Conserving and Restoring Vermont's Landscape: Reflection On the Goals of Vermont's Act 250

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Summary:

Vermont's citizens experience their state as one of unique pastoral beauty. That beauty is composed of identifiable landscape features including mountains, lakes and river valleys, farm lands, forests, scenic roads and compact towns and villages. These landscapes support and are shaped by human hands – the mountains harbor wind turbines, ski areas and radio towers – the lakes and rivers welcome swimmers and fishermen, the farmlands host a variety of agricultural activities and forests harbor recreation and lumber production and the compact towns facilitate social and political life. Although the workings of water, mountain, field and forest ecosystems underlie these landscapes, but human hands have also impinged on them in various ways.

Act 250, along with other laws both facilitate and seek to control the activities taking place in its landscape both though private actions and federal, state and local laws. Specifically, Act 250, its companion regional and municipal planning laws, as well as other legislation, i.e., downtown and energy laws, agricultural and forestry subsidies, water pollution treatments, subsidize or prohibit, modify or permit certain development activities in order to promote the health, beauty and economy of Vermont's citizenry by preserving, conserving and enhancing their landscape.

The provisions of Act 250 and its companion laws intended to nurture and protect Vermont's pastoral landscape features have been expanded and obscured by the pursuit of a laundry list of goals and objectives which hide the law's central mission – the preservation and conservation of Vermont's pastoral nature. Thus, Vermonters lose sight of the very landscape which they deeply cherish and which the law was designed to serve. Of equal concern, Vermont's Act 250 has relied primarily upon regulatory laws, primarily upon major developments and subdivisions and leaving to other laws the task of affirmative support of the landscapes through pursuit of non-regulatory alternatives. This essay reviews in some detail the myriad of goals of Act 250 and its companion laws and recommends their reorganization in light of the major landscapes of Vermont and the need for better non-regulatory support of the landscapes, in part through expanded countryside planning and smart growth measures.

Introduction

Everyone agrees that Vermont is a beautiful state – green mountains, river valleys, forests and lakes, shaped in the past by geological forces, shaped in the present by its frigid winters, thawed by its emerald green summer and decorated by its brilliant autumn. But Vermont is also shaped by its people; their farms, compact villages, and urban areas; its onrushing "soft energy" program; its' mountains are sculpted by visiting skiers and energy entrepreneurs. Less obvious but no less influential, to quote a famous Frenchman, Vermont is shaped by "the spirit of [its] laws". One such law is Vermont's "Act 250." Enacted in 1970, the year of the first Earth Day, Act 250 established a mechanism for state review and approval or denial of major developments and subdivisions in Vermont. Like its national counterpart, the National Environmental Policy Act, (NEPA) adopted in Washington D.C. at the same time, Act 250 authorizes the assessment of the environmental, aesthetic, historic, economic and social impacts of major projects. Unlike NEPA, Act 250 defines these impacts in some detail by statute and employs the definitions of these impacts as criteria to determine whether a permit for development should be issued. At first, this permitting system was also to be guided by a process of statewide planning consisting of a plan of land capabilities, a policies plan (misnamed "a capability and development plan") and a (never adopted) state land use plan. In addition, municipal and regional plans were to be consulted in assessing proposed developments. The Act embodied and envisaged robust citizen participation, not only in the planning process, but also in the composition of the district commissions and the Environmental Board, the latter of which was to review the proposed projects upon appeal from the District Commissions. Science- based and other technical considerations were introduced into the approval process including evidence gathered from other federal and state agencies or from municipal and regional plans. (In later years, the Environmental Board was abolished, and an "Environmental Court" was established to hear appeals from the decisions of the District Commissions.)

It is my contention, supported by an extensive study of the history of this law, (See Brooks et al. *Towards Community Sustainability (Vols.I,II, hereafter referred to as "Treatise"))* that this entire law was animated by a pastoral vision of Vermont and the threats originally perceived to the object of that vision. The history of Act 250 reveals a progressive recognition of the importance of Vermont's pastoral landscape. Its capability and development plan; the criteria, including those protecting its rivers and streams, historic sites, aesthetics, forest and agricultural land; amendments strengthening the ability of municipalities and regions to plan for its downtowns and surrounding landscape, the recent adoption of "smart growth" principles and a refocus upon downtowns, and the accommodation of the transition to a soft energy economy are elements in Vermont's continuous effort to conserve its farms and forests, preserve its historic compact towns and villages, manage its scenic roads, river corridors, mountains and valleys.

Twenty years ago, when I and my students completed the study of Vermont's "Act 250", I described resulting volumes as "the longest work written on the shortest law". Vermont's Act 250 is indeed a very short law, but, like another Vermont product, Robert Frost's poetry, its simplicity hides a daunting complexity which invites, then and now, extended commentary. Act 250 is appropriately simple because its home, Vermont, is occupied by a small population, and many of its residents are attracted by a quiet life pursued on its farms or in its compact towns and villages. A pastoral vision of a

simple life, whether feasible or simply a nostalgic dream rests in the origins and at the heart of this remarkable environmental law.

But, of course, modern life is not quite that simple. Vermont is part of a large modern megalopolis, laced with thruways to and from the major cities of Boston, New York, Montreal and Quebec. The farms and forested lands, the green mountains, even the villages, or at least their "products" (food, lumber and recreation products), are on sale in the market place and hence are susceptible to market forces. At the same time, modern technology has become part of all aspects of Vermont life. The political scientist, Frank Bryan, documents how technology has infused its apparent bucolic faming community in *Yankee Politics in Rural Vermont.* Vermont's "cities", Burlington and Rutland have always been moderate-sized, although they remain the major source of population growth in the state. In the course of a half century, at least some of its villages have grown to become modest sized towns. Since 1970, many well-educated residents have arrived in the state, and joined the newly educated sons and daughters of native Vermonters to bring with them urban ways of life and expectations. New industries and an array of non-profit institutions including colleges, law school and hospitals have also arrived. As a consequence of these and other changes, Vermont has become a *complex pastoral political community* – a "modern arcadia". As a consequence, to retain its historical countryside character, it must accommodate and control the institutions which are part of its surroundings – its economic markets, the larger political community which surrounds it, the social processes of urbanization, and the influences of modern science and technology.

The resulting clash between Vermont's pastoral dream and modern urbanizing reality was exhibited in 1970 when Act 250 was adopted. A ski area and land developer proposed to build a large development near a small Vermont town whose residents felt both tempted and overwhelmed by the prospect of such a proposal. Awareness of the social, economic and environmental consequences of such a development was heightened by the national mood of Earth Day, in which so many of our nation's citizens were acquiring a new consciousness of the limits placed by nature upon human economic activity. This event and other emerging threats led a conservative Republican governor to propose, and a Republican legislature to enact Vermont's pioneering legislation designed to protect its pastoral landscape. [This event exemplifies the conclusion of Vermont-born philosopher John Dewey, who, in an elegant little book, *The Public and its Problems,* suggests that the public emerges and is organized in response to citizens who undertake ventures with indirect consequences extending beyond those which they originally envisage].

Act 250 is now almost a half century old. In that half century, it has experienced a tumultuous history and undergone many changes. [Many of these changes I have documented in *Toward Community Sustainability* as well as other works cited in the Appendix]. In 2017, the Vermont legislature decided to evaluate the workings of Act 250. In the words of the legislature:

> "The General Assembly establishes a Commission on Act 250: "The Next 50 Years" and intends that the Commission review the vision for Act 250 adopted in the 1970's and its implementation with the objective of ensuring that, over the next 50 years, Act 250 supports Vermont's economic, environmental and land use planning goals."

Evaluating Vermont's Act 250 requires a clarification of its purposes prior to determining whether and to what extent the purposes have been met. Such a clarification is not easy. To outline the broad vision which animates the law is no easy task, requiring both historical and legal interpretation. Describing the multiple goals which can be found in its capability and development plan, its criteria-goals, regional and municipal planning goals, its accompanying downtown and energy legislation, and the objectives of other federal and state laws which are indirectly incorporated in the law is a daunting task. Assessing if and how these specific goals advance the broader goals of protecting its ecosystems, maintaining its sustainable communities, and supporting its pastoral ideals is made difficult since Act 250 does not explicitly set forth the relations among the specific goals in light of these broader visions. Complicating matters further are subtle changes in the law's objectives over time; these changes are partly the result of statutory amendments, partly the result of important court or Environmental Board decisions which reinterpret the goals of the law. The effect is a complex and perhaps somewhat ponderous legislative scheme serving numerous social and economic goals that may conflict with one another and which tend to obscure the original underlying goal of protecting Vermont's pastoral landscape.

I have chosen to evaluate the goals of Act 250 by exploring its fundamental premises: (1) conserving, preserving and enhancing Vermont's complex pastoralism is Act 250's principle purpose, [although other purposes, such as protecting ecosystems, insuring sustainability, achieving growth control are also important] ; (2) this pastoralism is composed of major landscape elements: mountains, rivers, lakes and streams, farms and forests, compact towns, scenic roads; (3) this landscape is a working landscape shaped by its residents and visitors in pursuit of their health, recreation and economic well-being; (4) selected major developments and subdivisions and consequent growth are sometimes deemed to be the primary threat to Vermont's landscape and to the health, welfare and recreation activities of the dwellers of this landscape; (5) regulatory measures are the principal means for controlling that growth.

I conclude that time has revealed these premises to be only partly correct. They fail to acknowledge or control the full force of population and economic growth, technology and affluence, which constitute significant forces at work in Vermont as elsewhere. I conclude that Insofar as these forces affect changes in land use, they can only be controlled by a variety of regulatory and non-regulatory measures, including tax policy, infrastructure programs, public land ownership, appropriate economic policies, and other regulations explicitly designed to support the major elements of Vermont's landscape. Since, until recently, Act 250 has been largely limited to regulatory devices, (although more recent amendments have added other tools), Act 250 regulatory review has been unable to control many of the major forces shaping the Vermont landscape. Laws other than Act 250 which support these landscapes are required for the task. As I and Robert McCullough and his colleagues have documented in my Treatise (Vol. II, Chapter IV and their history of Vermont's conservation measures, *Act 250 itself should be viewed as but one part of a suite of conservation measures adopted over the past century. In assessing Vermont's Act 250, these other laws must be taken into account.*

To support these conclusions, I propose to address the following questions:

> (1) What Is the pastoral vision which animates Act 250? [This question will be explored in Part I.]

(2) What are the landscape elements of this unique working landscape and what changes are taking place in them? (Part II)

(3) What are the more specific goals of Act 250 and what are their relationships- one to another? [This question, which will review the goals of the capability and development plan, the criteria-goals, the goals of municipal and regional planning, the state agency goals, the town development goals and energy goals will be explored in Parts III-VIII]

(4) How is Act 250 an important part of a Vermont's democratic community? [Part IX]

(5) What changes in the law might be considered to insure better articulation of Act 250 goals in the future? [This question will be addressed in Section X]

In addition to discussing these matters, I have appended a brief bibliographical essay which identifies some of the works which inform this discussion. Two omissions in this discussion are important. I do not propose to discuss specific decisions which implement the goals of Act 250. Nor do I propose to explore the on-the-ground results of specific decisions. Two decades ago, I, my colleagues, and students did undertake to trace these decisions the results are set forth in the *Treatise, Volume I: Toward Community Sustainability*. That volume and its accompanying volume is now out of date. To trace such implementation after another twenty years requires careful analysis of the more than 40 odd goals in all aspects of the law. I lack the time and resources to conduct such an inquiry.

Anticipating some of my conclusions here, *despite concluding that Act 250 remains an important, indeed, an invaluable law*, I have found the following limitations:

1. Omission of Key Landscape Features

The myriad of specific goals in the current Act 250 is only partly arranged to advance the vision of a complex pastoral community. The many major goals of Act 250 include references to a few landscape elements – lakes, rivers and wetlands, historical sites, special natural places, the aesthetics of the landscape, agricultural and forest soils – but these goals omit major landscape elements such as the Vermont mountains, downtowns, and scenic roads.

2. *Failure to Organize the Statutory Goals According to Landscape Features*

The goals of Act 250 are not fully developed, harmonized, nor organized into a coherent statutory strategy for pursuit of the pastoral vision of Vermont's landscape and its landscape elements and they are not clearly set forth for the public as the principal goals of Act 250 and its companion laws. I have proposed reorganizing amendments to Act 250 to remedy this problem.

3. *Failure to Mandate Municipal Planning*

The content of some of the municipal and regional plans, incorporated in Act 250's Criterion 10, [VSA: 10; 6086 (a) (10)] reflect Vermont's pastoral nature,

and, when the legislatively authorized smart growth strategy is included in those plans, there is some approximation of a set of countryside plans and policies. Unfortunately, many municipalities have elected not to undertake such planning. Such planning should be mandated and, if necessary, financially supported. And when planning is undertaken, clear characterization of the landscape it not set forth.

4. Failure to Integrate State Agency Planning with Act 250 Planning and Regulation

State agencies have conducted careful planning of Vermont's lakes and rivers, agriculture, forests, downtown development, scenic roads, and energy transition. One notable omission is the comprehensive study and planning of Vermont's mountain landscape, although some mountain related studies have been completed. I have been unable to find a comprehensive study of scenic roads embracing dirt roads, formally designed scenic roads and scenic vistas from non- scenic roads. It is necessary to forge better linkages between this planning and Act 250 regulations, as well as regional and municipal planning.

5 Failure to Link Regulatory and Non-Regulatory Measures

Even when pastoral plans and regulations are adopted as part of Criterion 10 in Act 250, the law, as primarily a regulatory law, fails to offer sufficient non-regulatory support of the major components of a pastoral community:- *e.g.*, support for the transitioning agriculture industry; plans and regulations for all of Vermont's mountains to accommodate the transition to soft energy; full support for sustainable forestry; protective corridors for Vermont's rivers and lakes; containment and economic strengthening of Vermont's compact towns and villages. Regulatory and non-regulatory measures for the impact of global warming upon each of the landscape features may be needed. For such non-regulatory support, the statutory enabling of an array of strengthened non-regulatory planning, laws and resources is needed.

6. *Shortcomings in the System of Democratic Participation*

The principal shortcoming is that citizens under Act 250 do not have an opportunity to review Vermont's landscape and its elements as a whole, when development decisions are made and reviewed, rather than simply reviewing impacts of specific projects.

I list these limitations as well as others in the text below to propose strengthening the law, not to provide ammunition of the enemies of the law!

Even if one limits oneself to an acceptance of Act 250's regulatory goals, an assessment of the *expected* implementation of those goals in light of careful studies of implementation, (See Sabatier et al., *Implementation and Public Policy)* suggests that the law, as currently structured, may not be easily or fully implementable. These scholars would find a wild proliferation of goals, the absence of a sound

causal theory identifying the important major factors which interfere with the achievement of the Act's policies, limits in the implementation process established to achieve its goals, (partly due to the unorganized and conflicting plurality of actors), questions regarding the legitimation of its leadership structure, the current continuing fragmentation of its constituency, and changes in socio-economic conditions over time – changes which may create problems unaddressed by the law. The presence of some or all of these factors may lead one to anticipate problems of implementation. *Only careful case studies will confirm or deny such an expectation.*

If this expectation is confirmed, and implementation problems are found, legislative changes may be needed to simplify and clarify Act 250's goals, but other changes may also be needed. These changes would require re-examination of whether a focus upon permitting only major developments and relying upon implementation of municipal and regional plans is an adequate means of protecting Vermont's statewide landscape; whether there is adequate integration between the plans and their enforcement; whether there is a legitimately recognized leadership with sufficient authority needed for such an important program; whether a coherent supporting constituency is in place; and whether socio-economic changes over the past half century have made the present Act more or less relevant. Such a case-based re-examination may suggest the need for statutory amendments to address these problems. *I have not addressed these implementation issues in this essay, which is only devoted to reflections regarding the goals of Act 250.*

I. Vermont as a Modern Arcadia

Introduction

> ''just then, they came in sight of thirty or forty windmills that rise from that [fair] plain. and no sooner did Don Quixote see them than he said to his squire – fortune is guiding our affairs…do you see the yonder forty or fifty giants…this is righteous war…" "What giants?" asked Sancho "take care sir – when they are whirled about by the wind, they turn the millstone."
>
> - Cervantes, *Don Quixote de la Mancha*

This quote seems appropriate to the recent Vermont discussions of Act 250 and other regulation of noise from wind turbines, and, perhaps also appropriate at this moment in thinking about Act 250 in general. Does Act 250 protect the 'fair plain'? Can it cope with the giants of modern life? malls? wind turbines? ski areas? cell towers? Is the Act, like its lovers, (I am one of those lovers), tilting at windmills? and if so, as the Spanish philosopher Miguel Unamuno argues, what's wrong with tilting at windmills? The "fair plain" to which Quixote refers is roughly equivalent to a pastoral Arcadian landscape, in which "the soft veil of nostalgia …hangs over our urbanized landscape …a vestige of the once dominant image of an undefiled green republic, a quiet land of forests, villages and farms dedicated to the pursuit of happiness." This definition of "pastoral" taken from Leo Marx's book, *The Machine in the Garden,* traces its ancient lineage to Theocritus and Virgil, and notes that its modern American version, found in Frost, Thoreau, Melville and other transcendentalist writings, is one which recognizes the tension from placing the machine in the garden – whether the advent of the railroad or, as we have learned in Vermont, the modern thruway. But, while recognizing the tension, just as

Cervantes did, Leo Marx in his book, *The Machine in the Garden* offers one answer to this tension and to my initial questions about modern life in Vermont:

> "So" say the parable makers, 'is your pastoral life whirled past and away? We cannot deny the fact without denying our history... but the ancient ideal still seizes the native imagination. even those Americans who acknowledge the fact and understand the fables seem to cling, after their fashion to the pastoral hope."

And Leo Marx concludes that 'in America, hopefulness has been incorporated in a style of life, a culture, a national character" and, I might add, the Vermont character. Perhaps Act 250 is "a law of hope!" Leo Marx does not find a solution to the inevitable withering away of pastoral life in his study of the writings of modern American novelists; instead he suggests that they acknowledge the power of the counterforce against pastoralism, and in doing so, introduce us to the need for a "complex pastoralism which acknowledges the reality of history." I call Vermont's pastoralism, 'a complex pastoralism" - a "modern Arcadia"

Since pastoralism is in decline in Vermont, (and the statistics on the decline of farming appear to bear this out), the question becomes whether the pastoral past of Vermont remains important and whether a future pastoralism is feasible. The history of Vermont, which still has a rural countryside, which remains visible in so many ways, may suggest the need to preserve our past and honor the traditions which lingers in an admittedly reduced form. To the extent that those traditions are practiced in the present, their recognition may supply the impetus to resurrect them in a more viable form in the future. In short, recognition of Vermont's complex pastoralism, whether past, present or future, leads to questions about whether we should accept the decline of the pastoral life in Vermont. Let me examine these questions.

The Questionable Assumption of Simple Pastoralism

Leo Marx would suggest, (and many others would agree), that Act 250 faces a struggle between the machine and the Arcadian garden or between modern life and Vermont's "sense of place". In this view, the struggle facing Vermont and this remarkable law seems to be a problem with unsatisfactory solutions. These solutions appear to be either banishing the machine, or capitulating to modern urban life, or simply striking an uneasy balance between the two. To be sure, each of these solutions have been tried in Vermont from time to time – the defeat of the Green Mountain Parkway in the 1930's or circumferential highway around Burlington more recently - come to mind as acts of banishment. On the other side of the ledger, the acceptance of the interstate highway system may be viewed as capitulation. Act 250 approvals of malls subjected to all kinds of interesting conditions, may be instances of striking an uneasy balance. Most of the Act 250 decisions appear to follow this route, (since most permits are granted, many with conditions), and perhaps this "balance" is the best that we in Vermont can do. But it is safe to conclude that the underlying assumptions of Act 250 envisage more than pursuit of these pragmatic options. The law is an effort not to balance but to reconcile the machine and the garden in a vision of a sustainable complex pastoral community – a modern Arcadia.

A start towards a reconciliation of technology and nature in Vermont may be based upon questioning two assumptions which underlie the "struggle thesis" – that is, the thesis that pastoral nature and modern technology are locked in a struggle. If, on the one hand, our pastoral nature turns out not to be not unmediated view of Elysian fields and farms, gurgling streams and mirrored lakes, nor

mountain “gloom and glory”. To be sure, in the words of Raymond Williams’ marvelous The *Country and the City,* “anyone who has lived in the country for a time can experience the unmediated nature: in an immediate awareness of birds, trees and shapes of land”

But despite this undoubted truth, as William Cronon, in his *Changes in the Land,* has suggested, the discipline of historical ecology yields the awareness that nature is not only the object of our unmediated perception, but is a “nature” has been shaped by our actions in history, {as any Vermonter knows who has walked through Vermont’s second growth forests). And, perhaps many modern nature writers and philosophers have demonstrated that our views of nature are, at least in part, “social constructions”, (to adopt Neil Everdon’s felicitous phrase which entitles his book, *The Social Creation of Nature*). In C.S. Lewis’s terms:

> “We reduce things to mere nature in order that we may conquer them. We are always conquering nature [in thought as well as action] because nature Is named for what we have, to some extent, conquered.”

On the other side of the ledger, human action and making – technology – if you will - seems “artificial” and “invasive” to many, but not to everyone. it has been noted that technology is merely an extension of “hands end”. By “hands end” is meant that any human act that makes a mark on any “outside” world also makes that world an extension of the human being who guides the hand. In other words, the world that we make through technology is humanity extended – “hands end.” As David Rothenberg notes: “a part of human essence is evident in the things we build, create, and design to make the earth into <u>our place</u>’. (Rothenberg, *Hand’s End*). Hannah Arendt has pointed out that an important part of our home is the things we make. (Arendt, *he Human Condition).* To offer a prosaic example of this truth, as mentioned above, Vermont’s Frank Bryan in his study of politics in rural Vermont describes in detail how technology has already invaded and shaped the agricultural activities which support our pastoral farms. (Bryan, *Politics in Rural Vermont)*

What all of this leads to is the conclusion that our environment is a “working environment” reflecting human action and technology as well as “nature”. Our pastoral environment is the product of human action, shaped and supported by the way we live, pursuing our health, recreation and welfare, including, of course, the economics of our lives. In some way or other, it must be a sustainable environment – one which allows us to maintain a way of life over time. Raymond Williams has put it best:

> “A working environment is hardly ever [just] a landscape. The very idea of a landscape implies separation and observation. …in any final analysis we must relate these histories [of landscapes] to the common history of the land and its’ society, [community]” (my interpolations in parentheses.]

But we share, work and live in that environment, we are in communities in which we share some of its perceptions of the environment as well as the values which arise from those perceptions and we also recognized the threats to those values. In sharing these values, we in Vermont enjoy some degree of autonomy from the megalopolis which surrounds us. We participate in shared ways of life with control over at least some of the major decisions in our public and private lives. In short, in the case of Vermont, we have at least modest autonomy to share in a complex sustainable pastoral community.

"A working environment", "sustainability" and "community" are now buzzwords, but they also represent fundamental truths. Given this admittedly philosophic preface, we can now clarify the premise of Act 250.

> *To facilitate of the construction and maintenance of a community with a sustainable working environment through conservation of farm and forest lands as well as energy; through preservation of endangered species, special natural areas and historic villages; through prevention of air and water pollution, and by insuring a social reciprocity of reasonable burdens of educational and municipal costs.*

Given this premise, when we invite the malls, wind turbines, cell towers, highways into our lives and communities, we must weave them sustainably into our environment which we share and have already partly constructed in the past. Once accepted into our lives, these works also become part of our history. There are many histories of Vermont and Act 250; some are part of the broader history of New England's environment, or, more specifically, Vermont's political and planning history. I have listed some of the histories in my appendix.

The Four Stages of Act 250's History

Pursuing my own account of this past, I would like to identify four stages of this history. In the first stage, Earth Day to 1988, the focus of Act 250 was upon the protection of the environment – here, after the first celebration of Earth Day, citizens and their lawyers contested major developments which appeared to threaten the environment. Some of these developments were stopped, but the overwhelming number of them were permitted - some only after being reshaped by the permitting process. Meanwhile, outside the direct purview of act 250, federal and state agencies, especially EPA, the U.S. Forest Service the U.S. Department of Agriculture and the Vermont Agency of Natural Resources implemented a vast number of technical federal and state mandates with detailed rules to protect the air and water. These are set forth in Volume II, Chapter IV of the *Treatise,* Chapter I of Brooks et al. *Law and Ecology* and the articles by Paul Gillies, cited in the Appendix). In this first stage of Act 250, It was these environmental bureaucracies which the played the major role in the control of pollution in Vermont. Although their regulations curbed pollution which affected the rivers, lakes, airsheds, forests, and agricultural lands, they did not view this environment as a system of landscapes which are part of Vermont's working environment, but rather as an objective nature best described in the language of science and law. And, although some of these agency actions were coordinated with Act 250 permitting activity, it would not be unfair to say that each of the major natural landscapes was largely regulated independently of each other based upon different media -air, water, land.

If the environmentalists and environmental bureaucrats led the first round in Vermont's Act 250 history, it was the land use planners who assumed a major role during the second stage, in which, with the adoption of "Act 200," regional and local plans were prepared. Whether these plans were adequately formulated and implemented is a question which will hopefully be evaluated under the Act 47. The upside of this planning effort was that the relationship between the various environmental programs pursued by federal and state agencies, which, when combined with the values and decisions in Act 250 could, in theory, be organized and integrated spatially and temporally into plans designed to protect landscapes. In addition, over time, with further amendments, the interrelationship between the rural environment and the towns might also became an important focus of planning for peripheral

sprawl. The downsides of this municipal effort were that many localities refused to participate and statewide interrelationships between and among major landscapes and human activities with statewide implications were not integrated in a statewide perspective nor were statewide problems addressed as part of any statewide plan.

In the third stage, the first years of the new Millennium, the lawyers took the lead and successfully urged the rearrangement of the institutional structure of Act 250. The elimination of the citizen based Environmental Board and the establishment of an "Environmental Court" as well as changes in procedure resulted. This reform in effect "legalized" the Act 250 process and, in various ways, may have diminished the role of citizens. *More significant to my mind, the new process turned the appeals process inward, making it less visible to the citizenry at large*. To be sure, the proponents of this change would argue that they made the appeals process "less political" and more efficient. However, the question is whether, in doing so, the reforms diminished the statewide public visibility and legitimacy of the appeals process and, diminished the possibility of citizen participation and education through the more open processes of the Environmental Board decision making. Such a diminution may have weakened the sense of community which should animate Vermont's approach to its environment. (This third stage of "the legalization" of an initial citizen-based program may illustrate a more general law of institutional change at work. Philippe Nonet, in a classic study, (*Administrative Justice]* of the history of national Workman's Compensation law, which was originally a citizen-based law but was similarly "legalized" over the years, increasing the role of lawyers and eliminating citizen participation. For a deep and persuasive critique of "legalism" in general, see Judith Sklar's *Legalism).*

The fourth stage of Act 250 arrived with the 2006 reforms which responding the municipalities, focused upon Vermont's towns and the need for housing; in the process of helping the towns, the 2006 reforms imported a legislative vision of Vermont's landscape as a whole, ("smart growth") complete with towns, villages and growth areas, nestled in the countryside and requiring planning, controls and non-regulatory support to maintain the landscapes pastoral character. The significance of this most recent major reform is that it explicitly reinstated attention to the Vermont landscape.

The Next Stage

Given these four stages of the history of Act 250, what is the next stage? In fact, what this next stage will be is the question facing the participants in Act 47 who now must evaluate Act 250 and recommend its future. Evaluation of Act 250 at this time makes sense. *With a pause in population growth in the state, full employment in the state as well as modest, if limited economic growth, a caesura in the movement of larger forces within the state has resulted. This pause allows for a thoughtful review of the Act, its strengths and weaknesses. Fortunately, there are now a plethora of recent studies and plans to be consulted in such an evaluation.* (I have not listed all of these studies here, but I mention a few of them below and Sharon Murray has listed many of them in her fine history of Vermont planning).

At the same time as this pause in population takes place, the state faces certain important changes and these planning studies document changes which include the following: global warming, a stasis in the growth of key economic sectors; continued decline in parts of Vermont's agricultural economy; decline in the forest industry; statewide energy transition; continued problems with uncontrolled residential growth; serious growing inequalities of wealth and income; significant aging of the population; shortage of affordable housing; and persistent water pollution problems.

These changes as well as the trends which underlie them are part of a slow transformation of Vermont's economy. I argue in my admittedly outdated treatise that over the past half century, there is clearly a decline in Vermont natural resources economy, a rise of a new service economy, continued urbanization, especially in and around Burlington, and the growth of the federal, state and local government bureaucracy. Many of these changes have implications for Act 250- implications which I briefly listed in my treatise (Towards Community Sustainability: Appendix: Vol 1) , and include pressures of small business growth on strip development, land use demands for services provision, decentralization of economic activity, improvement in communications increased affluence and demands for environmental amenities, increased provision of non-market goods and services, and changing work status of many adults, To understand the implications of these changes for Vermont, it is necessary to ask and answer another questions: viz, what is the implication of these changes for the working environment which underlies the original act 250? Let me suggest some possible implications.

The Implications of these Changes

It seems to me that the current trends in traditional agriculture, mining, forestry and tourism imply an overall decline in the natural resources economy which has made up the working environment underlying act 250. If this conclusion is accurate, the state faces several alternatives. First, the state might provide increased public support for these declining activities or offer direct support to maintain the environment currently supported by these activities. (The danger here, of course, is that the cost of such support may be significant. Moreover, through such support, the state might create a "welfare state for the environment" and for selected industries, propping up failing enterprises. Second, the state and the private marketplace might seek to support the substitution of a new economy over time to replace the present declining natural resources economy. It seems to me that this is what the present *Vermont 20-20 Economic Plan* is proposing. The question then becomes: is such a new economy feasible and does this substitute economy support the pastoral values of Act 250, or at least provide a continuity with these values? A third alternative is to concede that the decline is and will take place and Vermont must make painful adjustments in Act 250 to reflect such a change. (For example, Vermont might accept the growth in small businesses and permit strip developments to accommodate them. The state might label State Highway Routes 4, 5, 100, 7 as "strip development zones", since such development is taking place on these routes at the present time!)

A second implication arises from the change in the pastoral economy which supports act 250. This change becomes evident when one examines the problems of implementation of Act 250 and the local planning activities which accompany it. Recently, I reviewed the present and proposed comprehensive plan and zoning for one Vermont town. In doing so, I was trying to assess its protection of major environmental resources and determine whether it promoted appropriate economic development. A review of the plan reveals an impressive set of policies pertaining to protection of major and minor rivers, steep slopes, forest areas, town boundaries, and housing. However, the plan did not propose feasible economic development coordinated with such policies. When I turned to the plan's account of implementing its "environmental" policies, I found the implementation to be ineffective, since such policies *depended upon the unsecured consent of local citizens and other state laws and resources for their implementation.* For example, the plan was unable to effectively control strip development at its highway exit. As a consequence, existing continuing strip development is left in place. In other aspects of the plan, e.g., managing forest land and adopting flood prevention, the local implementation of forest land plans depended upon private citizen compliance though state land use-taxation programs and implementing flood protection depended upon the federal flood insurance program. In regard to proposals for affordable housing, the plan looks to outside funding support

sometime in the future. The plan for Connecticut River protection looks to private parties and federal and state wetland laws to secure protections. The plan identifies the need for river corridors and an overlay zone is provided, but whether and how this zone is to be implemented is not clear from the plan. The lessons learned from this plan is that despite much careful planning work, localities (and for that matter, Act 250) are heavily dependent upon other private, state and federal resources to implement their plans and regulations*. In short, a viable working economy must generate the resources to implement the plan to pursue the state planning goals.*

What might be the outlines of such a plan? A plan for a viable working economy to support the formulation and implementation of a comprehensive land use plan might include the following policies:

1. Retain and seek to expand the remnants of the natural resources economy of farming and forestry
2. Provide support for new national resources ventures – the new food systems
3. Offer assistance for economic activities which indirectly retain the pastoral landscape
4. Support private efforts to preserve natural resources; (these will be discussed in more detail below)
5. Identify, prevent or redirect "unnecessary development" to preserve the distinction of the pastoral/countryside values
6. Provide increased significant citizen participation in plans and decisions affecting Vermont's pastoral land use

7 Develop a well-articulated vision of the character of Vermont's countryside and the economic and cultural activities which support it.

Such a plan, however, assumes the adoption of statewide comprehensive planning in Vermont, a dubious prospect at the present time. It is my contention that only a flexible statewide plan could provide for an integrated protection and enhancement of Vermont's landscape. Moreover, many of the problems facing Vermont invite some form of statewide planning – global warming, the energy transition, shortage of affordable housing, statewide flooding – to name a few. Yet Vermont rejected statewide comprehensive planning in the early days of Act 250; a similar failure to embrace statewide planning took place in Act 200 amendments two decades later. In the late 90's, the statewide recreation plan (SCORP) was discontinued and only recently reactivated. The backdoor effort to renew statewide planning through the Council of Regional Planning Agencies was eliminated in recent amendments eliminating that Council. These rejections of statewide comprehensive planning may or may not have been justified at the time, but, if they were justified at the time, the reasons for these rejections might now be revisited to determine whether the reasons still are valid. [It should be recognized that in other states, statewide comprehensive planning, when it has been undertaken, has, at best, a checkered history. *One clear finding of that history is that such planning is most likely to succeed when embraced by the governor of the state, On the other hand, recent assessments of smart growth appear to support*

the need for statewide planning: See for example Ingram et al, *Smart Growth Policies: An Evaluation of Programs and Outcomes).*

There are, however, alternative statewide planning models, including citizen- based pluralistic adaptive planning ventures. {See DeGrove, *Planning Policy and Politics).* Such planning focuses sequentially upon a series of statewide problems over time or coordinates a sequence of statewide programs focused upon one such problem. Stakeholders are included as part of the planning teams, depending upon the problem. The entire process, however, is customarily supported by a state planning office. The resulting "plans" are advisory to the governor and the appropriate legislators. Several states, such as Florida, have followed one or another version of such planning. Their efforts might be studied. One planning effort which should be undertaken in Vermont is an effort at countryside planning, in which England and Ireland seeks to "characterize" entire "countryside areas" and recommend policies for the retention of its' countryside character. This English effort has been in operation for the past two decades and evaluation of its results and relevance to Vermont is recommended. [Two discussions are set forth in Bishop and Philips, *Countryside Planning* and Ian Hodge, *The Governance of the Countryside.* The characterizations of landscapes are set forth on the net]. A second and complementary statewide planning effort which might be undertaken is a comprehensive plan for the mountain spine of Vermont. Europe has undertaken such plans for its mountainous regions. [Vermont law school's Janet Milne and her colleagues have completed a comparative study of the ecological regulation of mountain resorts in Vermont, New Hampshire, New York and Quebec. [Milne et al. *Mountain Resorts], This work and its authors might provide guidance in regard to the mountain landscape.*

A Vision for a Modern Arcadia

In addition to the recommendations set forth above, a statewide effort, preferably led by the Natural Resources Board, (since it straddles the subjects of the environment and the economy), should create a statewide land use vision of Vermont, as part of the effort to develop a vision of a working economy of Vermont. Such a vision might rely, in part, upon the conclusions of the myriad of plans and should be formulated with maximum citizen participation. It should seek to capture Vermont's sense of place. That sense of place was first articulated in the original Act 250 capability and development plan memorialized in the Act 250 criteria (Criterion 9) for a considerable period of its history and reasserted in its more recent smart growth policies. This statewide vision of each landscape, would not be a regulatory document, but it would inform planning, legislation, executive action, legal interpretations and regulatory activity. In one impulsive moment, I entitle this vision: "Vermont as a Modern Arcadia". Arcadia was a Greek area of "wild harmonious beauty" in ancient time- the home of the Greek god, Pan, god of wild nature, its' mountains with the shepherds and their goats which still inhabit the area. (I grant you it requires a stretch of romantic imagination to call Vermont "Arcadian", but the term invokes rich literary meanings). Even today, Arcadia remains a relatively unsettled but a magically beautiful agricultural area on the Peloponnesus of Greece. But, perhaps it makes more sense to appeal to the English countryside which is undergoing an era of "countryside planning" or to Tuscany, Italy which, though an accident of history, still displays the remains of Renaissance culture, as well as beautiful hillside villas and wine fields, (through which marvelous bicycle tours take place, winding from one wine field to another). Greece, England, or Tuscany exemplify ways in which the beauty of nature can continue to survive along with the cultivated way of life which supports it. Vermont could do worse!

II. The Landscape Bridge to the Goals of Act 250: Nature, Culture and Purpose

Vermont's Act 250, along with other laws and programs, offers the possibility of retaining and enhancing a complex pastoral Arcadia. This pastoral Arcadia is composed of readily identifiable landscape features – farms and fields, mountains, rivers and lakes, forests, compact towns and scenic roads. The more specific goals of Act 250, (discussed below) are the constitutive means to conserving and preserving these landscapes. Landscapes are the visible features of the land, the land and water forms, and how they integrate with human activity. Such landscapes are mixtures of nature, memory and history as well as the backgrounds of our hopes, desires and ideals. These landscapes deliver to us our sense of place and our feeling of being "at home". (See Schama, *Landscape and Memory}.*

We may view such landscapes in three ways. First, as aggregates of natural ecosystems of organized and composed of evolving biotic and abiotic elements. Although Act 250 does not explicitly appeal to natural ecosystems, (perhaps because the law was adopted before the importance of the ecosystem was recognized by the public), the recognition, study and regulation of Vermont's lake, river, forest and mountain ecosystems have progressed in the past half century and this recognition and study have supplied evidences in some Act 250 decisions and ecosystem studies have been conducted within Vermont's Agency of Natural Resources planning. Second, the landscapes are hosts to human activity which may or may not interfere with the functioning of their natural ecosystems, which may unconsciously or unintentionally shape the very appearance of the landscape itself or may be shaped by the landscape. This recognition of the human component of landscapes is the subject of human and historical ecology. (See Burch et al. *The Structure and Dynamics of Human Ecosystems).* I refer to this combination of nature and human activity as "the culture of the landscape". One vivid example of the landscape changed by human and other actions in Vermont is revealed in the turn of the last century pictures of the Vermont hills, denuded, when Vermont was the sheep capital of the world. Third, the landscape may be an object of human purposes, deliberately protected from human or natural changes or intentionally "designed" to meet the variety of human needs. The example of mountain and forest ski and hiking trails come to mind in which nature is reshaped to meet human needs. (see Sax, Moutains Without Handrails).

Since I shall discuss the ecosystem aspects of landscapes and their planning and management below, when dealing with the relations of the state agencies to Act 250, I shall focus here upon the central notions of landscapes as cultural and objects of human purpose. In Vermont, we have recognized this cultural dimension of landscape by entitling Vermont's landscape a "working landscape". (See Appendix for studies of Vermont's "working landscape"). Behind this term is the notion that the landscape itself not only supports human activity, but also is supported by human activity. Each kind of landscape is both shaped by and shapes a distinctive set of activities. The agriculture landscape support and is supported by a range of farming and related activities. The evidence of the human support of the agricultural landscape is revealed when farms go out of business and the fields return to woodlands. The forest landscape is supported by productive forest activities including lumbering, recreation and wild life protection, and human activity intervenes into the "natural" forest to conduct these activities and the forest lands are different as a result of it. Lakes may serve as sinks for acceptable or unacceptable loads of pollutants, their plant growth may be controlled, their aquatic species fed and fished, their rivers damned; responses to these interventions may result in further human interventions. The mountains are hosts to ski areas and peripheral developments which shape their topography, and ridge lines may be festooned with telecommunication towers and wind turbines to make new more urbanized mountains. (More subtle interrelationships between mountains and man are set forth in John Elder's

Vermont's *reading the Mountains of Home).* Compact towns may be supported by human commercial and residential development and decorated by, among other things, historical sites.

Act 250 mentions Vermont's landscape in passing, although it barely mentions its compact towns and does not mention its mountains and scenic roads at all! Yet, it is these landscapes which represent the bridge between the shared vision of Vermont as a complex pastoral community and the more specific goals of Act 250 and other Vermont laws. Focusing only upon Act 250 and the accompanying municipal and regional planning laws, let me identify how their particular goals are related to landscape types:

Rivers, Streams, Lakes, Shorelines, Wetlands, Floodways, and Groundwater

Major rivers and lakes on its borders, its other rivers, streams and wetlands are an important part of Vermont's landscape. Act 250's Capability and Development Plan mentions one or more of these elements of the water related landscape, explicitly incorporating the language of Criterion 1, (with the exception of wetlands). It also includes their mention as scenic resources. Criterion 1 identifies water in general as well as floodplains, surface waters, headwaters, streams, water conservation, floodways, streams, shorelines and wetlands. Criteria 2 and 3 mention water supplies. Although not explicitly mentioned in Criterion 8, water related landscapes have been involved in decisions under this Criterion. The goals of the enabling laws for municipal and regional planning include a more complete statement of Vermont's landscape including outstanding water resources, water quality, and water related recreation. The elements of the regional plan briefly advert to those areas needing aquifer and wetland protection. *Because adopted at different times and in pursuit of different purposes as part of amendments to different sections of the statute, and not linked to the myriad of other water related provisions in the state statutes, there is no coherent statement of the water-related landscape and the human purposes for using, protecting or managing this landscape.*

Farms, fields and related agricultural land uses.

This distinctive land use is predominantly located on the western and northern part of the state, but farms are scattered throughout the state especially along with river valleys. Milk production, although in decline, is the dominant form of farming, although there is a slow transition to other crops. Act 250 contains a variety of farm related definitions, including the definition of farming and composting and exclusion o of farming as development at locations under 2,500 feet. The capability and development plan identify farm lands as an important part of Vermont's scenic beauty as well as its natural resource productivity. Criterion 4 addresses soil erosion and Criterion 9 addresses the protection of primary agricultural soils. A more extensive statement pertaining to farming is included in the enabling purposes of municipal planning, including density controls, manufacturing and marketing of agricultural products, encouragement of locally grown products, sound management practices and the planning of public investment. Regional plan purposes include the conservation of the supply of agricultural goods and promotion of their production. *All of these*

purposes from the different laws might be usefully amalgamated into one coordinated statement.

Vermont's Forests

Much of Vermont is covered with forestland, which, has grown for most of the twentieth century. The forested lands are held both in public hands, both federal, (e.g., The Green Mountain National Forest) and numerous state forests, as well as private forestland, including large swaths of the Northern Forest and scattered smaller forests, privately held throughout the state. Some of these forests supply the lumbering industry, others offer recreation or, in the case of wilderness, solitude in nature. Other forestlands function as settings for wild life. All of these purposes are recognized in Act 250. The enabling law for capability and development plan recognizes the importance "forestry" and the plan itself recognizes "forest productivity and the "conservation of recreational opportunity afforded by the state's …forests... Act 250's Criterion 8 protects "necessary wildlife habitat and endangered species". Criterion 9 protects "productive forest soils." The municipal planning enabling act lists the encouragement of forest industries along with agriculture and Act 250's mentions wildlife, important natural areas and "land resources" seem to implicate forest lands. The enabling law for the regional plan's elements anticipates identifying lands set aside for forests. All of these of objectives for Vermont's mountains might be usefully amalgamated.

Vermont's Mountains

Although Vermont's mountains are a prominent characteristic of its landscape, including the Green mountains which run down the central spine of Vermont as well as a small part of the White Mountains, in the northeast and the Taconic mountains in the southwest, Act 250 makes little mention of them! This is doubly strange since the state is literally named after mountains and at least one of its principal industries – the ski industry depends upon the mountains. In addition to skiing, the mountains provide sites for hiking and other recreations activities, telecommunications and wind turbines, and provide the initial source of headwaters for many of Vermont's rivers. To be sure, the mountains are indirectly regulated by the federal and state forest and wilderness management laws described above. The Act 250 Capability and Development Plan refers in passing to "hills" and, perhaps indirectly includes them in "scenic resources". Criterion 1 refers to "headwaters" and, in Criterion 8 refers to the "scenic and natural beauty of the area". The enabling law for municipal planning includes reference to "important natural and historic features of the Vermont landscape" but mountains are not included in the itemization of such features. To be sure, mountains could be implied by references to scenic areas, views and recreation activities, *it is indeed perplexing that this central feature of Vermont is not prominently identified and managed under Act 250, (aside from the Green Mountain National Forest).*

Scenic Roads. Nevertheless

Scenic roads are an important part of the Vermont landscape, both for its residents and its visitors as evidenced in Vermont's early remarkable billboard control law. Vermont's

scenic roads include the major thruways, the state roads designated as scenic, selected municipal roads as well as a network of dirt roads. Aside from the beauty of the scenes they offer, the scenes of these roads real the "gloom and glory" of the mountains, sublime or intimate views of Vermont's lakes and rivers, and, in one author's terms, the "shadows of civilization" cast by our forestlands. But the Vermont scenery also reminds us of our farm and forestry past, and the towns and villages allowing us to nestle in Vermont's valleys. Act 250 mentions these scenic highways and roads and recognizes the need for transportation planning to "respect the natural environment", while at the same time acknowledging the need to provide safe and efficient transportation systems. Criterion 4 limits its scope to the prevention of unsafe conditions and congestion in highways, but this criterion is supplemented by its attention to scenic roads by Criterion 8 which recognizes the scenic or natural view beauty of the area and aesthetics. The enabling laws of municipal planning identify the planning for "scenic roads, waterways and views", while the regional plan elements focus upon the evaluation of alternative methods of transportation*. A statewide plan for scenic roads is needed.*

Towns and Villages

Vermont's towns and villages, nestled in the folds of its hills and mountains, separated by agricultural and forest lands, are a major part of Vermont's landscape. The Capability and Development Plan recommended the renovation of village and town centers, the allocation of land to accommodate population and commercial growth, cluster planning and new community planning and the provision of decent housing for all income groups located conveniently to employment and commercial centers. Criterion 8 recognized the importance of historic sites, many of which are located in within villages and towns. Act 250 Criterion 9, sought initially to encourage compact development by requiring the review of the costs of scattered development. More recently, the legislative history, definitions and additions to Act 250 provide the basis for an affirmative town and village development policy which seeks to retain compact towns, prevent strip development, and supply housing. The major effort to properly plan and develop towns and villages is left to municipal and regional planning and their implementation. The purposes of the enabling law for municipal planning includes "to plan development so as to maintain the historical patterns including the original pattern of farm and forest surrounding intensive residential development in areas related to community center, prevention of strip development, economic growth "…to revitalize existing village and urban centers, reinforced by of infrastructure." Housing should be located conveniently near the town center. Despite extensive municipal planning, *the task remains to take these plans and formulate a statewide town and village plan. [*In 2004, the American Planning Association released a study*,* Nelson and Dawkins*, Urban Containment in the United States.* Although focused upon high population and fast-growing states, the study *holds* sobering lessons for Vermont. In order to have a strong containment policy, the study concluded that physical and growth accommodation goals were to be emphasized, that strong housing, infrastructure and open space policies were needed, a strong fact collection is needed, and strong intergovernmental coordination are required. Local planning and local containment plans are needed. Although the applicability of this

study to Vermont may be questioned, it does suggest a variety of institutional requirements which Vermont does not have].

"Tout ensemble" and Changing Landscapes

The nationally renowned planning law scholar and former Director of Planning for New York City, Norman Williams, used to say that one had to look at the planning elements "tout ensemble", i.e., as an interconnected whole. Obviously, the above listed elements of Vermont's landscape overlap and their relationships must be carefully considered. Until recently, such consideration has been primarily by means of municipal and regional planning; with the advent of smart growth planning in Vermont, and countryside planning in England, attention is beginning to be paid to a more comprehensive view of landscapes. The legislative findings of legislation adopted in 2007 recognize the importance of supporting existing compact towns and planned growth centers, the location of housing within or near those centers, and appropriate measures for maintain the rural countryside of such settlements as well as preventing strip developments. (In other parts of this discussion, I shall return to a discussion of these smart growth policies, which are important in their recognition of the interrelationship between town and country, (although not setting forth the full set of landscapes nor the non-regulatory elements need to maintain those landscapes).

It must be recognized, however, that these landscapes are undergoing significant change and numerous planning studies are documenting this change. [Overall changes have been documented by the Center for Social Science Research, *Vermont in Transition* (2008). Most of the major landscape elements have changed, primarily because of the decline of natural resource industries, (farming, fishing, lumbering) as well as population, housing and commercial growth over the past years. (For accounts of the decline of each of these industries, see the following for Vermont: (Detcher, Blythe, "Water Pollution in the Green Mountain State…13 Vt. J. Envtl. L (2012); Vermont Forest Products, *Blueprint for Action (undated);* Wironen et al., *"Phosphorus Flows and Legacy Orientation in our animal dominated region from 1925-2012" 50* Global Environmental Change 88-99 (2018); Similar changes have taken place in Vermont towns and villages including cumulative growth and sprawl, (Boright, *Cumulative Growth (2002),* limited infrastructure*, (*Vermont Agency of Commerce and Community Development, *Vermont 2020 Comprehensive Economic Development Strategy);* increased housing needs (*Vermont Housing Needs Assessment, (2014).* In Vermont's mountains, mountain resorts, communication towers, wind turbines and housing developments are affecting the landscape, (see Milne, Mountain Resorts: Ecology and Law (2009); Vissering, *Wind Energy and Vermont's Scenic Landscape (undated). [Other studies are set forth in the Appendix]. Given these changes, any plan for each landscape should take into account the changes presently taking place, determine which changes are desirable or inevitable, and provide guidance for those changes.*

The Working Landscape and Non-Regulatory Measures: Sustainability

The elements of Vermont's cultural landscape are both known and lived in by its citizens, but the recognition of their continual changes poses an important problem. If this landscape is to be maintained and enhanced, what is the impact of such an effort upon the human activities which are part of it and which may well support or transform its current form in the future? It is a mistake seeking to preserve, conserve or enhance these landscapes to focus simply upon their natural ecosystems, since to do so will not insure the continuation of the landscape itself and may have detrimental impact on the human activities in these landscapes. For example, if a law "preserves" prime farmland soils but fails to

support the farms which sustain that farmland, the law is self-defeating. If a law identifies prime productive forest land, but does not support the forestry industry, or productive private management of the forests, the productive management of the forests may not take place. If lakes and rivers are protected by prohibiting human uses, who will support the protective measures needed for such protection? Perhaps a proper model for protecting the cultural landscape is the Vermont hunting regime which generates revenues for protection of the herd by means of license fees, (a user tax); these revenues pay, at least in part for regulated wildlife management of the herd. This example suggests that the recognition of "cultural landscapes" invites careful attention to how humans use the resources, which, in turn, may suggest users' fees for those who use and benefit from these landscapes. (In one sense, impact fees, which have been authorized by Vermont's land use laws are closely related to user fees].

It may be suggested by some that no public regulation of these landscape features is necessary, and that the market place can foster the human activities which support the landscape itself. To be sure, some market activities, such as the sale of agricultural products, the sale of lumber, the charging of recreations fees for skiers, hikers, fishermen and hunters, even the rooms and meals taxes aimed at tourists, the sale of ridgelines for wind turbines, and the lease of mountains lands for skiers and second homes generate revenues. However, the market return for enterprises may or may not generate the revenues needed to "protect" the underlying natural landscape and such charges may require public organization and control of the resources generated.

The recognition that selected human activities must take place in landscapes requires both regulatory protection of the landscape and the affirmative support of activities within the landscape in question, *both for the current and future generations.* This is the core of sustainability. Act 250's goals, with few non-regulatory exceptions, focuses upon preventing activities which are harmful to the underlying natural environment or, in the case of traffic, education and municipal services, preventing undue harm to the social environment. However, these landscapes and the activities within them may also require public non-regulatory assistance. Subsidies, such as housing, agricultural, forestry and historic preservation subsidies, public management assistance for private forestry management plans, tax exemptions for the holding of open space resources, public or non-profit purchase of properties or easements on property, and grants for historic preservation and infrastructure construction, are but a few of the possible non-regulatory approaches. Although Act 250 does not explicitly authorize the range of non-regulatory tools, the legislation enabling municipal planning and zoning and the more recent Downtown Program provides for non-regulatory tools including capital budgeting, tax increment financing, tax stabilization contracts, purchase and acceptance of development rights, supporting plans and advisory commissions.

Although these regulatory and non-regulatory tools are instruments of implementation and not goals to be implemented, (the latter are the focus of this essay), discussion of these approaches to implementation suggest a goal which has not been mentioned in our discussion, namely, *sustainability*. Although receiving different definitions, "sustainability" in this context suggests a process over time in which human activities are coordinated with and made compatible with the processes of nature for the benefit of both. Hence, our discussion suggests that one of the overall goals of Act 250 is the sustainable support of Vermont's landscape. *Just as the laws enabling municipal planning provide for a series of non-regulatory tools in Vermont's statutes, (albeit a very limited list), it may be appropriate to amend Act 250 to establish the goal of sustainability and a complete statutory list of such tools be available to the*

Natural Resources Board and its District Commissions to promote such sustainability. The list of such non-regulatory tools might be formulated, based upon an in-depth review of the measures needed for the regulation of each kind of landscape. (For example, a recent planning study of the measures needed to contain urban growth includes a substantial list of both regulatory and non-regulatory measures; see Appendix).

III. The Goals of Vermont's Act 250: The Capability and Development Plan

Introduction

Based upon my previous exploration of the unique complex pastoral nature of Vermont, (described in an earlier section), and my suggestion that recognition of specific landscapes can provide a bridge between the pastoral vision and Act 250's specific goals, I now propose to explore the extent to which its premier law, Act 250, contains more specific goals promote that pastoralism. First, I repeat briefly the nature of Vermont's pastoralism. Second, I summarize Act 250 and its authorization of many goals. In the final section of this essay, I explore the meaning of these goals based only upon the statutory language within the Capability and Development Plan. I recommend the reformulation of the capability and development plan in light of what I perceive to be its shortcomings I identify in this review. {In future sections, I will describe the three principal instruments that Act 250 and related legislation adopts to interpret, specify and pursue these goals – the specification of criteria in the course of permitting of major developments, (criteria-goals); the goals stated in the authorization of municipal and regional planning and the resulting plans; the goals implicit in other legislation related to Act 250 and the agency plans authorized by that legislation and finally, a brief discussion of the citizen participation goal implicit in Act 250. I plan to discuss how these instruments- the criteria, the regional and municipal plans, the agency plans clarify and specify the goals originally set forth in the capability and development plan and pursue the preservation, conservation and enhancement of Vermont's landscape. It is my contention that only after specifying and clarifying the Act 250 goals and establishing their relationship to the landscape forms can one then turn to assessing the extent to which they have been implemented over the past half century.

Vermont as a Modern Arcadia

In a previous section, I suggest and argue for a complex pastoral vision of Vermont: a "working landscape", rural, with a modest low density population, clustered in small towns surrounded by open spaces, retaining to some extent its natural resource economy of farms, forests, nature based recreation pursuits, much of its land held in large lot, or commons or public ownership, and highly visible natural landscape features, (mountains, lakes, forests, rivers, valleys, farms) all contributing to its pervasive scenic beauty attracting tourists and second home development. This pastoral view of Vermont is made complex by the obvious forces of industrialization, urbanization and technology which have intruded in various ways into the Vermont way of life. In Act 250, this vision of Vermont as a complex pastoral community "sugars off" (to employ a Vermont rural metaphor) to a statement of more specific goals in Act and related legislation, and this section discusses these goals as set forth in Act 250 "capability and development plan". But first, it is important to view this plan in the context of the many goal statements of Act 250.

The Many Goals of Act 250

In 2017, Vermont's Act 47 was enacted to require the evaluation of the almost fifty years of Act 250 in light of its goals. Act 250 was adopted in 1970 and originally enabled the preparation of an interim capability and development plan, a capability and development plan and a land use plan. The legislature rejected the land use plan and adopted the capability and development plan. In addition, Act 250 established District Commissions and a state Environmental Board which were authorized to review and permitting of major developments according to ten criteria. One of these criteria required compliance with regional and municipal plans, and almost two decades later, Act 200 was adopted which set forth a variety of new goal statements to guide local and regional planning as well as requiring the plans to conform with the goals. A careful review of the Act 250 reveals that it has multiple sets of explicit goals as well as a number of implicit goals, and a history of refining those goals by statutory amendments, court and administrative decisions, as well as other administrative actions.

A. *Multiple Explicit Goal Statements*

The explicit goal statements of Act 250 include (1) the findings and declaration of intent in the 1969 and 2007 legislation; (2) the statutory statement authorizing the capability and development plan (10 VSA 6042), (3) the capability and development plan; (4) the Act 250 Criteria, (10 VSA 6086 (a) (1) – (10); (5) the statement of the goals of the continuing planning process as set forth in 24 VSA 4302, as well as an itemization of the purposes and elements of the municipal and regional plans; (6) the statement of goals in substantive statutes whose standards are incorporated in the Act 250 criteria or reflected in the evidence submitted under those criteria; (7) the goals of the Downtown Program. These goal statements overlap in many ways and I have prepared a rough matrix for my own use which offers a comparison of them, (as if they were adopted at the same time). I shall not discuss the findings and intent of the 1969 and 2007 legislation, nor the general statutory authorization of the capability plan from which additional goals might be gleaned, since these statements very general and seem to mere precatory introductions to the substantive legislation.

However, the sets of above goals have been adopted at different times and for different purposes. The original intent of the capability and development plan was to provide policies for a land use plan, but when such a land use plan was not adopted, the capability and development plan was authorized to not only to serve the land use plan, but also to provide general and uniform policies on land use and development to municipal, regional, and state governmental agencies…" and to be part of Criterion 9 of 6086. (See also 6046 (b)), (but not constitute an independent criterion). The capability and development plan was adopted to guide the regional and municipal planning process. Subsequent to the legislative adoption of the capability and development plan, both the courts and the Environmental Board have treated the plan as a means of interpreting the Act 250 criteria, specifically criterion 9.

The criteria in 6086 were adopted to assess major developments, whereas the capability and development plan goals appear to have been framed in a more general fashion. The ten criteria have numerous subparts and have been supplemented by statutory amendments on several occasions. Similarly, the goals of the continuing planning process, adopted and amended decades after the capability and development plan, were intended to guide and become part of municipal and regional

plans, which, in turn are incorporated in Criterion 10 of 6086 which applies to the permitting of major developments.

B. *Additional Implicit Goal Statements*

Complicating matters further, Act 250 incorporates other statutes in the 10 VSA 6086 permitting process. For example, under 6086 (d), permits from state agencies pertaining to the subjects of selected criteria and permits issued by municipalities pertaining to other criteria may be accepted as evidence or create presumptions of applicant compliance for the relevant criterion. Since these incorporated permits may be issued under other statutes, the purposes of these statutes may be tacitly incorporated into the 6086 Criterion. For example, in Criterion 6086 (a) (1) (A) (Undue water or air pollution), the applicant must also meet applicable Health and Environmental Conservation Department regulations, and the Natural Resources Board may by rule accept a permit from the agency in lieu of evidence of compliance with the Act 250 criterion. (6086 (d) A similar situation may be seen in the case of Criterion 10 which, when incorporating municipal and regional plans, may incorporate their purposes. Some of these purposes of the plans may have been draw from the goals set forth in 24 VSA 43. In addition, the state authorizing the Downtown Program, as cited above, also includes a set of goals (24 VSA 2790).

C. *Indirect Statutory Goals*

A careful reading and interpretation of Act 250 may indicate other purposes in the statute. For example, the statute provides a series of exemptions for certain developments. The exemptions from permitting requirements may express the tacit purpose of encouraging such exempted development. Second, the law adopts certain jurisdictional requirements; developments not falling within the jurisdiction of Act 250 may be implicitly encouraged by the law.

D. Historical Changes in Goals

Over the fifty-year period, the goals of 6086 (a) (1) – (10) criteria and the goals of the planning process of 24 VSA Chapter 117 regional and municipal plans have changed or been modified or supplemented by legislative amendments and court decisions. For one period of history, the court decisions have been Vermont Supreme Court, for another period the decisions have been made by both Environmental Court. Administrative decisions issuing permits have been made, by the District Commissions with appeals to the Environmental Board for one period of time and by District Commission with appeal to the Environmental Court for another period of time. Thus, decisions at different periods of time may have different meanings for authoritative definitions of the goals. I and my students have sought to document the evolutionary changes in these decisions up to 1997 in Volume 1 of the Treatise, but there remains a two-decade gap in analysis from 1997 to the present time. *It would be desirable to fill that gap with further analysis.*

E. *Other Administrative Actions*

Both the Environmental Board and its successor, the Natural Resources Board have issued rules, and prepared workbooks for permit preparation and review. The Department of Planning and Community Affairs has also prepared work books for regional and local planners. These materials contain interpretations of the statutes, court decisions and administrative decisions and these interpretations may further refine the goals adopted by these bodies. *An analysis of this oft-ignored administrative material should be completed.*

The resulting complexity of goal statements makes it difficult, but not impossible to settle on a set of goals by which to evaluate the law. Before confronting the problem of how to determine the achievement of Act 250 in reaching its goals*, it is necessary to identify the problems of articulating the goals themselves. As we shall see, these problems require one to assess: (1) validity, i.e. the extent to which the goals are an appropriate response to the problems addressed by the statute; (2) consistency, i.e. the extent to which the goals are internally consistent; (3) completeness, i.e. the extent to which the statement of the goals do not omit other relevant goals; (4) historical context and diverse purposes, (since the goals were adopted for different purposes at different times); (5) clarity – the clarity of the theory which underlies the goal in question; (6) the extent to which these goals advance the vision of a complex pastoral ideal in general and the landscape elements of this ideal. This analysis might be conducted as part of the above updating of goal assessment.*

To pursue this discussion, as stated above, I have prepared a rough matrix of the myriad of goals, and my review of this matrix reveals several conclusions. First, the sheer number of discrete goals is remarkable. There are nineteen capability and development goals, ten Act 250 permit criteria, with sub-goals (thirty-eight elements), and fourteen goals for municipal plans. This does not include relevant goals from other agencies or as part of the Downtown Program. Such a multiplicity of goals creates difficulty for the assessment of the Act in terms of its goals and may create problems for its administration. Second, there is overlap in the formulation of many goals but, when overlapping goals are laid side by side, it is often not clear that one goal statement is equivalent to another similar one. (Within the statute, there are definitions and explanations which may or may not reduce ambiguities). Third, although there are provisions which suggest that some criteria may be more important than others, there is not a clear priority system accorded to goals. Obviously, the multiplicity of goals and the lack of priority results in providing considerable discretion in the interpretation of the goals by courts, planners and administrators. Such ambiguity may encourage or at least permit conflict between and among different groups interpreting the statute*. Below, I shall return to this topic and make recommendations.*

V. The Capability and Development Plan as the Touchstone of Act 250 Goals

Confronting the variety of Act 250 goals, I believe a reasonable argument can be made for relying upon the capability and development plan to supply a reasonable and concise set of goals for the evaluation of Act 250. The capability and development plan was clearly intended by the legislature to help guide Vermont's land use and economic development. (For a history of the plan, see my *Treatise*, Volume II, Chapter 11). After hearings, it was adopted by the Governor and the legislature. It has been used to interpret the application of the criteria in specific cases, but not directly apply to the development applications. The plan does not suffer from the more limited purposes of the criteria themselves nor does it include the specificity of the goals of the regional and local land use enabling law. The capability and development plan is clearly one aimed at sustainability – an important and current objective of national and international economic and environmental policy. Finally, as I conclude below, the capability and development plan captures, *at least to some extent,* the complex pastoralism of Vermont and its elements of landscape which I have outlined above. Here is simply the list of its elements and organization. My attention to the capability and development plan will not ultimately exclude attention to other goal statements in future essays. What follows are merely my meditations, impressions and comments based upon a review of the goals. Hopefully, in a later essay, I shall look to

the implementation of the permits and the plans and their implementation, and, if time and energy permits, a final essay on the accomplishments in light of these goals as well as current studies and plans.

Summary of the Capability and Development Plan ("The Plan")

1. The Authorization of the Capability and Development Plan

In 1969, the legislature adopted the following authorization: [10 VSA 6042]

> "The Board shall adopt a Capability and Development Plan consistent with the interim Land Capability Plan which shall be made with the General purpose of guiding and accomplishing a coordinated, efficient and economic development of the State, which will, in accordance with present and future needs and resources, best promote the health, safety, order, convenience, prosperity, and welfare of the inhabitants, as well as efficient and economy ion the process of development, including such distribution of population and the uses of the land for urbanization, trade, industry, habitation, recreation, agriculture, forestry and other uses as well tend to create conditions favorable to transportation, health, safety, civic activities and educational and cultural opportunities, reduce the waster of financial and human resources which result from either excessive congestion or excessive scattering of population and tend toward an efficient and economic utilization of drainage sanitary and facilities and resources and the conservation and production of the supply of food, water and mineral
> . In addition, the plan may accomplish the purposes set forth in 24 V.S. A. Section 4302

What is perhaps most interesting about this early authorization is that it does not anticipate the important environmental values of earth day, does not appear to anticipate of resource use and conservation sections of the subsequent adopted plan and fails to highlight Vermont's pastoralism and its primary landscapes.

2. The Plan Itself

The Capability and Development Plan, adopted in 1973, is divided into three parts: Planning for Land Use and Economic Development; Resource Use and Conservation; Government Facilities and Public Utilities. Within each of these parts, a series of policy statements are set forth. Planning for Land Use and Economic Development include policies referring to land capability, utilization of land resources, private and public capital investment, planning for growth, seasonable home development. general policies for economic development, specific areas for resource development, and planning for housing. As a consequence, the emphasis, with the exception of references to "land capability" is upon economic growth and development, not environmental protection. The latter is reserved for the second section, i.e., Use and Conservation which includes natural resources, recreational resources, special areas, scenic resources, conservation of energy, and taxation of the land. Government Facilities and Public Utilities contains policies pertaining to planning for growth, public facilities adjoining agricultural lands, planning for transportation and utility corridors, transportation systems, and planning for waste disposal.

The interrelationship among these policies and their respective priority are not set forth, nor is there any explicitly pastoral or landscape vision uniting the list of policies. However, some courts have not shrunk from weaving the relationship among the policies together. Thus, in *Southview Associates v.*

Bongartz (980 F2nd 84 (1992), Judge Oakes, in facing a "taking challenge" from a developer denied an Act 250 permit, found the capability and development plan to express the legislative purpose of Act 250 and, in admitted dicta, wove together Policy 2 Utilization of Natural Resources, Policy 6, economic development, Policy 10 recreational resources and Policy 11 special areas to find "substantial advancement of a legitimate state interest" to outweigh any property interest. (See also *In re Village Associates 250 Land Use*, (188 Vt. 113, (2010), in which the court appealed to Policy 2 in its effort to define prime agricultural soils). In addition, there are, from 1980 to 2001, at least fifteen Environmental Board cases considering appeals to the capability and development plan. Perhaps a deeper issue is raised by the bifurcation in the plan between Part I which focuses upon economic development and Parts II and III, which focuses upon the impacts of such development. This bifurcation raises the question of the relationship of Part I to the rest of Act 250 which clearly focuses upon environmental protection. Having summarized these policies in the plan, I propose to review them one by one. Although nothing takes away from my admiration of these far-seeing policies, I recommend clarifications, additions and explorations of the possible relations among the goals and these recommendations are set forth in italics.

PLANNING FOR LAND USE AND ECONOMIC DEVELOPMENT

1. The Capability of the Land

This policy views "the capability of the land" to be the touchstone for all development and the policy statement refers to the interim capability plan for documenting that capability. However, that interim plan was to be incorporated in the land use plan and when the land use plan was not adopted, the authorization of the plan was repealed. However, the concern for the "capability of the land" is expressed in many other ways throughout Act 250 including its protections of agricultural land, wetlands and other natural areas and its' employment of permits from other agencies – permits which rest upon natural resource information within these agencies. The repeal of the interim capability plan signals appears to abandon a fundamental principle and signal deeper problems with this admittedly broad goal. Perhaps a clear and unambiguous legislative principles should be reasserted that all development should respect the land, its plant and animal life and the functioning of its ecosystems.

First, it must be said that with the elimination of the planning components of Act 250, the study of Vermont's land, (and waters and air) has devolved on other agencies, including the Department of Agriculture, the Department of Natural Resources and the Department of Housing and Community Planning as well as regional and local planning agencies. The inventory of natural resources may be found within each of these agencies. These agencies have now completed a variety of studies and plans as well as computer driven information, such as the Natural Resources Atlas. Second, with the recognition that the capability of land for development depends upon a variety of factors, (soil conditions, moisture, incline etc.), the documentation of constraining conditions has grown complex to include overlay analysis and ecosystem study. Third, the conditions of land may change over time, both due to the forces of nature and human actions. Lands may be reclaimed, as the Department of Agriculture has noted in its reclamation policy, and hence, lands once not capable of supporting human activity may, over time, become suitable. Finally, whether or not land is capable of development may depend upon the amount and nature of development itself.

Rather than pursue any difficult-to-construct coordinated map of all of these plans and studies, a centralized, easily accessible and continually updated compilation of everchanging studies and plans organized according to their relevance to the central decisions under Act 250 might be a useful low-cost alternative. (I elaborate on this recommendation below).

2. Utilization of Natural Resources

This policy seeks to "preserve" the productivity of natural resources, conserve recreational opportunities provided by these resources and protect the beauty of the natural resources. [The use of "preservation" and "conservation" may not accord with current usage]. *An important explicit omission to the present statement is the employment of natural resources to promote the health of Vermont's citizens. In light of the anti-pollution aspects of Act 250, the statement of such a broad purpose seems appropriate*. Whether or not the statement should be extended to embrace the more recent recognition of the rights of the environment itself or the plants and animals within it may be legitimately explored. Other states and nations have recognized such rights and their experience is usefully reviewed.

Although the preservation and conservation of natural resources seems to be an unexceptional policy, the history of the use of these resources over time, as well forth in Harold Meeks' *Time and Change in Vermont: A Human Geography,* suggests that resources change over time. The turn-of -the nineteenth century health resorts have disappeared, Marino sheep, mining and milk firms have declined. Forest land, until very recently, has increased. On the other hand, agricultural lands have been eaten up by urban development as well as increased forestation. Significant changes over time make it difficult to plot a linear path of "conservation."

Another question pertaining to the policy of the conservation of human resources in relation to Act 250 is raised by Charles Foster's recent *Twentieth Century New England Conservation.* The study of Vermont's Act 250 in this volume indicates that Act 250 is but a small part of the myriad of conservation laws and programs in Vermont. Since this policy animates many public and private efforts, the question becomes: in *what unique ways does the Act 250 program in relation to these other laws and programs contribute to these policies?*

Act 250's far-sighted statement of the policy of utilization of natural resources made in 1970, has more recently been formulated into a concern for sustainability, in which the proper balance is to be struck between the needs of the present generation and those of future generations. *Defining such a balance is important since Act 250's planning and regulations may be viewed by many as intrusions in private property and the economic market place*. Considerable excellent philosophic and economic thought as well as the experience of a half century of environmental law has been devoted to defining this balance in an effort to define "sustainability". Since I shall discuss this topic below in my review of related policies, here I simply call attention to two fine recent general treatments of the topic of sustainability- Edmund Page, *Climate Change, Justice and Future Generations* and Bryan Norton, *Sustainability).*

Particularly unique in the existing statement is the recognition of preserving recreation opportunities as well as Vermont's natural beauty. As Joseph Sax has demonstrated in his remarkable book, *Mountains Without Handrails,* recreation involves fundamental values of freedom*. And, although the Act 250 capability and development plan statement amplifies its goals of protecting beauty in the later statements invoking protection of scenic and special natural areas, much more recent writing has*

sought to amplify the value of natural beauty, landscapes and a "sense of place". These might be consulted in a rewrite. [This author along with many others have written law journal articles on the topic]

3. *Public and Private Capital Investment*

This goal seeks a "balance" between public and private investment for the well-being of Vermonters. More specifically, the goal envisages a rate and location of economic growth in towns, regions and the state which, presumably through taxation, will pay for the needed public services. [An additional explanation (B) is added to specify that the needed public service might be located in "other communities," and the state. [Other goals, discussed below, address both the promotion of selective economic development and land use planning for growth]. Thus, these purposes do not envisage a Vermont which is a no-growth society, but they do anticipate reasonable capital investments. [In 1970, it was recommended planning practice to time public developments such as sewer and water to guide the rate of growth in communities]. The policy statement does not define "reasonable" capital investment, but presumably it is referring to "selective development" which will not generate environmental or social costs which exceed the revenue generated. Since 1970, there have been numerous economic and planning studies seeking to assess the economic and environmental impact of different kinds of economic activities. The current Vermont economic plan (and Policy 6 above) recommends support of "selected" economic activities, however, they define selected industries differently, with the economic plan evaluating in terms of "growth potential, existing concentration in Vermont, strong leadership, higher than average wages, meeting other policy goals and building on Vermont's brand and quality of life," while Policy 6 below takes a different approach). Since Act 250 does not purport to provide an economic strategy for the state, or, for that matter, for regions or localities, it simply states that "conditions may be imposed upon the rate and location of development" without specifying who might place those conditions in what context, although, since this plan accompanies Act 250 permitting, and since certain criteria address the costs of development, presumably these conditions apply to Act 250 permits. *Presumably, such a policy invites a review of the steps which Act 250 permitting and its incorporated planning have taken to guide the rate of growth in towns, the region or the state.*

Unfortunately, between and within most states, there is competition for economic development to secure and increase the tax base. (*Given Vermont's culture and politics, perhaps this phenomenon is less prevalent in Vermont. This might be studied. In any case, the work of Norman Williams and others, recommending statewide tax sharing, which is already taking place to some degree in education funding, might also be evaluated as an additional part of this goal).*

4. Planning for Growth

The policy seeks to control strip and unnecessary scattered development, renovation of town and village centers, and provide for growth within these centers, as well as cluster planning and new community planning in appropriate non-natural resources areas, (defined in Policy 9 below). Although this standard is embraced by many planners and Vermont citizens, it conflicts with the operation of private property and the housing market, a well as the jurisdictional requirement of Act 250 which encourages large lots in many cases; it may also be defeated by the presence of unanticipated growth generators (highways; utilities) which have already been adopted in the past and encourage future growth. [Some scholars have even argued that scattered development may be more economical than

enforced compact development!] *In light of these realities it might be useful to reformulate this goal, drawing upon the APA careful study of urban containment in the United States.*

5. *Seasonal Home Development*

The Policy adopted here is concern over inequitable tax treatment of second home developments, an issue of concern when the ski areas and related housing developments were first being built. *If this policy is to be retained, it might be combined with Policy 8 dealing with housing and Policy 14 dealing with land taxation*. I am unsure as to whether the policy set forth in this section is consistent with the objectives set forth in Policy 8 and 14. *This specific concern with seasonal development might be usefully broadened to address the environmental impact, whether beneficial or not) of the fluctuating flow of tourists, migrant workers, higher education students as well as second home buyers, all of whom "visit" the state, placing burdens upon its resources, but also contributing to the economy.* I am not aware of any Vermont study which addresses this issue.

6. *General Policies for Economic Development*

This policy provides for "selective economic development" defined as one which yields maximum economic benefit with minimal environmental effect. As pointed out above, the definition of "selected development" differs from the definition of selective in Policy 3. This policy does provide the requirement that economic development comply with local, regional and state objectives, but does not indicate whose or which objectives. Also, the policy suggests that commercial and industrial development provide adequate employment for both men and women. *This policy statement, if rewritten, may usefully be combined with Policies 3 and 6 and the criteria provided in the state's economic plan. The four sets of policies and their different definitions of desirable economic development might be reconciled with attention to the recent discussions of sustainability identified in Policy 2.*

7. *Specific Areas of Economic Development*

This policy refers to the encouragement of industries which contribute "value added" to Vermont's natural resources. This appears to give priority to the natural resource economy, forests, agriculture, mining, and tourism ("services offered to out-of-staters in particular. This might be a specification of "selected economic activities" mentioned in Policies 3 and 6. Another issue is raised by the distinction of renewable and non-renewable use of resources. This distinction between renewable and non-renewable is axiomatic in energy and waste policies, but it is not mentioned in Policy 13 dealing with the conservation of energy and it is not mentioned in the waste policy. *It is curious that no mention is made of this distinction. It may be needed to introduce this distinction in this discussion of natural resource industries and in the later discussion of transportation (policy 17) and waste disposal, (policy 18).*

8. Planning for Housing

One of the most extensive policy statements pertains to housing which recommends among other things that housing is a basic need for all Vermonters, that a diversity of housing be provided for all Vermonters, but especially for low and moderate income, that it be safe and sanitary, convenient to places of employment and commercial centers, and that its location be coordinated with public facilities and consistent with municipal and regional plans. Interestingly, aside from the mention of regional and local plans, no mention of the relation between housing development and the environment is

mentioned. This omission may be due to the tacit assumption that housing would not fall under Act 250, although subdivisions may, under certain circumstances be included. *In any case, the reality is that Vermont in general and the Burlington area has been very much affected by housing developments and hence this omission seems inappropriate.*

RESOURCE USE AND CONSERVATION

9 Natural Resources Specifically Identified

This set of policies incorporates by reference selected sections of the Act 250 criteria, (6086 (a) (1), (8), an (9) identifying landscape features and includes headwaters, water conservation, floodplains, watercourses, shorelines, as well as wildlife habitat and endangered species, forests and agricultural secondary soils, earth resources, extraction of resources and developments affecting public investments*. Interesting omissions from the present Act 250 criteria list are wetlands, lakes, hills and mountains, and the recently settlement patterns as well as air and water more generally. Although landscapes are identified, no mention is made of ecosystems, and hence, any reformulation of this section might implement appropriate references to ecosystems*. This section of the plan also incorporates the "principles of environmental conservation set forth in those sections". *The relationship between these "principles" and the earlier provisions dealing with economic concerns is left unstated.*

10. *Recreational Resources*

This policy seeks to protect the diminishment of land and waters needed for the range of outdoor recreation activities and seeks to secure access and availability of public use "where feasible". As we shall see in the next essay exploring the relation of the goals of the Act 250 criteria and this capability and development plan, the former does not address recreation activities, perhaps because they are addressed in other parts of the Vermont statutes. (see, for example, Title 10 VSA Chapter 103). The reference to availability and accessibility to recreation resources, echoes an egalitarian theme which is suggested in a number of the policy statements, such as Policies 5, 6, 8, 9, 11, and 18. *Perhaps a more specific treatment of equality and the protection of natural resources might be formulated.*

11. *Special Areas*

This policy seeks to protect sites and areas which have historical, educational, cultural, scientific, architectural or archeological values. Unlike other policies, this policy suggests that this may be implemented by "rules of the Board" and makes reference not only regulation, but also to private and public ownership. The kinds of special sites and areas include educational, cultural, scientific, architectural and archeological areas which are not mentioned by its corresponding criterion 6087 (a) (8). However defined, this policy, along with the policy 9 and 10 above, and 12 below pertain to the effort protect Vermont's "sense of place*". Perhaps these policies can be re-conceptualized as parts of landscape elements which make up that sense of place, [the lessons of the English countryside commission can be brought to bear to better define the sense of place].*

12. *Scenic Resources*

This policy invokes the need to protect scenic resources, but, unlike Criterion 8. (6086 (a) (8), the policy includes reference to river corridors, scenic highways and roads, and scenic views. *In view of this enumerations, it may be desirable to have a more comprehensive list of scenic sties.* Unlike other policy statements, this policy statement indicates that it envisages "conditions" be imposed upon the development and may carry the implication that a permit may not be denied in pursuit of this policy. Whether such a limitation is motivated by concerns of feasibility or it suggests a lower ranking of the policy of scenic protection, I do not know, although I suspect the latter. *If the latter, this judgement may be revisited in light of the increasing acceptance in land use regulation and in court decisions of aesthetic purposes.*

13. *Conservation of Energy*

This policy recommends energy conservation and protection from the environmental effects of energy production. (Policy 17 pertains, inter alia., to energy distribution; perhaps this aspect of Policy 17 should be conjoined with Policy 13. The theme of conservation of energy parallels the conservation in waste management, (Policy 17), but, curiously, the latter conservation is not mentioned in either policy statement. *More important, the energy policy fails to recognize the transition to renewal energy and the important recognition of the need for equity in distributing the costs of purchasing energy. These matters should be added to a re-conceptualized statement of the energy goals.*

14. Taxation of Land

This section recommends appraisal and assessment of land tax based upon the use of the land "consistent with this act and any other state or local law or regulation affecting current of[sic] or [?] prospective use of land." This provision may seek to incorporate other land tax mechanisms or may seek to coordinate land use regulation and land taxes*. If the former, it may have to be reformulated to address different land tax mechanisms. If the later, it may have to be reformulated to clarify what precisely it envisages.* It is worth noting that Act 250, except for impact fees, does not deal with taxation. Impact fees is also authorized under municipal land use regulation

GOVERNMENT FACILITIES AND PUBLIC UTILITES

15. Planning for Growth

This policy appeals to duplicate Policy 4 discussed above; however, Policy 4 appears to focus upon private growth, while policy 15 deals with the growth of public facilities. *Nevertheless, the relationship between these two sections should be reexamined, in part because the policy treatment of private growth is more extensive than public growth, linking private growth to village and town centers, unlike Policy 15.* This section, like Policy 4, it envisages provision of public services in response to population increase and economic growth*, unlike Policy 4, it ignores the extent to which these facilities can generate secondary growth pressures with consequent financial and environmental effects. This concern should be added to Policy 14.*

16. PUBLIC FACILITIES OR SERVICES ADJOINING AGRICULTURAL OR FORESTRY LANDS

This policy seeks to discourage the reduction of resource values due to the development of public facilities, "unless there is no feasible and prudent alternative and the facility has been planned to minimize it effect on the adjoining lands. This policy echoes well known highway cases at the time of its adoption which established the standard of no prudent or feasible alternative. The standard mirrors the requirement of the National Environmental Policy Act requirement within the required environmental impact statement. The scope is somewhat vague since it applies to "governmental and unitality facilities and services" but does not extend to similar private developments. The policy applies to agricultural and forestry lands, but not developments near other natural resources as set forth in Policies 9, 10, 11, 12. *Consequently, the policy may be reframed to overcome its present limitations.*

17. Planning for Transportation and Utility Corridors

This policy recommends location of governmental and public utility facilities and corridors within public utility or highway right of ways. *Despite asserting that such locations would reduce adverse visual and physical impacts, such a policy may conflict with the scenic requirement of Policy 12. Omitted are wireless telecommunications facilities. Also, the growth potential of highway exists might be addressed in this policy.*

18. Transportation Systems

This policy addresses the need for safe, economic and convenient transportation as part of an integrated system which respects the integrity of the natural environment. The policy does not address the issue of choosing the least intrusive transportation mode. *It does not address the issue of the growth generation incident to highway development, nor the possible conflicts between transportation goals and environmental concerns. It omits specifying the limiting of impact of transportation upon the specific natural resources itemized in Policies 5-11.*

19. Planning for Waste Disposal

This policy enjoins waste disposal which permits the environment to reasonably assimilate it and waste disposal methods which to do not create an unreasonable economic burden. *This policy should be re-conceptualized to recognize the limitation of waste generation at each stage of its generation and the importance of adopting systems of recycling of wastes. This policy does not address certain types of waste, such as low level and high level nuclear waste, the appropriateness of sending waste out of state.*

The Deficiencies of the Capability and Development Plan

In the above review, despite the many strengths in the capability and development plan, a review has revealed serious shortcomings. It remains an unrelated series of policies lacking any overall vision of the pastoral way of life and landscape elements which need to be articulated if such policies are adopted. Serious conceptual problems underlie its principle of land capability, it fails to enunciate a clear statement of sustainability, and contains no recognition of ecosystems. It requires a reformulation of its goals statements pertaining to energy, control of growth and the treatment of waste. It omits natural resources such as wetlands and mountains. It is completely lacking a statement of policies regarding telecommunications, citizen participation, and compact town centers.

The statements of policies in the capability and development plan suggest a variety of means of pursuing its policies including; refusing permits, conditioning permits, employing tax approaches, changing ownership patterns and promoting selective economic growth. It remains unclear as to how some of these implementation recommendations, (some of which are undoubtedly advanced as part of the original state land use plan), are relevant to Act 250. The wide scope of the capability and development plan is especially important, since it extends beyond the permitting activity of act 250. It is clear that some of the policies were originally adopted for the preparation of the now rejected land use plan, were intended to promote the wide range of purposes of the authorization of the plan as set forth in Section 6042, (Capability and Development Plan) These purposes address subjects and require actions which extend far beyond Act 250's program for permitting of major developments. *As a consequence, it may not be appropriate to judge Act 250's permitting program solely according to the broad standards of Section 6042 and the resulting capability and development plan. I shall address this problem in more detail in the next section when I explore the relationship of the goals set forth in the Act 250 criteria to the policies of the capability and development plan.*

The Next Steps

I recommend that an appropriate drafting committee be assembled to redraft the capability and development plan in light of these criticisms of the present plan. I shall supplement these suggestions by other essays hopefully to be completed by the end of the Spring. However, it seems to me that the task of redrafting should begin promptly, since a redrafted set of goals would be helpful in the assessment of the Act. However, there are however, three ways in which a new capability and development plan might be adopted. First, it might be treated as part of the Act 47 process. On the assumption that a draft reassessment of the Capability and Development Plan could be completed by the Spring, it might be used as part of the citizen review process under Act 47 in the summer. Second, a rewritten plan might simply be an independent amendment submitted to the legislature. Third, according to 10 VSA 6047, a petition to change the existing plan may be submitted to the Natural Resources Board and procedures of 6047 may be followed, (although there is considerable ambiguity in the statutory authorization of this procedure].

IV: The Criteria- Goals of Act 250

Introduction

To understand the goals of Vermont's Act 250, it is necessary to view the law as animated by a way of life, (described in Section 1) and a complex of several different principles. I have characterized the first principle to be the recognition of the nature and culture of Vermont as a complex pastoralism, which enters, unbidden and unacknowledged, into the background meanings given to Act 250. The second principle is the identification of at least six major landscape forms which dominant our perception of Vermont. The third principle guiding the law is the Capability and Development Plan, adopted by the legislature in 1973, (three years after Act 250 was adopted), as a series of nineteen open-textured policies, which help to guide the interpretation of Act 250 criteria. In the previous section, I provided an analysis and commentary of this capability and development plan and concluded that, for various reasons, it should be rewritten. A third major part of Act 250 and its goals, is the set of criteria, (10 VSA 6086 (a) (1) - (10)), which is employed to approve, deny or condition applications for major developments and subdivisions. *This section will focus on these criteria.* In three later sections, I

shall explore the role of the goals of regional and local planning efforts, the goals contained in plans, regulations and permits of other state agencies, some of which are incorporated into the Act 250 criteria, and the implicit goal of Act 250 to promote citizen participation. *It is my contention that any evaluation of the achievements of Act 250 must begin with an account of each of the five sets of admittedly overlapping goals implicit in these principles, including their nature and their relationships- one to another and to other public and private actions pursuing similar goals.*

Turning to the subject of this section, i.e. the Act 250 Criteria, it is my contention that they may only be understood and clearly defined by recognizing that these criteria imply goals, e.g. clean water, limited soil erosion, protected scenic views, etc. and that these goals must not only be stated in their summary statement in the statute, but also are viewed as part of an adaptive management process over time. Such an adaptive process envisages that the broad goals of the statute will be further specified in other statutory language, as well as the regulations, guidance materials, and decisions of the Natural Resources Board, its predecessor Environmental Board, and decisions of the courts. I suggest that in the process of implementing Act 250, these goals and their definitions are shaped by other statutory language as well as amendments, regulations and decisions; in short, the history of Act 250 has shaped and specified the goals arrived at today. This process of specification of the goals has taken place over almost a half century. [My review of these criteria relies in part upon my Treatise, covering the period from 1970- to 1997, (Volume I; *Toward Community Sustainability), but also in* more updated reference to a selection of cases and applications decided after 1997, amendments and regulations adopted after 1997, and legal and other commentaries on these materials written since 1997].

Anticipating the conclusions of this section, I have discovered the following: (1) the criteria, when compared to the capability and development plan differ from it in significant ways; specifically *the criteria omit the economic sustainable development goals of the capability and development plan*; (2) these criteria are by no means statements of simple goals, since these goals are elaborated in Act 250 and other legal and quasi-legal materials qualify and specify them in important ways; (3) most of the statutory statements of each criterion introduce references to a series of more specific elements whose relationships one to another may not be apparent and is only resolved by regulations and decisions by administrative agencies and the courts; (4) the multiplication of the many goals within the criteria and their haphazard arrangement invite an effort to "reorganize" them so that their contribution to the protection of the major landscape features of Vermont's pastoral vision is clarified; (5) many of the criteria and their elements themselves overlap, one with another; whether these overlapping criteria conflict requires future research and if they do, they should be reconciled (6) the Act 250 statute often appeals to considerations of "unreasonable burdens" or "undue adverse" impacts in projects, without, for the most part, indicating how such terms should be defined; leaving it to administrative agencies and courts to arrive at appropriate definitions. It remains an open question whether these considerations should be considered part of the definitions of the goals of the statute; (7) amendments to the statute and the decisions of the courts and the administrative agencies have sought to resolve these ambiguities and have issued rules, guidance documents, and decisions, all of which may further complicate reaching an unambiguous definition of these goals; (8) the interpretation of the criteria over time means that their goals have been specified at different times; hence, they must be understood in their historical context in order to formulate and evaluate them.

These factors, along with the fact that the criteria are further defined by the incorporation of regional and local plans under Criterion 10 and the incorporation of permits from other agencies, which

operate as evidence of compliance under several of the criteria (a practice which will be discussed in future sections), make it extremely difficult to articulate a clear simple statement of the goals derived from the criteria. At the end of this essay, I shall demonstrate this difficulty by proposing a rearrangement of the criteria according to the major landscape types and I shall take one element of Criterion 8 "necessary wildlife and endangered species" and seek to define it in some detail. The analysis of the wildlife provision of Criterion 8 illustrates how difficult it is to define the criteria goals*. Nevertheless, I conclude that any evaluation of Act 250 must begin by seeking to define, as best we can, each of the multiple elements which are part of Act 250's goal.* But despite such definitions, *I conclude that it may be necessary to rely upon an impressionistic account and definition of an open textured statement of the elements, rather than seeking to formulate unambiguous definitions or goal indicators for each of these goals.*

The Criteria: Simply Stated

The following is a simplified statement of the original criteria: The development or subdivision:

(1) Will not result in undue water or air pollution…

(2) Have sufficient water …for the,,, needs of the subdivision or development

(3) Will not cause a reasonable burden on the existing water supply,,,

(4) Will not cause unreasonable soil erosion …

(5) Will not cause unreasonable congestion…

(6) Will not cause a reasonable burden upon {municipal provision of education}

(7) Will not provide an unreasonable burden upon [municipal services}…

(8) Will not cause adverse impact on scenic, natural beauty….

(9) Will be In Conformance with the Capability and Development Plan …

(10, Will Be in Conformance with Municipal or Regional Plan…

I have made several assumptions in this statement. First, I have abbreviated the list and formulated it for conciseness. For a full statement, the reader is referred to 10 VSA 6082 (a) (1) – (10). Ideally, a full copy of 10 VSA 6086 should be appended to this discussion, but the discussion is already too long! Second, in my discussion here I shall omit discussions of the role of other state agency permits within the Act 250 permit process and the goals set forth in 24 VSA Chapter 117, both of which will be discussed in later sections. Third, it may be argued that other sections of Act 250 imply goals, (such as the exemption sections, (10 VSA 6081), the preamble to Act 170 set forth in the Vermont statutes before 10 VSA 6001 and, for that matter, the definitions set forth in 10 VSA 6001. I shall not discuss these other sources of possible goals.

The Kinds of Act 250 Criteria Goals

The above criteria embody four kinds of goals. First, there are those criteria (1, 4, 8) which seek to protect unmediated nature. Second, there are criteria (2, 3, 5, 6, 7, 9) which seek to protect social public or private investments – water supplies, transportation investments, municipal and

government services and scenic/historical ambience. Third, there are the criteria (sub-criteria under criterion 9) which seek to prevent undue burdens resulted from economic or population growth. The fourth kind of goal is the series of goals to be pursued on a regional and municipal level to be pursued by more localized planning (Criterion 10). Each of the four kinds of goals pose different problems for evaluated their achievement under Act 250.

The Criteria and the Capability and Development Plan

In the previous essay, I discussed the Capability and Development Plan. However, it is now useful to discuss its relationship to the Criteria, which were adopted at the same time as the statutory provision authorizing the preparation of the capability and development plan, but before the plan was formulated in 1973. Several of the provisions of the criteria (especially parts of Criterion (1)), are explicitly incorporated into the capability and development plan and others, e.g. Criterion 8, are reflected in somewhat different language in the capability and development plan (Policies 11, 12, 13). There are some explicit inclusions in the criteria, e.g. wetlands which are not included in the capability and development plan. One important omission of a Capability and Development policy is Policy 10 "Recreational Resources", an important omission.

Most important however, there are a series of policies set forth in the Capability and Development Plan which are completely unmentioned in the criteria. Most of these policies are categorized as "planning for land use and development" and include public and private investment, utilization of natural resources, seasonable home development, general policies for economic development, specific areas for economic development, and planning for housing. [The last item- housing was added to Act 250 later as part of Title 24 amendments). I believe the efforts of the capability and development plan to set forth sustainable principles of economic development should be more explicitly stated in Act 250 itself, perhaps as factors in the overall assessment of the proposed developments and subdivisions within individual criteria. (As we shall explore below, some economic concerns, with few exceptions, may be implied in the series of references in the Act 250 criteria to "reasonableness" or "undue adverse" or they may be reflected indirectly in plans incorporated under Criterion 9 and 10). Such an omission of sustainable economic development goals in the criteria of Act 250 tends to create a polarization between environmental and economic development goals and their respective constituencies- a polarization which was not intended by the capability and development plan's more sustainable growth approach. In short, I urge a discussion which might be undertaken as to whether the omitted sustainable economic policies of the capability and development plan can also find a place in the criteria section of Act 250.

Specifying the Goals of the Criteria

The above summary of the goals in the Criteria makes them sound simplistic and abstract. However, as stated above, the history of Act 250 has been an evolutionary history of specifying the meaning of these goals over time. The specification has been conducted in several ways.

(1) Legislative language and definitions either as parts of the original statement of the criteria themselves or inserted as part of statutory amendments;

(2) Interpretation of the criteria by the relevant administrative agencies; i.e. the Environmental Board, the District Commissions, the Natural Resources Board;

(3) Interpretation by the Courts, primarily the Vermont Environmental Court and the Supreme Court.

Consequently, these specifications of the goals are set forth in the Vermont Statutes, the Vermont Regulations, the reports of administrative decisions and the court case reports – all of which have been made public. I should like to illustrate each of these "specifications".

(1) The Legislative Language

The full statements of the criteria add many qualifications to the initial simple statement set forth above. Thus, for example, in Criterion (1), there are seven sites of water pollution, (headwaters, waste disposal sites, water conservations sources floodways, streams shorelines and wetlands), each described or defined in the statute and a series of factors are identified to be considered when assessing whether they are threatened by any development or subdivision. In addition, regulations of the Health and Environmental Conservation Department are incorporated into the criterion. To give another example, when considering impacts of developments under Criterion 9 upon primary agricultural soils, one finds in other parts of the statute that there are relevant definitions (10 VSA 6001) such as "primary agriculture soils". [In addition, there is mention of such soils elsewhere in the Vermont statutes). The criteria of Act 250 have been amended from time to time; for example, a new element to criterion 1, wetlands, was added in 1985. To give another example, in 2011, reference to "settlement patterns" under Criterion 9 was significantly amended. In addition, from time to time, exemptions were included in Act 250; [the exemptions up until 1996 have been traced in Chapter V of my *Treatise* and others have updated the account]. For example, there was a statutory exemption pertaining to review of proposed projects which are part of downtown development in 10 VSA 6086 (b); selected exemptions from compliance with some of the criteria are authorized in order to promote development in compact downtowns. [Without my defending all exemptions, opponents of such exemptions must realize that they are intended to operate as incentives for some public policy. To label them as simply "loopholes" ignores the policies which they serve and their removal may affect that policy.]

(2) Administrative Interpretations

Until the Environmental Board was replaced by the Environmental Court, the Board interpreted the criteria in appeals decisions from specific decisions pertaining to applications to the District Commissions. An account of those decisions until 1996, is set forth in my Treatise Vol 1: *Toward Community Sustainability*, however the Board operated beyond that time and its later decisions can be accessed through the website of the Natural Resources Board. To give one example of one element, Criterion 8's treatment of scenic and natural beauty (and aesthetics) was interpreted in a key Environmental Board decision in the *Quechee Lakes* decision and upheld by the Vermont Supreme Court. The Board outlined a procedure for determining scenic impact beginning with determining the "adverse impact" of a proposed project to include a description of the surrounding site, a determination as to whether the design of the project was compatible with the site, the suitability of the colors and materials, where can the project would be seen from, and its impact upon open space. A second stage assessment of Its' "<u>undue</u> adverse impact" was then to be determined by whether the project violates a clear community standard, offends the average person, and lacks adequate mitigating steps. This approach has been followed and further interpreted by later decisions; thus, the Environmental

Decisions constitute a kind of administrative common law in which later decisions and their rules often were based upon the principles and rules of prior decisions.

The interpretations of the Act 250 criteria, however, may not be limited to rules advanced in administrative appeals cases. Under 10 VSA 6025, the Natural Resources Board may adopt rules, both procedural and substantive, although under separate statutory authorization, these rules must be ratified by the substantive rules. (See for example "Criterion 9(L) Guidance", March 15, 2016). In addition, although not carrying legal status, the "District Environmental Training Manual" contains careful, (although sometimes dated) analyses of the court and Environmental Board decisions pertaining to each of the criteria.

(3) Court Interpretations

In the earlier history of Act 250, appeals could be taken from the District Commission to the Environmental Board, and then to the Vermont Supreme Court; (in some circumstances, where diversity or substantial federal questions are involved appeal may be to federal court). With the abolition of the Environmental Board, the District Commission decisions are now made to the Environmental Division of the Courts and appeals from that division are made to the Vermont Supreme Court. These court cases offer specifications of the criteria and their goals.

The Natural Resources Board is authorized by law and has created an index and annotations of these cases. In addition, annotations of these court cases are available in the Vermont Statutes Annotated and are retrievable on Westlaw as well as an e-Board retrieval system. This process means that the courts may further define, refine and specify the criterion and its goal in question and those refinements are readily available. To give but one example: In *In Re: Pilgrim Partnership,* the Vermont Supreme Court interpreted Criterion 5, requiring that projects not cause congestion or unsafe conditions. In *Pilgrim,* the Court held that the proposed project need not be the sole contributing cause of congestion and that unreasonable congestion conditions may be "hazardous conditions". [This determination is an important precedent, since, in many cases, there will be multiple causes at work, not only in transportation cases, but in cases involving other criteria as well.

Criterion 5 is relatively simple, but the overall complexity of seeking a clear and satisfactory definition of the goals implicit in the Act 250 criteria is especially severe in those criteria which involve several elements, draw upon several sources for their definitions, and overlap with other criteria. Thus, in our review of the criterion in the *Treatise*, we found that Criterion One, air and water pollution, (which has 7 subsections, as well as other explications) and criterion nine, conformance with the capability and development plan, (which has 10 subsections) to be quite complex. Both criteria also incorporate references to other sources for their interpretation and application. Our discussion in the *Treatise* discusses the complexity of Criterion 1 and the Natural Resources Board has sought to clarify Criterion 9.

It is useful to briefly discuss Criterion 9 because it is probably the most important criterion aimed at protecting Vermont's pastoral landscape. (To be sure, Criterion 1 is directed at its water resources, criterion 8 is directed at its aesthetics, special natural places and historic sites, and Criterion 10 plans may embrace landscape features). But Criterion 9 addresses agriculture, forestry, town settlements, and strip development. In addition, in Criterion 9 (A), the impact of growth generally is considered. However, a careful examination of these sections as well as the cases interpreting them

suggest a limited protection of these landscape features and the law requires amendments to strengthen these provisions.

The Historical Nature of the Specification Process

The complexity of these criteria with their many elements and the various sources for clarifying their meaning is also complicated by the temporal dimension of the application of Act 250 over the years. The examples discussed above (Criterion 5 and 8) reveal that the specification of goals takes place over time. Thus, although most of the initial statements of goals in the original enactment were set forth at the same time, i.e. 1970, key interpretations as to their meaning took place at different times. For example, the *Quechee* court decision and the *Pilgrim* decision were made in 1990! This means that the definitive definitions of the scenic and traffic congestion criteria were not arrived at until twenty years after the Act was passed. The temporal and the changing nature of the goal definitions over time necessarily creates some uncertainty for applicants and citizens. Such an open-ended quality of the goals may be relevant when assessing the implementation of the scenic and traffic goals in 2017! The differences in time for the specification of the goals means that when one comes to assess the implementation of these goals, one goal may have been articulated a few years ago, while another goal, may have been articulated fifty years ago. Consequently, the implementation time for the two goals will be very different. Although other factors may also determine whether a goal will be implemented, the differential time available for implementation due to various "delays" in the articulation of the goals in the criterion may be an important factor in the level of successful implementation.

Conclusion: Reorganizing and Defining the Open-Ended Elements of the Criteria of Act 250

Although I make various recommendations throughout this essay, I would also like to propose that the Natural Resource Board undertake the effort to reorganize the goals in the criteria and formulate clear and concise definitions of the thirty odd elements which make up the goals of Act 250. (In the next two essays, I shall discuss how 24 VSA 117 and the goals which are implicit in the employment of other permits under other statutes may be part of this process). Such definitions, it seems to me, are an essential first step to the evaluation of Act 250. *(I believe this synopsis of act 250's elements should be published as part of the Act 27 process so that the public can be aware of the goals sought by this law).*

1. The Characterization of Landscapes and their Relationship to the Goals

As part of the application of the criteria, the agency or court should have at hand and require as part of its decision a characterization of the relevant landscape. This characterization has been described above and illustrations can be found in the English countryside characterizations referred to above. The relevant goals of the criteria should be related to an understanding of this landscape. In order to carry this out, it will be necessary to organize the criteria in light of the landscape types and, in any particular case, have prepared the relevant landscape documents.

2. The Reorganization of the Goals of Act 250 Criteria

The Act 250 criteria and their elements constitute a complex mosaic of considerations. (In the Treatise, I attempted when discussing each criterion to demonstrate how the criterion in question related to other criteria). Given the number of criteria, their specification over time, and their complex relations – one to another – it becomes difficult to see the relationship between the criteria and the major landscape features they are designed to protect. Without embarking upon a complex rearrangement of the elements here, let me simply posit the kind of organization I have in mind.

Protection of Water Resources – Criteria 1, 2, 3, 10

Protection of Agricultural Soils and Farming Activities – Criteria 4, 8, 9, 10

Protection of Forest Lands- Criteria 9, 10

Protection of Mountain Areas – Overlapping Criteria with Water and Forestry, Criteria 8, 9, 10

Protection of Compact Towns – Criterion 6, 7, 9, 10

Prevention of Strip Development and Protection of Scenic Roads – Criteria 5, 8, 9, 10

To be sure, statutes other than the Act 250 criteria pertain to these landscape features and are not considered here. (Some of these statutes will be discussed below when I discuss federal and state agency planning).

The definition of these elements should be based upon existing law: Act 250 and related statutes; rules of the Natural Resources Board, and decisions of the courts and administrative agencies and these sources should be clearly identified in the statement of the element. In addition, references should be made to overlapping and related elements in Act 250. Such an effort is feasible, since much analysis has already been conducted both by outside scholars and commentators, the legislative counsel, and the Board staff itself. Without suggesting that the following attachment is “a model”, I offer it as an example of what might be set forth for each element.

However, there is one characteristic of Act 250 goals which is important to note. These goals are open-ended. By that, it is meant that the scope of each goal is not fixed in advance. For example, in the case of scenic goals, what is “scenic” is determined by the decisions over time. In the case of “wildlife” protections, the wildlife to be covered may change over time. The extent of protection of the resource afforded in each goal is also flexible, in part, because the circumstances in each case may differ and in part because of new knowledge pertaining to the resource. In light of this flexibility, the Natural Resources Board and the courts seek to advance certain rules within their decisions to supply some basis for reasonable reliance by applicants and citizens. The open-ended characteristic of the goals, however, makes it more difficult to assess their implementation.

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Example, A Model Goal - Element Definition

10 VSA 6086 (8) "(A) Necessary Wildlife Habitat and Endangered Species…

A. Criterion Statement

This element is part of broader criterion which includes scenic and natural beauty, aesthetics, historic sites or rare and irreplaceable natural areas. Nevertheless, it has been identified as a distinct element in the criterion and mandates that a permit not be granted to an applicant if the development or subdivision will destroy or imperil necessary wildlife habitat or any endangered species. (This requirement is modified by further language discussed below). Within Act 250, "endangered species" is defined (10 VSA 6001 (5), by reference to those species the taking of which is prohibited under rules adopted under Chapter 123 of Title 10. "Necessary wildlife Habitat" means concentrated habitat which is identifiable and is demonstrated as being decisive to the survival of a species of wildlife at any period of its life including breeding and migratory periods. (10 VSA 6001 (12). Such a habitat may be an important part of a mountain, forest, or water-related landscape.

Criterion 8 (a) includes the following summarized qualifications of the protection: (1) the economic, social, cultural, recreational, or other benefits of the project will not outweigh the economic, environmental and recreational loss to the public from the destruction or imperilment of the habitat or species; or (2) all feasible and reasonable means of preventing [harm] to the habitat or species have not or will not continue to be applied; or (3) a reasonably alternative site is owned or controlled by the applicant which would allow the development or subdivision to full its intended purposes.

B. Generic Description of Relevant Landscapes

The Landscapes which are most relevant to this goal are water related and mountain landscapes. A description of the specific habitats which are part of these landscapes is set forth here.

C. Links to Other Statutes

1**.** References to Regional and Municipal Planning

Since 24 VSA 117 authorizing regional and municipal plans is incorporated in Act 250 to the extent that the plans are to be considered under Criterion 10, the language of this section may also be relevant. The goals of the planning process include "(6) to maintain and improve the quality of …wildlife… (24 VSA 4302 (6). Following this, (A) references the principles of Act 250's 10 VSA 6068 (a) .

2, Other Relevant Vermont Statutes.

Unlike many of the other Criteria, Act 250 does not include references to permits issued under other laws to be used in Criterion 8. (See 10 VSA 6086 (d)). However, as indicated above, it includes in its definition of endangered species, a broad reference to rules adopted under Chapter 123 of Title 10. This Chapter 123 authorizes the protection of Endangered Species and includes definitions of both "endangered" and "threatened" species, and "habitat". (See 10 VSA 5401 (7),(8),(9). It also contains a broader definition of "wildlife". [Further research is needed pertaining to the relations between the state's endangered species statute and Act 250).

3. Relevant Federal Statutes

This definition is subject to revision to insure compliance with relevant federal statutes and judicial opinions pertaining to these statutes.

4 Overlapping Other Criteria

The habitat protection of Act 250 may overlap or conflict with protections of waters (Criterion 1), especially streams and wetlands, soil erosion, and the protection of "productive forest soils, as well as the other elements with Criterion 8 including rare and irreplaceable natural areas, and even scenic and natural beauty. [Further research is needed as to whether conflicts have arisen and, if so, how they have been resolved]. [Forest areas as treated under 24 VSA 117 will be discussed in the next essay, but would be included here]. [In Volume I of the Treatise, overlaps among each of the criteria are described].

5. Key Court Cases

The Vermont Supreme Court, in *Re Southview Associates (1989) 153 Vt.* 171 held that the term "necessary wildlife habitat" means habitat that is decisive to survival of those particular members of the species which depend upon that habitat; it is not necessary that the habitat be decisive to the survival of the entire species within the state. In the later case of *In re Killington, Ltd (1992), 159 Vt. 206)* the court held that significant imperilment of the habitat of the population triggers review, irrespective of whether species as a whole is threatened with extinction. In the *Southview* case, cited above, the court instructed the Environmental Board to consider non-qualitative factor when performing the balancing text set forth in 6086 (a) 8 (i).

6. Administrative Decisions

The Natural Resources Board compiles annotations of court and administrative cases and other materials in its E-note index on-line. These annotations are organized to include materials pertaining to each substantive criterion, include Criterion 8 wildlife and endangered species. Without seeking to summarize these decisions, it should be noted that they address such questions as which wildlife are included (bobcats, deer, bear, beaver, et.) which adjacent areas to the habitat may be protected, the role of barriers between the project and the development, the eligibility of "degraded" and cleared areas as wildlife habitat and the approved conditions permitting development.

D. Selected Evaluation Questions Pertaining to the Wildlife/Habitat and Endangered Species Goal

Based upon this goal-element statement, the following questions may be asked: (1) Have necessary wildlife areas been identified throughout the state? (2) Have habitats of rare, endangered and threatened species been identified? What criteria are employed for rare, endangered and threatened species? Which species are included? (3) Which habitats and species have been protected by: (a) the federal and state endangered species program? (b) local planning and zoning? (c) Act 250 permit review under 8(a) wildlife and endangered species? (4) which species and habitats have been protected incidentally by other parts of Act 250, e.g. natural and scenic areas, forest lands? (5) To what extent have the habitats and species been subjected to an analysis of diversity and the ecosystem in which this diversity is located? What difference does such an analysis make? (5) What factors in the goal formulation impede the administration of this element? [These questions address the goals only; not the implementation of them].

E. Selected Relevant Reports

To reformulate the goal-element or to establish indicators for answering the above questions regarding the goals, the following reports might be consulted. [This is not a complete list} ANR, *Draft Guidance for Review of Evaluation of Potential Natural Resources Impacts for Utility Scale Wind Energy Facilities in Vermont;* Departments of Conservations and Fish and Wildlife, a series of guidance documents pertaining to rare, threatened and endangered species and wild life impacts of projects; ecosystem protection including *Vermont Conservation Design: Maintaining and Enhancing An Ecological Functional Landscape; Natural Heritage Inventory; Wildlife Diversity Program; Wildlife Action Plan.* Legal Analysis may be found at Brooks et al Towards Sustainability, Volume I: The Criteria; Natural Resources Board, *District Commission Training Manual*; Argentine et al, *Vermont Act 250 Handbook* and assorted law journal commentary summarized in Brooks, *Act 250 Bibliographical Reflections.*

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V. Act 250 Goals under Criterion Ten and Title 24 Chapter 117 Municipal and Regional Plans

Introduction

In the previous sections, I reviewed the goals of Act 250 as reflected in its "countryside vision", as a pastoral community, composed of six major landscape features. I also reviewed the Capability and Development Plan and its ten major criteria. In this section, I review the goals of regional and municipal planning as made applicable by Criterion 10 of Act 250. Unlike the goals discussed previously, these municipal and regional planning goals are set forth in separate sections of the state statutes [Title 24 Chapter 117], which authorize and govern the adoption of regional and municipal plans; these plans, in turn, are made applicable by Criterion 10, which requires that major developments and subdivisions, conform with "any duly adopted local or regional plan or capital program…". The state statutes have recently set forth the meaning of "conformity". [24 VSA 4303(6)].

In this essay, it is my contention that the renewed emphasis upon regional and local planning with the amendments to Act 250 add a different dimension to the criteria-goals discussed previously. Not only are new goals, in effect, imported into the Act, but these goals are envisaged to apply to regulate a wider range of developments, not limited to major developments, and include the use of both regulatory and non-regulatory tools. [In regard to non-regulatory tools, the statute (24 VSA 4403) includes capital budgeting, tax increment funding, tax stabilization contracts, purchase and acceptance of development rights, other supporting plans and advisory commissions. However, a much broader range of both public and private actions may be embraced under other statutes and constitute non-regulatory tools]. With this addition of new goals and the non-regulatory means to implement them, the possibility of conflicts among the many goals of Act 250 is heightened, and for that reason, in this section, I briefly address the general issue of conflict of goals within all of Act 250 in my discussion of municipal and regional planning and development. These conflicts are, in part, intended to be resolved

by their coordination in planning documents and within a new legislative policy of smart growth, adopted in 2004.

The most important contribution of these planning and smart growth goals of Act 250 is that they provide a bridge between Act 250 goals and the landscape vision which animates it. As set forth in Section 1, the vision of Vermont which animates Act 250 is a landscape vision in which the characteristics of Vermont's historic and natural pastoral landscape dominates. However, the criteria-goals of Act 250 described in Section 4 fragment this vision into many less inclusive goals and even smaller elements of those goals. It is with the municipal and regional plans and the smart growth legislative program that the effort is made to restore a more holistic attention to Vermont's complex pastoralism.

The History of Municipal and Regional Plans in Vermont

A brief history of the origin of these goals is important to understand their important role in Act 250. (A more detailed history of planning in Vermont is set forth in Sharon Meyers' history and in Chapter XI of the Volume II of the Treatise). Prior to the adoption of Act 250, in the late 1960's, Vermont adopted a progressive state law which enabled its municipalities and regions to plan their land use. (Professor Norman Williams was a principal author of this enabling law). The enabling law included a set of purposes to guide the municipalities and regions. Many municipalities did not take advantage of these enabling laws, either because they lacked the resources or possessed antipathy towards planning. When, in 1970, some municipalities were confronted with large scale developments, (ski resorts and their vacation home developments), they turned to the state for help. Act 250 was adopted and provided for the permission, denial or conditioning of major developments and subdivisions as outlined in previous section. However, in deference to the localities and, in some cases, respecting the planning which some municipalities had already undertaken, Act 250 did not preempt local land use controls, (to the extent that they existed!), and provided for making use of local planning through incorporation of it into Criterion 10 as described below.

In the next two decades following its adoption, certain shortcomings were revealed in the operation of Act 250. Among the shortcomings were recognition of the failure to adopt a statewide plan under the law and the failure of the law to cope effectively with growth; these problems led to amendments to the law. To be sure, Criterion 9 anticipated evaluating the growth impacts of major development and envisaged significant planning by the District Commissions to document those consequences. But the District Commissions lacked the resources to conduct such planning. As a consequence, amendments to the regional and municipal planning legislation, some of which were modeled after Oregon's land use law, set forth what has come to be a series of fourteen specific substantive goals for municipal plans as well as four selected goals to establish a comprehensive planning process.(24 VSA 4302) Although these goals are set forth in full in the appended statutory provision, I shall identify here only those goals not duplicated by the Act 250 criteria-goals which were discussed below. [However, it is important to note that these amendments also clarified overlapping criteria -goals with accompanying references and definitions).

The Municipal Planning Goals.

Although fourteen specific substantive goals, as well as general goals and goals for the planning process are set forth in the statute, many of these goals duplicate the criteria-goals or those set forth in the capability and development plan. I have selected for identification here only those substantive specific goals which are not set forth in the Act 250 criteria. (However, the overlap between the two sets

of goals should receive attention of re-drafters of the law, since there are different formulations of the same goal in the criteria and the municipal plan sections. (I have also not focused upon regional planning goals which appear to echo some of the municipal goal statements: See 24 VSA 4347; 4345a (6)), but also limit review to major projects which might have a substantial impact on the region. The following selected municipal planning goals set forth in the statute supplement the criteria goals discussed in Section 4:

> …to maintain the historic settlement pattern of compact villages and urban centers separated by rural countryside…
>
> …to provide for a strong and diverse economy…
>
> …to broaden educational and vocational training opportunities
>
> …to provide for safe, convenient, economic and energy efficient transportation systems…
>
> …to maintain and improve the quality of …forest and other land resources…
>
> … to make efficient use of energy resources and reduce emissions of greenhouse gases…
>
> …to maintain and enhance recreational opportunities…
>
> … to encourage and strengthen agricultural and forest industries….
>
> …to ensure the availability of safe and affordable housing for all Vermonters…
>
> …to insure the availability of safe and affordable child care…
>
> …to encourage flood resilient communities….

Each of these planning goals is elaborated in the enabling statute itself as well as in the interpretations by the planning manual of the Vermont Department of Housing and Urban Development. These goals reflect many of the capability and development plan goals which were not reflected in Act 250's criteria-goals, (See Section 3). For example, the goals involving housing, a diverse economy, maintaining recreation opportunities, strengthening of natural resource industries in the Capability and Development Plan but not included in the criteria goals are now echoed in the statement of the municipal and/or regional goals. As stated above, these goals are significant modifications of the criteria-goals. First, these goals involve both regulatory and non-regulatory municipal public actions, whereas the criteria- goals in Act 250 as described in the previous section are predominantly state regulatory activity. Second, the achievement of these non-regulatory goals may depend upon public resources, e.g., resources for housing, economic development, etc. and require independent actions of state legislature and/or municipal and state, regional, and municipal agencies other than the Natural Resource Board and its District Commissions (which are predominantly regulatory bodies). And a third consequence of these new goals is that they may conflict, one with another.

A central question is: what is the relationship between the regulatory goals of the Act 250 criteria-goals and the goals requiring non-regulatory implementation in the municipal and regional planning legislation? Municipal plans in their discretion, (24 VSA 4302 (f)) may pursue some or all of

these non-regulatory goals if deemed "relevant or attainable". Since the municipal plans may pursue non-regulatory goals (as well as regulatory goals) and since these plans are to help guide the permitting or denial of developments and subdivisions both at the municipal level and, under Criterion 10 at the state level, *these non-regulatory goals may be incorporated in the permitting process indirectly by means of the duly adopted plan of the municipality, which is incorporated under criterion 10 of 10 VSA 6086 (a) (10).*

The recognition of goals requiring non-regulatory implementation as part of the Act 250 process raises three interesting problems regarding evaluating their achievement of Act 250. These goals may or may not be achieved depending upon (1) federalism: the *state of federal-state-local relations* (2) sustainability - the *problem of available resources over time; (3) the problem of conflict: the relations of the goals- one to another.* The first problem, federal-*state-local relations* is illustrated by exploring the example of affordable housing. How does one recognize Act 250's contribution to "ensuring the availability of affordable housing", a goal of municipal and regional planning? Obviously, despite the requirement that there be a housing element in the local and regional plan, the development of "affordable housing" may depend not only upon planning for such housing but also upon local, state, and federal willingness to secure the public or private resources to support the construction, acquisition, management and transfer of such housing to low income families. If such housing is not developed, and this goal is not attained, it may be due to the lack of federal, state, and local community willingness and resources, and not to any shortfall in the Act 250 permitting process.

There is, however, a second and deeper problem: *the problem of sustainability.* Many of the non-regulatory goals of municipal and regional planning require the undertaking of development activities. The non-regulatory goals of providing housing, recreation facilities, a vibrant economy, infrastructure, all suggest the need for affirmative interventions into our natural and social environment. However, these pursuits of non-regulatory goals may conflict with the criteria-goals of Act 250. For example, a vibrant economy, promotion of housing, the strengthening of agriculture and forest industries may produce congestion, strip development, air and water pollution – consequences presumably forbidden to a lesser or greater degree in the regulatory provisions of Act 250. In so far as the different regulatory and non-regulatory goals conflict, there must be some mode of prioritizing or reconciling the pursuit of the myriad of goals set forth in Act 250.

The Conflict of Goals in Act 250

The problem of sustainability – reconciling non-regulatory and regulatory goals is part of a larger problem – i.e. the possibility of conflict among any or all the various goals within Act 250– one to another. Since, for the most part, Act 250 and the enabling provision of municipal and regional planning simply list the goals, one after another, how does a reconciliation of the goals take place? There are many ways in which goals under Act 250 may be reconciled: (1) balancing either under the statute or at the discretion of the decision makers, i.e. district commissions or courts, when confronting a particular project. (This balancing may be qualitative balancing or some effort at quantitative balancing may be undertaken, but, according to the Vermont courts, the latter is not required); (2) temporal reconciliation, i.e. through some goals to be realized first before others are pursued; (3) prevention of the conflict through the imposition of permit conditions on particular project proposals;(4) prohibition, i.e. simply prohibiting some developments to take place in some areas; ((5) environmental priorities, either set by the statute or adopted by the decision maker under the statute; such priorities may be found in allocating burdens of proof; (6) quantitative limits placed upon some consequences of

development, e.g. levels of pollution, (which would permit projects with consequences falling within the limits); (7) a hierarchy of goals implied in the statute; (this hierarchy may be revealed by the different burdens placed upon applicants or opponents depending upon the criteria); (8) the nature and cost of the remedy, i.e. the denial or high cost conditioning of the permit; (9) the relevance or irrelevance of a specific goal to the review of a specific project. All or at least many of these techniques can be found authorized at one place or another within Act 250 and invite extended discussion elsewhere. Here, I wish to focus upon two mechanisms for reconciling these goals: first, regional and municipal plans which allocate the achievement of purposes spatially or temporally; second the enacted policy of smart growth.

Municipal and Regional Planning in Act 250

The original Act 250 was a combination of a description of land "capabilities", a set of planning policies, and a never-adopted state land use plan. With the failure of adoption of the state land use plan, the core of Act 250 became the ten major criteria for evaluating proposed projects. As a result, most of the activity of the law was not planning but rather project review. The one major exception, (aside from criterion 9) was criterion 10 which incorporated the requirement of conformity with municipal and regional plans. Unfortunately, a line of Vermont Supreme Court decisions has narrowed the effect of Criterion 10 by limiting the enforceability of its requirement that a development conform to a local or regional plan to plan provisions that are set forth in mandatory terms. [See In re B&M Realty, LLC, 2016 VT 114.] Thus, aspirational planning provisions are in effect precatory.

As stated above, the more recent amendments to Act 250 expanded the ambit and role of these local and regional plans. These plans are necessarily geographical, i.e., they take into account the geography of landscape features and developments in towns and regions. (This attention to landscape features is important since, as I pointed out above, it is the landscape features which animate the vision of Vermont and Act 250. These features are unlike most of the criteria-goals, which, with some exceptions, deal with more specific goals and do not focus upon landscape features). This attention to landscape features of municipal and regional plans may provide one all-important bridge between the vision of Vermont and the specific criterion goals of Act 250.

There is another important contribution of planning. A regional and municipal plan allocates uses to different parts of the area and, in so doing, makes possible the reconciliation of goals by channeling their pursuit to different areas. Thus, in theory, the goal of a vibrant economy may be assigned to a business area, an environmental preservation goal to a wetland, coastal or protected forest area. (I do not purport to examine the many issues which such a "zoning" approach raises). Nevertheless, under some circumstances, such an allocation process may make sense, and, In fact, modern environmental laws adopt it to some degree by "zoning" their air quality districts and river segments. Whether municipal and regional plans can reconcile the different goals requires a careful examination of particular plans.

Conclusion: Municipal Self-Governance

Despite the impressive list of municipal goals in the municipal planning legislation, Vermont municipalities have the freedom not to establish a planning commission and, even if they form such a commission and proceed with planning, under the planning legislation, they are free not to adopt one or another goal set forth in the legislation, (as long as reasons are given for not pursuing the goal in question). Further, they need not adopt local regulatory legislation to fulfill the plan. Today, 20% of

Vermont municipalities still have not undertaken either land use planning or regulation. Thus, the district commissions, when proceeding to determine conformity of proposed project with the municipal plan under Criterion 10, may not necessarily review all the statutory purposes in their determination. In addition, my review of a sample of town plans revealed that the plans choose to emphasize some of the mentioned purposes and not others. Although frustrating to some planners who understandably wish to see planning as a universally adopted activity and are understandably concerned that failure of a municipality to plan might have detrimental impacts upon neighboring towns, the provision of such municipal freedom not to plan operates to preserve the political freedom of municipal self-governance – a well- established principle in Vermont and in many states. Given this reality, perhaps we should reluctantly add a fifteenth goal of Vermont's current municipal and regional planning – municipal self-governance – "the freedom not to plan".

VII. Historic Downtown Development and Smart Growth

Although not strictly part of Act 250, (although there are some links of shared language), a downtown development program was adopted at the end of the 1990's and culminated in legislation adopted in 2006. The background of this legislation was, in part, the increasing need for low and moderate housing, but also the precedent setting work of the Vermont Land Trust and the Vermont Housing and Conservation Board, both promoting unique programs linking conservation and appropriate development. The legislation sought to promote housing within Vermont's towns and villages, as well as locating commercial, historic and public buildings there. Second, the law provided an array of non-regulatory tool including special tax assessments, income tax credits and priority of state construction projects. Third, the Agency of Natural Resources supported the effort through land related regulations of municipally sponsored privately owned waste water systems. *From the point of view of pursuit of a landscape policy in Vermont, it was this law which recognized, through adoption of "Smart Growth" principles, which reintroduced the importance of recognizing and supporting Vermont's unique landscape. [Smart growth has been assessed by the Lincoln Land Institute:* Gregory Ingram et al *Smart Growth Politics: An Evaluation of Programs and Outcomes,* John DeGrove, *Planning Policy and Politics: Smart Growth and the States,* Arthur Nelson et al. *Urban Containment in the United States* and a series of recent essays on Oregon's efforts by Edward Sullivan reviewing preservation of "ecological areas", farmland, forests, and urbanization with a capstone article: "Smart Growth: State Strategies in Managing Sprawl" 45 Urb. Law 349 (2013).

The original Act 250 state land use plan envisaged a state of primarily small towns surrounded by agricultural and other natural resource lands. Although the land use plan was not adopted, a similar vision is implicit in the Capability and Development Plan. In the Act 250 criteria, bits and pieces of a landscape strategy may be discerned in the protection of water resources (criterion 1), historical sites, aesthetics and special natural areas (criterion 8), and criterion 9 focus upon growth, agricultural areas, and forest lands. In 2004, Vermont explicitly adopted "smart growth" principles (24 VSA 2731) by which the state and localities might establish downtown development districts, village centers, new towns, growth centers and neighborhood development districts as part of the municipal planning process to secure eligibility for a range of incentives. The smart growth principles include the maintenance of this historic pattern of compact villages and urban centers, separated by rural countryside, compact mixed use centers, a choice of modes of transportation protection of environmental natural and historic

features, strengthening agricultural and forest industries, balancing growth with public utilities, supporting a diversity of viable businesses, providing a range of housing and preventing a scattered settlement pattern and fragmentation of farm and forest lands. These principles were to be established as part of individual municipal and regional plans, which, in turn, would be consulted in determining compliance with Criterion 10. Smart growth principles were also invoked in other criteria, especially criterion 9. Under Criterion 9 (L), as part of the "smart growth" initiative*, "the historic settlement pattern of compact villages and urban centers separated by rural countryside" was to be promoted.* Other legislative amendments also provided definitions of "existing settlements", and comparable goals were set forth as purposes for the municipal plan; linkages were also provided in the statutory elements of the regional plan. This smart growth strategy adopts the landscape vision which I am recommending in this essay! It also suggests a list of goals or specific formulations of goals which are not set forth in the capability and development plan, the criterion-goals, the agency goals or municipal and regional goals. In light of this different statement of goals, there may need to be further efforts at harmonizing them.

In Vermont, this legislative smart growth approach is slightly more than a decade old and obviously cannot be evaluated as if it were in operation for fifty years. However, when it is evaluated, it might be approached in two ways. First, it may be assessed as an effort to promote the Vermont landscape vision and be judged upon the extent to which it has contributed to realizing that vision. Second, this legislative approach may be assessed as an effort, as part of the municipal and regional planning process, to coordinate the range of more specific goals which are reflected in the Act 250 criteria. Thus, in theory, a municipal or regional plan which embodies this smart growth approach may coordinate the pursuit of a series of discrete Act 250 goals – protection of agriculture and forest land, existing settlements, historic sites, and the aesthetics of open countryside and compact villages and the resulting "smart growth" plan, as part of a larger municipal or regional plan may provide a standard for regulatory review under Criterion 10 of Act 250!

VIII Federal and State Agency Goals
Their Relationship to Act 250

Introduction

When Act 250 was adopted, the development of national and state environmental law was in its infancy. (For a succinct history of environmental law, see Brooks, et al. *Law and Ecology*, Chapter 1). In the past half century, there has been a proliferation of federal and state agencies dealing with one or another aspect of the environment. (see Brooks, Chapter IV, Volume 2 *Towards Community Sustainability,* which lists the myriad of federal laws and more than 18 different subjects which are covered by various state departments and agencies). These agencies, although more narrowly focused and bureaucratically organized, are better staffed with the expertise to plan for their specific aspect of the environment. On the other hand, they may be less equipped for to promote effective citizen participation in the review of the major landscapes and their relationship, one to another.

In the previous sections, I reviewed the vision of pastoral Vermont, the capability and development plan of Act 250, its' criteria, and the incorporation of municipal and regional planning

provisions as sources of goals for Act 250's review of major developments. In this section, I turn to a less visible source of Act 250 goals, viz., the federal and state agency laws which play an indirect role in the Act 250 process. As described above, many federal and state laws, such as the regulation of water quality, posit goals which overlap with the goals of Act 250. Such an overlap creates the possibility of either competition or coordination with the Act 250 District Commissions and the Natural Resources Board administration of Act 250 criteria. Various approaches, which are described below, have been taken to facilitate coordinating the work of federal and state agencies with Act 250. *More important is the fact that these state and federal agencies conduct in-depth planning directly pertaining to the major elements of the Vermont landscape.* There is a myriad of excellent updated plans for agriculture, forestry, selected mountain areas, streams and lakes, scenic roads and towns. These plans include recommendations for both regulatory and on-regulatory measures to preserve, conserve and enhance Vermont's landscape features. With notable exceptions, *the current laws, both Act 250 and the laws authorizing state agency planning, do not indicate how such valuable planning might be properly linked to the Act 250 assessments of major developments.* This section concludes with suggestions of possible ways in which agency planning may be integrated into the Act 250 decision-making process.

In addition to municipal and regional planning which attends to the general planning of Vermont's landscapes, each state agency concentrates its planning upon one or another aspect of this landscape. The following crude list, without seeking to be exhaustive, seeks to indicate the kinds of planning undertaken for each element of the landscape. A stated above, these landscapes are working environments, in which a host of activities are taking place. The planning of such landscapes extends beyond simply protecting a passive natural area; such planning requires the adoption of both regulatory and non-regulatory measures to coordinate the activities within these landscapes.

1. Mountains

The mountain areas of Vermont, as described above, are host to a variety of activities which support and shape them: management of forests, (discussed separately below); management of wildlife, recreation activities, including, of course, skiing, hiking, etc.; energy generation, including wind turbines and the many uses of lakes and rivers. As a consequence of these activities, there are mountain management and wilderness plans, forest and wildlife management plans, recreation plans, energy generation plans, and lake and river management plans. These plans may be comprehensive, such as the comprehensive national planning of the Green Mountains, but many of them are limited in focus, purpose or geographical area. These plans allocate activities within the mountain areas, regulate some mountain activities and facilitate various public and private developments. Unfortunately, unlike some other states and nations, Vermont lacks a statewide plan for its mountain areas.

2. Forest Lands

Clearly, the planning of forest lands overlaps with the planning and regulations of mountain areas. As stated above, the federal government plans and regulates parts of the Green Mountain national forest. The Vermont Department of Forests, Parks and Recreation lists a myriad of plans for Vermont's forests as well as a comprehensive

forestry plan and a comprehensive recreation plan. Regional and municipal plans also include the planning for forests within their jurisdiction. Plans for the Northern Forest have been issued. State law also enables private forest owners to adopt management plans for their own forest lands. These plans pursue a variety of purposes, including, but not limited to wildlife management, recreation management, and lumber production. Despite this pattern of excellent forestry planning, there is no systematic method for bringing this vision of Vermont's forests to the table when making Act 250 decisions.

3. Agriculture Lands

The U.S. Soil Conservation service has identified high quality agricultural land, and the Vermont Department of Agriculture has promulgated a statewide agricultural plan. This plan embraces the protection of agricultural land, production of products and their distribution and the control of pollution resulting from agricultural activities. In addition, there are more recent plans and studies which seek to adjust the tradition milk faming of Vermont to encompass new approaches to farming.

4. Lakes, Rivers, Streams and Wetlands

Although mentioned above, (since water areas may be located on mountain and in forest areas, and may be affected by agricultural activities), lakes and rivers are usefully distinguished as unique elements of Vermont's landscape. They are a principal focus of national environmental law, which has been on protection and treatment of water quality, the management of wetlands, and flood protection. Recently, (2016), for example, the Agency of Natural Resources has promulgated a "water quality integrated assessment report" and there are many river corridor and management plans, as well as plans focusing upon Lake Champlain, the Connecticut River, the Vermont river and river basins. Some of these plans and studies (exceptions are the studies of Lake Champlain, the Connecticut River and the Vermont river envisage rivers as corridors related to their surrounding landscapes.

5. Scenic Roads

Scenic roads can refer either to the immediate ambience of the road itself or views of scenic areas from the roads. Although the Vermont Department of Transportation has issued a manual for the designation of scenic highways as well as identifying some such roads, both regional and municipal agencies have identified many more scenic roads. A state program preserves dirt roads and legislation prohibiting of billboards has also been adopted. To my knowledge there is no state plan for scenic roads.

6. Towns and Cities

State guidance for municipal and regional plans, in-town and neighborhood development plans, statewide housing plans and state historical preservation planning as well as state economic plans contribute to the effort to plan and regulate land use

within Vermont's towns and cities. However, as stated above, there does not appear to be a statewide overview of the urbanization of Vermont and the implications of that urbanization.

All of these agency plans set forth a variety of purposes or the management of Vermont's landscape and many of them identify both regulatory and non-regulatory methods for implementing these purposes. For example, the Vermont Forest Resources Plan, "VFRP" (2010) sets forth a sophisticated list of five "desired future conditions" of the forest including biological diversity, forest health and productivity, forest products and ecosystem services, a land ethic, and a legal framework for forest conservation and sustainability. Non-regulatory measures in the VFRP include the control of invasive species, creation of forest buffers and habitat blocks, maintaining recreation trails and extension of tax benefits under the Use Value Appraisal Program. This example illustrates the fact that the agency purposes set forth in their plans are clearly more elaborate and carefully stated than the rather succinct and somewhat outdated forestry related purposes set forth in Criterion 9 of Act 250, which seeks to protect lands with potential for commercial forestry. Part of the difference between the goals of the agency plans and the Act 250 goals is due to the fact that the more recent plans take into account the changes in the Vermont landscape and the activities taking place in this landscape. Thus, the transition to a soft energy economy, the decline in forestry production, the changes in the agricultural economy, the new forms of pollution in lakes and rivers, the increased appreciation of historic features of Vermont towns, and the increased recognition of the slow but steady growth of strip development are reflected in these plans. This differential between state agency and Act 250 statement of purposes suggests the need to "harmonize" Act 250's statutory goals drawing upon these agency plans to articulate in one coherent updated statement. *Given the myriad of valuable in-depth planning by Vermont's departments and agencies, the questions then become: how, if at all, are these plans and their purposes linked to the Act 250 decision-making process? If they are not, should they be?*

Delegating Selected Act 250 Goals and Plans to State Agencies

It has been proposed that some of the goals and planning within Act 250 be delegated to other agencies. For example, some have suggested that goals and planning be delegated to those regions and municipalities which have conducted detailed comprehensive planning. A recent law review article suggested delegating Act 250 review of energy project to the Public Utility Commission. Conversely, given the similarity of converge between Act 248 and Act 250 for assessing impacts of energy facilities, a recent "Act 147" has coordinated with regional planning agencies according to both agency's planning standards. In a similar effort at coordination, the Transportation Agency has broadened its attention to landscape issues in its *Better Connections Program.* Presumably, such a similar approach might also be recommended to delegate to the Agency of Natural Resources the responsibility of planning standards of regional planning in the case of lake, river, and wetlands.

There are two fundamental difficulties with such a proposal. First, individual agencies have a narrower but deeper compass of planning and regulation than the broad sweep of concerns falling under the Natural Resources Board and the District Commissions. It would seem desirable to have at least one agency which can bring such a broad citizen-based orientation to bear upon specific decisions. Second, political scientists have pointed out that each of the state agencies have a specific constituency

which can "capture" their activities. In light of the risk of "agency capture", it may be preferable to have a Board which has a broad constituency. Even if one rejects the delegation option, this rejection need not prevent better coordination among the Natural Resources Board and the individual agencies.

Since state agency plans are often part of the implementation of federal statutes, it may be suggested that such plans would preempt state Act 250 plans, regulations and decisions. However, most of the relevant federal statutes have saving clauses to preserve state laws which are more stringent and Vermont courts have held that Act 250 decisions, if more stringent than other state plans and regulations, may be held to be effective. (For a full, if somewhat dated discussion of this issues, see Chapter IV of Volume 2 of Brooks *Treatise*).

However, Act 250 has also established four other ways in which state and federal statutes, regulations and permits may be coordinated with Act 250 decisions under the criteria. First, the federal or state statute may be explicitly referenced and relied upon as part of the statutory Criterion. For example, under Criterion One, regulation of undue water pollution, the applicant must comply with the applicable Health and Environmental Conservation Department regulations. Secondly, as under Criterion 4 dealing with soil erosion, applicable federal handbooks are incorporated into the standard. Third, coordination between the Natural Resources Agency and other state departments and agencies may take place, authorized by statute either through formal agreements or informally through a practice of consultation. [Unfortunately, such consultation has been sporadic during the history of Act 250). Finally, as provided by Act 250, the state agency permits relevant to Criteria 1 – 5 may constitute presumptions that the applicant has complied with the Act 250 requirement and that technical determinations by the agency are to be accorded "substantial deference". *This practice has not been assessed although our Treatise, Vol 1: Chapter VII in reviewing the procedure of the District Environmental Commissions did discuss the treatment of presumptions by the Commissions.*

In theory, by incorporating agency regulations, manuals, permits and technical determinations into the decisions of the Act 250 commissions, the goals of the relevant plans of that agency are tacitly incorporated into the Act 250 decision making process. If, for example, the classification of a stream segment, or soil type is made by the agency in accordance with plans of that agency, reliance within Act 250 upon that classification will, in effect, implement the agency's goal of that classification. To be sure, such a "transfer" may be automatic and there may be little conscious attention by decisionmakers to either the original goal or plan which animates the agency determination relied upon. Similarly, even if there is consultation and coordination of agencies, there may be little attention to the specific plans and their goals within such consultation!

Non-Regulatory Measures

As stated above, the plans of state agencies may include recommendations, which extend beyond simply the regulation, i.e., the approval or prohibition of a given development. A series of non-regulatory measures may be included within the plan. Thus, for example, the Vermont Housing Needs Assessment recommends government subsidized housing, tax credit housing, and housing choice vouchers. Similar non-regulatory measures may be found in each of the agency plans. In addition, non-regulatory measures may be adopted as part of municipal and regional plans, which are, in turn,

incorporated into the Act 250 decision-making process. Specific statutes enable these non-regulatory measures.

Less recognized is the fact of the widespread conditioning of Act 250 permits to embrace non-regulatory purposes. (For a review of some of these conditions, see Brooks Chapter IX, Volume 2, *Treatise*s well as discussions of the role of conditions in implementing the specific criteria as set forth in Volume 1 of the Treatise). In the future, such non-regulatory measures may assume great importance for preserving, conserving and rehabilitating landscape features in Vermont. Such non-regulatory measures may include tax policies, fees, land acquisition, covenants running with the land, easements, infrastructure investments and subsidies for selected developments. Such recommendations of non-regulatory measures may be "imported" into the Act 250 process through its coordination with agency planning.

Specific Case: Energy Planning, Regulation and Act 250

The establishment of energy facilities, production of energy, transmission and its use have impacts upon the landscape of Vermont. The facilities themselves, such as power plants or wind turbines have an obvious impact upon some landscapes. The generation of power can affect natural resources, as in the case of wood fired power plants, and there may be residuals from power generating incinerators or coal or oil-fired plants. Transmission lines can degrade certain landscapes. Uses of energy, such as home heating, deliver a variety of residuals into the air. These effects, however, are not unique to any one landscape, but may affect all landscapes.

The goals of Act 250 intersect with the efforts of the state and federal agencies, especially Vermont's Department of Public Service, which seek to control the effects of energy development and production. The broad goals pertaining to energy are not set forth in Act 250, but are contained in separate statutes, (Title 30: Public Service). These goals include the meeting of the state's energy needs in a manner that is adequate, reliable, secure, and sustainable, assures affordability, and encourages economic vitality, encourages efficient use and cost-effective demand-side management and that is environmentally sound. The Department of Public Service is authorized to prepare a state comprehensive energy plan in conjunction with other State agencies consistent with the above goals. The plan purports to be guided by a concern for healthy ecosystems and a sustainable environment. Without going into detail, it would appear that the state energy goals and plans appear to track the goals set forth in Act 250. These goals are, in turn, incorporated into the regional and municipal plans, which are, in turn, included in Criterion 10 of Act 250.

There are, however, three direct linkages between energy regulation and the goals of Act 250. First, under Act 250's criterion 9 (F), developments and subdivisions must comply with a requirement for energy conservation and there is a presumption of compliance under Section 30 VSA 51 which is one of several provisions implementing the energy policy goals and plan. Second, Act 250, under Criterion 1 (B) and abiding with the appropriate health and conservation guidelines must review and approve the waste facilities, which include waste from power plants and, under 6086a, radioactive water from nuclear facilities. The third connect to Act 250 is Act 248 which reviews and approves applications for the purchase, investment and development of new gas and electric facilities, and, as part of this review and approval, must give due consideration to many of the Act 250 criteria. (In some cases, e.g.

aesthetics, there is a separate restatement of the criteria). Unlike the goals of the municipal and regional planning goals discussed above, which are incorporated under Act 250's Criterion 10, the Act 250 goals are "transferred" under Act 248 to be assessed by the Public Utility Commission.

Obviously, the complex relationship between the goals of Act 250 and the goals set forth in Title 30 pertaining to the Public Service Department and the Public Utility Commission is the product of legislative compromise over time, but I have to wonder whether the present allocation of goals and responsibilities pertaining to Act 250 and Title 30 provide an effective basis of effective regulation.

Conclusion Pertaining to State Agencies

Given the current inadequacy of the introjection of state agency plans and planning goals into the Act 250 decision-making process, the following is recommended:

1. The statutory goals of Act 250 and the laws and plans of state agencies be jointly articulated and harmonized and either placed in the statute or in supplemental regulations. This effort should be based upon the next step:

2. An inter-departmental committee be established to review the plethora of agency plans and assess their relevance to Act 250 determinations including permit conditions, regional and municipal plans.

3 A statutory mandating of a list of officially adopted state agency plans, be organized according to landscape form.

IX: Act 250 in Vermont's Democratic Community

Introduction

Act 250 is part of a number of Vermont laws which are the result of and contribute to its democratic community. These laws include the constitutional rights of citizens to elect their state and municipal representatives, to receive the common benefits of their government 's actions, limited by a separation of powers, and to enjoy the freedoms of speech and the press as well as immunity in legislative deliberations. Aside from these traditional but important elements of a constitutional democracy, Vermont benefits from its rich history of participatory governance through unique town meetings which one scholar has entitled "real democracy". (Frank Bryan, *Read Democracy)* An array of conservation laws has been adopted which call upon Vermont citizens to play a major role in the preservation or conservation of the environment. To evaluate Act 250 in light of its purposes must recognize that one of its purposes is to contribute to the tradition of laws which enable Vermont citizens to play a major role not only in the election of representatives and participation in town meetings, but also in the day to day administration of laws pertaining to its sustainable working landscape.

Characteristics of a Democratic Community

A democratic community may be identified as:

(1) a community which harbors and pursued shared goals which extend to all of its members;

(2) a community which has an identity and some degree of autonomy, protected by borders, both natural and legal.

(3) a community whose members have control through some form of participation over their community's political decision-making;

(4) a community which is socially and economically integrated, linked, in part, by shared formal and informal ways of life.

Vermont's laws, including Act 250, contributes to the formation and operation of Vermont as a political community, positing shared goals, (as outlined in the statements of goals above), establishing some degree of autonomy though establishing boundaries of jurisdiction for its operation, (including the power to adopt more stringent regulations when permitted by federal and state law), by allowing all classes of citizens to equally participate in the decision-making processes and enabling citizens and their communities to control the decisions it makes. It is, perhaps, the citizen participation in decision-making which establishes what Mill calls the "school of public spirit". It is only by participating in the functions of government that men and women can become competent as citizens. By engaging in civic activities, one "is made to feel himself one of the public and whatever is for their benefit to be for his /her benefit". As a consequence, one is able to "weigh interests not his own; to be guided in the case of conflict claims by another rule than his private partialities; to apply…principles…which have for their reason for existence the common good" ….

Many recent assessments of citizen participation (Selmi,"Reconsidering the Use of Direct Democracy in Making Land Use Decisions", UCLS Journal of Environmental Law and Policy" (2001-2002) in environmental management have been conducted according to the following more specific standards for measuring:

` 1. The extent to which such participation Incorporates values in public decisions
2. The extent to which it Improves the substantive quality of decisions
3. The extent to which it resolves conflict among competing interests
4. The extent to which it builds trust in institutions
5. The extent to which such participation educates and informs the public

Measuring such contributions is obviously difficult and most of the studies in other jurisdictions are case studies. Such *case studies might usefully be undertaken as part of the evaluation of Act 250.*

Act 250's Unique Contributions to Vermont's Democratic Community

Unlike Vermont's other environmental laws, which are bureaucratically structured, Act 250 is uniquely structured to enable both democratic representation and citizen participation. The law originated out of a community-wide process in which the original law was adopted. The major amendments to the law have been preceded by statewide public hearings and/or public conferences. Constituencies of planners, lawyers, municipal representatives, environmentalists and the development community have emerged out of this public participation process. The law enables citizens in a district by district basis to review major proposed projects in hearings which are relatively open to the public. Under Act 250, party status is available to the applicant, the landowner, the municipality in which the project is located, any state agency affected by the proposal, and any adjoining property owner who has a particularized interest protected by Act 250. Non-party friends of the Commission may be allowed limited participation opportunities with consent of the Commission. Appeals of District Commissions were originally taken to a citizen-based Environmental Board, but this Board has been replaced by an "environmental court". Under several criteria, the District Commissions and the appeals board could consider evidence from other agency proceedings; this evidence itself might have been the result of proceedings which were subjected to state or federal citizen participation requirements of relevant laws. Under Criterion 10, the District Commission and its appeals may consider municipal and regional plans adopted by citizen members of the relevant planning commissions. These plans are subject to public hearing requirements and their adoption is by the municipal legislative body. Thus, at various points in the process – the adoption of legislation, the Natural Resources Board rules, the District Commission hearings on particular projects, and the participation of citizens in the adoption of municipal and regional plans.

Despite this impressive system of citizen participation, there are several limits: (1) the substantive content of participation does not encourage focus upon Vermont's pastoral landscape as a whole and the elements of that landscape; (2) Aside from local land use controls, the citizens may not easily review the cumulative impacts of multiple small scale development; (3) the constriction of the first tier appeals to an environmental court rather than a citizen based Board restrict broad statewide participation of citizens in the appeals proceedings; (4) the failure of citizens in the participation of enforcement efforts; (5) the inadequate citizen review of agency plans and their implications for Act 250 decisions.

The effort to expand citizen participation has encountered several major issues. First, the public and private costs of such participation may be substantial. As a consequence, there is a continual effort by some to "streamline" the process. The Natural Resources Board has kept statistics measuring the time lapse between completed applications and their approval or denial which, in most but not all cases, appear to be quite modest. Second, in studies of citizen participation, a tension between intense participation by a limited number of citizens and an extensive but shallow participation by a more extensive public has been revealed. While intense deliberative participation may be possible for a limited number of citizens Third, there may be a tension between the decentralized system of decision-making in district Commissions and centralized decisions which provide state-wide uniform rules. Finally, there may be a tradeoff between seeking a comprehensive consideration of a range of goals considered in plans or in the review of projects resulting in legal, planning and factual complexity; such complexity,

in turn, makes citizen participation more difficult. I have not sought to document these issues nor provide answers as to how they might be resolved.

X. Statutory Revisions

Throughout this essay, I have made recommendations for possible studies, plans and amendments pertaining to Act 250. I have put these recommendations in italics. Here, I have simply listed a series of modest recommendations for modifications of the present land use and development and municipal and regional planning statutes in light of the discussion above. These recommendations are guided by the central purpose of assuring that the goals of Act 250 are understood as promoting a sustainable pastoral Vermont and preserving, conserving and enhancing its major landscapes.

1. Rewrite Section 6042 and the subsequent capability and development plan to identify the major landscape forms of Vermont and ensure that development would be guided to insure the sustainability of these landscapes.

2. Set forth a series of findings pertaining to the variety of threats to those landscapes

3. Reorganize the criteria-goals set forth in Section 6086 according to the major landscape types, include major criteria of mountain ecosystems, villages and towns, and statewide scenic roads.

4. Reformulate the definitions of the criteria objectives to harmonize with the statement of objectives of municipal planning (24 VSA 4302) and the regional planning (24 VSA 4307) organized according to landscape forms

5. Integrate a full statement of smart growth in the criteria, to conform with the statements of smart growth presently set forth in different sections of the Vermont statutes.

6. Review, rewrite and perhaps combine the regulatory and non-regulatory sections of Act 250, the municipal land use planning and development law and the downtown development laws to provide a coherent statement of the full panoply of powers necessary to implement conditions on Act 250 permits and other land use permits.

7. The unique democratic aspects of Act 250 should be identified and stated as a goal within Act 250

8. the statutes should be further amended to empower the harmonization of agency, Act 250, municipal planning goals, downtown development goals and energy goals and set forth the alternative mechanisms for full coordination between agency, municipal, regional planning, town development and energy planning and the permitting.

9. Review and strengthen selected citizen participation aspects of Act 250 including reinstatement of the Environmental Board, the election of regional planning Commissioners and citizen participation in the enforcement of Act 250 and municipal land use laws.

Neither these recommendations nor the memorandum which proceeds them address the problems of implementation of the goals of Act 250, but rather are designed to simply clarify its goals.

Appendix

Act 250: Some Late Life Bibliographical Reflections

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]*

[In addition, Dwight Merriam has edited an annual collection of excellent articles on land use law, *At the Cutting Edge 2012 -]*

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 four 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. A fourth work is McCullough, Ginger and Baumflek "Unspoiled Vermont: The Nature of Conservation in the Green Mountain State" in Foster's *Twentieth Century New England Land Conservation* (2009). This book offers broad comparisons with the environmental histories of other states. The authors place the history of Act 250 in the context of the development of other environmental history of the state. In my view, all four writings are required reading for anyone seeking to evaluate, let alone change Vermont's Act 250. [For a running account of land use issues in Vermont, see VNRC's *Vermont Environmental Report]*.

When we first studied Act 250 in the Treatise, we described 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 the support of 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". The approach to a sense of place involves an effort to protect the major landscape features of Vermont and to recognize the aesthetic and historical dimensions of that landscape. 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 by most Vermont lovers. More recently, "a sense of place" with its corresponding appeal to a shared community landscape has become a 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)]*

One issue which lies behind any discussion of "a sense of place" and its' major landscape features is the question as to whether these are merely "epiphenomena" of a deeper working of ecosystems. Although I will not yield to anyone my deep appreciation of ecology, it is also true that the average Vermonter is more likely to perceive the environment in landscape terms and hence the law, at least in part, must express the popular landscape perspective. Whether and to what extent this perspective may conflict with a thoroughgoing ecological perspective has been explored in an interesting discussion of Vermont's wilderness area. [see Foster, "*Wildlands and System Values: 22 Vt.. L. Rev 917 (1998). See also McHarg, Design By Nature (1969); Milne et al. Mountain Resorts: Ecology and the Law (2009). For an application, see Bennington County Regional Commission, The Vermont River: Heritage and Promise (1975)*

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 (1970)*). 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", to the extent that they have been adopted in Vermont's Act 250, to 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. [It is worth mentioning that Vermont's Act 248 and its amendments applied to utility- related projects took a similar approach to Act 250].

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, and McCullough [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 Vermont's recent population 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).*

I would like to suggest, however, that the population and economic changes in Vermont over the past two decades have been relatively small, especially when compared to many cities and states in the nation. One might provocatively suggest that Vermont, (along with Montana), comes the closest to realizing a "no-growth" society – an ideal embraced by some environmentalists. Interestingly, although growth is frequently appealed to assure full employment, at the time of this writing, Vermont has achieved low growth and low unemployment! [For discussions of a low growth economy, [see the works of John Stuart Mill and more recently Herman Daly]. If one is to return to re-examine the fundamental economic assumptions behind Vermont's Act 250 and environmental policy in general, one must examine the stead state theory. Gus Speth has published a proposal for a new economy (*America the Possible) (2012) and briefly explores the no-growth society. Not only might the changing economy require a re-examination of Act 250. The transition in energy and agriculture and the advent of the information society might do so as well. [see Sovacool and Dworkin, Global Energy Justice (2014) and* Ristino, *The Future of Food Law and Policy (2013)] .* One other change may be the ethical presuppositions of Vermont citizens. For an exploration of the impact of ethical views upon land use policy, see Timothy Beatly, *Ethical Lan Use (1994)*

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. One volume, *Smart Codes: Model Land Development Regulations* sets forth a variety of specific model state and local regulations to implement growth management.

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 remains 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, (later reduced in number) and a proposed system for insuring these goals become part of state agency, 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 and was discontinued in later amendments, 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 statewide 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) have taken place without the apparent need for such comprehensive land use planning. <u>In short, in light of the past history of statewide comprehensive planning, is comprehensive statewide land use planning needed in Vermont and, if so, why?</u>

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 250'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, and the capability and development plan was a policy plan adopted as part of Criterion 9, (which is described in the Treatise, but which has been amended since the Treatise was written), the land use plan (which was not adopted and the legislation enabling it was removed) was part of a more general "zoning type" plan. The areas were defined negatively, i.e. as simply unsuited for development, but the careful preliminary studies to support such an allocation of uses was not completed. Equally important, 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 land use plan was ultimately not adopted by the legislature. [It is worth noting that similar efforts at establishing critical areas in Florida ran into difficulties as well}. It is worth noting that 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), see McCullough et al. (above) and Norther Land Forest Council, *Finding Common Ground, (194).* 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 compared 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 more recent 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, i.e. impact planning, implementation planning, and requirements for consistency), 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)].

In addition to impact planning in Vermont's Act 250, there is also, under the Act 250 Criterion 10, requirements that the approval of permits "conform" or "advance" the purposes of the town and regional plans. {There have been legislative changes in this requirement over time and litigation pertaining to this requirement and the complexities of this issue is not set forth here}. But these complexities of plan implementation are important since, at least in the past, in Vermont and elsewhere, land use regulations have not implemented the plans.

[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, soils, and forest soils. But the references are to the immediate areas affected by the development, not an identification of entire critical areas to be protected or planned for.

Since the completion of the Treatise, several relevant books and articles have been written bearing upon the criteria, 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

The "problem" of growth is not new to Vermont; [see T.D. Seymour Bassett *The Growing Edge: Vermont Villages 1840-1880 (199)].* When Act 250 was adopted and in the following two decades, Vermont was undergoing population and economic growth. On the other hand, 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. Perhaps the issue is not the amount of growth but its distribution. 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].There has been many cases and much legislation recently aimed at seeking to control or guide growth.

The concern for the impacts of urbanization is 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, [See APA *Urban Containment in the U,S, (2004)* and, in some cases, undertaken. (see also De Grove; Conclusion, above]

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 increasing role of Vermont's Land Trust and her Conservation and Development program illustrate this trend. 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". Its' sense of place is accentuated by a discernible landscape and, within that landscape, there are major specific features, such as forests, large rivers and their tributaries, mountains, clustered small villages, scenic roads and agricultural lands. These landscape features are interrelated as mountain waters supply waters to rivers, lakes and reservoirs and these in turn 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 practices, 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 focus upon 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 or the participants of the permitting process the major landscape areas to be protected*. Instead, it protects them only with a narrow focus upon applications for specific projects. There is the option of developing substantive regulations for the critical areas and the values to be protected under the criteria. One effort though statewide planning was made in the past and was highly controversial. However, it is just such a regulatory approach which seriously considers the landscape impacts of developments which could highlight the landscape areas to be protected by the law. To highlight such decisions, it is necessary to reconsider the alleged recent "reform" of the law to satisfy lawyers, in which appeals to permit denials or conditions are no longer made to a highly visible Environmental Board, but to a narrowly focused and less publicly visible Environmental Court. As a consequence, these applications often do not receive widespread public visibility. Other issues include that fact that Act 250 approves most projects and it is unclear whether the conditions it places upon selected permits as part of that approval 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 the law relies upon regional and land use plans to control growth – plans which may or may not protect these critical areas from cumulative impacts or be properly enforced by land use regulations.

There is a vast literature pertaining to 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 a law enabling such a plan would be adopted nor, if adopted, would it be successfully enforced. 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 in the past, has not worked continuously. 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. Nevertheless, the recent Lincoln Land Institute Assessment of efforts to implement smart growth initiatives suggests, at the minimum, strong regional planning controls. Fourth, the state may canvass other tools such as land acquisition and taxation to further protect those lands needing protection and subsidies to guide favored activities. In fact, there are already some subsidies and land acquisitions in Vermont for precisely these purposes, although such tools are not tied to the current planning efforts. There is much literature I have not cited discussing these four alternatives, but I have not canvased it here.

Despite these recommendations, my brief discussion of the present challenges to maintaining and enhancing Vermont's landscape, which suggests that there may be insufficient support of the

underlying economies for the protection of agriculture, forestry, mountain tourism, water-based recreation and compart towns and that other non-regulatory approaches are needed. If this discussion is correct, the answer to the threats to the Vermont landscape may rest, at least in part, upon the restructuring of economic processes in Vermont. Such an exploration might be part of a larger inquiry into all of the fundamental forces affect Vermont's landscape. 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. Finally, returning to the theme of complex pastoralism, there is a rich history of literature on the culture of the countryside, both in the United States and elsewhere. In England, the two decades tradition of countryside planning has sought to capture and plan for both the aesthetics and the way of life in the English, Scottish, Welsh and Irish countryside. Perhaps a comparative study of this broader approach to countryside planning might be the starting point for any rethinking of Act 250!