past (1992); Dorothy Canfield Fisher, Vermont Tradition: The Biography of an Outlook on Life (1953).

25. Morrissey, supra note 10, at 5.

26. For a profile of Vermont's Forests and economy, see "Vermont Forests: A Decade of Harvests," Vermont Agency of Natural Resources, Dept. of Forest, Parks and Recreation (1980-1990). Selected statistics re Vermont from production, Loreen M. DeGeus, Economic Research Chief, Vermont Department of Agriculture.

27. For a profile of Vermont population trends, see 1991 Vermont Almanac, at 346.

28. For a history of the idealization of the simple life, see David Shi, The Simple Life: Plain Living and High Thinking in American Culture (1985). The simple life of Vermonters should not be romanticized. For a romantic view, see Dorothy Canfield Fisher, The Vermont Tradition (1953). For another view of New England life, see E. Hebert, The Dogs of March (1979).

29. Associated Industries of Vermont, Vermont Manufacturing in Perspective (1986).
For an excellent and more detailed description of the change of Vermont's economy in relation to Act 250, see A Product of Boom Times: Act 250 Feels Heat in Recessions, Rutland Herald April 3, 1994 at 1, 6, 7..

30. Vermont Business Roundtable Working Paper, A Critical Look at Vermont's Economy: Past, Present and Future, January, 1993.

CHAPTER III: The Legal History Behind Vermont's Environmental Law

A. Introduction

Vermont's Act 250 is a modern manifestation of the State's historical concern with community sustainability as reflected in four central public values: protection of its inhabitants from air and water pollution and soil erosion; promotion of conservation of water, wildlife, farm and forest land; preservation of scenic, natural areas and endangered species; and "social sustainability"~the adequate provision of educational and governmental services. Laws promoting each of these public values are recognitions of the need to sustain nature and the community for future generations. These four core public values did not sprout to life in 1970 with the passage of Act 250. Act 250 was preceded by two centuries of common law and statutes which gradually articulated a public policy of sustainability.

This history is important for several reasons. Such history contributes to the legitimacy of present statutes by demonstrating that such statutes are the product of an extensive legal tradition. Knowledge of this tradition sheds light upon the nature of the public values of sustainability and the extent to which they are indeed shared public values. Such a knowledge also reveals the different historical meanings given to the elements of sustainability over time.

Since I have organized this history to highlight selected values of sustainability, the reader deserves a brief chronological overview of Vermont's history. That history is elegantly summarized in The Vermont Papers:[1]

> Vermont's story is best told in four episodes, each making its own contribution to the thesis of a regenerative democracy. A traumatic birth under fire and the emergence of the independent Republic of Vermont (1763-91) established a profound sense of polity which will give Vermont the ability to act as it must in the c oming years. A dynamic half-century of growth, radicalism, and innovation (1791-1840) established Vermont's progressive traditions so evident today: entrepreneurialism, a tolerance of eccentricity, a deep-seated commitment to human rights, and faith in technology.
>
> Then came a century or so of massive out-migration (1840-1950). Vermont stood aside as the rest of America rushed headlong into the urban-industrial revolution. Yet under the cover of this great dark age, we preserved our liberalism and our democratic institutions. Only recently, of course, has it been possible to suggest that such a period of no growth could be a contribution in itself. The recent historical period (1950 to the present) has contributed both a new wave of settlement (which has revitalized rural Vermont) and a new high-tech infrastructure, the latter supported not only by the newcomer but also by Vermont's own disposition.

These steps in Vermont history reveal a state shaped as much by outside forces as by its own natural resources and values. The nineteenth century coming of the railroads,[2] the subsequent rise

of the nineteenth century recreation industry,[3] the adjustments of population and industry both to changes in agricultural markets and the availability of improved transportation[4] are important parts of Vermont's history. Such changes can be dimly perceived in the background of some of the legal developments discussed below.

The story below is told in terms of four parts of the ideal of sustainability. Different stories can be told. For example, one story might stress the economic transformation of Vermont in light of the national economy. The current environmental laws would then be viewed as symptoms of larger economic forces buffeting Vermont. The history I tell is a "local" environmental legal history which must be supplemented by these other histories.[5]

B. Preservation

"...a kind of respect and general duty of humanity which tieth us...unto brute beasts..."[6]

Preservation means the maintenance of nature and those species which we have not yet destroyed in its present "natural" condition, permitting only its "natural changes." Preservation is often looked upon as having two disparate motivations. First, such preservation, of course, may be instrumental to human progress. Seeking to keep endangered species for future medicinal discoveries or preserving beautiful sites for recreation and contemplation are oft cited purposes for such efforts. But preservation may also have a different rationale, viz., viewing nature as valuable in itself and hence, deserving of respect *irrespective of whether it serves future human needs*. In this sense, preservation of nature is different from its conservation for future human use and consumption. Vermont's conservation ideal will be discussed below.[7]

This preservation ideal animates several modem Vermont laws, which protect natural areas,[8] endangered species,[9] cruelty to animals,[10] wildlife and wilderness areas[11] and parts of parks and forests. All of these laws express a public desire to hold onto nature, to keep it, to treasure it, and, perhaps, to recognize its continuity and its independent claim to exist.

Preservation activities, whether by means of state law or private initiative, have a long history in Vermont. The early Indians would have understood our modem preservation laws and identify with them. Many of the American Indians, and Vermont Abenaki Indians in particular, held a respect for nature. Native American respect was grounded in both the divinization of nature and the belief in an identity of nature and Indian. Thus the Abenakis believed that their hunting grounds were not merely shaped by god, but god was embodied in the rock of Lake Champlain. The Abenaki viewed themselves as descended from animals, and they kept totems of these special animals. Animals had specific "human" traits such as wisdom.[12] The Abenaki respect for nature was reflected in their hunting and fishing practices which required a supplication to the animals for forgiveness for killing them and the proper ritual treatment of their bones. There was a corresponding avoidance of wasteful, unnecessary taking of wildlife. The importance of game in this hunting tribe resulted in the focus of their beliefs around animals. Totemism was anchored in hunting life and in many rites and dances where animal gods were venerated.[13] A comparative view of North American indians suggests that North American indians valued different parts of nature depending upon the sources of their livelihood.[14] Students of indians have concluded that the aesthetic contemplation

of nature was not a characteristic of Indian culture, although there are differences of opinion on this issue. Although there is evidence within many tribes of a belief that nature itself incorporates a higher order of reality, the indian treatment of some domestic animals sometimes appears to be callous and agriculturally based tribes seem to be less respectful towards nature. Determining the original Indian beliefs is complicated by the undoubted impact which the contact of white culture has had upon the indian culture.

When one turns from the indian culture to the early white settlers of this nation, one finds an absence of such a respect for nature. Indeed, as Roderick Nash has documented in his Wilderness and the American Mind, American settlers approached the wilderness with fear and a sense of superiority born in one of the traditions of Christian belief.[15] One searches in vain for the expression of preservationist attitudes in the life of the early Vermont settlers. What the Vermont settlers do express is a strong sense of respect for the hard work on a land to be farmed, the recognition of the need to conserve game and, at a later date, the importance of protecting natural beauty to be exploited for tourism. For Vermonters, preservation of land was inextricably linked to the more pragmatic purposes of human life; nature was a "working landscape" and ecology was a social ecology in which nature was not set aside from humans to be protected, but humans were indeed part of nature and worked with and on nature. Such a historical intertwining of man and nature suggests that the modern isolation of lands as natural museums is an artifact of a more modern urban civilization in which nature must be set aside and "kept" to be "protected" as if in a museum. The history of preservation efforts in Vermont consequently express the historical infusion of urban ideas and ideals from an outside, urban civilization which contributes to, but reshapes Vermont's present preservationist values.

No historical figure better represents Vermont's past attitude towards nature than Vermont's George Perkins Marsh, an important figure in the history of ecology and environmental law. The preface to his Man and Nature reads:

> "The object of the present volume is: to indicate the character and, approximately, the extent of changes produced by human action in the physical conditions of the globe we inhabit; to point out the dangers of imprudence and the necessity of caution in all operations which, on a large scale, interfere with the spontaneous arrangements of the organic or the inorganic world; to suggest the possibility and importance of the restoration of disturbed harmonies and the material improvement of waste and exhausted regions; and incidentally, to illustrate the doctrine that man is, in both kind and degree, a power of a higher order than any of the other forms of animated life which, like him, are nourished at the table of bounteous nature." *[emphasis added]* [16]

For Marsh it is the human capacity to recognize the harmony between humans and nature which dictates his perspective, not respect for a nature with values independent of humans.

Contrast this early "Vermont" view with the national founder of the preservation movement, John Muir, who wrote a half century later in 1916:

III--The Legal History

> "Let the Christian hunter go to the Lord's woods and kill his well-kept beasts or wild Indians, and it is well; but let an enterprising specimen of these proper, predestined victims go to house and fields and kill the most worthless person of the verticl [*sic*] godlike killers,~oh! that is horribly unorthodox and on the part of the Indians atrocious murder! Well, I have precious little sympathy of the selfish propriety of civilized man, and if a war of races should occur between the wild beasts and Lord Man, I would be tempted to sympathize with the bears." (emphasis added)[17]

John Muir is one of the principal figures in the establishment of the national park system, and certainly his spirit infuses the park's basic purposes. This system, along with the national wildlife refuge system,[18] the wilderness preservation system,[19] the National Trail and Wild and Scenic Rivers system,[20] embodies the national land preservation program. The first national parks, Yellowstone, Yosemite, and Sequoia, were established in the 1800's to protect the dramatic natural scenery of the West for human recreation.[21] In the words of the Yellowstone Act of 1871, the park was set aside as "a pleasuring ground for the benefit and enjoyment of the people..." The Secretary of the Interior was to adopt regulations to:

> "provide for the *preservation*, from injury or spoilation of all timber, mineral deposits, natural curiosities or wonders within said park, and their retention in their natural condition...He shall provide against the wanton destruction of the fish and game found within said park and against their capture or destruction for the purposes of merchandise or profit."[*emphasis added*][22]

More than twenty years later, Congress passed "An Act to Protect the Birds and Animals in Yellowstone National Park," in which all hunting and killing, except when necessary to protect human life or prevent injury, was prohibited and fishing was restricted to seasonal hook and line.[23]

The first state park in Vermont was established at the time of the national park movement in the 1920's, a movement which resulted in the establishment of the National Park Service. A Vermont state park protecting Mount Charlotte was established in 1924. In the 1930's, Perry Merrill, then Vermont Commissioner of Forests, used the Civilian Conservation Corps to construct recreation areas, both in Vermont forests and in her newly established state parks. Robert Simon, a landscape architect became the first Vermont Commissioner of Parks and began a major expansion of Vermont Parks in the 1950's.

The park building program became part of the tourist development effort under the catchy slogan "the Beckoning Country" which fostered the leasing of state lands of ski development in such areas as Okemo and Mount Mansfield. The state built access roads and other facilities for the ski areas. The development-oriented focus of Vermont's park policy initially received tremendous public support, but that support evaporated at the beginning of the modern environmental era in 1970, when hastily constructed ski developments began to create environmental problems.[24]

If Vermont's public park movement was heavily influenced by pragmatic economic development, a similar "Vermont spin" was placed upon the protection of animals. The colonial era embodied a wildlife law in which the "free taking" of game was encouraged and the early legislative

efforts to "protect" wildlife were merely closed seasons to conserve the supply of game, as well as bounties to encourage the killing of animal predators. None of these laws betrayed a concern about animals as such. Concern about the welfare of the game arrived with the advent of the sportsman hunter of the mid 1800's who was concerned about the "market hunter", the mass killer of animals for a wider market. The growth of a class of urban well-to-do who were concerned about humane treatment of domestic animals, and establishment of scientific and conservation organizations in the late 1800's who desired to observe and protect wildlife also contributed to the demand for new legislation for the protection of animals.

In Vermont, a heavily agricultural state, anti-cruelty laws existed alongside the recognition of human property rights in animals. As late as 1989, the Vermont legislature passed legislation asserting private property rights in fur bearing animals.[25] This recognition of property rights in animals enabled farmers or the government, within certain limits, to kill marauding animals or to find or hold persons liable in order to protect both people and farm animals.[26]

The more recent court cases involving animal cruelty in Vermont are situations in which there is a publicly-perceived failure of stewardship, the proper care of animals by humans. For example, in <u>State v. Persons,</u> the defendant's animals were found in a state of starvation.[27] Such a case arose under a 1947 statute penalizing a person for cruelty to animals, although the cruelty had to be "unnecessary" and "the taking of fish, wild game, or wild birds" was not considered curelty and was exempted in the law.[28] It was only in 1989 that a comprehensive new humane and proper treatment of animals law was passed in Vermont.[29]

This history demonstrates that protection of animals in Vermont has only slowly extended beyond the policy of conservation to embrace a sensibility to animal suffering and a duty of stewardship to domestic animals. Even that sensibility and stewardship does not extend to the protection of animal life as a value in itself. Such respect for non-human life has recently taken the form of federal and state protection of certain endangered species.

Preservation is often associated with aesthetic appreciation of nature. Aesthetic preservation efforts in Vermont have a long historical tradition. Vermont and the nation are especially blessed with great public natural beauty and bountiful natural resources. The majestic, sublime and pastoral scenic beauty of the American landscape has been recognized and appreciated since the early settlement of America.[30] The Europeans were some of the first individuals to "derive aesthetic pleasure from the unimproved nature" of the American colonies. Early Americans had mixed feelings of "hostility, indifference, appreciation, and wonder" about American wilderness.[31] These feelings failed to develop into a legally mature appreciation of the aesthetics of the natural scenery until the early 1900's.[32] Recently, aesthetic attributes of landscapes, countryside, and urban areas in the United States have been emphasized as worthy of protection through increased legislation, resulting in a broadened police power authority to protect scenic values and judicial opinions upholding that authority.[33] However, the judicial support of property regulation based solely on aesthetic considerations experienced a long and turbulent history.

In some states, the scenic beauty of wilderness areas has been recognized as worthy of legal protection since the late 1800's. In 1885, the New York legislature established a forest preserve and enacted in 1895 a constitutional provision to keep the remaining public domain of the Adirondack

Mountains "forever as wild forest land."[34] This act of preservation was in response to public recognition of the destructive nature of logging and the need to protect the forests for future generations.[35] This public awareness was promoted by George Perkins Marsh, mentioned above as the Vermont author of Man and Nature.[36] Marsh's book discussed aesthetic and practical implications of disrupting the delicate balance in nature.[37] "Beauty may not be queen, but she is not an outcast beyond the pale of protection or respect. She may at least shelter herself under the wing of safety, morality or decency."[38]

The use of scenery to promote tourism is not the same as the legal regulation of property for aesthetic regulation. From a legal point of view, it is important to recognize that the theory of aesthetic regulation evolved through three general theories: eminent domain, police power, and nuisance actions.[39] Eminent domain is based on the premise that private property may be constitutionally taken by the state or federal government for a "public use" so long as the owner is justly compensated. Such takings have been used to preserve scenic highway views, public parks, and courtyards.[40]

Aesthetic regulation was also realized through the exercise of police power to impose zoning ordinances which protect scenic attributes.[41] The three major types of zoning regulations for aesthetic purposes address billboards and outdoor advertising signs, junkyards, and architectural reviews.[42] Originally, courts did not allow zoning for aesthetic purposes only.[43] Following the 1926 U.S. Supreme Court decision in Village of Euclid v. Ambler Realty Co., which broadly defined the scope of general welfare as "elastic ... shrinking to embrace the situation," communities enacted zoning ordinances which combined aesthetic purposes with other valid public purposes such as health and safety.[44] This marked an important development in the legal recognition of aesthetics as a valid consideration in zoning regulations.

Nevertheless, most jurisdictions developed aesthetics as a justification of police power regulation.[45] In some states aesthetics were viewed as a "luxury and indulgence rather than a necessity" and therefore did not justify regulation through the police power.[46] More often, courts held that although aesthetic considerations alone could not justify police power regulation for public welfare,[47] the addition of aesthetic considerations would not invalidate zoning ordinances.[48] Furthermore, one court held that where the "primary and substantive purpose of the legislation is such as justifies the act, consideration of taste and beauty may enter in, as auxiliary."[49]

The classification of aesthetic considerations as auxiliary persisted until the landmark decision of the U.S. Supreme Court in Berman v. Parker.[50] Ironically, the case involved urban renewal, not the protection of natural beauty. In dictum the Supreme Court declared that "the concept of general welfare is broad and inclusive" and encompassed aesthetic considerations.[51] The court stated further that the legislature has the power to "determine that a community should be beautiful as well as healthy.[52] This case provided precedent for jurisdictions to permit zoning based only on aesthetics.[53]

Vermont parallels may be found to this national history of the gradual recognition of aesthetic values. Scenic preservation in Vermont was based upon economic policy rather than aesthetics or environmental concerns. In the late 1800's, the state recognized the economic

importance of Vermont's scenic attributes to the tourist and recreational industries. Vermonters soon realized that the preservation of the scenic mountain vistas and "pastoral" farming landscapes would ensure the continuing prosperity of tourism and related industries. However, an awareness of the necessity to preserve scenic qualities only arose after an initial economic success in tourism.[54] As Vermont's tourist industry developed throughout the late nineteenth and early twentieth centuries, this increased awareness of aesthetic and consequently economic value of natural scenery eventually evolved into the need for legal protection of these advantageous areas.[55]

Beyond zoning regulations, the police power has also been used to justify regulating the proliferation of signs and billboards along highways. The justification for the need to protect highway scenery was founded upon an appeal to economics and aesthetics.[56] An aesthetically pleasing environment was intended to attract tourists and bolster state economy.[57] The states have the authority to regulate scenic sites adjacent to highways under the theory of eminent domain and the police power was recognized.[58] However, there is no legal authority in Vermont to the effect that aesthetics alone is enough to justify regulation of private property under the police power.[59]

Aside from legislation and zoning ordinances which regulate aesthetic beauty, common law nuisance has been enployed to promote aesthetic values.[60] Nuisance law was well developed in its protection of the other sources~foul smells, loud noises, noxious gases.[61] One of the first cases addressing aesthetics as a potential nuisance in Vermont was the turn of the century Woodstock Burying Ground Association v. John Hager.[62] This case involves a defendant's unkept burial plot in a Woodstock cemetery. The cemetery was managed by the plaintiff association, but the deed to the plot was owned by defendant.[63] In 1881, complaints were made to the Association regarding the unsightly condition of defendant's lot.[64] Following numerous requests of defendant to attend to the lot, and defendant's consistent disregard of those requests, plaintiff filled and maintained the lot to abate the great annoyance it was causing.[65]

Plaintiff argued to the Supreme Court of Vermont that defendant's lot constituted a nuisance.[66] Plaintiff cited Blackstone, who defines a nuisance as an annoyance.[67] Plaintiff stated further that the Latin term for nuisance included "anything injurious to the health, or offensive to the sight" [*emphasis added*].[68] However, the Supreme Court did not accept Plaintiff's view. In a concise but eloquent opinion, the Court stated that although Defendant's lot "was unsightly and disfigured," "the law will not declare a thing a nusans because it is unsightly and disfigured ... nor because it is unpleasant to the eye and a violation of the rules of propriety and good taste ... The law does not cater to men's tastes ..."[69] Therefore, in Vermont in 1896, a nuisance could not exist entirely upon aesthetic justifications.[70]

While many nuisance cases intervened[71], this rule was again upheld in a nuisance case in 1943.[72] The case of Vt. Salvage Corp. v. St. Johnsbury involved the application of a newly amended ordinance requiring plaintiff to construct a fence surrounding his junkyard to shield it from public view.[73] The court held that the mere fact that a thing is unsightly and offends the aesthetic senses is not a valid ground for classification as a nuisance.[74] Furthermore, the court stated that "the use of a person's property cannot be limited or restricted under the guise of police power where the exercise of such power would be warranted solely on aesthetic considerations.[75] However, the court noted that the present law "is undergoing development and perhaps cannot be said to be conclusively

settled."[76] The court concluded that "even though aesthetic considerations may not warrant police regulation, they may be taken into account where other elements are present to justify regulations."[77] Even Vermont's Act 250, adopted in 1970, upholds the view that aesthetic considerations alone are not a valid justification to prohibit a development; there must be other considerations of public health, safety and general welfare to justify land use regulation in the name of aesthetics.[78]

C. Pollution Prevention

"We are parties to their degradation, inasmuch as we permit the inhabitation of places, from which it is not possible improvement in condition or habits can come."[79]

John Griscom's words on the sanitary conditions of New York City in 1845 express our shared obligation for environmental public health~an obligation asserted earlier in the colonial period, and reasserted during the period of industrialization of the 1800's, as well as in the early environmental cases of the mid-twentieth century. This historical commitment to protecting by law the sanitary conditions of the public is the true ancestor of modern environmental health law.[80]

To be sure, the early public health laws were limited in scope. From colonial times throughout the 1700's, protection of public health was especially concerned with the spread of smallpox, and to a lesser degree, yellow fever. The first sanitary legislation in this country was enacted in 1648 by the General Court of Massachusetts.[81]

Until the 1850's, fear and understanding of disease were associated with sin. If one became infected with typhoid or malaria, it was deemed to be due to his sinful nature. Another theory which attributed disease to filth began to take shape during the early 1800's. This Victorian theory lasted until about 1890, and received much support as religious theories of disease waned.[82] In 1877, Louis Pasteur discovered the bacillus which caused anthrax.[83] By 1890, the filth theory of disease had yielded to the germ theory of disease, as almost all diseases were attributed to bacteria.[84] All the health officials and agencies, originally set up in response to the filth theory of disease, began to accept the fact that water-born germs caused disease.[85] Throwing filth into rivers and flushing it away became unacceptable as health officials began to view sanitation and sewers as places to treat waste and prevent contamination of drinking water by germs.[86] As sewage systems to treat waste evolved, public health officials shifted their emphasis away from maintaining individual public nuisance actions under health ordinances toward implementing preventive sanitary provisions in populated areas like cities and villages.[87]

The history of early hygiene laws is important to the understanding of environmental law today. The disease prevention aspects of present environmental laws are a continuation and expansion of two centuries of public health laws. Unfortunately, this tradition of public health protection has been hidden by dramatic progress in the technology of remedial medicine. But, as microbiologist Rene Dubos has documented, it was the public health efforts which saved millions of lives in an industrializing and urbanizing world.[88]

As a result of Vermont's tumultuous early political history and sparse population, health was not a major public issue and no resulting laws or statutes existed until 1784.[89] After Vermont became a state and adopted its own constitution in 1777-78, it enacted a 1784 quarantine law in response to the early national sanitation movement. Like the earlier Massachusetts Act, the statute was an "act to prevent the spreading of the Smallpox." The statute was amended in 1787, and it required the selectman in each town to quarantine a person infected with smallpox, and

> "to take all prudent steps to prevent spreading the disease... immediately to employ...a Physician or Physicians, and nurses, as well as necessaries for such persons, as the nature of the case may require, at the cost of the infected person...and if he or she have no estate, at the cost and expense of the town where such person is from."[90]

The selectman was given broad powers in dealing with smallpox. Among these was the requirement that anyone seeking inoculation against smallpox needed the selectman's permission.[91] Thus, the State of Vermont began to regulate people's actions in response to smallpox in order to preserve a disease-free environment.

The Vermont Supreme Court had the opportunity to interpret this statute in 1830 in Hazen v. Strong.[92] In 1820, the inhabitants of North Hero were exposed to smallpox by persons passing through town who were infected with the disease. The selectman of the town hired a Dr. Fancher to inoculate all the citizens of North Hero. A town meeting was held and a tax was placed on all inhabitants in order to pay the doctor's bill of $74. Dan Hazen, plaintiff, refused to pay the tax and the defendant, the town constable, took the plaintiff's cow and sold her for the collection of the tax. The plaintiff, quoting the direct language of the statute, argued the selectman has the authority to take preventive measures only when there is some person in the town actually infected with the disease. In addition, he argued that inoculating the entire town was not a prudent measure, and that the town can only be taxed for those individuals who could not pay for themselves. Although the court reasoned that the selectman cannot compel those who cannot afford the inoculation to pay, it held that the town must foot the bill. "We are, therefore, disposed to support the selectman, and the town, in this measure to prevent the spreading of the disease, when circumstances render any measure necessary."[93] As a result, whenever prudent measures are required, "the provisions of the statute are broad enough to include it." Thus, the local selectman was assumed to be the strong arm of government in its fight on improving the health of its citizens through any reasonable measure.

Such reasonable public health measures were not unusual. An earlier environmental health regulation imposed by the state in order to secure the health of its citizens was demonstrated in the citizen petition of Wells Pond. The petition asked the General Assembly of 1794 to remove a dam's ill effects through legislation. A mill dam had been erected at the lower end of Wells Pond, which caused several large bogs and quagmires to overflow. A large segment of the population became ill with the "fever and ague." "Whole families are infected; and in almost every house may be seen grown persons, or children, too pale, and distressed to be described." Many had died.[94] The General Assembly found that the raising and lowering of the water levels caused a health hazard. As a result, an act was passed in 1794 empowering the petitioners to either remove the dam or to have the waters taken down to their natural height. The Assembly's committee reported that the "loss of time only,

independent of the loss of health, property, and constitution, vastly exceeds the profits of the...saw-mills erected on the side of the dam."[95]

A similar petition was formed by the citizens of Castleton Pond in 1794. Several mills on Castleton Pond were run by the raising of a dam which caused overflow into the town. Sickness resulted from the stagnating water.[96] The Assembly committee reported that the mills on the pond were of great utility to the state.[97] The Assembly eventually determined that although the sickness may have been aggravated by the dams, it was not the only cause, since the country in general had seen increased fever and ague.[98] Since the dams were important to the economy of the state, the Assembly denied the petition for destroying the dam.

At this early period, the law was not highly developed and few private rights of action were available to the general public. Consequently, the Vermont legislature became directly involved in regulating specific environmental health hazards through petitions. In its decisions in response to these petitions, the legislature seems to have balanced the harms between the health of its citizens with the potential economic loss involved. Although the Castleton result runs contrary to today's strict environmental and public health standards, at that time a strong economy was more important than the ill defined risk of safety to a few lives. Also, by denying the petition to remove the hazardous dam, the legislature was indeed relaxing liability for the mill's damage to people and property, and hence promoting economic development, a policy which was expanded in other laws during the 1800's.[99]

Despite the result of the Castleton case, commitment to public health did influence Vermont government decisions concerning the environment during its early years of statehood. The quarantine laws designed to prevent the disease from getting into the local population are roughly analogous to today's laws preventing waste dumping into the environment. In both cases, government involvement is primarily based on the concern for the public health of the people.

From 1790 until the 1880's, Vermont was continually plagued by smallpox and other epidemic diseases.[100] However, when the national government adopted the filth theory of disease, Vermont also began to increase its programs promoting sanitation and hygiene. The Vermont program specifically followed the lead of Massachusetts by attempting to establish a Board of Health.[101]

In 1872, Dr. Henry Holten gave the presidential address to the Vermont Medical Society as it met in Montpelier. He recommended the committee to urge the legislature to establish a State Board of Health "to investigate everything that injuriously affects the public health."[102] A year later a committee was set up consisting of Drs. Horton, Putnam, and Butler to lobby the legislature. After two unsuccessful attempts at getting the legislation passed, in 1886, "S#29," a bill for an "act to prevent the spreading of contagious disease and to establish a State Board of Health," was passed by both the House and the Senate.

The new act gave the Board the authority to "promulgate and enforce such regulations for the better preservation of the public health in contagious and epidemic diseases."[103] Furthermore, the Board was required to make inquiries into "the sources of mortality, and the effect of localities,

employments, habits, and circumstances of life on the public health."[104] The Board was also given advisory powers in working with local officials in terms of drainage, sewage, and water supply.

The initial three member state board realized that the real power in preventing disease and creating a healthy environment lay with enforcement by the individual town selectmen.[105] Two weeks after the act was passed, the board sent out circulars to selectmen with advice regarding smallpox, scarlet fever, typhoid, as well as suggestions for regulating slaughterhouses and public health nuisances.[106] However, the local selectmen in the towns did not adopt the rules promulgated by the Board. In 1892, an act broadened the Board's power and redefined its advisory role, providing that "the State Board of Health shall appoint a health officer for each city, town, and incorporated village in the State..."[107] Thus, the State Board of Health believed it had solved its problem of enforcing its regulations.[108]

The act of 1892 which broadened the State Board power to regulate public health was predicated on the "filth theory of disease." The circulars of 1886 were primarily advice on health and hygiene, and it was not until 1910 and the case of State v. Morse, (discussed below) that the courts accepted the germ theory of disease.

The history of the Vermont legislature's affirmation of the protection of public health by means of statutes is an important part of a two-century tradition of practice, which lends legitimacy to modern environmental health laws. That legal tradition of health protection required more than the affirmation of public health values. Court opinions had to define and weigh the relative importance of public health when counterpoised against other values, such as property rights and freedom. This weighing and balancing by the court in individual cases took place in cases involving common law public nuisances. Thus, in an 1866 case of Curtis v. Winslow,[109] Vermont Chancery Court recognized the power of courts to grant injunctions

> "to restrain parties from the use of their own lands and buildings for trade ... necessarily so noxious, unhealthy, dangerous or unwholesome to the occupants of neighboring buildings as to destroy or seriously and substantially impair, their value for the purposes for which they were designed. Thus power has been exercised to restrain the operation of smelting works, slaughter houses, forges, dryhouses, tanneries and other similar establishments. No exact rule can well be established for the government of these cases."[110]

Common law measures were usually enforced after the harm had occurred. The move to accept legislative control of property uses before any harm could be demonstrated was a big step, which Vermont courts did not take easily. Such reticence is illustrated in the case of State v. Speyer.[111] In State v. Speyer, a pigpen owner, Speyer, was convicted of the charge of violating a public health regulation prohibiting the maintaining of a pigpen within one hundred feet of any drinking well or spring or an inhabited dwelling house.[112] Speyer believed that the regulation was an improper constraint upon "a legitimate business." The court determined that although the legislature has the power to reasonably regulate property to preserve the public health, it agreed with Speyer that the court should review the regulations to determine if they were reasonable. The court ruled the regulation unreasonable because it would regulate all pigpens whether conducted poorly or adequately. In the words of the court, "a regulation so general and far reaching, affecting business

and the use of property, cannot be held to be reasonable or justifiable unless there are reasonable grounds for a belief that the necessary of the public health requires it." Vermont Supreme Court Justice Russell Taft summed up the court's concern for property in his concurring opinion by stating, "The keeping of pigs, not pigpens, is the evil."

The court's concern over general legislative public health rules and their "prior" constraint upon private property appear to be eased fifteen years later. In the 1910 case of State v. Morse,[113] Vermont recognized the germ theory of disease. Morse was a riparian landowner on Berlin Pond, which is a source of drinking water for the city of Montpelier. The State Board of Health determined that Berlin Pond was polluted. It promulgated a rule prohibiting anyone from swimming or bathing in the pond, until the establishment of a filtration plant was completed. The court held the regulation was a valid exercise of police power. While citing the earlier case of State v. Speyer several times, the court clearly deviated from the earlier case by recognizing that regulation of property for the common good was necessary and that the burden was placed upon the landowner to show the regulation unreasonable. At the same time, the court explicitly took notice of the germ theory of disease, and that the human body may give off germs dangerous to the public health; and that should these reach the intake of the water supply, they might, as suggested by the State Board, spread contagion throughout the city.

> ".... But this is not a matter inter partes; the order was not made for the benefit of the city in its corporate capacity, but for the protection of the people of the community, both individually and collectively; indeed the benefit was not confined to those who dwelt within the borders of the city, but was to be available to all who might be temporarily therein or otherwise brought into contact with its people.[114]

This history of continuous commitment to the public health of "the people of the community" is complex.

Thus, fifty years after Pasteur's discovery, Vermont accepted the germ theory and the community's power and responsibility to promote public health. Inevitably, Vermont recognized water as a carrier of germs and potential disease, and began to follow the trend set by Pasteur and others in the late 1800's. The germ theory of disease buttressed a preventive approach to health regulation. Other cases reveal Vermont's increased concern with preventing disease from water and air quality. In 1909, in State Board of Health v. Village of St. Johnsbury,[115] a regulation by the State Board of Health prevented the town from permitting the taking of contaminated water from the Passumpsic River until it was deemed safe by the Board. Although the court did not rule on the Board's prohibition, the authority of the Board to adopt such a prohibition was upheld on the grounds that individual rights to drink the water were subject to restraint for the good of the many. The St. Johnsbury case sets forth a clear discussion of the conflict between public health regulations and personal liberty. In viewing the conflict, the court turned to the landmark Supreme Court case of Jacobsen v. Massachusetts, which upheld compulsory vaccination.[116] The Vermont court found the rights of individuals to be subjected to constraint "...at times, under pressure of great danger..."[117] And the court demurred from taking on the task of determining the most effective method of preventing disease.

With this history, a pattern emerges in the evolution of the public recognition of public health values. The method of case-by-case court injunctions against already proven health nuisances was gradually replaced by broad public health legislation. The courts haltingly accepted this legislation and in so doing, also came to tacitly accept the more specific Board of Health regulations adopted to prevent future health threats. The courts deferral to legislative judgement regarding "reasonable" state regulations was a deferral to the Board of Health which prepared the specific regulations. Appeals to property rights and personal freedom began to fall on deaf ears. The final step was the acceptance of broad environmental health regulations which embraced the prevention of pollution.

In the 1926 case State v. Quattropani,[118] Quattropani violated a State Board of Health regulation prohibiting boating on Berlin Pond, the water supply source of Montpelier. The board was given the authority under a state law[119] which provides that the "board may make rules and regulations to prevent pollution and to secure the sanitary protection of waters, streams, and ponds used as a source of public water supply."[120] Quattropani argued his boating activity did not actually pollute the water and the statute was therefore an unreasonable exercise of the Board's police power.[121] In the language of the St. Johnsbury case, there was hardly any "great danger" posed by boating.

Although in the words of the court, the danger of contaminating the water was "not quite so plain as it was in the Morse case," the court upheld the Board's regulation.[122] "It is enough if, in the circumstances, it is reasonable to apprehend that the act may result, directly or indirectly, in the contamination of water."[123] The court seemed to base its decision on its acceptance of the germ theory, fearing the large effects of a relatively small amount of germs. Quoting a parallel from a Connecticut case, the court stated

> "it is not irrational for a public board to deem it likely or possible that sources of contamination and germs of disease might have a causal connection with the presence of fishermen upon the ice or waters of a supply of drinking water."[124]

The final step in the early progress towards an environmental health based regulation came after the courts had already recognized the germ theory of disease and the necessity of restricting individual rights of person and property to protect public health. In Vermont Woolen Corporation v. Wackerman et al[125] in 1960, the court reviewed a regulation promulgated by the Vermont State Water Conservation Board which had held a previous hearing on the pollution of the waters of the Kingsbury Branch watercourse. Vermont Woolen Corp., plaintiff, was a riparian owner and user of the waters. The board ordered plaintiff to establish a system of pollution abatement in order to reach a tolerable level of pollution in Kingsbury Branch.[126] Plaintiff argued that the water pollution statutes were unconstitutional because they denied him rights as a riparian landowner. In addition, the plaintiff argued that the cost would be unfair and too burdensome. The court declared that the water quality standards are "carried out in furtherance of public health and for the protection fish and game." In addition, the court added that "both of these purposes have already been recognized as areas appropriate for the exercise of the police power."[127] In weighing the impact on property rights, the court stated:

> "...when the legislation is, as here, supported by strongly favored policy considerations, neither legislation nor orders will be struck down as unreasonable, solely because a financial hardship is necessarily worked on a particular individual, even to the point of being destructive to his business."[128]

With the Wackerman decision, Vermont's public health regulations completed their evolution from primitive individual common law actions to modern laws and regulation enacted to protect the public generally. Perhaps Ernest Freund, a leading constitutional scholar, best captured the communitarian implications of the public health police power:

> "No community confines its care of the public welfare to the enforcement of the principles of common law ... it exercises its compulsory powers for the prevention ... of wrongs by narrowing common law rights ... *and positive regulations which are not confined to wrongful acts* ..."[129] [emphasis added]

Nevertheless, although Vermont recognized by the middle of the twentieth century that pollution should be regulated to prevent community health problems, it requires a modern environmental law regime to recognize the relationship between human health threats and more subtle injuries to the entire ecosystem. And our modern environmental law is just beginning to realize that fundamental changes in industrial processes are required to fully prevent pollution.

D. Conservation

"A Spoil or Destruction of Estate..."
(Blackstone defining "waste")

.01--Introduction. If any activity is dominant in the history of Vermont's environmental law, that activity is natural resource development and its conservation. The importance of farming, forestry, hunting and fishing throughout Vermont's history cannot be ignored. Out of the activity arose an awareness of the need to conserve soils, forests, game and fish. Vermont's Constitution, common law, and statutes attest to the public recognition of the need to conserve these resources.

Although a scattered selection of Vermont laws conserved selected natural resources, these laws conserved them one resource at a time, not as parts of an ecosystem. Although George Perkins Marsh recognized in 1864 that these natural resources were to be conserved as part of an ecosystem, and that man's abuses to one resource within that system could devastate another resource, Vermont's conservation law did not reflect this fundamental insight; each resource was and is regulated on its own. Nevertheless, the historical recognition of the need to conserve farm and forest, fish and game lays the basis for a modern law of ecological conservation.

The legal history of natural resource conservation law in America and Vermont is a history of subtle changes in the meaning of professed conservation accompanied by blatant changes in the landscape. The settlers in this country brought with them an ambivalence towards conservation. As David Shi has observed in his elegant history The Simple Life,[130] the early uncorrupted Puritans brought an abhorrence of waste and luxury which promised the modest use of resources. But Shi

omits the fact that some of the colonists fled from a cruel and restrictive regime of royal forests and game laws which extended back as far as William the Conqueror, in order to acquire a new freedom in the acquisition of nature.[131]

These early settlers met an Indian population which lived lightly on the land and conserved their resources as part of a way of life.[132] The Indians, though, were also the "enemy" which occupied the forest~a forest which then had to be cleared for both safety and farming. It is therefore not surprising that one of the first conservation measures in the new colonies applied to trees. England wished to reserve Royal Navy the choicest and largest white pines in the provinces of New England. In 1691, the charter forming certain colonies into the Province of Massachusetts contained a provision reserving certain "royal trees" for the Crown, and officers were appointed to mark each tree so reserved with the royal symbol, a broad arrow, symbolizing power and nobility. Whether landowner or not, no one was to cut down any "white and other Pines within the said township fit for masting our Royal Navy" without his "Majtys Especial Lycence," i.e., a permit.[133]

The earliest charters for Vermont towns exhibit a similar mandate for certain conservation-based behavior. The first Vermont charter of Bennington contained a number of conditions enforceable under "penalty of reverter" (if the owner did not follow the conditions, the property reverted to the grantor). The charter required two zones of land use to be created: a village center zoned at one-acre density, and the other zone to be remaining outlying agricultural lands.[134] This early "zoning" effort evidenced thought to conserving areas for future use. The village green, as this area is now commonly called, owes its Vermont origins to a recognition of the value of publicly preserved, undeveloped area in the town center.[135] (In earlier times, this green was often used for productive activities such as storage of manures, not a modern playground or center of quiet beauty!) The Bennington charter also provided that one share of land was to be set aside for the benefit of each of the following community or institutional purposes: for a school; for the first settled minister; for the society of the Propagation of the Gospel in Foreign Parts; and a glebe for the Church of England.[136]

If charters and statutes[137] were two sources of an early conservation ideal, the English common law was a third and perhaps a better example of modern conservation ideals. Blackstone's Commentaries on the Laws of England, despite controversy regarding its ambiguous role in the new revolutionary world, was read by lawyers and its conclusions adopted by courts in Vermont as elsewhere.[138] In many subtle ways, the principles of the commentaries encouraged a conservationist approach to natural resources. Like Locke, Blackstone opined that before private property came into existence, things were owned in common and that even after private property was instituted, certain properties remained either "in common" or "ownerless". Blackstone considered light, air, water, and wild animals when no longer held by man as "Things in Common."[139] "Things in Common" could be "owned" by an individual, but only so long as that individual had actual custody of the object. Once custody was lost, the object reverted to common ownership, and could then by possessed by any person. Similarly, Blackstone found "Ownerless Things" to be objects (such as forests, waste ground, and wild animals) which an individual may hold as permanent property, but which are often found without a proprietor.[140] A continuity of nature was assumed to lie behind the ownership of property.

This commons interest in game led Blackstone to recognize that game should be regulated by the state. In Blackstone's words,

> "...But it follows from the very end and constitution of society, that this natural right [to hunt] ... may be restrained by positive laws enacted for reasons of state or for the supposed benefit of the community..."[141]

The commons right to hunt game was viewed by Blackstone as analogous to "occupancy", a principal way of obtaining rights to air, water, and light.[142] "Occupancy" granted a priority of right to prior uses, which in Blackstone's time, were predominantly rural. Just as there was a touch of common property for game which could be regulated by the state and certain forests, Blackstone found the soil of "navigable" waters vested in the state and the public with a right of use to "pass over" and fish.[143] Obstructions were considered common nuisances.[144] The dumping of foul water was treated as an easement, either valid or invalid. The distribution between a body of water which couldn't be owned and rights to its use which could, implicitly encouraged the conservation notion of a sustained yield. One old common law action specifically related to conservation was the action of "waste," which Blackstone defined as the "spoil and destruction of the estate either in houses, woods or lands," either by demolition or neglect.[145] Only someone with interest in the estate could bring an action, but the interest could be a future interest, hence a duty to conserve was implicit in the action.

In short, the "usufructuary" (right to the fruits of natural resources) nature of surface water ownership, the "ferae naturae" nature of unowned nature of game (until capture), the origin from commons rights to air, water and light by occupancy, and the laws against waste operated as an 18th century conservation ethic which recognized, at a primitive level, the non-renewable flow resources and limited rights to depletion of stock resources. Blackstone's approach to the common property in game was explicitly adopted by Vermont's Supreme Court in a series of cases.[146] The importance of the common property nature of fish and wildlife is that the state was deemed to be able to regulate fish and game, without the regulation being determined to be an unconstitutional taking of anyone's property.[147]

The limits of private property in nature can be found implicit in the first Vermont constitution, adapted originally from the Pennsylvania constitution. This constitution set forth a civic republican philosophy subordinating private property to the public good. This philosophy provides constitutional principles for conservation of natural resources. Under Article 1st, all men, born free, have the inalienable right, in their pursuit of happiness, to acquire, possess and protect property. Under the 4th Article, they are to have a remedy for injury and wrong to that property. However, this individualism of property ownership and use is conditioned by several articles. Under the 18th Article, citizens and their representatives are to be guided by moderation, temperance, and frugality while under the 68th Article, the state is to encourage virtue and prevent vice. Thus, the expectation is for citizens to place limits upon themselves in the acquisition and use of property. These personal limits are supported by other articles. Under Article 2nd, private property is to be subservient to public uses. The Article 9th requires citizens to contribute their proportion to the common welfare. And under Article 67th, the citizens have the right to hunt, fowl and fish on their own and other unenclosed properties, subject to regulations of the legislature. Within this set of

principles, conservation may be seen as (1) the voluntary right of individuals to property in their pursuit of happiness; (2) the limit of the use and acquisition of property by the virtues of temperance and frugality; (3) the compliance with government necessity and the required contribution to the public wealth; (4) the compliance with legislative regulation of the fishing, hunting and fowling commons.[148]

The federal constitution was adopted after Vermont's first constitution. Aside from such provisions as the direct recognition of slavery[149] and the legislature's power to lay and collect taxes,[150] only two major property provisions are set forth. Article IV, Section 3 authorizes Congress to dispose of or regulate the territories and other "federal property."[151] The Fifth Amendment, adopted later, provides "...nor shall private property be taken for public use, without just compensation."[152] It has been universally recognized that John Locke's writings were a major influence on the founders of the Constitution.[153] Paradoxically, "conservation," in the form of "non-waste," although prominent in Locke's writing, is not reflected in the language of the U. S. Constitution. Not only is there no mention of conservation in the Constitution, but also the force of the constitutional language appears to draw a sharp line between public lands and compensable private ownership. Yet, the drafters of the Constitution were personally concerned about conservation and the owner's obligation to conserve. Jefferson's pet project was the Albemarle Agricultural Society, designed to promote improvements in agriculture. Madison took on the presidency of the society after Jefferson, and urged proper ploughing to prevent erosion, continued manuring to retain soil richness, appropriate irrigation, the limiting of farm animals and the control of "the injudicious and excessive destruction of timber and firewood.[154]

More important than the explicit language of the Constitution or the founders' views is the philosophy of property which lies at the heart of the document. That philosophy viewed property as a vehicle for the securing of civil rights, and for facilitating the marketplace; it viewed the constitutional checks and balances and the republican form of government as the way of checking the undue influence of property interests in governance.[155] Such a view of property is more concerned with the contribution of private property to checking political power, rather than checking the owner's abuse of his property; hence the explicit language does not envisage an obligation on the part of government or the individual to conserve her property. With emphasis placed upon the political and economic functioning of property rather than its natural conservation, the security of property for market purposes and civil rights is the central value, not conservation.

At this time, however, ways of life were more important than constitutins. Colonial conservation assumed a stationary rural mode of life~land remaining in forest, game and waterways. Yet by the early 1800's, the nation entered a period of westward movement and the abandonment of land. James Smith's eloquent descriptions of natural resources in Ohio at the time, drew a picture not of peaceful stability on the land, but a restless search for the more perfect land.[156]

Not only did western movement affect land stability, but the advent of the industrial revolution also influenced attitudes toward land and its conservation. The prophetic voice for the 1800's was Hamilton's first Report on Public Credit and his Report on Manufacturers. This report offered a spirited defense of the need for expanded manufacturing to provide employment, furnish "greater scope for the diversity of talents and dispositions," promote emigration, and create a demand

for agricultural surplus.[157] By the early 1800's, even Jefferson was arguing for the need to promote manufacturing at the expense of agriculture.[158]

The impact of the nation's growth in the 1800's can be seen in Vermont's history. Vermont was originally entirely forest land except for small burns, and rocky areas or marshes. As settlement and industry progressed in Vermont, man needed lumber for his homes, buildings, and industry of exporting lumber. The first primitive sawmill was built in Westminster in 1738 or 1739. The census of 1840 showed 1081 sawmills in Vermont! By 1840 to 1850, the height of clearing land for farms had been reached and Vermont's green hills were bare, as Vermont became the sheep capital of the country. Since the mid nineteenth century, the abandonment of the farm land began and reforestation has continued to this day. It is perhaps ironic that the natural reforestation of New England was first recognized by another Frenchman, the urban theorist Jean Gottman, in his classic work Megalopolis!

.02--Water Conservation. The evolution in Vermont's attitudes towards her natural resources is reflected in her water law. This evolution can best be understood by beginning with one of the modem notions of the conservation ideal. One part of the conservation ideal is "throughput". A modem term for thrift, the "throughput" idea is quite simple: material, going through the manufacturing process, should be used to the maximum either in the manufacturing process or the consequent products, hence minimizing waste. Applying this notion to rivers would require the river to be used to the maximum for the generation of its "products." In modem times, the "products" of a river would include fishing, recreation, water supply as well as commercial uses. In nineteenth century Vermont, the products of river use as described in the court cases of the day were the commercial uses of logging and milling. In the nineteenth century, in Vermont as elsewhere, considerable litigation arose over the commercial use of streams. The conflicts involved mill owners and other manufacturers such as tanneries and mines, as well as farmers whose land was often flooded or left dry by the manaipulation of streams.[159] Although the struggles were between differing commercial uses, the principles adopted by the courts are principles which might be applied to all conflicts of uses, including recreation and fish protection.

Blackstone's position on these matters, at least in the abstract, seemed quite clear. Riparian owners had temporary and reasonable use of the water.[160] Such a principle resonates well with the views of conservationists[161] or environmentalists, if "unreasonable" means the protection of the faquality of the stream. But the Vermont courts' interpretations of Blackstone's principles suggest a different outcome.

In some cases, Vermont courts simply rejected Blackstone. For example, Blackstone's version of the common law for water was urged by defendant mill owner in the 1927 case of Martin v. Bigelow[162] The downstream mill owner defendant removed the dam of an upstream owner without permission, claiming the right of an uninterrupted free flow. The court viewed the problem as one of maximizing the allocation of productive uses along the same stream. Since the upstream owner was making "productive use" of his water, the court found for the upstream owner, despite the impact upon the mill.

The Vermont courts took a different tack in the mid-century case of Snow v. Parsons.[163] The

defendant's tannery was obstructing the plaintiff's downstream waterwheel. The court here interpreted the Blackstone rule to depend upon the reasonableness of the use (as determined in part by custom), and upon the extent of the detriment to the downstream owner. The "reasonableness" in part depended upon whether prevention of the downstream harm would deprive the owner of all beneficial use of the stream for the tannery. But also, to determine such reasonableness may require evidence of the usage of tanneries "for generations."[164] According to the court, the downstream owner may have to submit to "some inconvenience."[165] The "inconvenience" which a downstream owner might have to accept is set forth vividly in the turn of the century case of Lawrie v. Silsby[166] Here the court reversed an injunction against an upstream owner's impoundment which, through evaporation, affected downstream domestic use. The court determined that the upstream use was "unreasonable," but held that the downstream owner's use must also be established to be a reasonable use, requiring it not to be interfered with!

Even in cases where the court apparently followed the Blackstone rule, it may undercut the rule in its award of damages. Thus in 1882, the Court in Canfield v. Andrews[167], found the sawmill owner to have improperly harmed the lower mill owner by dumping sawdust, but awarded for damages only the amount above and beyond the damage "necessary" for the sawmill owner's beneficial use of the stream.[168]

Not only did the court avoid the conservation implications of Blackstone rules of water law through the arbitrary interpretation of the "reasonable use" doctrine, thus permitting inconvenience to downstream owners, but the courts also employed loose standards which allowed significant water pollution.[169] Nevertheless, this slow emergence of the riparian rights doctrine in Vermont may be seen as the early courts' rough effort to maximize the allocation of uses along a river in the present time; such an approach is, perhaps, the first step to a modern conservation approach which seeks to allocate uses to obtain a maximized sustained yield through a stream of time into the future.[170]

Although the move toward conservation was not clearly revealed in the water power cases, it was in the law pertaining to fish. The Conservation Act of 1793 promoted the conservation of fish, and the common law prohibited the nuisance of erecting of any dam, hedge, seine, fish guard or other passage of fish obstruction, in any water-course, whereby navigation of fish may be obstructed, punishing the person erecting the same with a fine. Public authorities establish a "closed season" when trout could not be taken. The laws also allowed the Fish and Game Commission to restock the pond at the expense of the people of the State. The fish were protected from destruction until they began to produce.[171]

During the early 1800's it had become evident that certain fish populations were declining. The valuable Atlantic salmon, for example, was disappearing from New England rivers largely as a result of siltation and pollution. Trout and other freshwater species were declining too. State legislatures were asked to enact laws to restrict the catches, to outlaw certain kinds of traps and nets, and to establish closed seasons and limits on size.

Early conservation law aimed at managing fish reserves for the future use existed in State v. Theriault[172], where it was deemed a reasonable exercise of police power of the state to preserve and increase the common property of fish. Thus, the early statute law of 1898 recognized the reality

of nature -- that indeed fish were in water. The allocation of the common property of the natural resource of water was to include the public conservation of the resource of fish for the future.

By 1910, the conservation ideal gained momentum with the decision in State v. Haskell,[173] where the dumping of sawdust of mills was regulated to preserve the valuable food supply of fish for its people. In Haskell, the issue was whether the dumping of sawdust into the Lamoille River, one of the largest rivers in the state, damaged the resource of fish. The law in question prohibited the depositing of sawdust, shavings or mill refuse in the waters of the Lamoille River or its tributaries above designated places. The rationale of the law was to deter injury to and the destruction of fish and game fit for food, thus conserving for the people a valuable food supply. Under this law, in the Haskell case, the state acted to prevent the milling industry from damaging the resource of the Lamoille River of Morristown. In Haskell, the court was not merely uphold a law authorizing maximum allocation of the present use of the river, but also promoted the conservation of fish resources into the future. Thus, the primitive intimation of the conservation ideal of colonial bylaws was fully transformed into the statutory conservation law of the state by the beginning of twentieth century.

.03--Soil, Forest and Game Conservation. Perhaps no common law action is more closely allied to the conservation ideal than the common law action of waste. Blackstone defined "waste" as

> "A spoil and destruction of the estate, either in houses, woods or lands; by demolishing not the temporary profits only, but the very substance of the thing, thereby rendering it wild and desolute... by an actual or designed demolition...[or] arising from mere negligence...[174]

A person owning outright could commit waste, but a person who owned property subject to others with rights to the common or with a remainder or reversionary interest in property could be sued for waste by those others.[175] A later Vermont court awarded damages for timber which had been wrongfully cut.[176] Since the remedy was limited to the few people with a specific legal future interest in the land, and permitted only after-the-fact damages, the common law doctrine of waste was hardly a central mechanism for promoting conservation. In any case, actions of waste stopped appearing in Vermont courts by 1920. Perhaps the eclipse of the waste doctrine was a symptom of the destruction of Vermont's forest cover in the late 1800's to promote other activiteis such as sheep grazing. With the eclipse of the waste doctrine in common law, other laws offered better examples of the early legal means for soil, forest and game conservation.

[a]--*Soil Conservation.* Soil conservation as policy and part of Vermont's Act 250[177] assumes the necessity of consciously conserving soil, protecting it from a way of life which is abusive to soil resources. The Abenaki Indians--Vermont's first citizens--lived lightly on the land. Unfortunately, the early European settlers were neither aware of soil abuses nor concerned about them. In 1797, Jefferson wrote

> "We ruin the lands that are already cleared and either cut down more wood, if we have it or emigrate into the western country..."[178]

Madison, in an address to the Albemarle Agricultural Society, deplored the overcultivation of soil, the bad mode of ploughing it, the neglect of manures and irrigation, the keeping of "excess" cattle, and the excessive destruction of trees.[179] This abuse of the land was not limited to the South,[180] but also New England, where farmers abandoned their soil-exhausted lands.[181] Despite the wanton exploitation of natural resources in the 1800's, a few lonely voices argued the case for conservation. As early as 1813, Rodolphus Dickerson in his survey of Massachusetts remarked on the extensive spreading of plaster, which he considered especially useful on light soils. The idea was also becoming accepted that after cropping land a few years, a good farmer did well to sow clover and leave the field as a meadow to recover before planting again.[182] Early efforts at crop rotation were signs of the conservation ideal.

The abuses of land, in Vermont and elsewhere, must be understood in the context of the history of agriculture. The years of 1607-1783 were a colonial period of forest clearance, crop experimentation, and self-sufficiency. The period of 1783 to 1830 involved the rapid expansion westward, often abandoning fields behind. The transformation to a commercial agriculture took place between 1830 and 1860, a period when the railroads came to Vermont. Even before the railroads, the Champlain Valley farmers traded to the north and Connecticut River Valley farmers drove herds of cattle to the Boston market. Potash was a major product of the early 1800's. In the mid-1800's, Vermont was the Merino sheep capitol of the world, and her hills were denuded. By the end of the 1800's, the West had been opened up, the sheep left, and Vermont's farmers turned to dairying.[183] As a consequence of this history, Vermont's soils were less depleted than other areas of the nation, where a different kind of farming took place.[184]

In the mid and late 19th century, there were strong voices for soil conservation. Vermont's George Perkins Marsh and John Wesley Powell were two such voices.[185] Both national and state agricultural policies were primarily occupied with the beginnings of establishment of "scientific" agriculture and the financing of the land grant colleges and extension services.[186] A review of the Vermont Agricultural Reports of the late 1800's reveals a lively discussion of the public meetings of the State Board of Agriculture (Manufacturers and Mining) about fertilizers, crop rotation, manuring, recycling farm waste, soil exhaustion, soil minerals and the renovation of pasture lands.[187]

Soil conservation was a relatively minor part of the national conservation movement at the turn of the century. Soil conservation appeared to be a "local problem."[188] It was not until 1935, when a federal act established the soil conservation service that soil conservation became an official national policy,[189] and Vermont responded to the new national initiative.

In 1937, in response to the federal Soil Conservation and Domestic Allotment Act, Vermont passed a law providing for an "agricultural plan," to be formulated by the University of Vermont and the State Agricultural College. The plan, under the provisions of the federal law, was to be submitted to the U. S. Dept. of Agriculture and, if accepted, federal grants were available for the state to "...enter into agreements with producers and to provide by other voluntary methods, for adjustments in the utilization of land and in farming practices..." This was the beginning of the modern history of state soil conservation and soil conservation districts.

[b]--*Forest Conservation*. Perhaps the unsung forest conservation hero of the

1800's is Vermont's George Perkins Marsh.[190] Marsh was fascinated by the damage man could do the earth by overcutting, overgrazing, and thoughtless agricultural practices. He noted such devastation in Mediterranean countries while he was the U.S. Minister to Turkey from 1849 to 1854, and to Italy from 1861 to 1862. He made thoughtful connections between what happened in older civilizations and what was happening in his own country, based on what he had observed in his native Vermont. Marsh suggested why and how resources that had been disturbed or destroyed might be restored. In short, he established the fundamental ecological principles of conservation that exist today.[191]

The underlying scientific presumption of Marsh's writings is that nature enjoys a self-regulating balance, even under the stress of great natural catastrophes. This balance enables it to restore itself to a kind of primordial harmony, as long as human activity does not interfere with the process irreversibly. Marsh begins his analysis with the Roman Empire and shows how their intrusions through plant and animal domestication and clearing of forest caused erosion and other damage. Thus were lush forest and fields transformed into "an assemblage of bald mountains or barren, turfless hill, and of swampy malarial plain."

Early notions of balance in nature in American thought derived from Marsh an Charles Darwin, who independently developed the web-of-life concept about the same time. Marsh's notions influenced American public policy through Franklin Hough, follower of Marsh and first head of the Division of Forestry under the Commissioner of Agriculture, and Charles S. Sargent, professor of arboriculture at Harvard and an active member of the American Forestry Congress. Marsh's thought was also influential the famous conservationist head of the U.S. Forest Service under Teddy Roosevelt, Gifford Pinchot.

Gifford Pinchot, the Dept. of Agriculture Chief Forester in 1898 and Teddy Roosevelt's head of the forest service, is credited with beginning a formal conservation movement. Conservation for Pinchot was very different than the ecology of George Perkins Marsh. In Pinchot's words:

> "...Farming cannot go on unless crop succeeds crop. No more can Forestry. A farm crop may reproduce itself, or it may have to be sown or planted. Just so with trees... A well-handled farm gets more and more productive as the years pass. So does a well handled forest..."[192]

This view of conservation was not only adopted by the forest rangers, but by the forest experiment stations which were to carry on "experiments and studies leading to the full and exact knowledge of American silviculture, to the most economic utilization of the products of the forest, and to a fuller appreciation of the indirect benefits of the forest..."[193]

The national movement for conservation under Teddy Roosevelt, led to the Soil Conservation Service, the Civilian Conservation Corps formed during the depression, the Taylor Grazing Act to regulate overgrazing and prevent erosion, and a myriad of other national conservation efforts, both public and private.[194]

Less documented have been Vermont's efforts.[195] One of the first legislative steps in regard

to forestry was taken when Colonel Joseph Battel of Middlebury introduced a resolution in the house in 1882 to appoint a committee to investigate and report in regard to the forestry situation in the state.[196] That same year, by Senate joint resolution, the board was directed to inquire into the effect of stripping a country of its forests, upon the soil, climate, and health, the necessity and advisability of protecting the same, probable expense and such other facts as they may deem necessary for a clear understanding of the subject and to employ the same together with recommendations in their next report.

In 1894, Governor Urban W. Woodbury devoted a part of his message to the legislature to the subject "Our Forests", which might as well have been expressed thirty to forty years later.

> "The owners of timber lands in our state are pursuing a ruinous policy in the method used in harvesting their timber. There is no more valuable crop produced from the land than timber, especially spruce lumber. By the preservation of spruce trees of ten inches in diameter and under, when the large timber is cut, a good crop can be cut every fifteen years at least. Every decade will see timber more valuable and it is of great importance to the owners of timberlands as well as to the state as a whole, for what increases the wealth of a class increases the wealth of the state~that some measure should be adopted to lessen the wanton destruction of our forests."[197]

Woodbury possessed ecological insight that should have revolutionized thought about the forests. The problem then remains the problem today; short-term maximization of profits at long-term ecological cost.

Owners of land that is held in fee simple have certain responsibilities to leave it to succeeding generations undiminished in productive capacity.[198] Gradually during the early 1900's, it became the responsibility of forest owners and operators to a) harvest timber under approved cutting practices; b) properly fence farm woodlots and maple sugar orchards to keep the area ungrazed so as to let new trees grow to replace old ones as they become mature and are cut; c) be careful with fire; d) protect white pines from blister rust by the removal of wild and cultivated currant and gooseberry bushes; e) keep the land productive by reforestation of those areas unsuited to the production of agricultural crops or pastures; f) improve the timber stand and increase its growth by the removal of inferior species and unmerchantable trees where possible.[199] Early legislation made reforested land exempt from taxation and promoted the growth and maintenance of wood and timber lots.[200] Various types of cutting were introduced in an attempt to increase yields and conserve.[201] Intermediate cuttings were made in natural stands to improve the density, composition, quality of the stand and quantity of wood grown in any given period of time.

As a result of a recommendation of Governor Charles M. Smith, the legislature of 1935 enacted a law establishing a Department of Conservation and Development supervised by a board of three persons. The Department included the forest service, fish and game services, publicity service and state geologist.[202] A Forestry conference in 1949 revealed some deep wounds cut in Vermont forests. Of the area of Vermont, 62.5% or 3,713,400 acres, were covered with forest growth. The forests had been cut over several times with little regard for the next crop. Prior to World War II, mainly softwoods were taken. By World War II, everything was taken to fill the war

needs.

This blatant disregard for the forest environment changed the pattern of tree growth in Vermont. It resulted in a forest area composed of trees of a less desirable species; the stands had an insufficient number of trees per acre; the growth rate was half to a third what it should have been; a large volume of timber was in the lower diameter class and the cull timber was left from cutting high quality trees.[203]

In 1945, the Forest Practice Act was adopted. This act was "to assist forest owners and operators in the promotion and maximum sustained productivity of the forest, and to disseminate information relative to forest practices." The following policy was enacted:

> "Section 1. Declaration of Policy. The forest, timberlands, woodlands and soil resources of the state are hereby declared to be affected by the public interest. It is declared to be the policy of the state to encourage economic management of the forest and woodlands to maintain, conserve, and improve the soil resources of the state to the end that an adequate source for forest products be preserved for the people, floods and soil erosion be alleviated, hazards of forest fires be lessened, the natural beauty of the state preserved, the wildlife protected, the development of recreational interest encouraged, fertility and productivity of the soil maintained, impairment of dams and reservoirs be prevented, the tax base preserved and the healthy, safety and general welfare of the people of the state be sustained and promoted. It is declared to be the policy of the state to assist the forest land owners in cutting and marketing of the forest growth, and encourage cooperation between forest owners and the development of forestry.[204]

The legislature specifically authorized that as a member of the Conservation Board, the State Fish and Game Director "shall be a man [sic] with practical knowledge of an practical experience in protection, conservation, and restoration of the wildlife resources of the state."[205]

Conservation was clearly aimed at future economies, as evidenced in the Public Act of 1945.[206] By this Act, the State Conservation Board was vested with the power to promulgate rules to promote "economic management of the forests and woodlands to maintain, conserve and improve the soil resources of the state to the end that *an adequate source of forest products be preserved for the people...* " (emphasis added),[207] imposed a duty upon landowners that where foresting operations are conducted, the land must be left in a "favorable condition for regrowth" keeping enough trees on the land to simulate normal conditions.[208]

Unfortunately, this legal language was rhetorical and received little, if any, real implementation. In 1947 a program for the development of forest resources in Vermont was drafted, the objective of which was to manage the forest land of the state as to insure an adequate timber supply for wood using industries and to obtain and conserve for the owners and the public the maximum subsidiary benefits such as watershed protection and recreational and scenic values.[209]

[c]--*Game Conservation*. Not only fish and forests, but also other game suffered vast depletions in population during the nineteenth and early twentieth century. By 1890,

there were only 500,000 deer in North America. This decline took place despite the laws to protect deer, which appeared in many colonial legal codes. The first, providing for a six-month closure in deer hunting, was written into the charter of Newport, Rhode Island, in 1639, and extended colony-wide in 1646. Connecticut and Massachusetts adopted similar laws by 1698. By 1750 most of the original colonies had similar laws. Unfortunately, the date of each of these laws reflects the date when the deer became scarce rather than a turning point for the better in the status of the species.

These colonial bylaws are interesting curiosities, but they had little application under the wilderness of the frontier of Vermont. Their real value was that they remained in legal codes of the colonies and became part of the common law of the original states. As such, they served as precedents for more realistic game regulations after wildlife restoration began. The first known state game law adopted after the revolution provided for a closed season on ruffed grouse on Long Island, New York. Maine, in 1826, enacted a closed season of six and one-half months on deer and moose. Maryland was the first state to regulate waterfowl hunting. These laws, like their predecessors, failed because of inadequate public support.

Vermont did not enact state legislation regulating the taking of deer until 1865, and in the backwood towns the law was either ignored or men were appointed who could be trusted not to enforce the law. The law was finally enforced in Chittenden County in 1873.[210] In the case State v. Solomon Norton in 1873, the complaint alleged that the respondent did "chase, drive, worry and kill a live animal called a deer. The case was brought under the Act of 1865 General Statute 891, which creates the offense, and provides that a fine may be recovered by a suit before a Justice of the Peace, thus expressly conferring jurisdiction on Justices of the Peace to determine guilt or innocence of the party accused. Section 1 of the Act reads:

> "If any person shall ... kill any animal of the deer kind ... he shall be punished by a fine of $50 dollars, and cost of prosecution ... one-half of said fine to be payed to the complainant, and the other half to be paid into a treasury of the town in which such animal be so hurt, worried or killed."[211]

Laws with teeth did not begin to bite consistently until the modern wildlife conservation movement in 1905. In Payne v. Sheets,[212] the court fined the defendant $10 for wilfully entering upon private land without permission of the land owner for the purpose of trapping or shooting. The owner could recover in an action of trespass, with addition compensation for damages sustained. The Payne case signalled a significant change in the evolution of the conservation ideal, since the right to hunt wildlife on the property of another was curtailed. Land owners persuaded courts to employ the older English common law from which some of the colonists had fled.

The Vermont history of game conservation, including fish, also reveals an increasing public control over deer as a "resource." In 1857 the Governor of Vermont sponsored inquiries "into the state of the discoveries which had been made in relation to the artificial propagation of fish", and George P. Marsh was appointed to head the task. As a result of Marsh's report, two Fish Commissioners were appointed in 1867.

The Fish commissioners from 1867 to 1892 gradually took on the protection of other game

as well as fish and brought their management of the two allied resources closer under a single administrative body. By act of the legislature of 1892 the Fish Commissioners became Fish and Game Commissioners and all laws were revised and amended. John W. Titcomb, who made a memorable conservation record in Vermont and later in New York, Connecticut and Washington, and Charles C. Warren were the first men appointed to administer the collective fish and game resources.[213]

In 1904, a fish and game commission was provided, the members to be appointed by the governor for a two year term.[214] Not until 1906 were licenses required for hunting: then only non-residents were required to purchase a license and only to hunt deer. In that year 20 such licenses were sold. By 1908 the commissioners had received sufficient political support to enable the legislature to vote a general resident license law, the licenses to hunt and fish selling for 50 cents. Licensing, of course, did not stop the slaughter.[215]

The work of the Vermont Fish and Game service in trying to wisely manage this important game crop drew public attention in 1936. In response to outcries from interested sportsmen and land owners in Windham County, the first of several checking stations was started that year. A sample of the herd was weighed and measured in Windham County for many years to follow, and in time checking stations were added in other counties. With hunters complying with Vermont law by reporting deer killed, the Vermont Fish and Game service was able to maintain a complete check on the deer herd which continued to grow. At strategic locations in the state, deer were weighed and other data recorded at checking stations. Much information was also gathered from reports handled by town clerks, wardens, deputy wardens and specially deputized persons.

Leonard E. Foote, in a revised edition of "A History of Wild Game in Vermont," wrote in 1946:

> "At the present time the main deer problem in the state is to determine when control of the numbers of deer may become necessary and the type of a doe season best fitted to reduce the herd without destroying its ability to reproduce itself in a relatively short time."

In 1947 Roger A. Seamans of the Fish and Game Service compiled a pictorial story of Vermont's deer herd entitled "The Time is Now!" In that publication Seamans pointed out many examples from across the country of deer eruptions and the resulting losses from malnutrition. He described in words and pictures the growing problem of overpopulation in Vermont's deer herd. Seamans listed 19 facts for consideration by Vermont lawmakers in taking action "deemed best for the people of Vermont, its forests and its deer herd."

Seamans cautioned that legislation must be based on scientific research. He stated in part:

> "Vermont now has an overpopulation of deer in three of the four southern counties and parts of other counties. Maintaining the present population in these counties will seriously reduce the potential carrying capacity of the winter range. Winter range, once browsed out, requires a number of years to reestablish. Overbrowsing is changing the forest composition. Poor timber species are replacing desirable ones. Crop and orchard damage is presenting a major problem. Legislation should be enacted to permit the director, with the approval of the

> Commission, to establish open seasons on antlerless deer by counties or portions of counties and to formulate the necessary rules and regulations to remove a predetermined number of animals."

> In the same 1947 publication, Fish and Game Director George W. Davis stated in a preface:

> "...While not all parties will agree on the control proposed, most of us will admit game should be handled as a crop and the surplus harvested under proper management. An area can support through the winter only so much game. Protection should be afforded this seedstock. Environmental factors limit the survival of the population in excess of the seedstock and hunters should be allowed to harvest the surplus that results from the period of spring and summer reproduction."

Vermont made splendid progress in enforcement of deer laws. The common practice of illegally killing deer, as well as the salvaging and disposing of such deer, stimulated the demand for enforcement by game wardens in the state. An increased number of license holders and a larger deer herd contributed to more extensive patrol work and investigation. The use of a machine gun or of an automatic loading rifle with a magazine capacity of over six rounds was prohibited. All kills had to be reported and head exhibited within 48 hours to a Fish and Game warden, town clerk, a special deputized person or at one of the checking stations operated by personnel from the Fish and Game Service.

By 1950 there were many sections dealing with Vermont's deer regulations. The penalty of violation for illegal taking or possessing deer out of season was considerably more than the ten dollar fine of 1791. Acts relating to possession and sale of wild deer had changed to provide a penalty setting a fine of not less than $100 nor more than $300, or imprisonment of not more than sixty days, or both, for each offense. The 1953 legislature acted to reduce the danger to the deer herd by dogs during the spring of the year. During the period between the first day of February and April 30, both dates inclusive, Fish and Game wardens were authorized to kill dogs, whether licensed or unlicensed, when in such close pursuit as to endanger the life of a deer or found in the act of wounding, maiming or killing deer.

The laws made it illegal to sell deer for transport and consumption out of the state. Deer could be sold to be consumed within the state, provided they were sold during the open season and until not later than 20 days after the close of the season. The law required that deer be tagged as soon as killed with the tag being on the animal whenever it was being moved. These tags were provided with all hunting licenses.

The problem of crop and orchard damage by deer occupied much of the attention of the legislatures of 1953 and 1955. By that time the Fish and Game Service had added two district supervisors to its warden force, one for the northern end of the state and one for the southern counties. One of the tasks for these district supervisors was to work with wardens in the field in investigating deer damage complaints with a more uniform appraisal resulting.

Several proposals for antlerless deer seasons were considered by the 1953 and 1955

legislatures, and some action was taken at the '55 session. The legislature, in setting up a statewide bow and arrow deer season between October 24 and November 2, also created a southern zone with certain highways serving as boundaries and provided for the taking of antlerless deer in that zone. The regular deer season for the taking of deer with antlers not less than three inches long was set for 16 consecutive days commencing on the second Saturday in November.[216]

.04--Conclusion. This history of Vermont's early legal efforts to conserve forest, farm, and game establishes beyond any doubt that conservation of natural resources is not the effete invention of modern environmentalists but the result of the felt necessity of farmers, loggers and hunters, as well as deep beliefs of the indians who preceded them. For the settlers, however, the conservation ideal was a short-term practical thrift, not focused upon meeting the needs of future generations. The natural resources were not seen as part of a more interconnected ecosystem, nor was there a reflective public awareness of the impact of human action upon these resources.

E. Social Sustainability

Under Vermont's Act 250, a development or subdivision must not place an unreasonable burden upon transportation, educational services and other local municipal and governmental services,[217] or an excessive demand upon public utility services.[218] If the development is part of population growth, the District Commission is required to place conditions on a permit to prevent an undue burden resulting from that growth.[219] I have entitled this requirement "social sustainability" to emphasize that, like the requirements for natural sustainability through conservation and preservation, Act 250 is concerned to serve that an adequate infrastructure of governmental services is also available for future generations. The requirements that no unreasonable burden be placed upon municipal services is parallel to the other Act 250 requirements that unreasonable burden not be placed upon the air, water and the environment. In a sense, municipal facilities are viewed as part of the carrying capacity for development.

The requirements for municipal services did not arise out of the legislature's theoretical insights into environmental and social carrying capacity. At the time of passage of Act 250, new ski area developments were placing burdens upon the roads, sewer, water, schools and other services of small towns. One very real environmental problem resulted -- the overflow of sewage. As a consequence, Act 250 required these services to be provided. Many of the required community services, such as education, fire and police, have only a tangential relationship to preserving, conserving and protecting the environment. Nevertheless, the linking of the evaluation of social impacts of development to national impacts strengthens the legitimacy of the law in the eyes of many people.

The early legal tradition for social sustainability is different from the traditions of conservation, preservation and health protection. The early laws and cases of community sustainability come from the traditions of municipal law. For Blackstone, the good government of a town or district depended upon "lay civil corporations" created to carry out the purposes of the founder.[220] Their powers and duties were limited by their own constitution and the purposes for which they were founded. Some of the original Vermont towns had charters from the English

settlers. In revolutionary New England, freemen, recognized by the Vermont Constitution, would assemble in the meeting house and conduct business or "select" men to conduct business for them.[221] The Vermont town never had the power to adopt legislation without empowerment from the state legislature. However, the original colonial charters and the early state legislation granted a variety of specific powers and duties to the towns.[222] During the course of the 1800s, these powers extended to health regulation, the abatement of nuisances, economic regulations, the keeping of the town forest, and the suppression of riots, protection of shade trees along the roads, and the control roving livestock.

The forerunner to the modern governmental services required by Act 250 were the fire, education and road services of the late 18th century. The town fire warden and the fire districts were established by the early 1800s.[223] The first Vermont Constitution provided that "a competent number of schools ought to be maintained in each town,"[224] and by 1782, the Vermont General Assembly passed statutes enabling towns to create school districts.[225] The districts were empowered to levy and collect taxes for the school district.[226] In 1797, the Vermont General Assembly provided for the appointment by selectmen of "surveyors" charged with the care and maintenance of the town roads.[227]

The impact upon services may not be upon the municipality, but upon special service districts. Present Vermont statutes enable the formation of special fire, water, sewer, school, soil conservation, and waste disposal districts. The history of the formation of these districts extends back as early as the Middlebury Fire Society and the Burlington Free Company in 1909.[228] As early as 1797, Vermont laws provided for the formation of school districts.[229] Not only did the towns or special districts have the power and adopt the practice of providing services, but legal scholars Charles Haar and William Fessler, in their legal history of municipal services, have documented a tradition of the municipal duty to provide equal service. In the authors' words,

> "The hallmarks of the earliest common law doctrine of equal service, though cast and recast in various formulations, were the complementary concepts of equality of access, adequacy of rendition, and reasonableness in the pricing of public or communal services and facilities."[230]

The authors trace the common law duty of equal service as represented by the local miller back to the theory and practice of the early Plantagenets.[231] The courts established the duty to the public of ferries since the time of Edward I.[232]

With the advent of the railroads in the 1800s, the duty to provide equal access was translated by the courts into the duty of non-discriminatory railroad rates.[233] At the end of the 1800's, this non-discriminatory duty was extended to other public utilities which were labelled "public servants" by the court.[234] these public utilities were often municipal utilities. In the 1900s, the courts defined several motifs for the obligation to furnish adequate supply and service without discrimination as:

(1) The imposition of a common right to access drawn from the doctrine of services as a public calling, essential to industrial survival within the community;

(2) The duty to serve all equally, inferred from and recognized as an essential part of natural monopoly power;

(3) The duty to serve all parties alike, as a consequence of the grant of privileged power of eminent domain;

(4) The duty to serve all equally, flowing from consent, expressed or (more frequently) implied.[235]

This history underlies the modern Act 250 requirement of insuring social sustainability. Several of its legal assumptions have been tested here in Vermont. Towns (1) have the power (and may have the duty) to provide certain government services: roads, sewer services, electricity, water, education, (2) have the power to tax (or raise revenues in other ways) to pay for the services; (3) may delegate to others to provide these services; and (4) may require developers to pay their fair share of the cost of the services needed as a consequence of the development. Each of these assumptions have been contested extensively in the history of municipal law elsewhere and the cases and commentary fill volumes. I have simply selected a few Vermont cases to illustrate the historical flavor of the law.

In the quaint case of Village of Swanton v. Town of Highgate,[236] in 1908, the town contested being taxed for electricity on its "water power," a sawmill, grist mill and electric light plant. The 1894 town charter authorized it "to light the streets of said village by electric lights or otherwise as said village may elect,"[237] and to furnish water, electric lights and electric power to parties residing within the corporate limits of the village." The court held that the town had the power to light the public streets, but not to extend electricity to its inhabitants.[238] The case illustrates the way courts in Vermont and elsewhere at the turn of the century stringently limited the powers of municipalities.

Cases contesting the town's power to tax to support town services extend over two centuries.[239] In Van Sickler et al v. Town of Burlington,[240] et al, in 1854, the taxpayers contested a tax for repair of fire engines to be given in grants to fire companies. They claimed that the town didn't have enough property to warrant an engine and that they lived where the engine would do no good. The words in the state statute were "....for the persecution and defence of their common rights and interests, and for all other necessary and incidental charges within the town...."[241] (emphasis added). The court upheld the tax, claiming the authorized language "...embraces that large class of miscellaneous subjects affecting the accommodation and convenience of inhabitants which have been placed under the municipal jurisdiction of towns, by statute or by usage."[242] This early Vermont case also illustrates the ability of towns to delegate to other parties the task of providing various municipal services. The court[243] cited with approval a Massachusetts case,[244] which held that town assistance was proper for repairs to vehicles acquired by private subscription.

Finally, there remains the question of town requirements of private parties to provide for municipal services. The requirement first arose when a municipality required a special assessment. In the Lazelle v. City of Barre case in 1909,[245] the court upheld a special assessment against town abutters to a municipal street improvement project. The assessment was levied in accordance with a legislative charter amendment which authorized the recoupment of the benefit to the adjacent

landowners.

Although special assessments are based upon the principle of the recoupment of publicly funded benefits to the landowner, the land use requirement for "dedication" by developers and Act 250's requirements for provision of services is based upon the principle of protecting the public against the proposed development's impacts on the public environment and infrastructure. Under Vermont statutes, subdivision regulations may contain standards for public facilities,[246] requirements for parks and playgrounds,[247] and conditions for public improvements.[248] Although the fairness of these "dedication" requirements have been vigorously litigated in other states, there is no history of similar litigation in Vermont. In 1987, the Vermont legislature in 1987 adopted a municipal impact fee statute, which authorizes municipal adoption of a capital budget plan and the charging of an impact fee for development in accordance with a formula for measuring the impact upon the level of service required.[249]

This legal history of social sustainability is more abbreviated than the histories of pollution prevention, conservation and preservation because the tradition and legitimacy of laws to require community services is better known and more accepted than the conservation, preservation and pollution control traditions. Hence, these traditions of conservation, environmental protection and preservation are given more attention here. Nevertheless, this social sustainability contains several principles often not prominent in the statements of public environmental values. These principles include the more more explicit recognition of community -- a shared set of interests, obligations and expectations of citizens living close to one another. The major legal mechanism of achieving community rests upon a shared obligation to raise and spend funds for public purposes, and the concomitant expectation that people would share equitably in the resultant services. Community, contributory justice and equitable access to services are the important operative principles.[250] In the past 100 years, the nation has adopted policies similar to Vermont's legislative efforts to help local communities sustain themselves by funding or requiring community facilities including pollution and traffic control. In the past fifty years, a national grant in aid program for sewer and water facilities and highways been established. This program has helped to sustain communities whose unconstrained population growth results in a variety of environmental problems. Perhaps the most extensive environmentally-oriented national program which is aimed at community sustainability is the community stabilization program of the forest service. The partial adoption of community stability as a policy goal of national forest policy has has waxed and waned over the years, but it remains part of the criteria for evaluating sustained yield in forest plans and remains of continued interest to forest policy planners.[251]

F. Conclusion

Anglo-American common law lawyers study and appeal to legal precedent.[252] In so doing, they are tempted to misread the present into the past. On the other hand, they seek to recover the relevance of the past to the present. This chapter has sought to recover Vermont's legal history as relevant to the public values underlying "Act 250."

Act 250 resonates with two centuries of Vermont law. The core of the Act, 10 V.S.A.

6086(a)(1)-(10), sets forth criteria by which developments are to be assessed. The first criterion seeks to prevent air and water pollution. Some of the criteria pertain to preservation--aesthetics, endangered species, natural areas, high altitude areas. Other criteria seek to conserve water supplies, forests, agricultural lands, soils and wildlife. Others require community sustainability in the form of required municipal services.

The policies in the past legal history of Vermont are not the same as the modern policies of Act 250. In the early history, the people lacked a vision of natural ecosystems, and a full awareness of the impacts of growth upon diminishing natural resources for future generations. But a deep knowledge of the early legal history of Vermont's Act 250 corrects some modern misconceptions.

Some avid environmentalists, seeking to turn Vermont into a wilderness, view Act 250 only through the lens of Earth Day, and find its central public values to be preservation. Although latter chapters of this book will examine the immediate legislative history of Act 250, we can already see that the early history of Vermont's environmental laws is much broader, encompassing aspects of conservation, pollution, and social sustainability as public policies.

It would be a serious historical mistake to overstate the influence of these values. Other values, e.g., the protection of private property, played an important role in Vermont's history. External forces committed to uncontrolled development, e.g., the railroad, national markets for wool, milk and cheese, reshaped Vermont. By selecting these other aspects of nineteenth-century American history, when private property assumed its dominant role and economic development was often uncontrolled, some opponents to Vermont's land use regulation have portrayed the major issue of Act 250 to be a newly-created conflict between private property and the "new" state regulations supported by avid environmentalists. However, the foregoing history reveals Vermont's rich historical tradition of commitment to the public values of preservation, pollution prevention, conservation, and community sustainability. In short, this chapter has sought to revivify and make more accurate our collective memory of Vermont's historical tradition leading to Act 250 and its central public values.[253]

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1. F. Bryan, J. McClaughry, The Vermont Papers at 27 (1989).

2. H. Meeks, Time and Change in Vermont: A Human Geography at 106-140 (1986).

3. Id. at 140-157.

4. Id at 177-220.

5. For one such effort, see Harold Weeks, Time and Change in Vermont: A Human Geography (1986).

6. K. Thomas, Man and the Natural World: A History of Modern Sensibility (1983).

7. See text accompanying notes 130-216.

8. "Natural areas" under the Vermont law means land which has retained its wilderness character, which is host to the rare or vanishing plant or animal life, or which is a unique ecological, geological, scenic or contemplative site

worthy of preservation. 10 V.S.A. § 2607.

9. 13 V.S.A. 2 § 53(2).

10. 13 V.S.A. §§ 351 et seq.; § 399.

11. 10 V.S.A. § 2351.

12. C. Calloway, The Abenaki 19 (1989).

13. A. Hultkrantz, Belief and Worship in Native North America, 120 (1981).

14. Id. at 125.

15. R. Nash, Wilderness and the American Mind (1982).

16. George Perkins Marsh, Man and Nature, 3 (1974).

17. John Muir. The author cannot locate the origin of this quote.

18. 16 U.S.C. § 668 dd.

19. 16 U.S.C. §§ 1131 et seq.

20. 16 U.S.C. §§ 1241 et seq.

21. 16 U.S.C. § 21 - § 79.

22. "9 Stat. 17, 32," as cited in J. Ise, Our National Park Policy, (1979).

23. Id. at 46. [8 Stat. 28, 73]

24. These problems led to the adoption of Vermont's "Act 250."

25. 13 V.S.A. § 351.

26. State v. Muzzy, 87 Vt. 267, 88 Atl. 895 (1913).

27. State v. Persons, 46 A.2d 854, 114 Vt. 435 (1946); See also State v. Vance, 125 A.2d 800, 119 Vt. 268 (1956).

28. 13 V.S.A §§ 401-481.

29. 13 V.S.A. §§ 351-400.

30. See Philip G.Terrie, Forever Wild: Environmental Aesthetics and the Adirondack Forest Preserve, 16-17, (Temple Univ. Press, 1985).

31. Id. at 17.

32. Id. at 17.

33. Norman Williams, Scenic Protection Law, Chapt. B, 1, unpublished (1989).

34. Id. at 92.

35. Id. at 93.

36. Id. at 94.

37. Id.

38. Perlmutter et al v. Greene, 182 N.E. 5, 6 (1932).

39. See Note: "Aesthetic Nuisance: An Emerging Clause of Action," 45 N.Y.U. Law Rev. 1075.

40. As early as 1923, a court in California upheld the condemnation of a strip of highway located entirely within privately owned property on the basis that the highway obtained scenic views of the mountain range on one side and the Pacific coast on the other.Rindge Co. v. Los Angeles, 262 U.S. 700 (1923). The court stated that scenic highways "may be condemned to places of pleasing natural scenery," and is justified as a public use. Note though that Vermont's constitution explicitly subjects private property to public necessity.

41. See infra Note 56.

42. K. Regen, "You Can't Build That Here: The Constitutionality of Aesthetic Zoning and Architectural Review", 58 Fordham L. Rev. 1013, 1018 (1990).

43. Id. at 1013; See also Attorney General v. Williams, 55 N.E. 77, 78 (1899).

44. Regen, supra note 42, at 1016-1018; Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

45. Id. at 1017.

46. Id. at 1013; See also City of Passaic v. Paterson Bill Posting, Advertising and Sign Painting Co., 62 A. 267, 268 (1905).

47. Thomas Cusack v. City of Chicago, 108 N.E. 340 (1915); In Re Opinion of the Justices, 127 N.E. 525, 528 (1920).

48. Welch v. Swasey, 214 U.S. 91, 107 (1909); Sundeen v. Rogers, 141 A. 142, 147 (1928).

49. General Outdoor Advertising Co. v. Department of Public Works, 193 N.E. 799, 815 (1935).

50. Berman v. Parker, 348 U.S. 26 (1954).

51. Id. at 33.

52. Id.

53. Regen, supra note 42, at 1013-1014.

54. In a 1931 report written by Vermonters, it is noted that "the recreational field offers a wonderful [economic] opportunity if we are wise enough to establish and maintain high standards...and wise consistent policies of protection of our scenic assets." The report also suggested that "care should be taken to avoid features that disfigure the landscape and are an offense to good taste."

55. Vermont's first resort area were established in 1798 and focused on public health concerns rather than the beautiful Vermont scenery. Roomet, Louise B., "Vermont As a Resort Area in the Nineteenth Century," 44 Vermont History No. 1, p. 2 (Winter 1976). These natural mineral spa resorts advertised mineral water with medicinal attributes. Id. In the mid-1800's, these resorts began to focus on the Vermont landscape and scenery to attract tourists, offering

fishing, boating, walking paths and carriage roads. Id. The new focus on tourism resulted in part from the decline in industrial success and the out-migration (to the west) of much of Vermont's younger population. Tourism afforded an economic resurgence to the more than 200 towns affected by the decline in industry.

From the 1850's through the 1870's, Vermont was the "epitome of pastoral landscape." A. Rebek, "The Selling of Vermont: From Agriculture to Tourism, 1860-1910," 44 Vermont History No. 1, at 19 (Winter 1976). Vermont's mountains were not "sublime enough" to attract the quantity of tourists that the neighboring states of New Hampshire, New York and Maine claimed. Id. at 20. However, public taste shifted to favor the pastoral and serene landscape that Vermont offered in the 1880's. Id. at 21. As a result, the state government focused on promoting tourism and recreation to increase economic growth. G. Sanford, Redstone Reflections, September 1986, Publication for the Secretary of State's Office of Vermont.

In the early 1900's, Vermont tourist industry boomed. Publications from the publicity bureau contained statements from important vacationers including a Supreme Court Justice (1913) who praised Vermont, and President Taft who, as an adroit politician, stated that he only vacationed in Western New Hampshire because he could enjoy a view of Vermont's charming Green Mountains. Additionally, at the Tercentenary celebration of the discovery of Lake Champlain, Lord Bryce advised Vermonters to "save your woods...because they are a great source of beauty," and "do not permit any buildings to deform beautiful scenery which is a joy to those who visit you."

56. Allen Fonoroff, The Preservation of Roadside Scenery Through the Police Power Central Planning Office, State of Vermont, (1966).

57. Id.

58. Id. at 17.

59. Id.

60. Note, 45 NYU L Rev 1075 at 1087.

61. Id. at 1090. But into the early twentieth century, court found the concept of aesthetic protection too refined for legal cognizance. [45 NYU L Rev at 1077; See also Whitemore v. Brown, 102 Me. 47, 59-60, 65 A.516, 521 (1906)]. Courts have remained less receptive to aesthetic nuisances, although later cases have found selected uses, e.g., cemeteries and funeral homes, as nuisances. [NYU L Rev at p. 1078-1080]. The problem with a visual nuisance remedy, whether public or private, is that unlike smell or noise situations, the potential for a myriad of cases brought by owners when views are affected, may discourage courts from permitting such a remedy. In any case, most of the legal action for aesthetic control emerges out of eminent domain or regulatory situations.

62. Woodstock Burying Ground Association v. John W. Hager, 68 Vt. 488 (1896).

63. Plaintiff's brief at 2, by W.C. French.

64. Id.

65. Id. at 3.

66. Id. at 4.

67. Id.

68. Id.

69. Woodstock Burying Ground Assn v. Hager, 68 Vt 488, 489 (1896).

70. Id.

71. The 1918 case of Hazen v. Perkins, 92 Vt. 415 (1918) is but one interesting example. In this case, plaintiffs sought an injunction against defendant who constructed a gate mechanism at the outlet of Lake Morey in Fairlee, Vermont. Id. at 417. This mechanism caused the water level to fluctuate and interfere with plaintiff's enjoyment of their lakefront property. Id. The lake provided a popular summer recreation and resort area and the water height variations had an adverse effect on the shoreline properties, shade and ornamental trees were washed away, and shallow beaches left exposed resulted in conditions detrimental to health. Id. at 421.

The court held that the "artificial variations in the height of the water of the lake have accentuated the adverse effect upon the shore properties of plaintiffs, in respect to ... beauty and enjoyment in use." Id. at 422. The court found that plaintiffs "sustained nominal damages." Id. However, in order to be classified as a public nuisance, the plaintiff must suffer more than nominal damages, the damages must be "special and distinct" as well as "substantial." Id. Once again a Vermont court refused to hold an aesthetically unpleasant condition a public nuisance.

72. Vermont Salvage Corp v.St. Johnsbury, 113 Vt 341 (1943).

73. Id. at 344.

74. Id. at 355.

75. Id. at 351.

76. Id. at 352.

77. Id.

78. Thus, under 10 V.S.A. § 6086(a)(8), although the Board may consider scenic and natural beauty and aesthetics, it may not deny a permit based only upon these grounds.

79. J. Griscom: Report on Sanitary Conditions in New York City in 7 Annals of America 213-218 (1968).

80. Unfortunately, many environmental legal scholars claim to find the history of environmental law in nineteenth century nuisance laws. By concentrating upon the harms to discrete individuals, these scholars hide the legal history of our obligations to the community.

81. This legislation provided for a maritime quarantine due to a yellow fever epidemic in the West Indies. James Tobey, The National Government and Public Health, 6 (1926). In 1797, Massachusetts adopted a comprehensive act to prevent the spreading of contagious diseases. "An Act to Prevent the Spreading of Contagious Diseases," 4 The Annals of America 13-18 (1968). This act authorized the removal of sick people, registration of people coming from other places of epidemic and removal of such people, keeping people out of town and destroying plague-related property, as well as removal of filth, provision of nursing, etc.

82. During this time, studies began displaying high rates of disease in the poor, filth-infested areas of cities. The "filth theory of disease" operated to reveal the workings of God through Nature. Disease was the result of man's sinful living in filth. 127 Criminal Law to Regulation. Disease could be prevented by man's attempts at living a clean, natural life.

Obviously, the rapid growth of cities from 1800-1850 exacerbated the health problems of filth. In the poorest sections of cities, filth existed and eventually ran into the water supply, spreading disease to rich and poor alike. One need only read the vivid opening paragraphs of Dickens' Bleak House to understand how filthy London was at this time. Early nuisance laws were a means of combatting threatening health practices, but were too sporadically enforced and were ineffective to control such large scale pollution. Id. at 130. As a result, the public responsibility for health began to manifest itself in the form of comprehensive sewer systems and the establishment of state boards of health. Massachusetts established the first United States State Board of Health in 1869.

83. Id. Tobey, note 81, at 14.

84. Frank, at 138. We may now be entering a new era of the virus theory of disease.

85. Frank, at 138.

86. Frank, at 138.

87. Frank, at 139.

88. Rene Dubos, Man Adapting (1965).

89. Lorenzo D'Agostino, The History of Public Welfare in Vermont, (St. Michael's College Press, 1948). It is important to note that Americans in general and Vermonters in particular were not concerned with everyone's health. Indians were not "people of the community." The settlers introduced diseases, which had a devastating effect upon the native populations of Vermont. The mortality rate for the Western Abenaki of Vermont was determined to be 98% from smallpox, measles and other white man diseases. Frank, at 15. The Abenaki interpreted the epidemics as supernatural, and their attempts to prevent the spread of disease rested mainly on their belief in their shaman. The shaman was a healer and clairvoyant whose power permitted him access to the spirit world. However, his power proved useless against the plagues, and as the shaman lost considerable influence, the Abenaki way of life also suffered greatly. Frank, at 17.

The European settlers did nothing to aid the Indians during these epidemics. Instead, the Europeans "believed it was the hand of God" operating on their behalf, that cleared the land of savages. P. Jeffrey Potash, Health Care in Vermont: Then and Now, Vermont Academy of Arts and Sciences, Occasional Paper #20, at 17 Oct. 26, 1985. In addition, Europeans were concerned with their own public welfare. During the French and Indian Wars from 1744-49 and 1756-60, the area of Vermont was a traffic lane for the French (who were settled in the North and Northeast) and English armies (who were settled in the South and Southeast). At the end of the French and Indian Wars, it is estimated that only three hundred English settlers existed in the Vermont area. After expulsion of the French, the commonwealths of Massachusetts, New Hampshire and New York claimed shares of Vermont.

90. R. 1787, p. 143 (Revised Statutes of Vermont 1787), State Papers of Vermont~State Archives.

91. Id. at 157. If a person violated the regulations, he could be fined up to ten pounds.

92. Hazen v. Strong, 2 Vt. 427 (1830).

93. Hazen v. Strong, 2 Vt. 427, 432.

94. Vermont State Papers, General Petitions 1793-1796, Vol. 10, at 126.

95. Id. at 185.

96. Journals and Proceedings of the General Assembly of the State of Vermont, 1795-1796, 23.

97. "That in a dry season, the corn mill is the only one in ten or twelve miles, that can be depended on~that not only those works, but others of more importance to the state at large, are deeply interested in the flowing said Castleton Pond~That the proprietors of said works...made generous offers to those, whose land is injured by raising the dam by said works, for accommodations." Assembly Journals and Proceeds, 1793-1794 at 205.

98. Journals and Proceedings, 1795-1796, 23.

99. Horowitz, The Transformation of American Law, 1780-1860, Chapter III pp. 63-109 (1977).

100. In 1812, 10-12 soldiers per day were dying of pneumonia in Burlington, while waiting for transportation during the War of 1812. Gallup, Sketches of Epidemic Disease in Vermont, 1815.

101. Within New England, Massachusetts was the major force in implementing state health policies in order to secure healthful living conditions. Massachusetts established the first local board of health in 1799, with the state health organization being formed in 1869. In 1850, under the direction of Lemuel Shattuck, Massachusetts delivered a report on the sanitary condition of the Commonwealth, Report of the Sanitary Commission of 1850. Barbara, Rosenkrantz, Public Health and the State, p. 10 (1972). Shattuck's study determined deteriorating health was influenced by the environment, and the responsibility for abating the effects of dangerous surroundings rested with the public authority. At this time the population of Boston was heavily influenced by immigrants. The changing "character" of the city, according to Shattuck, meant that citizens were either unwilling, did not know any better, or were too preoccupied with surviving in the new world to concern themselves with hygiene. Id. at 31. Shattuck's report recommended creating a general board of health to recommend legislation for the prevention of disease and the promotion of health, and to advise the state as to sanitary arrangements for public buildings and installations. Rosenkrantz, p. 32. This report was circulated throughout the U.S. and Europe, and may have played a role in the eventual development of Vermont's Board of Health.

102. Transactions of Vermont State Medical Society at 333, (1972), quoted in Lester J. Wallman's State Government and Public Health, University of Vermont College of Medicine (unpublished manuscript located in the State Archives~Montpelier, Vt).

103. Vermont Public Acts 1886, No. 93, p. 64, § 6.

104. Id. § 3.

105. L. Wallman, infra note 108.

106. Id.

107. Vermont Public Acts, No. 84, at 90, § 1 (1892).

108. Lester J. Wallman, in his unpublished manuscript study of Vermont public health law, gives an explanation of why the legislature struggled to get the Board of Health passed. At the time the legislation was being passed, the recent discovery of anthrax may have been the impetus for creating a State Board of Health. According to Wallman, most legislators were farmers who did not understand the workings of a foreign laboratory or its implications. Wallman, supra. In addition, farmers resented "class legislation." They believed that when doctors put up a bill, and when they spoke out on it, the bill was intended to help just one group of people, the doctors! Wallman, unpublished manuscript, state archives. Wallman also suggests that members of the legislature could have been in good health, and questioned the expenditure on such a venture. Furthermore, an era of anti-professionalism existed around 1860-1870. At that time, it was popular to believe that law and medicine could be understood by any person. Any attempts to concentrate the authority in health matters into the hands of physicians only was viewed as elitist. The attitudes of Vermonters, however explained, hindered the legislation and may also have prevented the full acceptance of the germ theory of disease until 1910.

109. Curtis v. Winslow, 38 Vt. 690 (1866).

110. Id. Note, however, the court refused an injunction after weighing the circumstances of the case.

111. 67 Vt. 502 (1895).

112. The regulation was adopted on the basis of a state statute of 1892, §2, which provided that the State Board of Health shall have authority "to promulgate and enforce such regulations for the better preservation of the public health in contagious and epidemic diseases, also regarding the causes which tend to their development and spread."

113. State v. Morse, 84 Vt. 387, 393 (1910).

114. Id. at 391.

115. 82 Vt. 276, 285 (1909).

116. Jacobson v. Massachusetts, 197 U.S. 11 (1905).

117. State Board of Health v. Village of St. Johnsbury, 82 Vt. 276, 285 (1909).

118. 99 Vt. 360 (1926).

119. G.L. 6317.

120. State v. Quattropani, 99 Vt. 361, 362 (1926).

121. Id.

122. Id. at 366.

123. Id. at 365.

124. Id., at 366.

125. Vermont Woolen Corp. v. Wackerman, 167 A.2d 533, 122 Vt. 219 (1960).

126. At the time the water was classified by state regulation as below "Class D," unsuitable for irrigation of crops. The goal of the commission was to obtain a "Class C" classification, suitable habitat for wildlife but too polluted for public water supply.

127. Vermont Woolen Corp. v. Wackerman, 167 A 2d 553, 122 Vt. 219, 224 (1960).

128. Id. at 228.

129. Freund, The Police Power~Public Policy and Constitutional Rights (1904).

130. David Shi, The Simple Life: Plain Living and High Thinking in American Culture (1985).

131. Marsh, Note 16 at 241.

132. This practice of "living lightly" on the land may have derived from belief, small population size, or lack of technology. The Indian conservation practices included not only the controlled consumption of fish and game, but also agricultural practices which maintained the fertility of the soil. R. Douglas Hart, Indian Agriculture in America 27-42 (1987).

133. Walter Hill Crockett, Vermont: The Green Mountain State, Vol 1, at 179 (Fireside Forum Edition, 1938).

134. Id. at 179-180. "That before any Division of the Said Land be made to and Among the Grantees a Tract of Land as near the Center of Said Township as the Land will admit of, shall be Reserved and Marked Out for Town Lotts one of which Shall be Allotted to Each Grantee of the 'Contents' of One Acre..."

135. Wilbur, 2 Early History of Vermont 225 (1900).

136. The glebe for the Church of England was confiscated by the Vermont General Assembly in an action upheld by the U. S. Supreme Court in 1815. A 1794 statute in Vermont authorized selectmen to lease lands granted for the use of school for "as long as water runs or wood grows" evidenced legislative intent to conserve land to provide for the cultivation of young minds. The "wood" for "grass" substitute illustrates the importance of the timber resource and unintentionally communicates the commonly held idea that the resource would forever remain inexhaustible. This

statute was discussed in Johnson v. Selectmen of Salisbury, 132 A.2d 423, 120 Vt. 6 (1957).

137. In the seventeenth and eighteenth centuries, the colonists were concerned over the loss of forest to fire and cutting and many colonies adopted ordinances to limit the cutting of trees. Russell, A Long, Deep Furrow, 525-528 (1976). In farming, there were not explicit laws, although the reservation of a town grazing commons might have served a farming conservation purpose. There were, however, practices of manuring, rotation, the spreading of ashes to "rejuvenate" the soil.

138. It is important to take a historical approach when addressing Blackstone's role in the historical development of conservation. Blackstone was widely read and accepted in the early history of our nation, but many courts, including Vermont courts, later rejected Blackstone.

139. J. W. Ehrlich, Ehrlich's Blackstone at 121: ***Things in Common***~But, after all, there are some few things, which notwithstanding the general introduction and continuance of property, must still unavoidably remain in common; being such wherein nothing but an usufructuary property is capable of being had: and therefore they still belong to the first occupant, during the time he holds possession of them, and no longer. Such (among others) are the elements of light, air, and water; which a man may occupy by means of his windows, his gardens, his mills, and other conveniences. Such, also, are the generality of those animals which are said to be wild by nature, or of a wild and untamable disposition which any man may seize upon and keep for his own use or pleasure. All these things, so long as they remain in possession, every man has a aright to enjoy without disturbance; but if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterwards.

140. Id. at 121: ***Ownerless Things***~Again there are other things, in which a permanent property may subsist, not only as to the temporary use, but also the solid substance; and which yet would be frequently found without a proprietor, had not the wisdom of the law provided a remedy to obviate this inconvenience. Such are forests and other waste grounds, which were omitted to be appropriated in the general distribution of lands. Such also are wrecks, estrays, and that species of wild animals, which the arbitrary constitutions of positive law have distinguished from the rest by the well-known appellation of game.

With regard to these and some others, as disturbances and quarrels would frequently arise among individuals contending about the acquisition of this species of property by first occupancy, the law has therefore wisely cut up the root of dissension, by vesting the things themselves in the sovereign of the state; or else in his representatives appointed and authorized by him, being usually the lords of manors.

141. Chase's Blackstone, 533 (1914).

142. Id. at 524.

143. Id. at 221.

144. Id. at 926.

145. Ehrlich supra note 139 at 587.

146. See esp. State v. Theriault, 70 Vt. 617 (1898); see also State v. Niles, 78 Vt. 266 (1905).

147. The Vermont courts, however, also taken a narrow view of what constitutes a reimbursable taking; see Livermore v. Jamaica, 23 Vt. 361 (1851).

148. Despite this apparent predominance of public purpose over private property, such language was the hastily adopted wording of the Pennsylvania constitution, the product of a colony with a very different history and purpose. As a consequence, the words of Vermont's constitution may not reflect the cultural realities of a society composed of Ethan Allen and the Green Mountain Boys. Moreover, Vermont's early constitutional history is more complex than

presented here.

149. Vt. Const. Article IV, Clause 3; Vt. Const. Article I, Section 2[3] [Modified by amendment].

150. U.S. Const. art. I, § 8, cl. 2.

151. U.S. Const. art. IV, § 3, cl. 2.

152. U.S. Const. amend. V.

153. Not only did Locke provide for a natural right theory of property, according to which property originated in the state of nature, but the right originated out of mixing labor with nature and was limited. In Locke's words,

> "...But how far has he given it us? *To enjoy*; As much as any one can make use of to any advantage of life before it spoils; so much he may by his labour fix a Property in ... Nothing was made by God for Man to spoil or destroy..." J. Locke, Two Treatises of Government (Critical edition by Peter Laslett, 2 ed.) 308 (1967).

Locke also recognized the commons, which he viewed as established by law unlike Blackstone's "Great Commons" out of which man appropriated private property.

154. James Madison, "Agriculture and Conservation" July 18, 1818, reprinted Annals of America Vol. 4, 503 (1968).

155. Here I follow Jennifer Nedelsky's Private Property and the Constitution: The Madisonian Framework and its Legacy, esp. 170-183; D. McCoy's The Elusive Republic: Political Economy in Jeffersonian America 120-135 (1980), and J. Madison, "The Right to Property and Property in Rights" The Annals of America Vol. 3, at 497 (1968).

156. J. Smith, "The Rich Land of the Frontier" Annals of America Vol. 4, p. 10 (1968); see also, M. Austin, "Exploring the Ohio Valley", American Historical Review Vol. V, pp. 523-542.

As for the movement west, J. Hector St. John de Crevecoeur in his Letters From an American Farmer in 1782 observed

> "...This [fertility] is not, however, the natural state of our fields in the Northern provinces. The fecundity of the earth is greatly diminished; you may in those of Jersey, New York, Connecticut, etc. already perceive a great vegetative decay. The rich coat which was composed of old decayed leaves and other particles preserved for ages by the existence of timber and sheltered from the devouring impulse of the sun by the shade it produced is long since exhausted and gone. This it was which enriched the first settlers and procured them such abundant crops. All the art of Man can never regain this.." [J. Hector St. John de Crevecoeur, Letters from an American Farmer, p. 354].

To be sure, Crevecoeur found richer soils inland. But fifty years later, another astute Frenchman, Alexis de Toqueville, found those fields abandoned in the push westward. [A. de Toqueville, Democracy in America (The Henry Reeves Text) Vol. 1, at 295 (1987)].

157. A. Hamilton, "Report on Manufacturers", American State Papers, Documents and Executive of Congress of the United States. Walter Lowrie and Matthew Clarke, eds., Vol. V, Washington at 123-144 (1832).

158. T. Jefferson, "On the Present Need to Promote Manufacturing" Annals of America Vol. 4, at 412 (1968).

159. Snow v. Parsons 28 Vt. 459, 67 Am. Dec. 723 (1856); Boynton & Moseley v. Gilman 53 Vt. 17 (1880).

160. In Blackstone's words:

> "...For water is a movable wandering thing, and must, of necessity, continue common by the law of nature; so that I commonly have a temporary transient usufructory property therein..." Chase's Blackstone, 221 (1914)..

161. For the definitive economic discussion of conservation, see S. V. Ciricay-Wantroup, Resource Conservation Economics and Policies (1968).

162. Martin v. Bigelow, 2 Aiken 185 (1827).

163. Snow v. Parsons, 28 Vt 459 (1956).

164. Id. at 463.

165. Id.

166. Lawrie v. Silsby, 82 Vt 505, 79 A.94 (1909).

167. Canfield v. Andrews, 54 Vt. 1 (1882).

168. Id. at 16-17.

169. Jacobs v. Allard 42 Vt. 303, 1 Am. Rep. 331 (1869). The courts also adopted other rules for groundwater. See Chatfield v. Wilson 28 Vt. 49 (1856).

170. For a discussion of riparianism in Vermont, See J. Sax, R. Abrams & B. Thompson, Legal Control of Water Resources (1991). Sax cites other cases as well. Chapter 2, pp. 162-173.

171. In the words of "Vermont Statutes 356" (1882):

> "When the Fish and Game Commissioners place fish in a pond or streams they may prohibit fishing therein, or in specified portions thereof, for a period not exceeding three years, posting notices to that effect conspicuously upon the banks thereof, and publishing such notice three weeks successively in a newspaper published in the county where such waters are located; if a person fishes, or attempts to fish, in such waters within time specified he shall be fined $50, if prosecution is commenced within six months after the offense is committed."

"Vermont Statutes 357" reads:

> "Waters stocked by Fish and Game Commissioners shall thereafter be treated by public waters, but no person who might make the same a private preserve or posted waters, may do so at the expiration of five years from the date of filing, of the Fish and Game Commissioners, a written notice of his intention to do so."

See also: Drew v. Hilliker, 56 Vt. 641 (1884). This case speaks of the Act of 1882, which prohibits fishing with nets, etc., in Lake Champlain and the rivers entering into it.

172. State v. Theriault, 70 Vt. 617 (1898).

173. State v. Haskell, 84 Vt. 429 (1911).

174. Chase, supra note 141 at 743-744.

175. Some Vermont courts have commented on the "waste" doctrine. See Keeler v. Eastman, 11 Vt. 293, 294 (1839).

176. See Powers and Peck, Ex., et al v. the Trustees of Caledonia County Grammar School, 108 A.836, 93 Vt 220 (1919).

177. 10 V.S.A. § 6086(a)(4).

178. Letter from Thomas Jefferson to George Washington, reprinted in The Letters of George Washington (Doubleday, 1966).

179. James Madison, "Agriculture and Conservation," Niles Weekly Reporter, July 18, 1818, reproduced in Vol. 4 Annals of America 503 (Encyclopedia Britannica, 1968).

180. Joseph Petulla, American Environmental History, 47, 57, (1977).

181. Id. at 94.

182. Id. at 303.

183. For a brief history, see "Land, Bread and History," Center for Studies in Food Self-Sufficiency," Vermont Institute of Community Involvement (1976).

184. Id. at 10. However, one profile of farming in 1890 revealed little attention to soil conservation. [Scott Hastings and Geraldine Ames, (Billings Farm and Museum), The Vermont Farm Year in 1890 (1983)].

185. J. W. Powell, Report of the Lands of the Arid Region of the U. S. (1878).

186. A detailed history of this stage of agricultural policy is set forth in Edwin Rozwenc's Agricultural Policies in Vermont, 1860-1945 (Vermont Historical Society, 1981).

187. Vermont Agriculture Report--First Annual Report of the Vermont State Board of Agriculture, Manufacturing & Mining (1872).

188. For a history of this period, see R. B. Held and Marion Clawson, Soil Conservation in Perspective, 29-40 (1965).

189. Id. at 41-90.

190. In New Hampshire, as early as 1822, the Board of Agriculture recommended the selective cutting and the propagation of forest trees. [Id. Plowing (at 304)]. Despite these warnings, the mass market for timber, the use of charcoal burning and railroads, and the clearing of land for sheep grazing decimated the forests. Massachusetts and New Hampshire passed laws to protect shade trees and many New England towns planted them along the highways. Meanwhile, down on the farm, ample use was made of manure and other organic wastes. [Id. at 390].

191. Marsh had a particularly strong disciple in Frederick Billings. During the 1870's and 1880's, Frederick Billings bought the Marsh property of Woodstock. Billings pursued an active career, culminating in his presidency of the Northern Pacific Railroad. His work revolutionized the conservation ideal in Woodstock, where he developed his estate as a showcase of scientific farming and of the best in progressive land management, following the concepts of George Perkins Marsh.

Billings' careful reforestation of Mt. Tom illustrates his interest in the work of Marsh. Like much of Vermont, Mt. Tom had been clear-cut in the early 1800's. This deforestation subjected the land to rapid erosion and downstream flooding. Human activity was irreversibly altering the environment and was considered waste. Nothing was being done by government, but Billings was replanting Mt. Tom's forest and showing the way for reforestation projects elsewhere in Vermont. In 1882, Governor John Barstow appointed a Vermont Forestry Commission, naming Billings one of three commissioners, and Billings soon became the leading member of the commission.

192. G. Pinchot, Breaking New Ground, 31 (1947).

193. Id. at 309.

194. Stephen Fox, The American Conservation Movement: John Muir and His Legacy (1985).

195. Too late to be incorporated in this discussion is Robert McCullough, The Landscape of Community: A History of Communal Forests in New England, (1995).

196. Merrill, Perry H., History of Forestry in Vermont, 8 (1959).

197. Id. at 9.

198. The history of conservation laws in Vermont reveals a halting movement from common law to statute, from simple prohibitions to more complex regulation, and an increased awareness of the need to conserve water, game, and lumber for future generations. But each resource was to be protected separately without viewing it as part of a larger ecosystem, despite the more than century old urgings of George Perkins Marsh. The underlying forces affecting recent resource use - the steady growth of the state and national populations and economy remained essentially unregulated.

199. Merrill, supra note 196 at 16.

200. "No. 1" of the Acts of 1912. Another such regulatory act was "No. 185" of the Public Acts of 1913, which related to the sale and cutting of evergreen trees.

201. Forest conservation policy included weeding and cutting and removing undesirable tree species. "Weeding is carried out during the first fifteen years of age. About 200 of the tallest and best shaped trees per acre were to be left for the crop trees. Enough other trees of good shape will be left to properly cover the ground with shade. Thinning is a cutting which removes unneeded trees from a stand to improve the quality, composition and rate of growth. Thinnings were to be made in stands over fifteen years of age. Pruning is the removal of branches to improve quality of lumber. A "liberation cutting" removes trees which compete with crop trees." Id. at 21.

202. Id. at 12. The legislature of 1943 abolished the Department of Conservation and Development and established a Department of Natural Resources with the same divisions, but with a board of five members.

203. Id. at 15. From this early forestry survey Vermont learned that of "the total board feet volume of [the] timber ten inches and over in diameter, 16% was soft or red maple and beech, and an additional 11% was hemlock, making a total of 27% of these less valuable species." Id.

204. Id. at 22.

205. Public Act No. 5 of 1945, § 4. The State Geologist and State Forseter were also members of the State Conservation Board.

206. Public Act No. 6 of 1945, titled An Act to Assist Forest Owners and Operators in the Promotion of Maximum Sustained Productivity of the Forest, to Disseminate Information Relative to Forest Practices, signaled action by Vermont in an attempt to create sustained economic growth. [Public Act No. 6 of 1945, An Act to Assist Forest Owners and Operators in the Promotion of Maximum Sustained Productivity of the Forest].

207. Id., § 1.

208. Id. § 4(I).

209. Id. at 23.

210. State v. Solomon Norton, 45 Vt. 255 (1872).

211. Id. at 256.

212. Payne v. Sheets, 75 Vt. 335 (1903).

213. The legislature in 1896 and 1897 appropriated, for protection and propagation of fish and game the sum of $4,750.

214. The first state warden system was also promulgated and one to two wardens were appointed by the commissioners for each county. After the revision of 1892, the public laws relating to fish and game were not revised until 1912, and again in 1933, when the salaries of wardens were first fixed by legislative action.

215. In 1908 Vermont hunters took 2,208. Then came the seasons on deer of both sexes in 1909 and 1910. The 1909 season produced a total kill of 4,597. In 1910 the figure was 3,609. Bucks only were taken for the next four years with the kill averaging 2,000 annually. The season was moved into November 9, 1915, the dates being November 1-18, both dates inclusive, and there was another buck and doe season that year. A total of 6,042 deer were taken. It was bucks only again in 1916, and by 1918 the kill had dropped to 825 with the season changed again, this time from November 10 through November 20. With the season set for the first week of December in 1919, actually only five hunting days, a total of 4,092, both bucks and does, were killed. Another season on deer of either sex was held in 1920, again in December and for five days, and the kill was 4,477. That was the last of the seasons for taking deer of either sex. The period of taking deer with antlers at least three inches long spanned into decades. The season reverted back to November in 1921 for 12 days. The take of legal antlered deer that year numbered 1,507. The figure dropped during the next two years, then reached 1,537 in 1924 and was on the decrease for the next three years. The season was whittled to nine days from 1927 through 1933, except that in Essex County a longer season of 26 days was allowed. The same was true in 1934. After that the special exception for Essex County was dropped. The season varied from eight days to nine days through 1944 as the annual harvest showed a steady increase, reaching 3,657 by 1944.

Sunday hunting was permitted for the first time in 1945 with the season, still in November, being extended to 11 days. The kill continued to climb and passed the 6,000 mark in 1950. The legislature of 1951 made provisions for a special season for bow and arrow hunters, November 1-10 inclusive, with the regular deer-hunting season of November 14-27 inclusive, following. Originally the bow and arrow season applied to Windham County only, but the legislature of 1953 granted the special season to eight more counties. It wasn't until November of 1953 that legal antlered deer were taken for the first time by archers. The kill by this method was very small, but the enthusiasm for the sport grew tremendously to where special bow and arrow licenses had numbered 1,005. The legislature drafted regulations prohibiting the sale of a deer taken during the special bow and arrow season, and according to law a person who took a deer during the November 1-10 archery season was not entitled to take another deer in the same calendar year. THe law stated that only bows with a drawing weight or pull of at least 35 pounds could be used. Crossbows were illegal. Arrows had to be of the broad head type at least 7/8 inches wide and without barbs. Deer taken by bow and arrow had to be reported and exhibited to a Fish and Game warden within 24 hours.

By 1953 the average annual deer kill for a four year period had been more than 6,000. In fact, the 1953 the kill climbed to 7,482 bucks legally taken, and 1954 saw a new record of 8,410. This figure included eight bucks taken during the bow and arrow season. These figures were gleaned from the State of Vermont annual reports on game statistics.

216. This history is taken from a brief history found in the Vermont Historical Society library, Montpelier, Vt.

217. 10 V.S.A. § 6086(a) (5-7).

218. 10 V.S.A. § 6086(9)(J).

219. 60 V.S.A. § 6086(9)(A).

220. J.W. Ehrlich, Ehrlich's Blackstone, 102-110 (1959).

221. Andrew Nunquist, Town Government in Vermont or Making Democracy 'Democ' 5 (1964).

222. For a brief discussion of town powers from a national perspective, see Lawrence Friedman, A History of American Law, 459-63 (1973).

223. Nunquist, Id. at 133-140.

224. Vermont Constitution, 1977, Chapter II, Section XL.

225. Nunquist, Id. at 142.

226. Id.

227. Id. at 82.

228. Laws of 1808, at 42, and 157.

229. Laws of Vermont, 1797, Chapter LIV, at 494. [Andrew Nunquist, Town Government in Vermont (1964)].

230. Charles Haar, William Fessler, Fairness and Justice: Law in the Service of Equality 56 (1986).

231. Id. at 55-78.

232. Id at 78-109.

233. Id. 109-140.

234. Id. at 141-193.

235. Id. at 200.

236. Village of Swanton, 69A 667, 81 Vt 152 (1908).

237. Id. at 156.

238. Id. at 157.

239. See cases in Vermont Digest, towns § 54.

240. Van Sickler et al v. Town of Burlington, 27 Vt. 70 (1854).

241. Id. at 74.

242. Id. at 74.

243. Id. at 78.

244. Allen v. Taunton, 19 Pick. 485.

245. Lazelle v. City of Barre, 71 A. 819, 81 Vt. 545 (1909).

246. 24 V.S.A. § 4413(2).

247. 24 V.S.A. § 4417(5).

248. 24 V.S.A. § 4418.

249. 24 V.S.A. § 5201.

250. These three principles of community, contributory justice and equity are developed in both legal and philosophical literature. See Robert Rodes, The Legal Enterprise (1976); Michael Sandel, Liberalism and the Limits of Justice (1982); and Gary McDowell, Equity and the Constitution (1982).

251. Schallau and Richard Alston, "The Commitment to Community Stability: A Policy or Shibboleth?" 17 Envtl. L. 429 (1987).

252. Harry Kalven, Jr., "Tradition in Law," 1974 Great Ideas at 21-34. See also, "The Idea of Tradition in Great Books of the Western World," at 77-90.

253. While some emphasize the recovery of the past, see Bruce James Smith, Politics and Remembrance: Republican Themes in Machiavelli, Burke, and Toqueville (1985), others argue that we are inventing the past; see Nicole Liraux, The Invention of Athens: The Funeral Oration of the Classical City (1986); and David Lowenthal, The Past is a Foreign Country (1985). The issue has been reanimated by debates over interpretation; see Gerald Bruns, Hermeneutics: Ancient and Modern (1992).

1.4 RICHARD BROOKS (REFLECTIONS)

Act 250: Some Late Life Bibliographical Reflections Oct. 15, 2017

Richard Oliver Brooks

Introduction

Almost fifty years ago, (1970) Vermont adopted its "Act 250" in the year of the first Earth Day. The law was stimulated by an effort to stem the unregulated tide of large scale ski areas and their ancillary developments, (condominium developments at the time). (In a sense, these ski areas represented "machines in the garden" of Vermont, to borrow a phrase from Leo Marx's fine book). Under Act 250, a state-wide plan was proposed and new "major" developments had to secure a permit from District Commissions requiring them to comply with a list of environmental and other criteria. Although comprehensive state-wide land use planning was never realized, the law, in the past half century, has enabled its District Commissions, Environmental Board and, later, the Environmental Court to review and either permit, deny permits and/or issue the permits with appropriate conditions for major developments. Now, under Act 47, this remarkable and important law is up for evaluation and possible reconsideration. This essay seeks to assuage an old man's curiosity regarding what happened to this law, (or at least what happened to the scholarship about this law), since he once wrote about it more than 20 years ago. Perhaps the reflections and, more importantly, the bibliographical materials cited will be helpful to those responsible for evaluating the law, as well as my fellow scholars, who, I hope, will continue to study it.

History of Act 250

Since 1970, when Act 250 was first enacted, Vermont has changed in many ways, the environmental movement has grown and diversified, and Act 250 itself has weathered many controversies and amendments. In 1997, I and my colleagues and students at Vermont Law School sought to describe the law, its' history, organization as well as its' myriad of decisions in a two-volume work, *Toward Community Sustainability*, [cited as *"Treatise"].* In studying Act 250, we adopted certain principles to guide us:

> "Law, and environmental law … can only be understood in its community context, as part of a place, both natural and social; the community can only be understood by interpretation of its past, present and future practices; consequently , the law must be understood in light of historical changes in a specific community;, as well as its plans for the future; Vermont Act 250 is best understood in terms of the ideals implicit in Vermont's current law; the "intimations" of preservation, conservation, pollution prevention and socially sustainable development of communities….Law must be designed to encourage democratic management in the fact of modern science and the growth of modern bureaucracies. Vermont's Act 250 is designed to facilitate the democratic management of environmental protection. A flexible citizen oriented management raises fundamental questions about the modern role of the lawyer and the nature of law itself in guiding the decision making of citizen-based b boards; In post-modern jurisprudence, law in

general and Act 250 … is to be understood through recognition of necessary pluralism in history, community context and the values of modern life. [*Treatise Vol 2, p.1]*

As a consequence, the Treatise described the environmental law history preceding Act 250, including a history of Vermont's other environmental statutes, a detailed legislative history of Act 250, and the historical development of Act 250's criteria through its myriad of Environmental Board decisions. [see *Treatise Vol. 1; Vol 2, Chapters III, IV and V].* Since 1997, Paul Gillies has written brief histories of Act 250 and the Environmental Court, [*Gillies, The Evolution of Act 250: From Birth to Middle Age 35 Vermont Bar Journal 12, (2009).* Since 1970, major amendments have been enacted, new regulations adopted and a host of new Environmental Board as well as Environmental and Supreme Court decisions have come into being and much legal scholarship pertaining to the law has taken place. Since Gillies' work in 2009, the history of Act 250 remains to be written. However, the Williams and Taylor *American Land Planning Law* (2015) updates accounts of the statutory provisions and court cases as part of an update of the "quiet revolution" in land planning and development regulation, (See Section 171). A somewhat updated political history, is set forth John DeGrove's *Planning, Policy and Politics: Smart Growth and the States (2005) [See "New England" pp 131]*

The Treatise also included a brief description and history of Vermont's environment. However, since the Treatise was written, much important work on this topic has been completed, including a myriad of studies and some major books. I shall refer to the studies below, but three major works should be taken into account. The first is *Sherman, Sessions and Potash, Freedom and Unity: A History of Vermont.* The importance of this book lies in its comprehensive political history, but also its recognition of the tensions between freedom and unity which run through Vermont's history as well as the history of Act 250. A second book is *Klyza and Trombulak, The Story of Vermont: A Natural and Cultural History (1999)* which describes in detail the interrelationship between environment and culture in Vermont's history. A third is *Jan Albers, Hands on the Land: A History of Vermont's Landscape* which traces in text and pictures, the changing landscape of Vermont and the economic forces which have shaped that landscape. In my view, all three books are required reading for anyone seeking to evaluate, let alone change Vermont's Act 250.,

When we first studied Act 250 in the Treatise, we uncovered it to be governed by four major objectives: preservation, (historical and natural); conservation for use of natural resources, pollution prevention (for protection of human and non-human health; and "social sustainability" to protect existing natural conditions and support social institutions for future generations. [*Treatise, Volume 2* Chapter 1}. Each of these objectives have their own important histories, both intellectually and in action, and both in the United States and abroad, (See, Norton, *Sustainability;* Lowenthal*, The Past is a Foreign Country;* Brooks et al. *Law and Ecology*). I shall not burden this essay with citations to many recent works on preservation, conservation (and sustainability), new understandings of pollution prevention, especially in light of applied ecology, and social and economic impact analysis.

In addition, when we prepared the Treatise, we omitted to clearly identify that Act 250 was a response to an assault on Vermonters' "sense of place". To be sure, at the time, "sense of place" was a somewhat vague and undeveloped notion, but a very real phenomenon, recognized in much early nature literature and most Vermont lovers. More recently, "a sense of place" with its corresponding appeal to a shared community landscape has become commonly used term and the frequent subject of

scholarly inquiry. [*For an early thoughtful discussion, see Mark Sagoff, "Settling America or the Concept of Place in Environmental Ethics, 12 J. Energy Nat. Resources & Envtl. L. 349 (1992)].* Sagoff notes that:

> A natural landscape become a place- "a shape that's in your head"- when It is cultivated, when it constrains human activity and ins constrained by it, when it functions a center of felt value because human needs, cultural and social as well as biological are satisfied in it. The hunter, trapper, angler or famer who come to terms with nature in particular places in pursuit of specific purposes may get to know its local conditions so intuitively that they get build into his reflexes. …(458) The concept of place combines the meaning we associate with nature and the utility we associate with the environment. It fosters a respect for our surroundings that arises from harmony, partnership, and intimacy. A sense place depends as well on a sense pf temporal community – the consistency with the past and a continuity with the future. …it is what they have in common .

[For a few other excellent discussions of "a sense of place" see *Lawrence Buell, The Environmental Imagination (1995); Schama, Landscape and Memory (1995), Jackson, A Sense of Place; A Sense of Time (1994),* There have also been many efforts to capture the culture of Vermont's sense of place*, including Betsy and Tom Melvin, Robert Frost's New England (2000)* and *Tom Slayton, Sabra Field, The Art of Place [1993]. [See especially,* John Nagle, *Law's Environment: How the Law Shapes the Places We Live (2010)*

Another important aspect of the history of Act 250 is its borrowing from the major land use and environmental reforms underway at the time of Earth Day. Earth Day had experienced a "quiet revolution" of land use planning and control, which was underway in Florida, Hawaii, Washington, Maine and elsewhere. *(Callies et al, The Quiet Revolution*). In addition, The National Environmental Policy Act (NEPA) was enacted the same year as Act 250. Finally, The American Law Institute was in the process of designing a "Model Land Development Code"; [*The Model Land Development Code: 1975)* and the Nixon Administration was getting into the act with a proposed "National Planning Act". All of these efforts envisaged (1) statewide land use and environmental planning, (2) designation of "critical areas" and (3) assessments of impact of major developments. As applied to Vermont, the question becomes: can these three components of the "quiet revolution" protect and enhance the Vermont "sense of place".

In Vermont, in 1970, state, regional and local planning and land use regulations were relatively undeveloped, (although Norman Williams spearheaded a far sighted local planning enabling act in 1968. State planning was largely non-existent. When Act 250 was enacted, it borrowed from other states and modified these borrowings; In addition, state and federal environmental statutes were in their infancy. [For a history of these federal statutes, see Brooks et al., *Law and Ecology (2007).* By adopting the three major elements of the laws of the quiet revolution in 1970, Vermont undertook a state-wide land use planning process, (unusual in New England, where local land planning was the common practice), an impact assessment process for its permits of land uses, (first employed as performance standards in local zoning during the 1960's, and a process for the identification, planning, and regulation of critical areas. Each of these three major components of the model land use law, the "quiet revolution states" (Hawaii, Florida, Oregon, Washington, Maine) and Vermont have an extensive history of their own. As

we shall see below, Vermont also has a unique history in seeking to implement these three components. Before exploring these three components and their history, it is useful to briefly indicate the accounts of changes in Vermont during this period of her history.

Changes in Vermont and Future Prospects

The changes in Vermont and its landscape may be measured against its' "original" natural conditions as described by Harold Meeks, [see above}, although, as Cronon and McKibbon have demonstrated, nature itself is infused with human action. [Cronon, *Changes in the Land (1983) McKibbon, The End of Nature, (1989)*. Longer histories of these changes in Vermont are set forth by Jan Albers [see above] and Klyza and Trombulak, [see above]. The Treatise documents these changes as well, [see *Treatise, Volume II,* Chapter II). [Changes taking place in critical areas and in major developments are documented below]. [See also, Brooks, "Vermont's Problem of Growth: Growth Control in a Historical Perspective" (1999) [on file with author], which describes a "new model of Vermont" in light of its recent changes. Turning from counts of past changes to projected changes in the future, see Balduc and Kesel *Vermont in Transition (2008); Miller, Vanishing Vermonters: Loss of Rural Culture (1917) Rural Policy Research Institute, Demographic and Economic Profile: Vermont (2006). [See also Vermont Futures Report].* One relevant account of the changes taking place due to global warming is the Gund Institute for Ecological Economics, *Vermont Climate Assessment: Considering Vermont's Future in a Changing Climate (2014).*

State Planning and Control of Development

Vermont appears to be a suitable subject for statewide planning. A small state with definable natural and man-make borders – Lake Champlain west, Connecticut River east - the Northern Forest to the north – its sense of place with the Green Mountains at its spine, the Champlain and Upper Connecticut Valleys -*a long and relatively autonomous history* - a distinctive ethos and accessible state institutions contribute to that suitability. Equally important, many of its critical areas – rivers, lakes, mountain areas, wetlands, agricultural areas- extend beyond local boundaries and major developments – malls, ski areas, wind-farms – affect areas beyond their immediate municipal boundaries. At the same time, many of the small towns have limited planning and regulatory staffs capable of serious in-depth planning. In the 1970's, the scholarly study of Vermont Law School's Norman Williams, [*American Land Planning Law)* and the work of the American Law Institute [see ALI Model Code cited above] stressed the importance of state wide planning.

Statewide land use planning in America has been an object of great interest since the early 1970's. The history of this planning is set forth in Stuart Meck, "*Model Planning and Zoning Enabling Legislation: A Short History*" in APA's *Modernizing State Planning Statutes, "MSPS")*. A more specific history of the Model Land Development Code of the 1970's is set forth in Callies "*The Quiet Revolution Revisited: A Quarter Century of Progress", ("MSPS").* Various *approaches to* state planning and land use regulation were adopted as part of the "quiet revolution" in Florida, Oregon, Washington, Maine, Hawaii. There is a large body of literature describing these approaches. [Works include Williams and Taylor, (see above), John de Grove, *Planning Policy and Politics ((2005);* and numerous recent studies of individual states, such as Robbins, *Landscape of Conflict (Oregon),* Grunwald, *The Swamp,* (Florida). A study of the success and failure of these other states is important to making recommendations for Vermont.

The *ALI Model Land Use Code* comments trace the history of state planning in general and land use planning in particular. The state planning agency under the Code is to prepare a state plan which among other things, conducts a series of relevant studies for guiding public and private land development, critical areas and developments of regional impact. Within this broad framework, different approaches have been taken to the role and structure of state planning agencies and Rohse identifies six types of state land use planning programs and 34 possible functions of state planning agencies! The Rohse article (See "Recommendations for the Role and Structure of State Planning Agencies" ("MSPS") provides an excellent checklist for any future consideration of state land use planning in Vermont. The MSPA volumes review an array of legal and non-legal problems emerging from each of these approaches. There is much scholarship documenting the successes and failures of public planning. [In the mid-1990's, I described the limited success of the interesting effort to plan the new town of Columbia, Maryland in the book, *New Towns and Communal Values* (1974). The best conceptual analysis of public planning is John Friedmann, *Planning in the Public Domain (1987)].*

The Vermont history of state land use planning began with its 1968 municipal enabling planning act followed in in 1970 by Act 250's capability and development plan in the early 1970's which led to a state land use plan which was rejected by the legislature. In 1988, major amendments to Act 250 were enacted, ("Act 200") which set forth 16 state planning goals and a proposed system for insuring these goals become part of state, regional and local plans. This history is described in some detail in chapters 11 and 12, Volume 2 of the Brooks *Treatise, which covers the wide variety of state, regional and local land use plans in Vermont.* This history is also set forth in a series of more recent articles in APA *Modernizing State Planning Statutes (Volume 1),* and in the De Grove volume cited above. As Douglas Porter recounts in *"State Agency Coordination in State Growth Management Programs*", after Act 200 was enacted, Governor Kunin accepted plans for 17 separate state agencies and departments. With a change of administration and lack of funds, little attention was paid to coordination. Later regional and local planning efforts were viewed to be "low on clout:" and "have not been considered a rousing success". Since that time, the Council of Regional Commissions has lacked staff to review the plans. Although ad hoc coordination between agencies and regional planning agencies have taken place in more recent years. [see also, Squires, *Growth Management Redux: Vermont Act 250 and Act 200" (1992)]*.

Given the checkered history of statewide land use planning in Vermont – the rejection of the capability and land use plan, the failure to include comprehensive statewide land use planning in Act 200, the sporadic implementation of planning in more recent years, and the unwillingness to bear the cost of a state planning effort, it is unlikely that any significant comprehensive planning effort will be undertaken in the near future. Part of the reason for the failure of state comprehensive planning is that a decentralized approach to both critical area designation (see below), and assessment of major developments (see below) has taken place without the apparent need for such comprehensive planning. In short, is comprehensive statewide land use planning needed in Vermont and, if so, why?

Critical Areas

The ALI Model Land Development Code recommended the designation of state areas of critical concern. They based their recommendations, in part, upon the experience of states such as Maine,

Florida, and Hawaii which had embraced, (at least initially) the designation of such areas. One example of a critical area approached, established by constitution, is the nearby Adirondack Park area, [see Banta, "*The Adirondack Park Lan Use and Development Plan and Vermont's Act 250 After forty Years" 45 John Marshal Law Review, 417}.* One of the purposes of critical areas designation was to intensively plan for development in areas having "historical, natural or environmental resources of regional or statewide importance. Thus, *the notion of "critical areas" establishing the linkage between law, planning and areas important to a state's "sense of place".* In Vermont, such areas might be its mountains, lakes, rivers and river valleys, agricultural plains, forests, and small historic towns.[The notion of critical areas also embraced areas affected by significant public facilities and possible sites for new communities. I shall address below these definitions when discussing more recent tow center amendments to Act 250 in the context of Act 25 0's criteria addressing growth}

In the original Act 250, it was left to the interim capability and development plan, the capability and development plan, and the land use plan to designate such areas. Although these areas were identified in a generic sense, they were part of a more general "zoning type" plan. Moreover, these areas were defined negatively, i.e. as simply unsuited for development. A sense of place and the range of natural resource values in these areas were not explicitly recognized and defined in the initial stages of the law. (See Brooks Treatise Vol 2 Chapters 11,12). In any case, the plans were ultimately not adopted by the legislature. [It is worth noting that similar efforts at establishing critical areas in Florida ran into difficulties as well}. The political enemies of Vermont's early comprehensive planning effort were the state agencies themselves as well as private property advocates. At a later date, concern for critical areas in Act 250 was to enter through the back door, as (1) part of decisions under Act 250 criteria applied to specific projects; (See below for discussion of the Act 250 criteria) (2) as part of state goals, which were added by Act 200 as well as (3) strengthened local and regional planning also resulting from Act 200.

Before turning to a discussion of Act 200 and the criteria, it is important to note that as a consequence of the failure of comprehensive state land use planning in the early 1970's, it was the federal government, other state agencies and private groups which established planning and protection of state critical areas *outside of any state comprehensive land use plan.* Lake Champlain was "protected" in part by the Lake Champlain Basin Program (see Wroth, "*Six Flags Revisited…13 Vt. J. of Envtl. Law* 489 (2012) and other laws [Chapman, Duggan, "*The Transition Towards the 2016 Lake Champlain TDML" 17 Vt. J. Envtl L. 629]; Kamman, Ethan Swift, "Tactical Basin Planning…" 17 Vt. J. Envtl. L. 710 (2016); Mears, Martin, "Foreword: Restoring and Maintaining the Ecological Integrity of Lake Champlain" 17 Vt. J. Envtl. L. 470 (1916) ; Winslow, "A Natural and Human History of Lake Champlain"17 Vt. J. Envtl. L. 482 (2016)}.* Part of the Green mountains were protected by the Green Mountain National Forest and designated wilderness areas as well as the Northern Forest. [See *Symposium:* The Northern Forest Lands and the Law 19 Vermont Law Review (1995); Foster, "Wildlands and System Values" 22 Vermont Law Review 917 (1998). The Connecticut River and Vermont rivers are protected by watershed councils, as well as state environmental agencies. [Lavigne "*Watershed Councils East and West: Advocacy Consensus, and Environmental Progress" 22 UCLA J. Envtl. L. and Pol'y 301 (2004), Kline, "Giving Our Rivers Room to Move"* (17 Vt. J. Envtl. L. 733 (2016). The rivers and wetlands areas are protected by federal, state, and local wetlands legislation and ordinances. [State of Vermont *Water Quality Integrated Assessment Report (2016)* Historic areas, including town greens, are protected

by state historic preservation laws as well as local land use regulations. [Lavigne, Williams, Kellogg, *Vermont Townscape]*.

Although Vermont's Green Mountains are its predominant landscape feature, and although other environmental laws protect aspects of its ecosystem, Vermont does not designate most of its mountains as "critical areas". [For an excellent ecological and legal overview of Vermont's mountains and their regulation comparted to treatment in New York, Quebec, and New Hampshire, see Milne et al. ed. *Mountain Resorts: Ecology and the Law (2009)].* The protection of Vermont's distinctive agricultural lands is set forth in Daloz, "Farm Preservation: A Vermont Land-Use Perspective" *12 Vt. J. Envtl L. 427 (2011).*

Under the definition of "critical areas" in the Model Land Development Code are historic resources, and sites for new communities. Historic resources extend to Vermont's historic small towns, which may be enhanced and protected not only under historic preservation laws [see Tisher, "*Historic Housing for All"* 41 Vt. Law Rev. 603 (2017); Williams et al. American Land Planning Law 74.25 "The Typical New England Town-Less); as well as under the historic and aesthetic criteria of Act 250 discussed below. In addition, the smart growth initiatives in 2000-2001 and the Downtown Program under the 1998 Downtown Development Act provide guidance for growth and enhancement for village centers. (De Grove, at pp. 190-207 for the history of Act 200 and related legislation up to 2005). The "smart growth" initiatives will be discussed below.

One general lesson from the history of protection of critical areas ins Vermont is that such areas are not protected by one master comprehensive land use regime, as originally envisaged in the early 1970's. Rather, they are protected by a complex matrix of federal, state, and local laws and, equally important, a plurality of organizations accorded responsibility for the regulation of one or another aspect of these areas. The question then becomes: what unique contributions can Act 250 and its amendments in Act 200 make to the protection of these areas?

As indicated above, although Vermont's Act 250 did not initially advance a critical areas program comparable to some other states, the law may indirectly protect critical areas through the application of its criteria, (discussed below) and through the operation of its' other amendments and regulations.

Act 250 Criteria

Certain major land uses, subdivisions and plans for them – uses such as ski area developments, big box stores, community sized subdivisions, wind turbines appear to shatter many Vermonter's "sense of place" as a pastoral land of mountains, valleys, farmlands, and small towns. Act 250, after having failed to delineate critical areas with statewide plans, adopted a program for reviewing such developments and subdivisions in terms of certain criteria and issuing or denying or conditionally approving such proposed land uses. [The history of the definition of such developments is discussed in the *Treatise V 2 Chapter 6* "Jurisdiction" as well as in 171.30 American Land Planning Law and 31 Vermont Bar Journal "Defining the Limits of Act 250 Jurisdiction" (2005) The Treatise identifies commercial and industrial developments, state and municipal projects, housing complexes, master plans (for projects0 and subdivisions, as well as the exemptions to the Act's jurisdiction].

These developments and subdivisions are assessed according to ten criteria, which are composed of 28 different elements. The statutory statement of these criteria may be regarded as an effort to specify the broader purposes of Vermont's land use regulation. However, although they are relatively specific, they require extensive interpretation by state courts (Vermont's Supreme Court and Environmental Court), the Environmental Board until 2002, the District Commissions, and state and local agencies. [For an extensive discussion of these criteria and their history, See Volume I of the *Treatise,* a brief update to 2010 by Argentine, *Vermont 250 Handbook, a variety of guidance documents, some of which are set forth on the Act 250 website, some are cited in Appendix C of Volume I of the Treatise. Law Journal articles will be cited below}.*

The value of the interpretations of these criteria as a kind of "internal administrative law" (see Metzger, Stack, *"Internal Administrative Law" 115 Mich. L. Rev, 1239 (2017)* lies in their record of a citizen based process of "adaptive management" in which, over time, the purposes of the regulation and its enforcement is better defined as it encounters specific projects, [see Warren Coleman, 23 Vt. Law Rev 1777 (1998) "Legal Barriers… and the Utilization of Adaptive Management"; Fishman and Ruhl "Adaptive Management in the Courts" 95 Minn. Law Rev. 424 (2010) . [This is also characterized as "incremental planning": see Brooks et al. *Law and Ecology Chapter 11]*

Vermont's impact planning approach may be regarded as one of three legal approaches to insuring that planning will be implemented. [For an account of this approach compared to other approaches, see Brooks, The Law of *Plan Implementation).* Impact planning in land use has taken different approaches including local zoning performance standards, the well-known National Environmental Policy Act environmental impact statements [see Mills, *Talking Stock of Environmental Assessment: Law, Policy and Practice (2007)* and companion state "mini-NEPA's", [see "Improving Community Character Analysis in the SEQRA: Environmental Impact Process: A cultural Landscape Approach" 17 N.Y.U Envtl. L. J. 1194 (2009)], and the "review of development impacts" ("DRI"). [DRI's were first undertaken at a state level by Maine, and included in the ALI *Model Land Development C*ode Article 7, which was then adopted by Florida, Georgia, Cape Cod, Colorado, Washington and elsewhere. See Morris, *Approaches to Regulating Developments of Regional Impact, 111 ((MSPS).* The fate of DRI's in Georgia and Florida is discussed in the De Grove study cited above. Although Vermont's approach is perhaps the most long lived, its effectiveness remains to be assessed in comparison to programs of other states. [One interesting generic study is a discussion of "significant thresholds in 22 Ecology L. Q. 213 (1995)].

{There is not room to review each of the elements of the Act 250 criteria here, but the reader is referred to Volume I of the Treatise as well as the update by Argentine, (see above). For each of the elements, I have identified the problem posed by the development, the statutory and regulatory definitions of the relevant aspect of the environment affected, the stated goals for regulation, the materials, e.g. maps, guidance documents, relevant to the element, the key court and environmental board decisions, and the interaction among the criteria. In separate chapters, I discuss the permit system and enforcement in Volume II, Chapters IX and X. The footnotes in all of these chapters and the Appendix in Volume II sets forth additional references].

The principal point I wish to make here is that the review of development projects does have implied reference to the protection of critical areas, but such indirect reference is not sufficient. Criterion One covers headwaters, streams, wetlands, and shorelines. Criterion eight refers to areas of

scenic beauty, rare and replaceable areas and historic sites, as well as wildlife areas, g soils, forest soils. But the references are to the immediate areas affected by the development, not an identification of entire critical areas.

Since the completion of the Treatise, several relevant books and articles have been written including: Wind Generation, Sautter, Kreis" *Energy Siting in the Green Mountains: Why Vermont's Holistic Approach Work (200()s;* Big Box Stores, Symposium, *"Small Town America in An Era of Big Box Development,* Vermont Journal of Environmental Law (2005); Symposium; Mountain Resorts, Milne et. al. eds. *Mountain Resorts: Ecology and the Law (2008);* Highways, Murphy, *"Addressing the Land Use, Environmental and Transportation Connection in Vermont 31 VLR 784 (2007);* Large Scale Residential Development*, "in Re Quechee Lakes Corporation: Mitigating Aesthetic Environmental Damage"* 16 Vt. Law Review 543 (1992).

Growth Control

When Act 250 was adopted and in the following two decades, Vermont was undergoing population and economic growth. Since the recession, the growth in Vermont has significantly lessened and this is also reflected in the decline of applications to the District Commissions for Act 250 permits. On the other hand, Chittendon County and the counties surrounding it have continued to experience modest growth. Although overlapping with the protection of critical areas and preventing hams though review of major developments, preoccupation with growth has been a continuous theme in the history of Act 250 since 1970. [See the Treatise, Vol 1 Criterion 9]

The concern for the impacts of urbanization was not limited to Vermont. Many states were experiencing more rapid urbanization than Vermont. For the next two decades, planners became preoccupied with controlling or "managing" growth and published a myriad of studies. [For one of many bibliographies, see Appendix A APA *Modernizing State Planning Statutes].* New "growth control instruments such as establishing growth boundaries or coordinating growth with the building of infrastructure investments were proposed, and, in some cases, undertaken. (see also De Grove; Conclusion]

Meanwhile, in Vermont, When Act 250 was adopted, major concerns was the growth of developments at ski areas as well as the problems of the costs of growth for smaller towns. Several of the original criteria (3,5, 6, and 7) were concerned with the burdens such growth might place upon water supply, congestion of roads, educational services, and government services. Criterion explicitly addresses impacts of growth from proposed developments and Criterion 10 requires conformance with local and regional plans. [See discussions of Criterion 9 and 10 in Vol 1 of the Treatise]. Act 250 acknowledges the problem of growth and provides, (See Criterion 9) for review of development growth impacts, it does not adequately control growth. (See discussion of Criterion 9 in Treatise, Volume 1). Eighteen years, later, with the report of the Governor's Commission on Growth followed by Act 200, it was hoped that growth control might be handled through better regional and local planning and local land use regulations. [See also, Cowart, *Vermont Act 250 After 15 Years: Can the Permit System Address Cumulative Impacts, 6 Envtl. Impact Assessment Review 135 (1986) See also VDHCA, History of Planning in Vermont 19990]. In 1998, A Downtown Development Act* was adopted to revitalized Vermont's downtowns and to enable the designation of New Village Centers and New Town Centers. [See, for example, Brice Simon, *Threatened by Sprawl (undated)]* In the early 2000's a variety of reports and

recommendations were made to embrace "smart growth", In 2006 the Vermont legislature adopted Act 183 seeking to identify areas appropriate for growth and target state investments into these areas. [Kraichmnan, "*Vermont's Act 183: Smart Growth Takes Root in the Green Mountain State" 32 Vt. L. Rev. 583 (2008)] [*This cursory history is set forth in full detail in John De Grove's *Planning Policy and Politics. Chapter 5. The footnotes in his Chapter 5 pertaining to the Vermont contain references to many Vermont related documents. (pp 206,207).*

In the review of more recent growth control efforts in Vermont, the emphasis appears to have shifted to either rely upon local and regional planning and local land use regulations or TO rely upon public investments and subsidies to preserve selected areas or to support public and private investments. The land use regulatory efforts may not be effective unless the race for "ratables' is controlled. *[See Williams "Halting the Race for Good Ratables" (MSPA)].* Subsidies and investments might be more effective than regulatory approaches, but they may also be more expensive. *[In addition, I recommend to the reader a deeper inquiry into coping with urbanization as set forth in Mumford's The City in History and Bookchin, The Limits of the City; these works look to the underlying economic and social forces shaping urbanization]]*

Conclusion

Here is a brief reprise of the argument which frames these bibliographical offerings. Vermont is known and valued for its "sense of place" about which there is much recent writings. It's sense of place is accentuated by discernible landscape boundaries and, within those boundaries, there are major landscape features, such as forests, large rivers and their tributaries, mountains, clustered small villages, and agricultural lands. These landscape features are interrelated as mountain waters supply waters to rivers and lakes and supply agricultural lands and village water supplies. In short, there are statewide interactions among these landscape features and the human activities which shape them. These landscape features reflect human activities - "hands on the land" – "working landscapes" – "uses of land"—which are found reflected in second growth forests, mountain pastures, agricultural laws, historic towns, river corridors, lakeshores, ski striated mountain peaks. These human activities which have shaped the land, may also threaten its degradation in various ways. As John Nagle has demonstrated in *Environment's Law,* law has helped to support both the activities which shaped the landscape in the past and will shape it in the future.

The present laws, including but not limited to Vermont's Act 250, can hopefully prevent at least some of the environmental harms resulting from these activities. However, history reveals that Act 250 does not directly identify and protect Vermont's critical landscape. The upfront identification and management of the critical areas are left to other federal and state environmental laws. Act 250, at most, protects these areas to some degree with its' review and permitting of major developments and subdivisions. This review and permitting does not highlight for the public at large the major landscape areas to be protected. It protects them only with a narrow focus upon applications for specific projects. With the alleged "reform" of the law to satisfy lawyers, appeals to permit denials or conditions are no longer made to a highly visible Environmental Board, but to a narrow focused Environmental Court. As a consequence, these applications often do not receive widespread public visibility. In addition, Act 250 approves most projects and it is unclear whether the conditions it places upon selected approved permits are designed and enforced to protect the environment in question. Cumulative growth of small

developments is not captured in Act 250's jurisdictional definitions and as a consequence, the law relies upon regional and land use plans to control growth – plans which may or may not protect these critical areas.

There is a vast literature pertaining to all of these topics, but a review of the leading states' efforts does not provide clear solutions to Vermont's problems. Four broad alternatives may be suggested. First, strong and detailed state-wide land use plan may be undertaken, but there is no guarantee that such a plan would be successfully enforced. Moreover, Vermont has a long history of lack of commitment to fund and conduct such statewide comprehensive land use planning. Second, the focus might center upon careful coordination of the state agencies responsible for critical areas, However, such coordination, although mandated by Vermont law, has not worked continuously in the past. Third, the state may turn to the regional and local planning agencies and local governments, strengthening their ability to control land uses. However, localities have their own limitations. Fourth, the state may canvass other tools such as land acquisition and taxation to further protect those lands needing protection. In fact, there are already some subsidies and land acquisitions for precisely these purposes. There is much literature I have not cited discussing these four alternatives, but I have not canvased it here.

But perhaps one must step back for a moment. Underlying the changes of land use in these areas are ecological processes, social changes (population increase and mobility), economic forces, (market place demands) and political/legal considerations, (including private property rights). I am not aware of much solid scholarship in the study of these underlying forces of change in Vermont's land use, but, in all humility, this is not my area of expertise. Perhaps this might be the starting point for any rethinking of Act 250!

1.5 PAUL GILLIES (ACT 250, FROM BIRTH TO MIDDLE AGE, AND POSTSCRIPT)

The Evolution of Act 250: From Birth to Middle Age

Forty years ago there was Woodstock, Viet Nam, the moon landing, the Manson murders, and Act 250. The world was tilting in new directions, and there was a crisis in Vermont. Fourteen hundred second homes were planned for Stratton, and Stratton had no subdivision regulations, nor for that matter did Vermont.[1] If all nineteen of the vacation home subdivisions planned for Dover in 1969 were built, its population would have increased from 370 to 16,000 in a short number of years.[2]

Governor Deane Davis heard the concerns of southern Vermonters, and took a tour, led by Windham Regional Planner Bill Schmidt in the spring of 1969, and what he saw infuriated him. Jim Jeffords, who was Vermont's Attorney General at the time, later wrote, Governor Davis saw raw sewage "bubbling out of the ground next to some quick- built ski chalets," and that was enough for him.[3]

Davis is such a charismatic figure in Vermont history. The Governor single- handedly stopped the Stratton development by calling up the president of the International Paper Company and asking him to abandon the project—and he did. Even though Vermont had virtually no formal control mechanism to condition or prevent the development, in 1969 a little gubernatorial persuasion was enough.[4] But everyone saw this as a close call. Something had to be done.

The governor held a conference, and appointed a commission, headed by Arthur Gibb, a retired banker. The Gibb Commission issued two reports, which formed the template for the legislation that ensued.[5] The legislature passed the law that spring.[6]

The story of how Act 250 came to be, and what happened to it in the forty years that followed, engages the entire modern history of Vermont. Leading up to its passage were changes that presaged a greater state role in regulating development, including the

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1 DEANE C. DAVIS & NANCY PRICE GRAFF, AN AUTOBIOGRAPHY 249 (1991).

2 Southview Associates, Ltd. v. Bongartz, et al., 980 F.2d 84, 87 (2nd Cir. 1992).

3 JAMES M. JEFFORDS, YVONNE DAILEY, & HOWARD COFFIN, AN INDEPENDENT MAN: ADVENTURES OF A PUBLIC SERVANT 93 (2003). Jeffords, always a man of clever language, later called Stowe the "sewage capital of the East" when the selectboard refused to build a new and needed sewage treatment plant." *Id*. at 111-112.

4 DAVIS & GRAFF, *supra* note 1, at 150. Joe Sherman talked to Governor Davis years later about that visit to southern Vermont. "I found these developments were being built on the most improper basis. I mean, on hillsides where there were very fragile soil. The road that they had to them were the kind of roads that you could never get a school bus around. And, of course, the history of second-home development is that a lot of them do come to be permanent homes, and it becomes the responsibility of the town to educate the kids, and also to keep up the roads, to plow the roads … " JOE SHERMAN, FAST LANE ON A DIRT ROAD: A CONTEMPORARY HISTORY OF VERMONT 93 (1991, 2000).

5 STATE OF VERMONT GOVERNOR'S COMMISSION ON ENVIRONMENTAL CONTROL, REPORTS TO THE GOVERNOR (Jan. 19, 1970, May 18, 1970). *See also*, MICHAEL SHERMAN, GENE SESSIONS, & P. JEFFREY POTASH, FREEDOM & UNITY: A HISTORY OF VERMONT 607-611 (2004).

6 "An act to create an Environmental Board and district environmental commissions," No. 250, 1969 (Adj. Sess.). Who wrote Act 250? Act 250 had many fathers. There were Walter Blucher, Art Gibb, and Deane Davis, but Jim Jeffords and John Hansen wrote it. JEFFORDS ET AL., *supra* note 3, at 100; DAVIS & GRAFF, *supra* note 1, at 252.

building of the Interstates, reapportionment, and the early environmental initiatives, including the billboard law (1968), the bottle return law (1953-1955, 1972), and Section 248 reviews of new utility lines (1969), among others.

Over the next four decades following the enactment of Act 250, it has endured, in spite of its setbacks, which included the loss of the state land use plan, the judicial voiding of a few of its administrative rules, accusations of its toxic effect on economic development, the refusal to confirm the reappointments of the board chair and two members in 1994, at least two major permit reform initiatives, the abolishment of the board and transfer of its appellate review responsibility to the environmental court, and efforts to promote land use, economic and social policies by the creation of new exemptions.

Every year there are demands to make the process easier, faster, and more predictable. Today, Act 250 looks forty. It has a maturity and an understanding of its limits. But sometimes, its supporters look around and wonder if Act 250 retains the vision and the passion it enjoyed at first. Every decade is different; every biennium brings new challenges, new ideas. The history of Act 250 is best told by looking at what was done with it, legislatively, judicially, and administratively, over its time. Each branch has had its impact in shaping Act 250.

Sometimes the relations of the three branches sound like a David Mamet film script, with long pauses, half-finished thoughts, and curious rhythms and tonal changes. Although sired by the executive and delivered by the legislature, Act 250 has its greatest ally in the Supreme Court. To date the Supreme Court has never reversed the board for any finding of fact. The legislature is fickle. It is at one time generous, at another reactionary and timid. So with the executive. No governor has dared to criticize Act 250's values. But there have been uncomfortable feelings. Justice William Hill used to say that we must never forget how fragile government really is. When it works, it fulfills our trust; when it goes awry, it can do great harm. That is the tension. Act 250 depended on a strong Environmental Board. The legislature gave it powers to enact rules that pushed the envelope of traditional administrative law by deferring to the board decisions on party status and jurisdiction usually reserved for the popular branch of government. This led to inevitable collisions among the branches.

There are about one hundred decisions of the Vermont Supreme Court that constitute the canon of state land use law in Vermont, in its first forty years. Most involve questions of jurisdiction—whether a development is governed by Act 250 or not—or standing—what rights others have to challenge the development. Thirty decisions are reversals, where the Court has criticized the board (or in some cases the superior court or later the environmental court), for its zeal on matters of jurisdiction. The rest of the decisions are affirmations of the work of the board, many of them supporting new ideas adopted by the board in the conduct of its reviews. This is what makes Act 250 so interesting—this synthesis of ideas about jurisdiction, the continuing concern for procedure, the confrontation of values and resolution of disputes.[7]

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[7] What lawmaker decided that the maximum noise level allowable in Act 250 is seventy decibels (dBu) on the A scale at the boundary line? Not the legislature. Not the courts. The board did it. *See* Findings of Fact, Conclusions of Law, and Order at 14, Re Bull's Eye Sporting Center, #5W0743-2-ED (Feb. 27, 1997). It was adopted as an aesthetic performance standard, based on evidence presented in a series of decisions. The latest established 70 dBa Lmax at the property line and 55 dBa Lmax at residential structures. *See*

Act 250 has served as the arena where major battles were fought over residential subdivisions, the growth of ski areas, the expansion or reopening of gravel pits, bear habitats, deeryards, cell towers, big box retail establishments, and agricultural soils. While the crisis began in the southern counties, in the mountains, the battle lines soon moved northerly to Burlington, Williston, and eventually St. Albans, where this fall the environmental court's hearings on the Wal-Mart store have recently ended.

The passage of Act 250, according to Chief Judge James Oakes, "represented the culmination of an effort to create a process that would subject subdivisions and other large developments in Vermont to administrative review so as to ensure economic growth without environmental catastrophe."[8] Its purpose was to protect "Vermont's relatively unspoiled environment."[9] It was, as Chief Justice Albert Barney stated, "a philosophic compromise between protecting and controlling the State's lands and environment, and avoiding an administrative nightmare."[10] It was never intended to cover every land-use change, "or to interfere with local land-use decisions, except where substantial changes in land use implicate values of state concern."[11] Sometimes, as Chief Justice Jeffrey Amestoy described it, the process can be an "extraordinary procedural maze."[12]

Act 250's strongest armor has been the deference the Supreme Court has shown Environmental Board decisions, with regard to both facts and the interpretation of the laws and rules governing the system. This is not mere deference—it is "high level" deference.[13] Infused with a presumption of validity, requiring clear and convincing evidence to overcome board findings on appeal, only an extreme abuse of discretion, a failure to follow its own rules, or gross violence to the plain language of the statute can disengage the decisions of the board.[14] Attempts to justify avoidance of jurisdiction based on statements made by government officials, including district coordinators, always seem to fail.[15] Although uncertainty in construing land use regulations traditionally defaults to the property owner, that trope is seldom used in more recent Supreme Court rulings.[16] Perhaps this is due to a lessening of uncertainty in Act 250 over the years. It remains to be seen whether the environmental court will enjoy the same latitude of deference as the Environmental Board did.

Act 250 has survived four decades. The law has staying power—when all around it government has changed, Act 250 has retained its core values and standards. Act 250 is not statewide zoning. Zoning is practical. It says how far, how big, what use is appropriate. Act 250 asks different questions. Its criteria are more relative, and aspirational, as shown by the use of the words "unreasonable," "undue adverse," or

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Findings of Fact, Conclusions of Law, and Order at 13, Re Barre Granite Quarries, LLC, Land Use Permit Application #7C1079 (Revised)-EB (Dec. 8, 2000).

[8] Southview Associates, Ltd. v. Bongartz, 980 F.2d 84, 87 (quoting Governor's Commission on Environmental Control, Reports to Governor 2 (Jan. 1970, May 1970).

[9] Southview Associates, Ltd., 980 F.2d at 88.

[10] In re Agency of Administration, 141 Vt. 68, 71 (1982).

[11] *Id.*, 76.

[12] In re Lawrence White, 172 Vt. 335, 349 (2000) (Amestoy, C.J., dissenting).

[13] In re Vitale, 151 Vt. 580, 582 (1989).

[14] In re Wal-Mart Stores, Inc., 167 Vt. 75, 79 (1997).

[15] In re Orzel, 145 Vt. 355, 357 (1985); In re McDonald's Corp., 146 Vt. 380, 384 (1985); In re Spencer, 152 Vt. 330, 342 (1989); State v. Godnick, 162 Vt. 588, 593 (1994).

[16] In re Vitale, 151 Vt. 580, 584 (1989); Committee to Save the Bishop's House, Inc. v. Medical Center Hospital of Vermont, 137 Vt. 142, 152 (1979).

"materially interfere."[17] No one can deny the audacity of its enactment. The legislature had been bold enough to challenge what Deane Davis called "one of the most fundamental rights of Vermonters … the right to use one's own land as one saw fit."[18] The 1970 legislature, Governor Davis, and many who followed him saw a greater right in the protection of Vermont lands and waters, a public interest in traditionally private matters.

The First Decade (1970-1980): Kick Starting

After Act 250 took effect, on April 4, 1970, Governor Davis appointed the first Environmental Board, with Benjamin Partridge, Jr., as chair.[19] He also appointed the first district commissions, and the work of transforming an idea into a program began. The board adopted its interim rules on June 1, 1970, less than two months after Act 250 became law. As with other board rules that followed, the heart of these regulations was the definitions. At first the choices were conservative, largely parroting the statute, but in several instances the rules reached beyond the statute to do what rules ought to do—fill in the gaps between the statute and practical implementation. Just how far the board could go became one of the major themes in challenges to its jurisdiction.

Reflecting the lack of adequate planning at the local level at this time, Rule 8(d) named only sixteen towns and villages whose permits would be received in evidence as rebuttable presumptions, but allowed others to be recognized once those towns adopted permanent zoning and subdivision regulations. The board also adopted the rules of the Health Department as guidelines.[20] As if uncertain how the system would work, the interim rules, which became permanent shortly thereafter, allowed the board or commissions to "take a case out of these rules when, in their opinion, the interest of the public so requires."[21]

Act 250's first important judicial test came with the *Preseault* case in 1972. A Burlington developer hoped to develop a large residential subdivision in Burlington. After he appealed the district commission's denial of a permit to the Environmental Board, adjoining property owners were denied party status by the board, based on its reading of the statute. The Supreme Court reversed the board, calling its interpretation unreasonable and contrary to the intent of the legislature.[22] The adjoiners were allowed to participate in the hearings before the board. This was the first in a long line of cases the board faced involving the issue of standing.

During the 1972 session, the legislature took its first look at proposals for a state land use plan. Governor Davis later explained that the eventual failure of the legislature

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[17] These words are from the ten criteria, 10 V.S.A. § 6086. There will be erosion, but not unreasonable erosion (4). There may be an undue effect on scenic beauty, but it may not be adverse (9). There may be an interference with the public's use and enjoyment of public lands, but it may not be material (9(K)).

[18] DAVIS & GRAFF, *supra* note 1, at 250.

[19] Partridge, a retired Navy Captain and attorney, served until 1974.

[20] Rule 8(c).

[21] Rule 14(e).

[22] In re Preseault, 130 Vt. 343, 348 (1972). The Court explained, "The unreasonableness of this interpretation becomes more manifest when the fact finding significance of a *de novo* proceeding before the Environmental Board is considered. Therefore, we hold the intent of the legislature as expressed in the broad purposes of the Act, and in the Act itself, is to accord to adjoining property owners the right to appear as parties at hearings before the Environmental Board." *Id*. at348-349.

to adopt a state plan was the greatest disappointment of his time in office. "The plan had generated so much controversy and the task to write it was so gigantic that I was unable to submit a finished plan until the eve of my departure from office."[23] His retirement removed Act 250's greatest ally from the stage, and doomed the plan.

In 1973, three years after Act 250 became law, the legislature passed the first substantive amendments.[24] The amendments represented a significant change in Act 250, reflecting concern over the board's powers, and the need to make the process more flexible. The amendments prohibited the Environmental Board from enacting emergency rules.[25] The legislation authorized the board to distinguish between major and minor applications and encouraged the development of "simplified and less stringent procedures."[26] The legislature wanted to be sure that Act 250 never "be construed to limit in any way the freedom of any person to sell or otherwise dispose of his land unless by so doing he will create a subdivision."[27]

The 1973 amendments also encouraged non-regulatory approaches to the protection of the environment, including tax changes, public acquisition of land and easements, and "resource payments to private landowners permitting public use of their lands."[28] Preserving land from development became state policy, by purchasing the development rights or through current use tax reduction.[29]

The legislature incorporated the capability and development plan into Act 250, adding eleven new subcriteria to the original ten.[30] The 1973 amendments added subcriteria to criteria 1, 8, and 9, relating to agricultural soils, energy conservation, earth resources, and development affecting public investments.[31] Since that time there have been no amendments to the ten criteria. Everything else has changed, but the criteria remain inviolate.[32]

The 1973 amendments expressly prohibited granting permits that were contrary to any duly-adopted local plan, capital program, or municipal bylaw, "unless it is shown and specifically found that the proposed use will have a substantial impact or effect on surrounding towns, the region or an overriding interest of the state and the health, safety and welfare of the citizens and residents."[33] With those words the legislature was loosening reins.

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[23] DAVIS & GRAFF, *supra* note 1, at 312-313.

[24] "An act to amend 10 V.S.A. §§ 6001, 6025, 6043, 6046(b), 6086(a) and (b), 6089; 32 V.S.A. § 3481 and to add 10 V.S.A. § 6027(f) relating to land capability and development and to add 3 V.S.A. § 805(e) relating to filing of rules," 1973, No. 85.

[25] *Id*., § 2.

[26] *Id*., § 3.

[27] *Id*., § 6.

[28] *Id*., § 4.

[29] *See* 32 V.S.A. §§ 3751-3776 (current use) and §§ 6301-6309 (acquisition of interests in land by public agencies).

[30] 1973, No. 86, § 6; Leonard U. Wilson, *Land Use, Planning, and Environmental Protection*, in VERMONT STATE GOVERNMENT SINCE 1965, at 453, 459 (Michael Sherman ed., 1999).

[31] 1973, No. 86, § 10.

[32] A prescriptionist might take issue with this. In 2006, Criterion 9(B) was revised to allow off-site mitigation to offset the challenge of satisfying the prime agricultural soils in productive farmland. "An act relating to creation of designated growth centers and downtown tax credit program," 2005, No. 183 (Adj. Sess.), § 7.

[33] 1973, No. 86, § 5.

The role of adjoining property owners was also clarified in 1973. They would be allowed to participate in hearings before the district commission and the board (but not to appeal to the Vermont Supreme Court) only "to the extent the proposed development or subdivision will have a direct effect on [their] property."[34] This was both a codification of *In re Preseault* and a limitation on the issues adjoiners could present before the commission or the board.

Although not directly related to Act 250, the legislature also passed the land gains tax in 1973, one of Governor Thomas Salmon's initiatives, for the purpose of discouraging the quick purchase and resale of Vermont land.[35] The effect was to slow down the conversion of Vermont land into residential subdivisions.

Governor Salmon approved a draft of the State Land Use Plan and sent it to the legislature at the beginning of 1974. But the legislature, as it had done during the previous biennium, left it in the committee rooms. The legislators were unwilling to approve having the state planning office map the entire state, placing all land into one of seven districts—urban, village, rural, natural resource, conservation, shoreline or roadside area—and mandate the type of uses and minimum sizes for lots in those various districts, in towns that had not adopted permanent zoning bylaws and subdivision regulations.[36]

Great Eastern Building Co. was decided in 1974. Neighbors one quarter of a mile away from a proposed residential subdivision were denied party status before the district commission. The Supreme Court affirmed this denial, assuring them that their concerns over traffic were protected by the municipality.[37] They had no standing, because the statute, and the board's rules, denied it. Act 250 was not intended to serve as a civil court for the resolution of disputes among neighbors. It was designed to rely on towns, through their plans and local processes, to represent the public interest.

That same year, in *State Aid Highway No. 1, Peru, Vermont,* the Court overturned a decision of the board based on board members' disqualification for conflicts. One was a member of the Vermont Natural Resources Council, another had contributed to the organization, and their sitting, the Court decided, was an egregious error that it "could not in conscience" allow to stand.[38]

The board amended its rules in the summer of 1974, to respond to the statutory amendments of 1973.[39] Among the changes, advisory opinions by district coordinators were also first authorized.

In 1975, in *Wildlife Wonderland,* the Supreme Court admonished the Environmental Board for violating its own rules in failing to recess its hearing on a commercial game park in Mt. Holly once the board realized an air pollution permit was required for the project. Rule 13(C)(5) required the board to suspend its consideration until the other state permit was issued.[40] The board, the Court insisted, must follow its own rules.

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[34] *Id*., § 9; In re Wildlife Wonderland, 133 Vt. 507, 518 (1975).

[35] No. 81, 1973, now codified at 32 V.S.A. §§ 10001-10011.

[36] State Land Use Plan (Jan. 8, 1974), at 5-21.

[37] In re Application of Great Eastern Building Co., 132 Vt. 610, 613-614 (1974).

[38] In re State Aid Highway No. 1, Peru, Vermont, 133 Vt. 4, 6, 9 (1974). [39] Rules of the Environmental Board, Amendments (eff. June 25, 1974). [40] In re Wildlife Wonderland, 133 Vt. 507, 514 (1975).

On June 27, 1975, the Environmental Board amended its rules by redefining "development."[41] Jurisdiction was triggered if a road of more than 800 feet was constructed to provide access to or within a tract of land incidental to the sale or lease of land, whether five lots were involved or not.[42]

The bishop's house in Burlington was scheduled for demolition, to make room for more parking. Concerned citizens persuaded the Environmental Board an Act 250 permit was needed, as the hospital complex involved more than ten acres, counting involved land. The Chittenden superior court issued an injunction, which on appeal was vacated by the Supreme Court. The high court then invalidated Rule 2(F), defining "involved land" to include "all land within a radius of five miles which is part of, closely related or contiguous to" the land on which the project sits. The Court found the rule too vague and the decision to claim jurisdiction going "beyond mere interpretation or implementation of the statute, and compromis[ing] the substantive requirements of Act 250."[43] The board had violated its own standards. The Court stated that Act 250 was intended to reach developments "only where values of state concern are implicated through large-scale changes in land utilization."[44] The building came down; the parking lot was constructed.

The decision in *Juster Associates* (1978) provided another example, in the view of the Supreme Court, of the board's misunderstanding about its jurisdiction. After filing an enforcement action against a permit holder, the board held hearings on an amended permit, to bring the project into compliance, but the Court reversed the decision, underscoring the need to follow the statute carefully: district commissions should hear permit amendments; the board's authority is purely appellate on new permits and new conditions.[45]

Act 250 is a mirror of the issues that concerned Vermonters, or at least Vermont legislators, through the years. In 1980, for instance, Act 250 was altered to regulate the exploration of fissionable materials beyond the reconnaissance phase.[46] The practice of expanding, and later contracting, the jurisdiction of Act 250, to promote or discourage regulation of different industries, started there.

At the tenth anniversary of Act 250, the Environmental Board held a conference and issued a performance evaluation, providing statistics to show how the system was working. Contrary to popular belief, explained Chair Leonard U. Wilson, only 2.6% of all applications had been rejected in that decade. Wilson wrote, Act 250 "has been remarkably successful in promoting development compatible with the environmental quality and with the quality of life in Vermont."[47] Act 250 works because "the overwhelming majority of decisions are made at the district level by lay persons who live

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41 Rules of the Vermont Environmental Board (June 27, 1973).

42 Rule 2(A)(6).

43 Committee to Save Bishop's House v. Medical Center Hospital of Vt., 136 Vt. 213 (1978); Committee to Save Bishops' House v. Medical Center Hosp. of Vt., 137 Vt. 142, 151 (1979).

44 *Id*.

45 In re Juster Associates, 136 Vt. 577, 581 (1978). Justice Rudolph Daly wrote, "To accept the Board's rationale is to diminish the scrutiny given to land use under the statutory framework, because it allows for approval of a development without the discussion provided for by the statute."

46 "An act relating to fissionable material development," 1979, No. 123 (Adj. Sess.), §§ 1-3 (eff. April 14, 1980).

47 LEONARD U. WILSON, ACT 250: PERFORMANCE EVALUATION 2 (1981).

and work in the district where the proposed development will take place."[48] Wilson's report contained proposals for reform, including closing the "10-acre loophole" and a proposal to redefine "involved land," correcting the deficiency in the law identified in the *Bishop's House* decision.[49]

Robert Reis, then a second-year student at Vermont Law School, wrote his own review of Act 250, suggesting a less rosy picture of the state of the law.[50] Looking at how the appeals of the Pyramid Mall in Williston, the Davison housing development in Morristown, and the Hawk Mountain resort in Plymouth were decided by the board, Reis worried that the lack of decent statewide maps and a state land use plan might be the end of Act 250.[51]

The first decade was the hardest of the four, as may be expected. The law was young and untried, and the board was still learning how to make Act 250 work.

The Second Decade (1981-1990): Stronger for Being Challenged

In 1981, Secretary of the Agency of Development and Community Affairs, Harry Behney, stated publicly his disenchantment with Act 250 and other permit programs, reflecting comments he heard from developers that the law was driving away potential business. Governor Richard A. Snelling then called for a thorough review of the law, and attendant permits. The report of the Permit Process Review Committee concluded that Act 250 was blameless, but that the State could do a better job coordinating various permit programs and providing more assistance to those seeking to do business in Vermont.[52]

That same year the Act 250 permit issued to the Town of Springfield was voided by the U.S. District Court for Vermont on grounds that jurisdiction for a hydro project was preempted by the Federal Energy Regulatory Authority.[53] That same year, the Vermont Supreme Court reversed the superior court's denial of an Act 250 permit, because the trial court based its decision not on facts but on a sense that the applicant could not perform. "[C]onjecture or some unarticulated concept of unacceptability" was insufficient justification for denial.[54]

After Vermont became the target for companies seeking new sources of energy beneath the surface of the earth, the legislature added drilling for oil or gas wells to the definition of "development" in Act 250 in 1982.[55]

Never in Act 250's history was there a case as hard on the board, and the process, as *In re Agency of Administration* (1982). Reversing the board's decision to treat the demolition of a state-owned building as part of a larger plan within the capitol complex, the Supreme Court struck down Rule 2(A)(4) as exceeding the board's authority, overbroad, contrary to the statute, and not reasonably related to the purposes of Act

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48 *Id*. at 3.
49 *Id*. at 1, 12-13.
50 ROBERT K. REIS, VERMONT'S ACT 250: REFLECTIONS ON THE FIRST DECADE AND RECOMMENDATIONS FOR THE SECOND (1980).
51 *Id*., 1-8.
52 Report of the Permit Process Review Committee at 13 (Dec. 1981).
53 Town of Springfield & VPPSA v. State, 521 F.Supp. 243 (1981).
54 In re Zoning Permit Application and Land Use Permit of Patch, 140 Vt. 158, 167 (1981).
55 "An act relating to oil and gas drilling," 1981, No. 240 (Adj. Sess.), § 6 (eff. April 28, 1982).

250.[56] The case became one of the most quoted decisions in Act 250 history, regularly cited in other cases where the board's decisions were challenged. Chief Justice Barney emphasized that the Court would be "especially vigilant" in reviewing the board's conclusions of law.[57] He wrote, "If the jurisdiction of Act 250 were invoked every time a spadeful of earth turned on state-owned property in apparent conformance with a proposal from a government planning group, the burden on state agencies to fulfill the requirements of the Act would be impossible to meet."[58] The opinion expresses a profound disappointment with the Environmental Board and a wariness about the board's tendencies toward inflation of its jurisdiction.

In 1984, the legislature finally abandoned the state land use plan completely, removing all mention of it from the enabling law.[59] But with the support of Governor Richard A. Snelling, the legislature closed the ten-acre loophole.[60] This was a statutory exemption from Act 250 for the creation of lots larger than ten acres. Although the threshold for jurisdiction of Act 250 was the creation of ten lots within a period of time, Act 250 had defined "lot" to be limited to lots over ten acres in size.[61] The definition was amended to delete the size of a lot as a factor.

That year the Supreme Court upheld the board's decision to require the Baptist Fellowship of Randolph to obtain an Act 250 permit, defining "commercial purpose" to include any venture that involves an exchange of things of value for services, including churches, and avoiding an attempt to carve out a public, pious, or charitable exemption to Act 250.[62]

The 1984 amendments to the board's rules started the practice of pre-filing of testimony, which became a feature of Environmental Board procedure until the abolishment of the board in 2004.[63] Once that practice was implemented, hearings became exercises in cross-examination, as pre-filing eliminated direct examination. This change necessarily shortened hearings, and ensured that the board and the parties were fully apprised of the positions of the parties before the hearing began.

The legislature amended the Act's definition of "farming" in 1985 to ensure that the operation of greenhouses, maple syrup productions, and the on-site preparation and sale of agricultural products principally produced on the farm and of fuel or power from agricultural wastes were exempt from Act 250.[64]

During that same session, the legislature took the unusual step of ratifying the rules of the Environmental Board, essentially turning the rules into statutes, and putting them beyond the reach of attacks alleging that the board, through its regulations, had overstepped its authority.[65] The ratification included explicit direction that the rules could

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[56] In re Agency of Administration, 141 Vt. at 92.

[57] *Id*. at 75.

[58] *Id*. at 88.

[59] "An act relating to subdivision regulations," 1983, No. 114 (Adj. Sess.), § 2.

[60] Wilson, *supra* note 30, at 460.

[61] *See* Re Harland Miller III, Declaratory Ruling #253 (May 13, 1992).

[62] In re Baptist Fellowship of Randolph, Inc., 144 Vt. 636, 638 (1984).

[63] Recently the environmental court has considered reinstating the practice for Act 250 appeals. Rules of the Vermont Environmental Board (Sept. 1, 1984), Rule17(D)-(E).

[64] "An act relating to the Act 250 definition of 'construction for farming purposes," 1985, No. 64.

[65] 1985, No. 52, § 5. "Rules of the Environmental Board pertaining to the administration of Act 250 and adopted under subsection 6025(a) or 6086(d) of Title 10 are hereby ratified and shall apply retroactively from the date of adoption."

be applied retroactively. The Supreme Court subsequently treated the rules as having the same effect as "any law passed by the Legislature in the first instance."[66]

Governor Madeleine Kunin appointed the Commission on Vermont's Future in 1987, called the Costle Commission, and charged it with the duty "to assess the concerns of Vermont citizens on the issue of growth, to establish guidelines for growth, and to suggest mechanisms to help plan Vermont's future."[67] In the session that followed, the legislature enacted a comprehensive rewrite of Chapter 117 as it related to planning, provided funds for the development of municipal plans through an increase in the property transfer tax, and set up a system of reviews and approvals of town and regional plans.[68] The object of the law was in part to fill the hole left in Act 250 by the loss of the state land use plan.

In her 1989 inaugural, Governor Kunin explained, "As Act 200 gains in stature, the regulatory aspect of Act 250 will diminish. Towns and regions with approved plans will be able to shoulder many of the decisions now assumed at the state level through Act 250."[69]

Act 200 also created the Housing and Conservation Trust Fund for the purpose of encouraging the development of low-income housing and preserving farmland and other significant lands.[70]

In *Hawk Mountain Corp.* (1988), the Vermont Supreme Court affirmed the Environmental Board's decision to deny a permit for a large sewage system that the board concluded would pollute a nearby river. The Court deferred to the judgment of the board in requiring the applicant to obtain a water discharge permit, even after the Agency of Natural Resources ruled none was needed.[71] In the decision, the Court stated that the legislature "intended to confer upon the Board powers of a supervisory body in environmental matters."[72]

The board was reversed in *Vermont Gas Systems, Inc.* (1988), the Supreme Court concluding that jurisdiction did not attach until construction is about to commence. "[T]he board struck too quickly in asserting Act 250 jurisdiction in this case," explained the Court.[73] Although the Court found no due process violation in the board's mix of enforcement and permitting duties in *Crushed Rock, Inc.* (1988), it reversed the board for giving the gravel pit operator no chance to provide evidence against the revocation of a permit.[74]

The ELD (Environmental Law Division) was first created in 1989 to hear appeals from enforcement decisions of the Agency of Natural Resources.[75] This act was adopted to encourage diligent enforcement of violations of Act 250 and other environmental laws.

[66] In re Spencer, 152 Vt. 330, 336 (1989).

[67] Report of the Governor's Commission on Vermont's Future: Guidelines for Growth at 3 (1988).

[68] 1987, No. 200 (Adj. Sess.); SHERMAN, SESSIONS AND POTASH, *supra* note 5, at 613-614.

[69] See the Secretary of State's homepage under Archives/Gov't History/Governor's Inaugurals and Farewells for Kunin's address. Critics called Act 200 misbegotten and a mockery of municipal liberty. *See* FRANK BRYAN & JOHN MCCLAUGHRY, THE VERMONT PAPERS: RECREATING DEMOCRACY ON A HUMAN SCALE 230-231 (1990).

[70] Wilson, *supra* note 30, at 463.

[71] In re Hawk Mountain Corp., 149 Vt. 179, 180, 183-184.

[72] *Id*. at 186.

[73] In re Vermont Gas System, Inc., 150 Vt. 34, 38 (1988).

[74] In re Crushed Rock, Inc., 150 Vt. 613, 623-624 (1988).

[75] 1989, No. 98.

To ensure that the judge was not diverted from this duty, the legislation prohibited assignment to other judicial functions.[76]

From the beginning, Act 250 had specifically exempted developments under ten acres if a town adopted permanent zoning bylaws and subdivision regulations. In 1990, the General Assembly allowed towns to adopt an ordinance to have Act 250 apply to any project of over one acre, even if the town had adopted regulations and bylaws.[77] Brandon, Benson, and Manchester exercised this option.[78]

That same year the legislature created the Waste Facility Panel, with exclusive jurisdiction to review decisions and hear and determine appeals from agency decisions concerning solid waste management facilities.[79] Transactions to preserve segments of the Long Trail were also exempted from Act 250 in 1990, as long as the lots were created by the conveyance to the State or a land trust.[80]

Appellants in *McShinsky* (1990) failed to convince the Supreme Court that the board had erred in ruling on the undue impact of aesthetics. They claimed the board could not assume the role of the "average person," but the Court explained that the board "need not poll the populace or require vociferous local opposition" to conclude that the average person would be offended by the proposed recreational vehicle campground on the White River.[81] *McShinsky* relied on *Quechee Lakes Corporation* (1990) for the method of analyzing aesthetics under Criterion 8, requiring the board first to decide whether the impact of the project was undue—meaning it violated a clear, written community standard, offends the sensibilities of the average person, or when no mitigating steps were taken in the proposal to improve the harmony of the project with its surroundings—and if so, to decide whether the adverse impact was "undue" by the average person sensibility offense test.[82]

In the second decade of Act 250, the process found its bearings. The growing canon of prior decisions and established precedent gave more confidence to the district commissions, board, and staff to treat Act 250 as a system, root out its anomalies, and provide better service to developers and the public. By 1990, Act 250 was in a safe harbor, or at least seemed to be.

The Third Decade (1991-2000): Sturm und Drang

The third decade of Act 250 was its most difficult. The decade began with approval of the board's method of analyzing wildlife habitats, in *Southview Associates,*

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[76] *Id*.

[77] "An act relating to creating a local option to make Act 250 jurisdiction apply to development on more than one acre, notwithstanding the adoption of permanent zoning and subdivision bylaws and notwithstanding the fact that it may be a state or municipal project," 1989, No. 231 (Adj. Sess.), § 1 (eff. July 1, 1991).

[78] http://www.nrb.state.vt.us/lup/publications/1-10acre.pdf.

[79] "An act establishing procedures for the emergency certification of solid waste landfills and providing for a combined environmental and land use review process for new solid waste facilities," 1989, No. 218 (Adj. Sess.), § 3; 10 V.S.A. § 6107. Appeals from the panel are treated like appeals from the Environmental Board, directly to the Supreme Court. The panel was eliminated by the "Permit Reform" act of 2004.

[80] "An act relating to Act 250 review of transactions to preserve segments of the Long Trail," 1989, No. 154 (Adj. Sess.).

[81] In re McShinsky, 153 Vt. 586, 592 (1990); In re Quechee Lakes Association, 154 Vt. 522 (1990).

[82] *McShinsky*, 153 Vt. at 592-593.

Inc. (1992).[83] Then the Supreme Court affirmed the board's bold Criterion 5 ruling that projects that worsen existing highway conditions may be denied, even though the development is not the principal cause of the congestion.[84] But in June of 1993, the National Trust for Historic Preservation placed Vermont on the list of the eleven most endangered places in America.[85] That was the first blow.

The Supreme Court reversed the board's decision to consider issues not previously heard by the district commission in *Taft Corners Associates, Inc.* (1993), concluding that the board exceeded its authority.[86] Its ruling denying an Act 250 permit to large retail stores in Williston was criticized after the Court found that the board had not attempted to define what impacts existed before issuing the denial.[87] The Court also held that the unappealed umbrella permit for the same project issued six years earlier preempted any new consideration of the ten Act 250 criteria.[88]

Understanding Act 250 improved in 1993. That year, Cindy Argentine's *Vermont Act 250 Handbook* was first published by the Putney Press.[89] Its impact cannot be understated. The reference book has since gone through two editions—the first in 1999, the latest this year reflecting the 2004 permit reform changes to the process. It remains the single most useful guide to the process, aside from Richard Brooks' treatise.[90] Since its publication, during the years of the Environmental Board, it was not uncommon to see a copy being carried into the hearing room by board members.

The trouble started with the *C&S Wholesale Grocers* case in Brattleboro. The board's hearing was conducted in a motel next to Route 5, as trucks rolled by toward the Interstate. After a contentious number of days, the board granted a permit to the company, limiting the number of daily trips on Route 9 to 120 and the number of trips entering or leaving the facility to 600.[91] Although unappealed, the decision ignited a controversy.

The Senate Natural Resources and Energy Committee refused to recommend the reappointments of three members of the Environmental Board, including its chair, Elizabeth Courtney, in January of 1994. Their appointments were not confirmed by the Senate. Governor Howard Dean appointed new members to take their place, and Art Gibb became acting chair. Leonard U. Wilson wrote that the announced reason for the refusal to confirm stemmed from some committee members' belief that "the board regularly exceeded its statutory and authority, and extended its jurisdiction beyond the legislature's intent."[92] This was a shock to the system. So were the other legislative changes to Act 250 that year. The environmental judgeship was eliminated, and a rotation established so that all appeals of zoning matters would be heard in one of three

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[83] Southview Associates v. Bongartz, 980 F.2d at 91 (whether the deeryard was decisive to the deer that used it, not, as Southview argued, whether some deer survived).
[84] In re Pilgrim Partnership, 153 Vt. 594, 596-7 (1990).
[85] SHERMAN, SESSIONS AND POTASH, *supra* note 5, at 613.
[86] In re Taft Corners Associates Inc., 160 Vt. 583, 585 (1993).
[87] *Id*. at 592.
[88] *Id*. at 591-592.
[89] CINDY CORBETT ARGENTINE, VERMONT ACT 250 HANDBOOK (1993, 1998).
[90] RICHARD O. BROOKS, TOWARD COMMUNITY SUSTAINABILITY: VERMONT'S ACT 250 (1996, 1997).
[91] Land Use Permit Amendment, #2W434-8-EB (June 2, 1993).
[92] Wilson, *supra* note 30, at 464.

designated superior courts.[93] There was no talk of repealing Act 250, but the message was clear. This was a time for retrenchment.

The high court deferred to the board's expertise in its interpretation of "large scale development" in *BHL* (1994). "We are mindful of our duty to ensure that the Board not overreach in enforcing Act 250," wrote Chief Justice Frederic Allen, "but we conclude that in this case the Board has acted within its statutory authority."[94] But in *Molgano* (1994), when the board ruled against a Manchester developer's plan to build two office buildings, concluding the development was inconsistent with the town plan, the Court reversed the decision, finding no specific policy in the plan to prohibit the project.[95] Using language that would be recited frequently in the years to come, the Court refused to give "nonregulatory abstractions" the weight of law.[96]

One of the original premises of Act 250 was the limited role of adjoining neighbors in the process. Gradually, the status of adjoining property owners in Act 250 improved. Act 232 of 1994 required adjoining property owners to receive notice of applications for Act 250 permits.[97] The act also allowed district commissions to grant tentative party status to some parties, with the right to re-examine their decision at the end of the hearing.[98]

In 1994, the expiration dates of all permits issued prior to July 1, 1994, other than those for the extraction of mineral resources, operation of solid waste facilities, and logging above 2,500 feet, were extended for an indefinite term, "as long as there is compliance with the conditions of the permits."[99]

The legislature exempted ancillary slate mining activities from Act 250 in 1995, granting unused quarries exemptions from the usual rules of abandonment as long as slate was taken from the quarries before June 1, 1970, and the quarries' owners registered them with the State.[100] This weakened Act 250, according to Leonard U. Wilson, although he considered it a small victory that the exemption was not extended to the granite and marble industries.[101] In 1994, the legislature amended the definition of "development" in Act 250 to limit jurisdiction over railroad improvements by treating only the land physically altered by the project to be considered "involved land."[102]

Zoning and Act 250 are related, and sometimes at odds with each other. From the beginning, local zoning and subdivision permits enjoyed rebuttable presumption status in Act 250, and local plans were expected to rule the permit process when it came to Criterion 10. In 1994, the legislature allowed development review boards to issue findings on criteria 6 (education), 7 (municipal services), and 10 (town plan), which

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93 John Dooley, *The Judiciary*, in VERMONT STATE GOVERNMENT SINCE 1965, at 187, 229-230 (Michael Sherman ed., 1999).

94 In re BHL, 161 Vt. 487, 491-492 (1994).

95 In re Molgano, 163 Vt. 25, 29-30 (1994).

96 *Id*. at 31.

97 "An act relating to consolidating the Act 250 process and the permitting processes established under the administration of the Agency of Natural Resources," No. 232 (Adj. Sess.), § 29.

98 *Id*., § 30.

99 *Id*., § 35.

100 "An act relating to Act 250 and the quarrying of dimensional stone," 1995, No. 30. *See* In re Catamount Slate, Inc., 2004 VT. 14, ¶ 3.

101 Wilson, *supra* note 30, at 465.

102 "An act relating to railroad lines and Act 250 applicability," 1993, No. 200 (Adj. Sess.).

would be treated as rebuttable presumptions in Act 250.[103] The idea was to strengthen local control.[104]

This act also created the Vermont Environmental Court, abolishing the former ELD.[105] This was not the court that exists today, however. The judiciary's administrative judge was directed to appoint three superior court judges to serve in rotation as judges of the court. The position of environmental judge was converted into a superior court position, and the former judge appointed to fill that slot, after having to reapply.

The failure to confirm three members of the board in 1994 had an impact on the remaining board members in rulemaking and in its decisions. The board proposed new rules in 1995 that would have eliminated participation by materially-assisting parties, replacing them with a new category, "friend of the commission (or board)," with significantly reduced roles in Act 250 proceedings. The Conservation Law Foundation, among others, objected on grounds that this change would make public participation in Act 250 hearings more difficult.[106] The board ultimately rejected the idea of eliminating this category of participant, but when the final rules were adopted in early 1996 the board added a new prerequisite, that Rule 14(B) parties must raise "an issue of public interest not adequately represented by other parties" to qualify for standing under specific criteria.[107]

On the twenty-fifth anniversary of the enactment of Act 250, board chair John Ewing issued a progress report. He announced the development of performance standards for the administration of Act 250, which set timelines for the production of decisions and permits, prepared a standard hearing day schedule for commissions, and suggested other improvements designed to make the process speedier and simpler. He promised greater enforcement and showed the result of the board's success in reducing its backlog.[108] In his introduction, Ewing stated emphatically, "Act 250 is not an anti-growth law. In fact, most feel that it protects our most valuable assets and, with its long term focus, will ensure Vermont's future."[109]

In 1997, the Vermont Supreme Court first approved the board's practice of requiring developers to include projections of prospective population and economic growth as part of the review of large retail stores, such as the Wal-Mart in St. Albans Town, finding support for the practice in the 1973 amendments to Criterion 9(A).[110] That year the legislature also required cell and radio towers twenty feet or higher to be

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[103] "An act relating to consolidating the Act 250 process and the permitting processes established under the administration of the agency of natural resources," No. 232 (Adj. Sess.), § 24 (eff. March 15, 1995).

[104] *Id*. The act provided, "The acceptance of negative determinations issued by a development review board under the provisions of 24 V.S.A. § 4449, 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. § 4449 shall create presumptions only to the extent that the impacts under the criteria are limited to the municipality issuing thedecision."

[105] *Id*., § 38.

[106] Lewis Milford, CLF Comments, June 27, 1995.

[107] Rules of the Vermont Environmental Board, Jan. 3, 1996.

[108] John T. Ewing, Act 250 Progress Report (Jan. 11, 1996), at 3.

[109] *Id*., at 1.

[110] In re Wal-Mart Stores, Inc., 167 Vt. 75, 85 (1997).

reviewed under Act 250. Once the structures were erected, however, future improvements were not to be treated as development or to require amended permits.[111]

In *Munson Earth Moving Corporation* (1999), the Supreme Court admonished the Environmental Board for taking an "unwarranted inferential sidestep" in denying a permit on grounds that the subdivision would endanger public investment in governmental facilities. The board's analysis of impacts as yet unbuilt could be no basis for denial of the permit. "[C]onstruction of the circumferential highway through appellant's land is too speculative," according to the Court, to qualify as an "extant governmental facility."[112]

One year later, the U.S. District Court found no preemption of Act 250 by federal highway laws.[113] The Vermont Supreme Court took the same position relative to federal aviation law.[114] There would be no avoiding it. Act 250 still needed to be respected.

In 2000, the Supreme Court reversed the board in *Mark and Pauline Kisiel*, finding the board mistaken in its interpretation of the enforceability and meaning of the Waitsfield town plan.[115] During the same term, the Court faulted the board for abuse of discretion in refusing to admit certain studies relating to sound measurements, in *Lawrence White* (2000).[116]

The changes to the board and Act 250 in 1994 continued to resonate into the next decade. No more reappointments were challenged after that time, but there was a wariness about Act 250, an unresolved concern that it was still unwieldy.

The Fourth Decade (2001-2010): Structural Change

In a 2001 act, the legislature tried another approach. Reacting to criticisms that the process took too long, a new act authorized any statutory or prospective party to file a request for recorded hearings, to be taped at the commission level and available for use by the board, eliminating the *de novo* hearing previously a central feature of Act 250 reviews.[117] There would be a limit of twelve such opportunities, and no more than three motions per district, until the legislature was able to review the wisdom of the pilot program. The program was repealed by operation of law on September 1, 2004, and was not revived. The experiment failed. No one ever made such a request.[118]

The 2001 act also amended the mechanism for reviewing projects under Criterion 10 by authorizing the board or commission to look to zoning bylaws for assistance in determining the meaning of a town plan, "but only to the extent that they implement or

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111 "An act relating to Act 250 jurisdiction over communication support structure extending 20 feet above the ground," 1997, No. 48. See also, "An act relating to authorizing disbursement of planning assistance to certain municipalities that do not already have an approved plan," No. 94 (Adj. Sess.).

112 In re Munson Earth Moving Corporation, 169 Vt. 455, 462 (1999).

113 Omya, Inc. v. State of Vermont, 80 F.Supp.2d 211 (2000). Nor would Act 250 need to defer to the Vermont Agency of Transportation on matters of limiting truck traffic. OMYA, Inc. v. Town of Middlebury, 171 Vt. 532 (2000).

114 In re Commercial Airfield, 170 Vt. 595 (2000).

115 In re Mark and Pauline Kisiel, 172 Vt. 124 (2000).

116 In re Lawrence White, 172 Vt. 335 (2000).

117 "An act relating to Act 250 appeals on the record and other technical matters," 2001, No. 40, § 5.

118 E-mail from John Hasen, Vermont Natural Resources Board General Counsel, Sept. 8, 2009. Mr. Hasen explained that developers were unwilling to undertake review on the record because it required consent of all parties, which was unavailing.

are consistent with those provisions, and need not consider any other evidence."[119] This part of the act was a direct reaction to the Vermont Supreme Court's holding in *In re Kisiel*.[120] The effect of this act was to give liberty to the board to make rulings on Criterion 10 in spite of the decision of the local planning commission.

The 800-foot rule, previously adopted in 1978 and ratified when the legislature changed the rules into law in 1985, was abolished by the 2001 act, at the request of the board.[121] The rule had encouraged spaghetti lots and strange-shaped parcels to get around the rule. At the same time, the threshold for Act 250 jurisdiction in towns without zoning and subdivision bylaws was lowered from ten lots to six.[122]

In May of 2001, the Environmental Board issued its decision in *Re: Stonybrook Condominium Owners Association*. This case recognized the right of an applicant to limit the boundaries of a permitted project to an area smaller than what was owned, and avoid having to obtain an amendment for a material change, for changes on that part of the tract not within the scope of the project.[123] Material changes of the original permitted project, however, are still subject to jurisdiction

In 2001, the Supreme Court discussed the standard of practice for attorneys in Act 250, on grounds of judgmental immunity, relieving several lawyers of claims against them brought by their own clients, who had violated Act 250 and been fined, on grounds of reliance on their attorney's advice. Justice James Morse dissented, claiming the "failure to advise a client of the risks associated with an action of questionable legality" constituted a failure of the standard.[124]

The following year the legislature passed the Downtown Development Act, limiting the Act 250 review of projects located in downtown development district, which are designated by the local development review board. The act expanded the threshold for review of mixed use or mixed-income housing, depending on the population of the municipality and thereby allowing projects that would formerly have been reviewed by Act 250 to avoid jurisdiction.[125]

This act also provided greater exemptions for farming under Act 250.[126] In deciding whether Act 250 applied, farm land could not be considered "involved land" within the one-acre or ten-acre jurisdictional threshold unless it was actually involved in any activity that triggered jurisdiction.[127]

In *Vermont Verde Antique International, Inc.* (2002), the Supreme Court struck down Environmental Board Rule 3(C), to the extent that it authorized district coordinators to issue opinions without a formal request, finding that the rule exceeded the

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119 2001, No. 40, § 6.

120 *See* In re John A. Russell Corp. & Crushed Rock Inc., 2003 VT. 93, n. 4.

121 2001, No. 40, § 14.

122 *Id*., § 1. Whether the repeal worked is open to discussion, as many subsequent applications with small and large tracts divided into five lot subdivisions escaped Act 250 review.

123 *See* Natural Resources Board's District Commission Training Manual, at http://www.nrb.state.vt.us/lup/publications/manual/stonybrook70523.pdf. The Natural Resources Board suggests this ruling does not apply to subdivisions, however.

124 Roberts v. Chimileski, 2001 VT 158, ¶¶ 9, 22-24.

125 "An act relating to the Vermont downtown development board," 2001, No. 114 (Adj. Sess.), § 6.

126 *See* In re Eustance Act 250 Jurisdictional Opinion, 2009 VT 16, ¶ 18.

127 "An act relating to capital construction, state bonding, and the department of corrections," 2003, No. 121 (Adj. Sess.), § 75. In *In re Eustance*, *supra* note 126, the Court noted that the exemption applies even when land devoted to farming is subsequently developed for otherpurposes.

scope of the board's rulemaking powers as granted by the statute, and invalidating a jurisdictional opinion made by the district coordinator on a quarrying operation.[128]

The definition of "development" changed again in 2003, temporarily exempting the improvement or maintenance of any portion of any statewide system of snowmobile trails, providing that the changes follow acceptable management practices. The exemption applied only to snowmobiles and hiking trails, but not other motorized recreational vehicles. Agricultural fairs and equine events were also exempted in this act.[129]

In *MacInyre Fuels, Inc.* (2003), the Supreme Court ruled that the board erred in including all fourteen miles of a railroad right-of-way as "involved land" with a proposed rail siding project.[130] The Court next reversed the board for refusing a permit for an asphalt plant on grounds that it was inconsistent with the Clarendon town plan, finding the plan insufficiently direct in prohibiting industrial uses in a residential district.[131] Will town plans ever be respected?[132]

In 2004, the legislature adopted the Permit Reform Act.[133] Governor James Douglas made the need for reform part of his 2002 campaign and his 2003 inaugural address. He saw the need to fix "a broken permitting system that has become too costly, duplicative, unpredictable and often times contradictory, not by weakening our commitment to the environment, but by strengthening our commitment to common sense." The legislature responded.

In the process, it abolished the Vermont Environmental Board and Water Resources Board, consigned their adjudicatory powers to review appeals of district commissions to the Vermont Environmental Court, created a second environmental court judgeship, and established the Natural Resources Board, with powers to enact rules through the Water Resources Panel or the Land Use Panel.[134] Rulemaking for Act 250 is now the duty of the Land Use Panel; rulemaking for all water-related permit programs is for the Water Resources Panel. The chair of the board has administrative control over the district commissions, and the Land Use Panel serves as the enforcement wing for Act 250. All district commission appeals are made to the Vermont Environmental Court.[135]

This act also created a project scoping process for applicants, which required the

Department of Environmental Conservation or district commission to issue a project review sheet, naming all of the permits each applicant will need to file, holding a scoping

128 In re Vermont Verde Antique International Inc., 174 Vt. 208 (2002).

129 "An act making appropriations for the support of government," 2003, No. 66, § 217c.

130 In re MacIntyre Fuels, Inc., 2003 VT 59, ¶ 1.

131 In re John A. Russell Corp. and Crushed Rock Inc., 2003 VT 93, ¶ 19.

132 In 1993, the Environmental Board denied a subdivision permit because the town plan prohibited building on slopes of more than 20%. Findings of Fact, Conclusions of Law, and Decision, Dorset/McNamara Associates, #80458-EB (Jan. 22, 1993).

133 "An act relating to consolidated environmental appeals and revisions of land use development law," 2003, No. 115 (Adj. Sess.).

134 *Id*., § 48.

135 The Environmental Board's many years of work live on. The permit reform of 2004 ensured that. Section 8504(m) of Title 10 now provides, "Prior decisions of the Environmental Board, water resources board, and waste facilities panel shall be given the same weight and consideration as prior decisions of the environmental court."

meeting where parties, including adjoiners, may learn the basics of the project, and where the applicant answers questions from the public. The process is voluntary.[136]

The opportunities for adjoiners and others to participate in Act 250 proceedings were expanded through Act 115. Adjoiners are now parties of right, and have a right of appeal, including appeals to the Vermont Supreme Court, but only to the extent of their interest. "Friends of the commission," which are nonparties, may participate by filing of memoranda, proposed findings of fact and conclusions of law, and argument on legal issues, but may not offer evidence without permission of the commission or court.[137]

The Environmental Board gradually finished its business. The Court vacated the board's order in *Catamount Slate, Inc.* (2004) because the board had reconsidered a quarry's exempt status after receiving a petition from three neighbors, none of whom were subsequently determined to be entitled to notice, and years after the quarry had filed its registration with the board.[138] The board was overruled again in *Huntley* (2004) for trying to assert jurisdiction over a reclaimed gravel pit with an expired permit.[139]

A commitment to downtown and new town center development led the legislature to establish a "growth center" designation to promote "smart growth principles" in 2004.[140] Housing projects for mixed-income housing or mixed use were given the same exemption from Act 250 review as designated downtown development districts were in 2002 and the jurisdictional thresholds were expanded. Subsidized, affordable housing enjoys a broader exemption under this law.

The jurisdiction of Act 250 was further restricted in 2007 when the legislature enacted a law to encourage greater broadband and wireless access, raising the minimum height at which the law comes into play from twenty feet above the ground to twenty feet above the highest point of an attached, existing structure or fifty feet above the ground, if a new support structure is involved and placing jurisdiction in the Public Service Board over the review of cell towers that are built within three years of three or more facilities, rather than the Environmental Board.[141]

In *Green Crow Corporation* (2007), the high court reversed the Environmental Board's denial of a permit to conduct logging activities below 2,500 feet, even when logging above that elevation justified jurisdiction.[142] In 2008, the Supreme Court reversed the board's decision to deny a permit on grounds that a project failed to conform to the town plan. The plan was too ambiguous and uncertain to be enforced.[143] In 2009, the Court again reversed the board, finding it had overreached in requiring an Act 250 permit for an extension of an electrical distribution line.[144]

In another act from 2008, the legislature explained how a policy of higher Act 250 thresholds, "coupled with strengthening criteria related to scattered development, rural

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136 *Id.*, § 6.

137 *Id.*, § 55. Act 115 included a thorough revision of Chapter 117 as well.

138 In re Catamount Slate, Inc., 2004 VT 14, ¶¶ 1, 15-16 (court reversed).

139 In re Huntley, 2004 VT 115. ¶¶`1, 10.

140 "An act relating to creation of designated growth centers and downtown tax credit program," 2005, No. 183 (Adj. Sess.).

141 "An act relating to establishing the Vermont telecommunications authority to advance broadband and wireless communications infrastructure throughout this state," 2007, No. 79, §§ 13, 17.

142 In re Green Crow Corporation, 2007 VT 137, ¶ 11.

143 In re Appeal of Times & Seasons, LLC, 2008 VT 7, ¶ 23.

144 In re CVPS/Verizon Act 250 Land Use Permit Numbers 7C1252 & 7C0677-2, 2009 VT 71, ¶ 9.

growth areas, transportation and settlement patterns," can "better achieve the state's planning and development goal of maintaining Vermont's historic settlement pattern of compact village and urban centers separated by rural countryside."[145] That law also limited jurisdiction over demolition of historic buildings if the Division for Historic Preservation approves the destruction.

Act250'sMiddle Age

It was the crown jewel when it was first adopted, the crystallization of an environmental consciousness and conscience: Vermont's Act 250. It put us in the front rank of the environmental movement, unique among other states. Forty years later, it has lost its dewy innocence. Attacked at first as unworkable and in every decade for inefficiency, it has survived more close calls than any comparable law. While it is still respected, it has begun to show its age. Some environmentalists rue where it has headed.

Perhaps that is the reason the story of the birth of Act 250 is so often retold. That is our creation myth. Repeating how Vermont turned back a wave of unwelcome, unplanned subdivision development just in time allows us to revive our inspiration.

Act 250 has become a tool for social and economic policy in never-intended ways. Like the tax code, its exemptions have multiplied. Relief from Act 250 has become a tool to promote affordable housing, downtown development, and other political causes, such as the use of compost in Burlington's intervale.[146]

Vermont is very different now than it was in 1970. Towns are far more sophisticated, and planning has become professional, and smart. The economy is sagging this year, but growth is still an issue. Over time, Act 250 has changed because Vermont has changed. The stresses of development are different now. Vermonters have learned to use Act 250 in those decades. The process of applying for and opposing permits for large development has become systematized, efficient, and in some cases preordained. It has also become accessible. The decisions of the Vermont Environmental Board and environmental court are available on the net, back to 1990.[147] The e-index clues parties to decisions all the way back to 1970.[148] The Natural Resources Board's website is comprehensive and comprehensible. District coordinators are the heart of Act 250, the bridge between parties and commissioners, avoiding surprises, keeping the process on track.

Act 250 is both a legal and political process. It is an idea that became a law that grew into an institution, with devoted people to administer it, precedents and case histories, and rules. For its entire existence Act 250 has struggled to make sense of itself, in part because it has had to adapt to survive. Act 250 changes and evolves with each new appellate decision or legislative reform. It has been revised almost as often as educational theory. What other law has had to be saved so often?

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145 "An act relating to municipal planning, creating Vermont neighborhoods, encouraging smart growth development, purchasing of mobile homes, closure of mobile home parks, and landlord-tenant relations and state residential lead-based paint poisoning prevention," 2007, No. 176 (Adj. Sess.), § 1a (findings).

146 In 2008, an act was passed exempting some composting facilities holding existing permits to avoid Act 250 review and established a moratorium on enforcement until July 1, 2010. "An act relating to the cleanup of Lake Champlain and other state waters," No. 130, 2007 (Adj. Sess.), Sec. 10.

147 *See* http://www.nrb.state.vt.us/lup/decisions.htm.

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149 http://www.nrb.state.vt.us/lup/publications/2008%20annual%20report.pdf (accessed September 5, 2009).

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, chaired by VNRB Chair Diane Snelling, 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

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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.

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.

"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

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

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 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