MANAGING RURAL GROWTH

The Vermont Development Review Process

ENVIRONMENTAL BOARD
STATE OF VERMONT
Richard A. Snelling, Governor

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State of Vermont
Environmental Board

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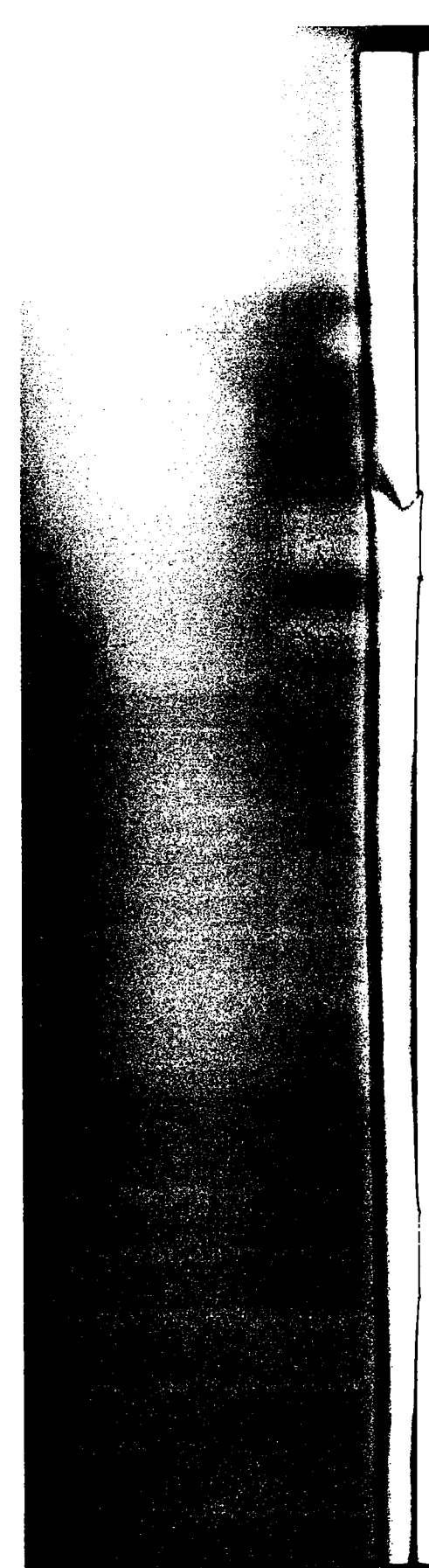

DEDICATION

This publication is a tribute to the late Dr. James W. Marvin, a member of the Environmental Board from June 1970 until his death in December 1977. Professor Marvin's contribution is discussed in the Overview section. The present Board joins with the trustees of the Conservation and Research Foundation and the James W. Marvin Memorial Fund in honoring a distinguished former colleague.

Leonard U. Wilson
Chairman

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I. OVERVIEW

Vermont has had a state development permitting process in operation since June 1, 1970. The Land Use and Development Law, commonly referred to as Act 250, established a statewide system for the examination of the environmental and community effects of residential, commercial, industrial and public facility projects, including land subdivision. The purpose of this publication is to provide historic background on Act 250, explain how the process functions, and report on the results of court reviews and other evaluations of the system.

While Act 250 has many critics, the process has received sustained public approval. This has been revealed in opinion polls, legislative decisions and performance studies. The political leadership of the state has been consistently supportive. To a great extent, these continuing positive attitudes reflect a general commitment shared by native and recently-arrived Vermont residents to the preservation of the state's environmental quality and community stability. They are also a demonstration of confidence in a regulatory system that is heavily dependent on citizen deliberation and judgment.

This publication is dedicated to Dr. James W. Marvin in recognition of his extraordinary contribution of knowledge and effort toward making Act 250 effective. He exemplified the kind of Environmental Board and district environmental commission member on whom the success of the process has always relied.

Jim was a logical candidate for appointment to the first Board. He had been an active member of the advisory panel of the Governor's Commission on Environmental Control which had recommended state development regulation. He was a natural scientist, a distinguished professor, an independent thinker, and a man of sound and impartial judgment. As he subsequently proved in his 6½ years of service on the Board, he was a tireless and dedicated steward of the environmental quality and natural beauty of Vermont.

On the first Board with Jim were an architect, a realtor, a community leader and housewife, a county extension agent, a ski area operator, an engineer, a businessman, and a county sheriff. A similar diversity of occupations was represented in the group of 27 citizens who were appointed to the original nine district commissions. These were the pioneers who established the enduring doctrines of Act 250 regulation: as a quasi-judicial function, the process must be autonomous and the role of its citizen members must be paramount.

The citizens who serve in the system continue to represent a broad spectrum of occupations and backgrounds. They receive their indoctrina-

tion and training on the job from fellow Board and commission members. They function within the framework of the law and are guided by rules and precedents set by the Board and the courts. However, the language of the law invites broad discretion. In determining whether projects satisfy the criteria of the Act, and what conditions should be attached to permits, panel members must weigh the evidence presented against their own sense of what is fair and reasonable and suitable to particular local conditions. They know that their decisions are subject to both judicial and political scrutiny.

The Board and the Commissions have always been supported by a small professional staff of high quality. The executive officer and seven district coordinators must be, by the nature of their responsibilities, versatile, personable and sensitive to their subordinate position in the system. They are expected to guide and assist applicants as well as assure that applications are considered in a timely and orderly manner and decisions issued in proper form within the time constraints set by the Act. No academic or professional prerequisites have been found appropriate to the coordinator's job and the encumbents have had varied education and experience. The current and immediate past two executive officers have been practicing attorneys.

The process established by Act 250 is adversarial. The applicant must demonstrate that his project meets prescribed criteria that include environmental and community impacts. He may be challenged by other parties, both public and private. All participants must provide evidence in the form of exhibits and witnesses in public hearings. Witnesses are subject to cross-examination as well as questioning by commission members. Rules of evidence and due process requirements must be observed. Appeals to the Board on both procedural and substantive grounds are allowed and have been taken on about 5 percent of commission decisions. Board decisions can be appealed to the Vermont Supreme Court. There have been 31 such appeals since 1970.

Applications are rarely disapproved. In fact, only 2½ percent of the nearly 4500 applications processed in 13 years have been denied. However, many projects are modified and some substantially changed in the application process. Conditions are regularly attached to permits to assure that the project will be consistent with the criteria of the Act.

Since Act 250 was adopted, Vermont has grown in population at a rate far exceeding that of the Northeast region and it has experienced sustained economic expansion. State development regulation is generally regarded as having improved the quality of construction and subdivision projects. The Act 250 process has encouraged development that is compatible with the state's considerable environmental and community assets.

Despite broad public acceptance, the Act remains controversial. There are complaints that standards are ambiguous and decisions arbitrary. Some developers charge that the process imposes unreasonable costs and delays. On the other hand, there are those who believe that the process provides an insufficient curb on growth and that Vermont's heritage and natural resources are being steadily eroded by development that is inappropriate to a mountainous, rural state with fragile ecosystems. There is a particular concern that Act 250 is not effective in protecting agricultural land from conversion to other uses.

This publication is intended neither as a critical analysis nor a defense of the Act 250 process. It is a description. Its objective is to be an informative introduction to the history, procedures and problems of Vermont's unique regulatory system.

The authors have attempted to produce a readable study. To do this, they have translated statutory language and simplified procedural complexities. Potential developers and others who contemplate participation in the hearing process are cautioned to read the Act and the Board rules and to consult with the coordinator in their district.

The Environmental Board is grateful for a major grant from the Conservation and Research Foundation and a supplementary grant from the James W. Marvin Memorial Fund. By providing funding for the preparation and publication of this report, they have enabled the Board to broadcast the story of Act 250 and honor the memory of a distinguished former colleague.

II. BACKGROUND

Accelerating growth and change were major factors affecting the political climate of Vermont in the late 1960s. After years of relative stability, the state's population was in a period of rapid expansion. At the same time, the state was beginning to see the development of large-scale recreational projects in remote rural areas. The passage of Act 250 in 1970 reflected recognition by the state's executive and legislative leadership of the need for more than locally-administered protection of the state's distinctive natural environment and quality of community life.

Between 1860 and 1960, Vermont's population had grown at an average of less than 2 percent a year. In the decade of the 1960s, population growth was over 12 percent. It would expand by over 13 percent in the 1970s. In actual figures, growth over the two decades, 1960 to 1980, equaled the growth over the previous 135 years. In the 1960s, Vermont lost its ability to boast of having more cows than people, reflecting both population growth and a decline in the relative importance of the dairy industry.

Recreation and tourism began to boom in the affluent 1960s. The growth of the seasonal and transient population had as much and possibly more impact than the increase in the number of permanent residents. A key factor in the rapid expansion of the second home and tourist industries was the completion of the interstate highway system which made Vermont more readily accessible to the millions of urban dwellers of the metropolitan regions of New York, Boston, and Montreal. At the same time, with the nation experiencing general prosperity, people had more leisure time and skiing was steadily gaining in popularity. The official state development policy portrayed Vermont as the "Beckoning Country."

These various growth factors working in concert had the effect of increasing the demand for land in Vermont. This heightened demand drove the price of land upward, particularly in the rapidly-growing vacation resort areas. Even farmers with efficient, productive agricultural operations could not resist the lure of the financial gains which more intensive uses offered. Land conversions to non-agricultural uses increased. Rapid development also created public service costs which caused tax rates to go up. Higher taxes sometimes resulted in forced sales of land.

The development of land in some areas happened with such haste that most basic improvements, such as sewer and water systems, if planned for at all, were totally inadequate. The soils and topography of much of Vermont are inhospitable to intensive development and require meticulous planning if they are to be developed in any way. This rapid, unplanned development of the 1960s resulted in substantial environmen-

tal harm at a time when there was an emerging environmental consciousness throughout the United States. The ironic result was that the green mountains and clear streams which had attracted people were being degraded and abused by inappropriate development.

Vermont towns were seemingly powerless to deal with these environmental and economic problems in spite of the fact that the state legislature, under Governor Philip Hoff, had provided authority for a variety of planning activities for towns and regions. Towns had the power to adopt comprehensive plans and zoning regulations and to institute subdivision regulations. The Planning and Development Act passed in 1968 also created a strong role for regional planning commissions in the planning process. However, for the smaller communities, local land-use control was an alien concept and the processes were complex and time-consuming. Many were overwhelmed by development pressures before they were able to initiate local planning.

As early as 1963, the Hoff administration had begun to investigate the role which it could play in directing development and land use within the state. In 1963, by executive order, the Governor formed a Central Planning Office which was intended to coordinate state agency policies and the various planning activities at state, regional and local levels. Citizen task forces were created to examine critical issues, among them natural resources, education and transportation. There was particular concern about the course the development of the state would take as a result of completion of the interstate highway link to Vermont. In 1968 the General Assembly acted to protect scenic values which the task forces had identified as an asset in attracting tourist trade. Legislation was passed which banned billboards and other off-premise signs and to control the location and operation of junkyards.

The Vermont Planning Council was created by the Legislature in 1968 as a representative body, chaired by the Governor and including as members delegates from state agencies, the legislature, and the public. The Central Planning Office became the staff of the Council. The function of the Council was to coordinate planning activities so that the state would benefit from effective use of human and natural resources, and it began to formulate broad goals and policies which could inform the planning process at all levels of government. All of these initiatives laid the foundation for the more specific legislation of the 1970s.

In the summer of 1968 a subsidiary of International Paper Company proposed a large second-home development on 20,000 acres of land in southern Vermont. General public concern became focused on this project as there was considerable news coverage of the "development crisis." What had originally been perceived as a localized problem in some

southern towns became an issue of controversy throughout the entire state. Attention focused on second-home and recreational developments which were being built for the enjoyment of out-of-staters. In addition to the economic and environmental concerns, there was the emotionally-charged perception of a negative change in the quality of life enjoyed in Vermont. Public interest became so intense and emotional that a suggestion was made to convene a special session of the legislature to deal with the problem.

Deane C. Davis became governor in January 1969. He personally intervened to request a halt in the International Paper project. He instructed the Property Tax Division to report all land transfers of over 100 acres to his office so that the administration would be aware of where other large-scale development was likely to take place. Recognizing that part of the problem towns faced was a lack of expertise in areas of public planning such as water pollution, traffic safety and soil erosion, his administration formed "development technical advisory teams" whose function was to assist local officials in coping with growth. This action provided immediate attention to the most troubled parts of the state. Another significant change was the shift in the policy of the state's development department. Prior to the "development crisis" the official position of the state was to attract and actively solicit development. The new state position was that it should protect itself from unwanted development and be more selective in its development campaign.

In May 1969 Governor Davis created a special Governor's Commission on Environmental Control which was chaired by Representative Arthur Gibb, a key member of the House Natural Resources Committee. The Governor directed the Commission to consider existing reports on the state's environment, develop public information programs about the environment, and hear the views of qualified experts on environmental issues in an effort to strike a balance between continued economic growth and high standards of environmental quality. The Commission was composed of people representing a variety of interests. In January 1970, after meeting regularly for several months, the Commission made a number of recommendations which formed the basis of the body of environmental legislation passed in the 1970 General Assembly, including Act 250.

The Commission identified the mountainous regions and the lightly populated towns of Vermont as areas in need of special state protection, and their recommendations about how to effect this protection formed the skeleton of Act 250. The Commission advocated a state development permit process which would review specified impacts of certain types of developments. Adoption of a state plan guiding land and resource utilization, and a framework of state regulations within which existing local

regulations could function, were deemed necessary components of the state land development control program.

Among the other recommendations of the Commission was the suggestion that the municipal planning law be amended to allow municipalities to enact subdivision regulations prior to adoption of a comprehensive plan thus facilitating a prompt remedy to development pressures. It was also pointed out that the State Board of Health had the power to revise the state subdivision regulations and the Board was urged to do so in a way which would expand their scope of jurisdiction. Specific controls over the use of water resources and pesticides were also advised. To efficiently achieve all of these goals, the Commission pressed for a reorganization of state government which would locate the responsibility for environmental protection within one agency. The Commission also made a variety of recommendations about the regulation of power transmission facilities and open space preservation. Some of these suggestions were incorporated into other regulatory legislation and others are still being discussed.

In December 1969 the State Board of Health had acted on the Commission recommendation to adopt fairly stringent emergency subdivision regulations. These regulations were credited with slowing development somewhat and alleviating the "development crisis" prior to the 1970 legislative session. However, environmental legislation remained very much a central issue for the General Assembly that year, and a full array of bills on the subject was introduced. The Governor was thoroughly committed to environmental action and there was broad-based citizen support for state action to regulate development.

During the 1970 session, the General Assembly ratified legislation which enabled the state and its towns to buy or lease land or scenic easements to keep land open for public enjoyment and safeguard scenic or natural resources. The General Assembly gave the state preemptive power to grant permits for trailer parks and wrote into the legislation incentives for certain improvements of trailer parks. A state permitting system for water pollution was established along with a schedule of fees to be paid by those who exceeded the allowable state pollution limits. State authority to protect lake shorelines was included in the Water Pollution Control Act. The legislature adopted the expanded subdivision regulations, making them permanent. The substantial government reorganization proposed by the Gibb Commission was affected and super agencies, among them the Agency of Environmental Conservation, were created. The landmark achievement of the 1970 session was the passage of the Land Use and Development Law, Act 250.

III. ACT 250

The bill which was adopted as Act 250 was based on the Environmental Control Commission recommendations, but there had been an extensive redrafting process in which many administration officials, legislators and citizens had taken part. The final product was a group effort incorporating considerable compromise. The Commission had recommended "an act to regulate and control subdividing and use of land . . . under which a duly constituted state agency be given authority to regulate and control land uses . . . in accordance with a highest and best use land plan. . . ." The bill that emerged from the legislature created a permit process in which decision-making power was vested in citizen review boards rather than state agency officials. The bill provided for regionalized administration of the state law which would allow for local participation. This important structural change in the administration framework was and continues to be regarded as a critical factor in assuring public acceptance of the process.

The decision to locate primary responsibility in regional citizen commissions supplies the process with a grassroots responsiveness which safeguards the system from charges of bureaucratic insensitivity to local issues. The state level Environmental Board was envisioned as a general overseer of the process and an appellate body.

Many of the drafting changes focused on the various plans which were to accompany the permit process and exactly what the function of those plans was intended to be. The Interim Land Capability and Development Plan was to be the first plan which the Board was required to adopt. It was intended to describe the current use of land and to define in broad categories the development capability of land, based on environmental considerations. This plan was to have a limited period of effectiveness, but the following plans were to be based on its findings so it would form the foundation for permanent plans. The first of these was the capability and development plan described in the legislation as having the general purpose of guiding coordinated, efficient, economic development of the state.

Following the adoption of the capability and development plan, the Board was to adopt a land use plan consisting of a map and statements of present and prospective land uses based on the capability and development plan. The land use plan was to determine the proper uses of land in the state giving full consideration to existing local and regional plans, zoning and capital improvement plans. Local zoning and subdivision regulations were the intended means of implementation and the plan would serve as a guide for non-regulatory land use activities. The plan was not considered to have application to land uses not defined in the statute

as development.

The responsibility for drafting the plans was not clearly defined in the statute, but a detailed adoption procedure was provided. The Board had to adopt all three plans. Public hearings were to be held for the purpose of gathering information. Public opinion gleaned from these hearings was to be incorporated into the plans prior to their adoption. The Board would also be required to receive the comments of the local and regional planning commissions before adopting any plan. Once the Board had accepted a plan it was to be forwarded to the Governor for his approval. In addition, the capability and development plan and the land use plan would require legislative approval.

The fact that the responsibility for preparation of the plans was ill-defined subsequently became a problem which persisted throughout the drafting of the plans. The reorganization of state government had disbanded the Central Planning Office and distributed the personnel to various agencies or to the newly formed State Planning Office which was attached to the Governor's office.

The Interim Land Capability and Development Plan was prepared by a special team of planners which worked under the supervision of the State Planning Office. This plan consisted primarily of a series of county scale maps which identified the existing uses of land and the ecologically determined potentials and limitations of the land. The plan was adopted by the Board and approved by the Governor in March 1972. The Board established policy guidelines for use of the plan in the Act 250 permit review process. The statute limited the period of time for which this plan had effect to July 1, 1972 or the adoption of the land use plan, whichever came first. In July of 1972 there was still no land use plan so the interim lost effect. This was not a significant matter because the interim plan had little regulatory utility, while the information it contained was of continuing importance in the preparation of the capability and development and land use plan drafts.

Throughout 1972, framing and drafting of both the capability and development plan and the land use plan continued. The Board wanted plan drafts by November so that hearings could be held on both before the legislature assembled. The Governor had again assigned responsibility for the preparation of the plans to the State Planning Office. Regional task forces worked with the drafting group by gathering public reaction and making recommendations. The process moved slowly because of uncertainties about exactly what the purpose and elements of the plan should be. The statute provided limited guidance and there were virtually no models of similar efforts to guide the endeavor. There was continual tension between the technical staff and members of the Board, and among

members of the Board, as controversy over basic planning concepts persisted.

The capability and development plan draft that emerged consisted primarily of policies and objectives regarding land use and environmental issues. The statements were couched in very broad terms and were not intended to have direct regulatory effect because it was expected that the Board would implement the goals through the adoption of rules. The land use plan draft contained a map of the state divided into five broad categories of proposed land use accompanied by an explanation of the purposes of these urban, rural residential, agricultural conservation, resource conservation, and reserve land districts.

During the time that work was proceeding on the plans, the Vermont Natural Resources Council, a citizen interest group, had secured a substantial grant to conduct an extensive public information and education program regarding environmental planning. The major intention was to increase public participation in the Act 250 plan development process. Known as the Environmental Planning Information Center (EPIC) this project undertook a variety of activities. Detailed public opinion polls were conducted which sought out the attitudes of Vermonters on the natural environment, economic security, and the proper role of government in safeguarding these values. A slide show entitled "So Goes Vermont" was produced and shown throughout the state. This project also sponsored the distribution of the drafts of the capability and development plan and the land use plan in newsprint form to every household in the state, prior to public hearings.

Both plans created heated debate at eight regional hearings. There was misunderstanding regarding the objectives of the plans and opposition to portions of the plans which sounded regulatory in effect. The land use map was the subject of considerable suspicion, partially because of the small scale and quality of reproduction on newsprint, but largely because of objections to what appeared to be state-administered zoning. The issue was further complicated by the vigorous hostility among land developers and landowner organizations that had been stirred by the earlier announcement by the State Board of Health that it was expanding its jurisdiction over land development by adopting emergency subdivision regulations.

The efforts of the EPIC project and the active support of public and political officials at all levels of government helped to create general public acceptance of the capability and development plan. However, the reaction to the land use plan remained mixed and the decision was made to postpone presentation of that plan to the General Assembly until its format could be reconsidered and a new version drafted.

Meanwhile, Governor Davis and Governor-elect Thomas Salmon appointed an *ad hoc* interadministration transition team to work with the Environmental Board on refining the capability and development plan draft based on the recommendations and criticisms made at public hearings and by regional planning commissions. The policies of the plan were reorganized and edited to achieve greater clarity, and some new policies addressing social and economic consequences of development were added.

In January 1973 the capability and development plan draft was approved by both outgoing and incoming governors. Consideration of the plan in the General Assembly was delayed because of the need to translate it into statutory form. The House of Representatives passed the plan legislation in March. Approval came quickly in the Senate and final General Assembly approval came on the last day of the 1973 session.

The legislation which was ultimately adopted included policy statements which were intended to be used as guidelines by state agencies and local planning bodies and to provide the basis for the land use plan, but not in the review of specific applications. The statements addressed three major topics: planning for land use and economic development, resource use and conservation, and government facility and public utilities planning. Specific subcriteria reflecting some of these policies were added to criterion nine of Act 250. In this way, the Act was significantly amended and the scope of development review expanded by 11 new provisions relating to such matters as protection of agricultural soils, energy conservation and development affecting public investments.

During the 1973 session, the State Planning Office and the Environmental Board worked together on a unified description of what the final land use plan should achieve and provide. In May they agreed that the major purpose of the plan was to provide more direction to the district environmental commissions in their case-by-case review of development projects. There was general agreement on the necessary components of a state land use classification system, and it was decided that the system should set carefully-defined performance standards for determining the permissible uses within a given classification. Furthermore, there would be specifically permitted, limited and prohibited uses within each classification based on density. Opinions diverged at this point and in June the State Planning Office and Environmental Board were formulating plans which differed on certain key issues. There was considerable divergence of opinion over which level of government should be responsible for the mapping of each classification and what mechanism would be used for coordinating local and state planning. The scope of the jurisdiction of the plan was also the subject of disagreement.

The Board supported the concept of state authority to explicitly map only those areas of preemptive state concern such as higher elevations, floodplains, agricultural lands and natural or historic areas, because these areas could be mapped with considerable accuracy. An extension of state authority to review all developments in these areas, since even incremental changes in them would have an impact on critical state concerns, was favored by the Board. Meanwhile, the Board was willing to defer the responsibility for mapping all other areas to the towns and regions. However, the State Planning Office leaned toward maintaining state authority to map all districts in broad terms which could be supplemented and refined by the towns and regions. The planners felt that once local and regional plans had received approval from a state agency as promoting identified state goals, the local or regional plan should be used in the Act 250 permit review process instead of the state plan.

These differences of opinion reflected continued controversy over what effect state plans should be given, where responsibility ultimately should lie for mapping land use classifications, and what role the state should play in directing local land use planning. The planning office continued to work on a plan which it hoped would be acceptable to the Board. In September the state planning staff began holding meetings with regional planning commissions on a plan which it felt the Board supported. However, when the Board began its own public hearings in October, it became evident that it did not fully support the State Planning Office draft. When the Board began to rewrite the plan to express its own goals, divisiveness was revived and became a public news item.

These disagreements between state agencies did not encourage public support of the plan. Dedication to the plan within state government also decreased as the controversy increased, and the final compromise bill which was presented to the General Assembly did not have the broad-based backing that Act 250 itself had received. Furthermore, the legislature did not appear to be favorably disposed to any increase in state regulation because of the state's economic situation. Vermont had been hard hit by the energy crisis. The legislative draft of the land use plan never even made it to the floor of the House in the 1974 session. In fact, the Environmental Board requested its return to them so they could rework it, but the House decided to form their own committee to review and rewrite the plan for presentation in the 1975 session. The House did adopt a weakened version of the plan that year, but the Senate did not act on the bill. Efforts to produce a plan were then abandoned and have not been revived.

The 1973 legislation resulting from the capability and development plan adoption has been the most significant amendment of Act 250 in its

13-year history. However, the Act has been amended in several other ways. In 1971, the number of districts was reduced to seven to conform to a new administrative district law. Within two years, as a result of public outcries, the nine district configuration had been reestablished. In 1973, the Act was amended to allow applicants to remove their appeals from the Board to Superior Court. In 1974, new provisions were added to control land auctions. A 1979 amendment extended jurisdiction to exploration for fissionable materials and, in 1981, jurisdiction was further extended to drilling for oil and gas.

Legislation is currently before the General Assembly to eliminate the exemption from Act 250 review of large-lot subdivisions, to change the enforcement provisions to provide for civil penalties, and to require the recording of permits in local land records. These amendments, supported by the Board, were passed by the House of Representatives in the 1983 session and will be considered by the Senate in 1984.

IV. ORGANIZATION

Nine district environmental commissions receive and consider applications for development and subdivision permits. Each has a defined area, and the three commission members must reside in that area. Appointed by the governor, commission members are on call to serve as needed to fulfill their responsibilities. They are chosen for their general familiarity with local conditions, diversity of occupations, and, most importantly, common sense and sound judgment. Few have special training or expert status in environmental or land use planning.

The Environmental Board hears appeals from district commission decisions and has policymaking responsibilities. The Board is made up of nine members whose appointment by the governor must be confirmed by the Senate. Board members are also citizens who serve as hearings are scheduled. Only the chairman receives a salary as a part-time state official. In addition to hearing appeals, the Board responds to petitions for declaratory rulings, adopts and amends rules of procedure, and, through its chairman, oversees the staff and financial administration of the system.

The chairman of the Board and the chairmen of the commissions are appointed to two-year terms coinciding with that of the governor. Members of the Board and commissions have staggered four-year terms with four Board members and one member of each commission — in addition to the chairmen — appointed every two years. Chairmen serve at the governor's pleasure: members can only be removed for cause. The Board is attached to the Agency of Environmental Conservation for the purposes of administrative support. However, in all other respects, it is itself an independent state agency. This is necessary because the Agency of Environmental Conservation not only is a statutory party in commission and Board proceedings, but also frequently appears on behalf of other state agencies. Moreover, some of its component departments are occasional applicants for permits.

The Board is assisted by a full-time executive officer. As the chief administrative official of the Act 250 process, the executive officer is responsible for personnel, budget, training, and general office administration. In addition, the executive officer sits with the Environmental Board at hearings and pre-hearing conferences and drafts the Board's decisions according to their instructions. Since 1979, the executive officer has also served as general counsel, providing legal advice to the Board and commissions.

The district coordinators parallel the role of the executive officer at the commission level. The coordinator orchestrates the process, performing the necessary administrative duties of keeping commission records and

scheduling hearings. The coordinator also serves as a guide to the applicant by informing him about the process and helping him through the various steps. The coordinator's role at the hearing is to advise the commission on procedural and legal matters. The coordinator also drafts the commission decisions according to their instructions.

There are seven coordinators, one of whom serves as supervising coordinator and assists the executive officer in general administrative functions. Two of the coordinators serve two commissions, and all are called upon, from time to time, to share in the workload of particularly active districts. With the executive officer, seven coordinators and eight additional administrative and clerical staff members, the Board has 16 full-time employees. Its operating budget for fiscal year 1983 was $451,721.

The Act directs state agencies to cooperate with the district commissions and the Board in fact-finding by providing data, personnel and facilities. This reflects the decision of the legislature not to create a new bureaucracy of experts, but to rely on the existing authorities in the state government to supply the needed evidence and testimony. The aid of the regional planning commissions may also be enlisted for these purposes.

Whether the agency representatives appear as applicants in the process or expert witnesses supporting or opposing the project, they are regarded as presenting evidence necessary to rendering decisions like all other witnesses. That is to say that the testimony of state witnesses is given no special weight or value.

For enforcement purposes the Board relies primarily on the Protection Division of the Agency of Environmental Conservation. The options available for compelling compliance are limited. The first avenue is to try to secure voluntary cooperation by bringing the violation of the statute or of permit conditions to the attention of the developer with the request that he remedy the situation. If this fails to elicit a response, notice is given to the delinquent party, stating the violation and the necessary corrective action. An opportunity for the violator to file an assurance of discontinuance with the attorney general's office and court having jurisdiction over the matter, is allowed. If this method is not successful, the enforcement officer may then resort to action in the courts and secure an injunction against the violation. The Act authorizes the courts to punish violators by a fine of not more than $500 for each day of the violation or imprisonment for not more than two years or both.

Because of the language of the Act, dealing with violators has been a continuing problem. The Board has proposed and the General Assembly is considering amendments to make enforcement procedures more flexible, fair, and administratively serviceable. The proposed changes would

make possible the voluntary payment of fines as part of a settlement agreement, and the imposition of fines in a civil proceeding to recover the violator's economic advantage for noncompliance.

V. JURISDICTION

In defining the jurisdictional scope of Act 250, the legislature cast a broad and finely-grained net. Most larger commercial and industrial projects are subject to review. Permits are generally required for residential construction of 10 or more units and subdivisions of 10 or more lots. State and local government projects are included. The only general exemptions apply to electric power generation and transmission facilities and to construction for agricultural and logging purposes below the elevation of 2500 feet.

Jurisdiction is basically established through the definitions of "development" and "subdivision" in the Act. Over the years, these definitions have been refined by Board rules and decisions, often made in response to opinions handed down by the Vermont Supreme Court. The most troublesome problem has been the determination of the amount of land that should be regarded as involved in a specific project, and, after 13 years of experience, ambiguities remain.

The statute defined commercial and industrial development as construction involving 10 or more acres in municipalities which have adopted both zoning and subdivision bylaws. For municipalities without both of these regulations, the threshold is one acre. Only limited guidance is offered as the basis for judging the involvement of areas beyond the perimeters of actual land disturbance. Only land owned or controlled by the applicant can be included. The property may be in one or several tracts within a five-mile radius. Land shall be included that directly pertains to the use for which the project is intended with lawns, parking areas, roadways, leaching fields and accessory buildings specifically cited.

In the case of *Committee to Save the Bishop's House vs. Medical Center Hospital of Vermont, Inc.,* 137 Vt. 142 (1978), the Supreme Court clarified the definition of involved land. The project under review entailed the demolition of a residence in order to make way for a 1.44 acre parking lot adjacent to a hospital unit located on three acres of land in a municipality with both zoning and subdivision regulations. Located one-half mile away, was another hospital unit occupying 26 acres. Both units were owned by the same hospital. The Board relied on its Rule 2(F) to determine that the 26-acre tract was involved land. That rule defined as involved all land controlled by one person within a five-mile radius, which is part of, closely related to, or contiguous to the development. The Board found that the construction of parking on one site was closely related to overall plans of the hospital to provide additional parking and found the two tracts interrelated. The Board ruled that an Act 250 permit was required. Upon hearing the matter on appeal, the Supreme Court invali-

dated Board Rule 2(F), finding that it "goes beyond mere interpretation of the statute." The Court offered, in replacement, the definition that land is involved "only where it is incident to the use . . . or where it bears some relationship to the land actually used in the construction of improvements, such that there is a demonstrable likelihood that the impact on the values sought to be protected by Act 250 will be substantially increased by reason of that relationship." The Court did not find that such a relationship existed in this case.

The Board has had occasion to use the Court's definition in more recent declaratory rulings regarding state and municipal projects which are reviewed under Act 250 when they are built on a tract or tracts of land involving 10 or more acres. Such a ruling was made regarding the Burlington Resource Recovery Project,[1] in which the Burlington Department of Streets proposed to construct a resource recovery facility on a six-acre site owned by the city. There were three purposes which the facility would serve. As a refuse incinerator, the facility would reduce the volume of solid wastes introduced into the city landfill by 75 percent; in the process, recyclable waste would be removed; and the steam produced by the incineration was to be piped to the University of Vermont and used for the purpose of heating and cooling buildings. The Burlington landfill is a 16-acre tract located one quarter of a mile from the proposed recovery site. The Board found that the landfill was "incident to the proposed resource facility" and was, as such, involved land. The two sites were identified in evidence as "operational components of a single waste disposal system." Furthermore, the construction and use of the recovery facility would not only allow longer use of the landfill but would alter considerably the nature of the fill introduced, such that additional safeguards would be required to protect values defended by Act 250. The inclusion of the 16-acre landfill as involved land raised the project size above the 10-acre minimum required in order for Act 250 jurisdiction to ensue.

By Board rule, the construction of roads longer than 800 feet or serving more than five parcels of land is defined as development. Construction of these roads must be incidental to a commercial or industrial use, that is, the intended sale of the parcels, in order for jurisdiction to ensue. A parcel, as opposed to a lot, is of unspecified size and includes those of over 10 acres. The Board extended this definition in a declaratory ruling establishing Act 250 jurisdiction over the subdivision of a 185-acre tract into 16 parcels of land all of which were over 10 acres in size.[2] The developer proposed no construction of roads prior to sale of the land but created a pattern of subdivision which would necessitate such construction. The Board found this an attempt to elude Act 250 jurisdiction by shifting to the

purchaser the responsibility for improvements which, if undertaken by the seller, would require Act 250 review. The Board decided that since construction of roads would be a result of the subdivision and was incident to the sale of the land, an Act 250 permit was required.

The statutory definition of development also includes the construction by one person of 10 or more units of housing within a five-mile radius. This definition includes housing projects such as cooperatives, condominiums, hotels, rooming houses, dormitories and mobile homes.

The scope of Act 250 jurisdiction over projects above 2500 feet in elevation is particularly broad because of the environmental problems which accompany any activity above this elevation. The Act defines development above this elevation as any "construction of improvements for commercial, industrial or residential uses." A number of declaratory rulings on proposed projects have confirmed jurisdiction of Act 250 over projects in this fragile area. One example involved the intended addition of two microwave dishes to an existing 24-foot tower located above 2500 feet in elevation.[3] The dishes were six and eight feet in diameter. Jurisdiction over this project was captured on the basis of the definition of development above 2500 feet and the rule requiring review of all substantial changes made to a project which were initially subject to Act 250 jurisdiction. A change is defined as substantial if it will have a significant impact on any of the 10 criteria of the Act. In this case, the Board found that the addition of microwave dishes would have such an impact on two criteria, and that the addition was being proposed to an existing improvement which the Act defined as development.

An Act 250 permit is also required prior to offering for sale, selling or commencing construction on any subdivision. For Act 250 purposes, subdivision is defined as the partitioning of land for the purposes of resale into 10 or more lots, within a five-mile radius, and a lot is defined as a property of less than 10 acres. The exemption of projects in which land is subdivided into larger than 10-acre parcels has resulted in the widespread creation of large-lot developments designed to avoid Act 250 jurisdiction.

[1]*City of Burlington, Resource Recovery Project, Declaratory Ruling No. 125, November 1980*

[2]*Dr. Bernard Barney, Declaratory Ruling No. 82, September 1977*

[3]*Karlen Communications, Inc., Declaratory Ruling No. 89, January 1978*

VI. CRITERIA

The foundation of the Act 250 process is the requirement that, for every project subject to the Act, a permit will be granted only when that project has been found to satisfy all relevant criteria. A commission must receive a documented application, take evidence, hear challenges and reach positive conclusions. In granting a permit, the commission must provide substantiation for its decision specific to each criteria.

It is incumbent on the applicant to provide information showing that his project answers the requirements of each of the components of the 10 criteria. However, in regard to criteria five, six, seven and eight, project opponents must prove adverse effects. A special provision of 9(A) places the burden of proof on opponents except where a town has a capital improvement plan. The burden is on the applicant for the other criteria and the remaining subsections of criterion nine.

The first four criteria can be broadly characterized as environmental. Under criterion one the commissions are charged with finding that the project will not result in undue water and air pollution. All aspects of water pollution are reviewed, but the statute particularly directs the commissions to consider a number of physical features of the site and offers applicable health and water resource regulations as guidelines for use in reaching a determination regarding the project's impact on headwaters, waste disposal, water conservation, floodways, streams and shorelines. Also subject to review under this criterion is air pollution resulting from the project. The commissions review all sources of air pollution and any measures proposed to control pollution. The sources of pollution considered include but are not limited to incinerators, smokestacks, automobile emissions, dust and noise.

Criteria two and three review the availability of a water supply and the burden imposed on an existing water supply as a result of the proposed project. The adequacy of the plans for the water supply system are reviewed by the Department of Health or the Division of Protection as well as by the commissions.

Much of the material reviewed under these criteria is fairly technical and may require the developer to retain the services of an engineer. Department of Health and Department of Water Resources regulations overlap somewhat with these criteria and a certification of compliance with those agency regulations creates a rebuttable presumption of compliance with Act 250 criteria. The failure to comply with any of these criteria may result in the denial of a permit. Conditions to assure compliance with the criteria are frequently attached to permits.

The impact of the project on soil erosion and soil stability is reviewed

under criterion four. Any disturbance of soils results in some erosion, and in many parts of Vermont this problem is particularly acute because of the slope of the land and the quality of the soils. The commissions review plans for both temporary and permanent soil erosion controls.

Criteria five, six and seven deal with the burdens which a project may impose on existing basic public services, and the difficulties in future delivery of services which a development might cause. Although permits may not be denied solely for failure to comply with these criteria, mitigation of possible adverse impacts may be provided for through permit conditions.

Under criterion five, the project is reviewed for creation of unreasonable congestion and unsafe conditions with respect to transportation facilities. In the case of one large shopping mall,[1] the commission found that the existing traffic design could not safely handle the additional traffic that the project would generate and, by condition, required the installation of traffic control devices at the expense of the developer.

Criterion six requires that a project not place an unreasonable burden on the ability of the municipality to provide educational services. In one subdivision case,[2] after reviewing the present and maximum capacity of the school system and the number of students which the project would generate, the commission found that the project would place an undue burden on the school system and conditioned the permit to require phased sale of the lots.

In order to comply with criterion seven, a project must not cause unreasonable burden on the ability of local governments to provide municipal or governmental services. Review under this criterion usually includes analysis of impact on the ability of the town to provide a full range of municipal services including police, fire, and road service. Problems most typically arise with the ability to provide road service. On one occasion, a commission found that an air pollution problem as well as a traffic safety problem would result from the increased use of the gravel-surfaced town road which provided the only access to the project site.[3] The costs and responsibility of treating the road to make it suitable for use were assigned to the developer.

Criterion eight directs the commissions to find that the project will not have an undue adverse effect on scenic or natural beauty, aesthetics, historic sites or rare and irreplaceable natural areas. Review of projects under this criterion often results in conditioning of the permit to require landscape plans or other design considerations which will minimize undesirable visual aspects of the development. Criterion eight also requires that impact on historic sites be reviewed. As a result of this consideration a permit to build a shopping center in an historic district was conditioned to

protect the historic buildings as much as possible.[4] A preliminary permit was granted to allow site work which would not affect the historic buildings, but, prior to granting final site plan approval, a joint study by the Division of Historic Preservation and the applicant was required to ascertain the adaptive reuse potential of the buildings. Although the study revealed that it was unfeasible to reuse the buildings, portions of them were saved and the new buildings were required, by condition, to complement the historic structures in their style.

This criterion has also been used to protect natural areas. A 93-lot housing subdivision was denied for the damaging effects it would have on an adjoining bog.[5] The waste and organic matter which would leach into the bog from the subdivision site was considered a considerable threat to this sensitive and rare natural area.

Subcriterion 8(A) says that a permit shall not be granted if a project will destroy or significantly imperil necessary wildlife habitat or any endangered species. However, there is qualifying language absolving the project when it is shown that public benefits of the project outweigh losses, that precautions will be taken to lessen the destruction, and that no other suitable sites are owned by the developer. In one case, a developer proposed a huge residential subdivision on a mountainside site which drained into a major river into which Atlantic Salmon had been reintroduced.[6] Soil erosion from the project was expected to cause an unacceptable degree of water pollution in the river which would destroy the salmon habitat. The commission found that the project as proposed was not in conformance with 8(A) because the loss of this habitat was not outweighed by public benefits, precautions to minimize the impact had not been taken, and the developer did own more suitable sites for such a project.

Criterion nine requires that a project be in conformance with a capability and development plan and a land use plan. The land use plan referred to has never been adopted, but the capability and development plan draft was, in part, translated into an amendment to the Act adding several subcriteria to criterion nine which address a variety of issues that reflect the intent of the plan. Other elements of the plan draft were adopted by the General Assembly as policy statements, but with the specific provision that they not be used as criteria in considering applications.

Subcriterion 9(A) requires the commissions to evaluate the ability of a town and region to accommodate the total growth and rate of growth of population which a project will generate. The determination is based on the existing financial ability of the town and the potential financial contribution which the development might provide. When all costs are considered the commissions are directed to condition permits so that

undue burdens are not created. This criterion expands the review of impacts considered under criteria five, six and seven to include regional effects as well as local impacts.

Reduction of agricultural potential is the subject of 9(B). Prior to initial review under this subcriterion, the conclusion must first be reached that the project will be located on primary agricultural soils which for Act 250 purposes are defined by a group of physical characteristics. The soils must have a high or good potential for the production of food or forage crops and the slope, drainage and size of the tract must favor mechanized cultivation. If the project is located on soils meeting all of these qualifications and the commission finds that the development will significantly reduce the agricultural potential of the soils, then in order to comply with this subcriterion the developer must prove the following four things: 1) that he cannot make a reasonable return on the fair market value of the property without significantly reducing the agricultural potential of the soils; 2) that he owns no other sites suitable for the intended use; 3) that the development has been planned to minimize the adverse impacts on agricultural soils; and 4) that the development will not significantly endanger the continuation of agricultural uses on adjoining property.

The Board and commissions have frequently found that a reasonable return on fair market value can be gained only by significantly endangering the potential of the primary agricultural soils. The Board has pointed out that this is almost a foregone conclusion because fair market value is usually a reflection of the developmental potential of property. However, in an appeal from a permit denied on the basis of failure to comply with 9(B),[7] the Board stated that while the owners could expect to make a reasonable return on the fair market value of the property, it was unreasonable for them to expect the highest return, particularly, if gained from a use which was the most detrimental to the agricultural soils. Denial under 9(B) has also occurred on the basis of a finding that insufficient effort was made to minimize the adverse impacts of the development on agricultural soils. Permits for subdivisions have been denied because they failed to cluster lots to reduce impact. In one case a re-application was accepted which incorporated a change in the configuration of lots which left a 30-acre tract open and available for agricultural use.[8] In another subdivision application, the permit was granted and conditioned to require a covenant providing for cooperative leasing of the land which was left open.[9]

Subcriterion 9(C) offers similar protection to secondary agricultural and forestry soils. These soils are also defined in the Act on the basis of physical characteristics. Developers proposing projects on such soils must prove the first three requirements enumerated in 9(B).

subject to protection under 9(K). This subcriterion was also a factor in the large subdivision affecting Atlantic Salmon habitat. The considerable amount of money invested in reclaiming this habitat was regarded as constituting a public investment which deserved 9(K) protection.

The final subsection, 9(L), generally encourages provision for reasonable population densities, reasonable rates of growth, and the use of cluster and new community planning in rural areas where such requirements are not specific under other criteria.

Under the tenth and last criterion, projects must be found to conform with plans and capital programs adopted by local governments, and by regional planning commissions to the extent that projects have regional impacts. Because local plans are frequently ambiguous and lacking in specificity, this criterion has been found to have limited applicability. However, it has been proved a significant determinant on occasion. A municipal planning commission appealed a permit granted an applicant to build a travel trailer park and commercial camping area on the banks of a river in what the town plan had designated a scenic corridor.[14] The appeal was based both on the visual impact under criterion 8 and the lack of conformance with the town plan. While finding scenic intrusion, the Board relied primarily on the plan in denying the permit.

[1] *Permit Application No. 4C0099*
[2] *Permit Application No. 6F0217*
[3] *Permit Application Nos. 6G0202 and 6G0220*
[4] *Permit Application No. 6F0192*
[5] *Permit Application No. 4C0243*
[6] *Permit Application No. 3W0246*
[7] *Permit Application No. 5L0444-EB*
[8] *Permit Application No. 1R0383*
[9] *Permit Application No. 5L0487*
[10] *Permit Application No. 2W0219*
[11] *Permit Application No. 4C0281*
[12] *Permit Application No. 4C0281*
[13] *Permit Application No. 4C0243*
[14] *Permit Application No. 5W0534*

VII. PROCESS

District commissions generally receive 20 to 45 applications a year, although the busiest districts may receive over 60 in an active year. In most cases, an applicant will receive a permit within 30 to 60 days, with the time varying according to the complexity of the project, how thoroughly the applicant has prepared, and the participation of opposing parties. Vigorously contested large projects sometimes involve numerous hearings and, if the commission decision is appealed, prolonged proceedings at higher levels.

Before an Act 250 application is formally submitted, the potential applicant is encouraged to meet with the district coordinator who will make an initial determination whether the project is subject to Act 250 jurisdiction. The coordinator completes a project review sheet which directs the applicant to those of the major state permit programs, including Act 250, which may apply to the proposed development. The applicant is responsible for securing all other permits. There may also be local permits needed which the applicant is advised to obtain prior to filing an Act 250 application. Act 250 does not supercede any other state or local permits, and compliance with other regulations does not preempt Act 250 jurisdiction. Rather, Act 250 is intended to provide an additional level of review for larger scale projects which are likely to have greater than local impact, or it is intended to review smaller projects in towns which have adopted minimal local controls.

The applicant, and any other interested party, may request a second opinion regarding Act 250 jurisdiction from the executive officer of the Board. Appeal from an Advisory Opinion by the Executive Officer may be made by petitioning the Board for a Declaratory Ruling. When a petition for such a ruling is made, parties to the petition are notified. These parties, as designated in the statute, are the town, the town and regional planning commissions, and state agencies. The chairman of the Board may either make a preliminary ruling on the matter or schedule it for hearing by the full Board, and any party may specifically request that the issue be decided by the full Board rather than the chairman. A decision by the full Board may be appealed to the Vermont Supreme Court.

When a final determination on the threshold question of jurisdiction is reached, the process moves forward to the actual filing of an application. The application is submitted to the commission and must contain certain specific information beginning with the name and address of the applicant and a description of the legal interest which the applicant has in the property. A list must be provided of other persons with a substantial interest in the property and the nature of that interest described. The

commission may determine that other persons with a substantial interest in the property must be co-applicants. The nature of the applicant's ownership of the property must be recorded in the deeds of the town in which the property is located prior to construction of the project. A list of adjoining property owners and their addresses is also requested.

Detailed plans must also be submitted with the application along with such other information that will be needed to properly evaluate the project's compliance with the 10 criteria of the Act. The coordinator will review the application and advise the applicant about what additional information the commission is likely to require at the hearing.

There is a fee, determined by rule, which must also be remitted with the application. For projects involving construction, the fee is $1.00 for each $1000 of estimated construction costs. For subdivisions, the fee is $5.00 for each lot. Public works projects, projects of non-profit corporations, and projects involving less than $20,000 in construction costs are exempt from fees. If an application is withdrawn prior to convening the initial hearing, the fee is partially refundable when in excess of a minimum amount.

Once the application is submitted, a hearing must be scheduled within 25 days and held within 40 days. The statute requires the applicant to send notice and a copy of the complete application to the municipality in which the land is located, an adjacent municipality if the project is on a boundary, and the appropriate municipal and regional planning commissions. Notice of the application must also be posted in the town clerk's office and published in a local newspaper at the expense of the applicant. The coordinator is responsible for notifying and circulating copies of the application to interested state agencies and making arrangements for publication of the notice.

At the state level, an interagency review committee meets on a regular basis to discuss pending applications and their potential impacts on state interests. Some agencies are regular participants at these meetings and others attend on an infrequent basis. The product of these meetings is an agency position paper which serves as a guide to the commissions in their investigations by alerting them to problem areas perceived by state experts.

Pre-hearing conferences with the applicant and all parties may be held in the interest of expediting the proceedings. The conferences are intended to clarify issues of controversy, to identify documents and witnesses to be presented at the hearings, and to obtain such stipulations as may be possible. A pre-hearing order, containing the results of the conference, is sent to the parties attending the conference five days before the hearing and is considered binding on them. Some commissions find these sessions

more productive than others and rely more heavily on them.

Public hearings, though not required by the Act, are held on almost all applications at the request of parties involved or by decision of the commission. The hearings are quasi-judicial but vary from district to district and case to case in general tone and formality. The proceedings tend to be more formal when projects are large, complex, and contested, and when several parties are represented by lawyers.

Some commissions routinely visit each project site. Other commissions will make such a visit upon the request of the applicant or any party. Since the commissions are regionally located and commissioners are residents of the districts which they serve, there is a good chance that one or more of them will be somewhat familiar with the site. These site visits do, however, aid in evaluating the ability of a specific site to support the proposed development.

The first business of hearings is to determine who will be admitted as proper parties to the proceedings. Automatically admitted are the statutory parties identified in the Act as requiring notice, including the town and its planning commission, the regional planning commission, and affected state agencies. These parties have standing on all criteria. Adjoining property owners are admitted, but may only participate on criteria that directly involve their interests. Other individuals or groups who can demonstrate that their interests will be directly affected by the project or who can assist the commissions by providing testimony may be admitted. The chief function of all parties is to supply evidence which forms a basis on which to make decisions regarding compliance with the 10 Act 250 criteria.

The substantive review of a project generally begins with the applicant giving a brief description of the project. The commission then hears evidence on each of the criteria in order to evaluate compliance with them. The Act 250 process is dependent on the testimony of the applicant and the opposing parties. All evidence and testimony are taken under sworn oath. If the commission feels that there is not adequate information on which to base a decision on any one of the criteria, it may request additional evidence and recess until that evidence is produced. The commissions have the power to subpoena evidence and witnesses. By Board rule, evidence on the criteria may be introduced in the sequence which the commission finds timely and judicious. In addition, a limited ruling may be made to determine compliance with criteria nine and 10 before investigation of the other eight criteria is undertaken. This rule allows the applicant to postpone the investment of the time and money necessary to develop evidence about the more technical criteria pending an initial conclusion about general compatibility of the project with the appropriate

state, regional and local plans.

The applicant must provide information on all criteria and demonstrate compliance with one through four, 9(B) through 9(L) and 10. Opponents of a project bear the burden of establishing non-compliance with criteria five through eight and 9(A). Permits may not be denied solely on the basis of failure to comply with five, six or seven which address the creation of an unreasonable burden on public services as a result of the proposed development. Certificates of compliance and permits from other regulatory agencies create a rebuttable presumption of compliance with certain Act 250 criteria and assure that the commission will find the project in compliance unless the presumption is successfully challenged. In the event of such a challenge, the applicant must offer substantive evidence to show that the project satisfies the criteria.

When the commission is confident that the record contains sufficient evidence on which to base a decision, the hearing is adjourned. Within 20 days of adjournment, a decision containing findings of fact and conclusions of law must be made and distributed to parties. The statute requires commissions to make positive findings of fact on each of the 10 criteria before reaching a decision. No permit may be denied unless the commission finds the project detrimental to the public health, safety or general welfare. If the decision reached is a denial, specific reasons for denial must be cited.

Outright approval or a conditional permit are the other alternatives. The vast majority of permits are granted with conditions on one or more criteria. The scope of conditioning can be very broad; the statute specifies only that the conditions must be a proper exercise of the police power and appropriate with respect to the criteria. Conditions may include the posting of bond or establishing escrow accounts to assure financial capacity to comply with the conditions enumerated in the permit. Permits granted run with the land. The Board has adopted a rule requiring that permits and their conditions be recorded by town clerks. In the event that a permit is denied, the applicant has six months in which to redesign the project and reapply. If a permit is granted, a developer must demonstrate the intention to proceed with the project within one year or the permit will be considered to have expired.

Every permit has a construction completion date and an expiration date. The period for completion is determined by considering the amount of time necessary to construct the project taking into account the effect that financial arrangements may have on the time required. If a permit is granted for an extended period of time, the commission may establish a schedule for compliance with certain conditions of the permit at specified times. Failure to adhere to this schedule may result in revocation of the

permit. The expiration date is based on a projection of the time during which the land will continue to be suitable for the intended use, but the duration of the permit may be limited to what is considered to be the economically useful life of the permitted project.

If a developer wishes to change the project after a permit is granted, a new hearing on the proposed permit amendment may be necessary. Unless the applicant specifically requests a new hearing, that decision is made by the commission on the basis of the nature of the change and the impacts it might have. In some cases, such as industrial park "umbrella" permits, an original permit will anticipate amendments and limit the scope of review, but in most instances compliance with all criteria which relate to the change will be reviewed.

A simplified and shortened procedure has been formulated by the Environmental Board for projects deemed minor in scope or impact. An application is defined as minor if the district coordinator determines that there is no indication that the project will have significant impacts on interests protected by Act 250. If there is such a determination, the coordinator informs the commission and circulates notice of the application and proposed permit, findings of fact and conclusions of law to all parties. By order of the commission or at the request of a statutory party, or adjoining property owner, a hearing will be held. Otherwise, the permit as circulated is granted within 60 days.

Commission decisions may be appealed to the Board by any aggrieved party, including the applicant. Applicants have the option of removing the appeal from the Board to Superior Court. Appeals must be initiated within 30 days of the issuance of a commission decision. The non-statutory parties may appeal only on criteria for which they sought party status at the commission level.

Hearings by the Board or the Superior Court are held *de novo* on the criteria that are subject of the appeal. Decisions made by the Board or Superior Court may be appealed to the State Supreme Court by statutory parties only. At this level of the court system, objections not previously raised may not be initiated, and when supported by substantial evidence, the findings of fact of the Board or Superior Court are considered conclusive.

Although occasionally the Board, applicant and parties may agree to have an appeal heard by a hearing officer, appeals are heard by the full Board. The hearing must be opened within 40 days of the filing of the appeal unless the timing requirement is waived by the principal participants. Hearings before the Board are generally conducted in a more formal manner than commission hearings. While parties need not be represented by attorneys, the applicant, appellant and the state usually are so represented.

VII. COURT DECISIONS

The Vermont Supreme Court provides the final level of review of Act 250 decisions. The small body of case history regarding the Act has helped to clarify questions of law and has hinted at what interpretation the Supreme Court might make about other legal issues raised by Act 250. The Court has generally been supportive of the substance of Environmental Board decisions, but has identified procedural errors. The Court has limited its scope of review to clearly defined questions of law and has, so far, declined to address broader constitutional challenges of Act 250. Supreme Court decisions have addressed clarification of party status, procedural questions, jurisdiction, and, occasionally, substantive issues.

Party status has been dealt with directly in a number of Supreme Court decisions. The language of Act 250 limits the parties for appellate purposes to only statutory parties, but the Supreme Court has given broad interpretation to the overall legislative intent of Act 250 to allow participation in Board *de novo* hearings by all those properly admitted as parties by the district environmental commission. The Supreme Court made the first step toward establishing this policy in its first Act 250 decision, *In re J. Paul and Patricia Preseault,* 130 Vt. 343 (1972). The central issue was whether an adjoining property owner who had participated in commission hearings was entitled to take part in Board proceedings. In this case the commission had denied the permit and the applicant had appealed to the Board. The adjoiners requested party status before the Board. The Board, in a strict reading of the statute, denied that status. The hearings proceeded and the Board granted the permit. The adjoiners appealed to the Supreme Court. The Court first determined that the adjoiners had standing to appeal to the Supreme Court under the Administrative Procedure Act because they had exhausted all administrative remedies and were aggrieved by the decision made by the Board. The Court then found the Board's narrow reading of the statute to be contrary to the intent of the statute as a whole, which is to extend broad party status for the purpose of Board hearings. The Court also found that to disallow party status at the Board level to those who had been parties at the commission level frustrated the purpose of a *de novo* hearing which, by definition, is to begin the process anew and compile a new factual record. Broad participation and party status facilitate that intention. The Court reversed the Board's decision and returned it to them for a new hearing with the adjoiners included as parties.

In *In re Application of George F. Adams and Co., Inc.,* 134 Vt. 172 (1976) the Court applied the broad interpretation of the right to participate at the Board level to include parties admitted under the Board's Rule

12(C) (since renumbered 14(B)). The Court affirmed a decision of the Board permitting a 12(C) party to appeal a commission decision to the Board. In the Adams case, however, the Court made it clear that a 12(C) party's right to participate at both administrative levels did not extend to Supreme Court appeals. In a true appeal, that is, a review by the Supreme Court based on an existing administrative record, participation would be limited to the statutory parties. Adjoining property owners and 12(C) parties would be excluded.

The Supreme Court reviewed the discretion which the commissions and the Board use in determining 12(C) party status in *In re Lunde Construction Co.,* 139 Vt. 379 (1981). The application involved a project in Barre Town which would rely on municipal water and sewer services. The Town had no such services, but did have a contract with the City of Barre to use a limited amount of their services. Barre City had applied for and been denied party status by both the district commission and the Board. Barre City appealed to the Supreme Court which ruled that neither body had abused its discretion to confer party status under Rule 12(C) because the interests which Barre City sought to protect by gaining party status, although valid concerns, were adequately safeguarded by the participation of other parties, and the contract limiting the amount of water and sewer services provided to Barre Town sufficiently protected the specific concerns of Barre City.

In *In re State Aid Highway No. 1. Peru, Vermont,* 133 Vt. 4 (1974) the Court made some interesting statements regarding party status, but ultimately vacated the Board's Declaratory Ruling on procedural grounds. When originally filed with the commission, the road project involved more than 10 acres. When the size of the project was later decreased to below the jurisdictional threshold, the applicant requested to withdraw the application. The commission dismissed the case, ruling that it was without jurisdiction. At the request of the Vermont Natural Resources Council and the State Agency of Environmental Conservation, both parties before the commission, the Board issued a Declaratory Ruling, holding that the project was subject to Act 250. The applicant appealed that ruling to the Supreme Court. The Court did not review any of the Board's findings of fact or conclusions of law because they found a Declaratory Ruling an improper remedy. The Court speculated that the reason the petitioners had petitioned for a Declaratory Ruling rather than appealing the commission's decision was that the two parties who requested the Declaratory Ruling were not proper parties for appellate purposes.

At the time the Court made this decision, there was no Rule 12(C) and since the Vermont Natural Resources Council was neither a statutory

party nor an adjoining landowner, the Court found them ineligible for party status. Under current rules the Vermont Natural Resources Council could properly be granted party status at the discretion of the commission, and could bring an appeal to the Board, although not to the Supreme Court. The Supreme Court also questioned the propriety of the Agency of Environmental Conservation to be a party in what the Court described as quasi-judicial proceedings "within itself." This misconception regarding the relationship of the Board to the Agency of Environmental Conservation was clarified in a later decision, and the independence of the Board from the Agency is now established.

The Supreme Court again found the Board in procedural error in *In re Juster Associates,* 136 Vt. 577 (1978). The case involved a private sewage treatment facility which was in violation of a permit which the Board had granted in an appeal from a commission decision. The developer found that the only available remedy for the violation was to build a new treatment facility on a four-acre parcel physically separate from the original tract. The Board heard the amendment request without returning the matter to the commission. The Court ruled that such a project alteration might affect people not affected by the original project, and that an amendment proceeding at the Board level, limited to the parties involved in the underlying application, was improper. The Court concluded that the amendment should have been heard by the commission, affording other potentially interested parties the opportunity to participate.

In one of the broadest court challenges to Act 250, *In re Wildlife Wonderland, Inc.,* 133 Vt. 507 (1975), the Court found the Act constitutional and the Board's interpretation of it. An application to build a large commercial game farm was the subject of this case. The commission had granted a permit for the project which, on appeal, the Board denied. The applicant then appealed to the Supreme Court, challenging the Board's decision on several grounds and the constitutionality of certain aspects of the Act.

The appeal alleged that the Board's findings on two criteria were not supported by substantial evidence. The Court ruled that the Board's determination regarding one criterion was, in fact, substantially supported by the record and reaffirmed the Board's role as the proper trier of fact. However, the Court did find error in the Board's findings of noncompliance with the other criterion. The error resulted from conflict between the Board's own rules governing the use for Act 250 purposes of certifications of compliance issued by agencies with overlapping regulatory powers, and the Board's conduct in this particular incident. The Court clearly supported the concept that a certification of compliance represented only a rebuttable presumption if opponents of the project

presented contrary evidence, but found fault with the existing mechanism for applying that concept. The Board has since amended its rules to make the use of certifications of compliance in the process function more smoothly.

In *Wildlife Wonderland,* the applicant also objected to the participation of the Agency of Environmental Conservation, two town planning commissions, and an adjoiner in the appeal from the commission decision. In its decision, the Court corrected an earlier misconception by clearly recognizing the independence of the Board from the Agency of Environmental Conservation for Act 250 proceedings. As for the other parties, the Court found that just because a town planning commission had not participated on all criteria at the commission level, the commission had not forfeited its right to take part in Board hearings on all criteria. In reviewing the rights of an adjoiner to participate, the Court restated its policy that adjoiners were permitted participants in commission and Board hearings, but lacked party status for appeals to the Supreme Court.

The final challenge, directed at the Act itself, alleged that the criterion requiring review of a project's impact on aesthetics was an unconstitutional delegation of legislative authority to an administrative agency. It was further charged that denial of a permit on the basis of findings that the project would result in undue aesthetic damage and would unreasonably danger public investments resulted in the taking of property without compensation. These issues represented fairly substantial challenges to Act 250, but the Court declined to rule on these matters because it was able to accept the Board's decision to deny a permit on other statutory grounds.

The Court's decision to affirm the Board's denial, although noting procedural errors, was an important confirmation of the entire process. The recognition of the Board's role as the proper trier of facts and clarification of its relationship with state agencies were of particular significance. The Court's commentary on the Board's rule concerning acceptance of other state permits was helpful in establishing an administrative policy for overlapping jurisdictions.

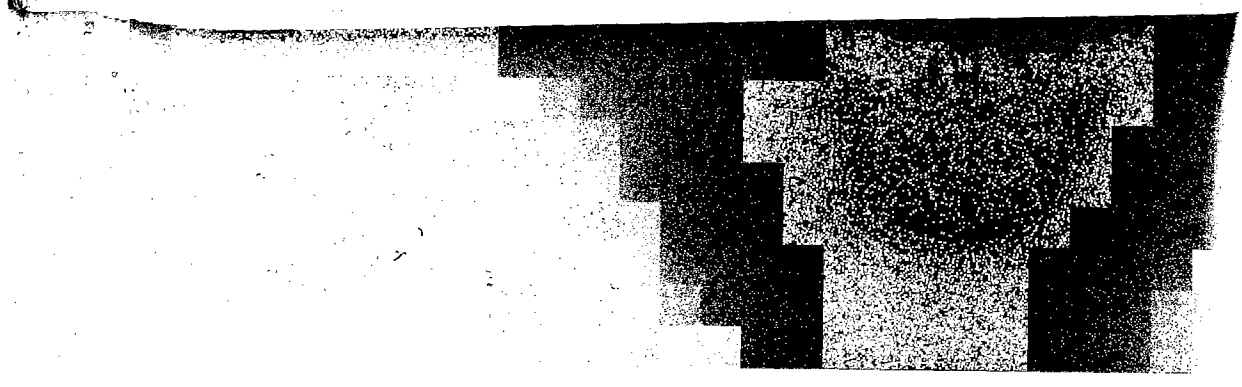
In the more recent case of *Committee to Save the Bishop's House v. Medical Center Hospital of Vermont, Inc.,* 136 Vt. 213 (1978) the Court further clarified the jurisdictional limits of Act 250. The project in question required the Board and the Court to determine what constituted involved land for the purpose of defining commercial and industrial developments of 10 or more acres. The Board had adopted a rule amplifying the statutory explanation which the Court found vague. The Court first stated that it was the clear intention of the legislature that Act 250 would not supercede local land use regulations unless there was an

overriding state concern. The Court found the Board rule contrary to this intent because it encouraged an interpretation of involved land which resulted in too frequent state review of local decisions. The Court therefore struck down this rule and offered some interpretation of legislative intent as guidance for the determination of involved land.

The Court clearly ruled out a narrow definition that involved land was limited to acreage actually used in construction. The Court also recognized that such an interpretation would be inconsistent with the legislative mandate to calculate land incident to the proposed use as involved. Furthermore, the Court did not interpret the legislature's illustrations of lands incident to the use as a limitation of involved land to only those enumerated examples. The Court offered a definition of involved land as land bearing a relationship to land used in construction where, by reason of that relationship, there is a demonstrable likelihood that there will be a substantially increased impact on the values sought to be protected by Act 250.

The Board has had an opportunity to apply the Supreme Court interpretation of involved land in recent Declaratory Rulings. The Board determined that the Supreme Court decision in *Bishop's House* was intended to apply only to the definition of involved land when the tracts in question were physically separate from the tracts used for construction, but owned by the same person. In cases where the Board is called on to determine jurisdiction over a project proposed on a single tract of land, the Board interprets the language of the Act to intend inclusion of the entire tract of land as involved. The Board cites not only the language of the Act in support of this definition, but the overwhelming practical difficulties of calculating, prior to determining jurisdiction, which land will be involved by virtue of a relationship affecting the criteria of Act 250. Such a determination of involved land would require detailed surveying, mathematical calculation and extensive fact-finding hearings, including an exploration of the probable impacts of the project, just to establish jurisdiction. Furthermore, a jurisdictional definition which did not include as involved the entire tract on which construction is proposed would encourage the segmenting of a project to avoid Act 250 jurisdiction.

The Court has also been called on to consider the issue of which town and regional plans have authority for Act 250 purposes. In *In re Application of J. Paul and Patricia Preseault,* 132 Vt. 471, (1974), the case involved a local plan which had been adopted three days prior to a *de novo* appellate hearing by the Board. The Board declined to assign any significance to the plan for Act 250 review, and the Court supported this position, stating that a *de novo* hearing contemplates only new factual evidence, not new laws or ordinances.



More recently, the Vermont Supreme Court upheld a Board Declaratory Ruling stating that the construction of 35 housing units on three different tracts of land within five miles of each other triggered Act 250 jurisdiction even though only three units and six units were proposed for two of the three sites. *In re Burlington Housing Authority,* No. 287-81 (S.Ct.Vt., decided April 21, 1983).

IX. EVALUATION

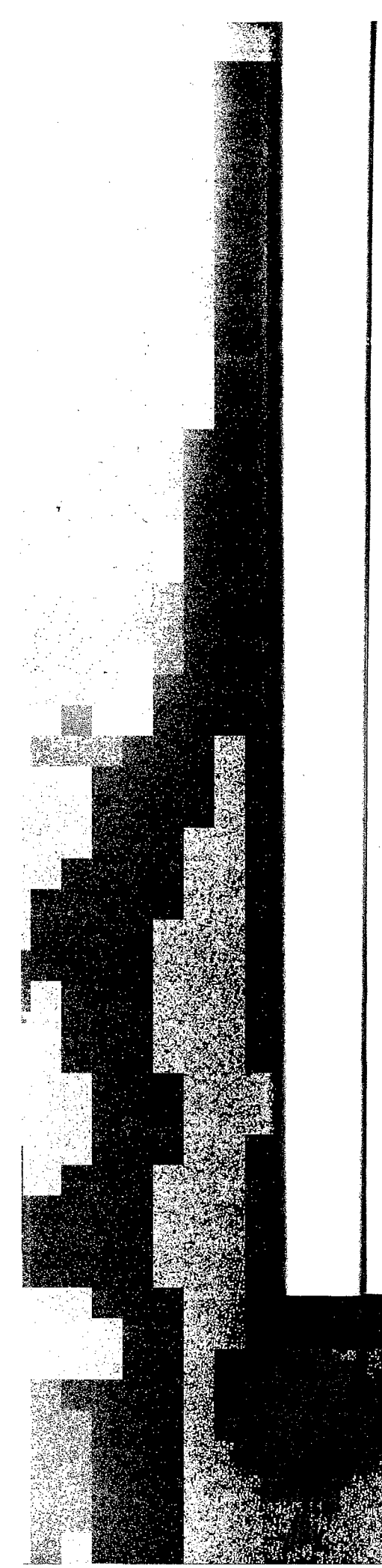
Throughout its 13-year history, Act 250 and its administration have been the subject of continual critical analysis. Individuals involved with the process, informed commentators, and academic researchers have evaluated the effectiveness and unanticipated side effects of the review process and have identified problems and strong points of the regulatory system. The Bibliography at Appendix A lists many of these studies.

As a result of a conference held in the summer of 1980, the tenth anniversary of Act 250's passage, the Environmental Board produced a report *Act 250: A Performance Evaluation* that not only cited weaknesses of the Act and its administration, but attempted to identify the sources of the problems and suggested some corrective measures. The report represents the opinions of the Board, private citizens, and public officials involved in the process. It also reflects many of the conclusions reached by independent observers over the first 10 years of the Act's life.

Most analyses of the Act 250 process have incorporated an assessment of the impact of the regulatory system on development in the state. The consensus has been that Act 250 has not caused a drastic curb on growth in Vermont. Temporary slow periods of development activity since the passage of the Act have been attributed to general economic conditions rather than regulatory disincentives to develop. Indeed, the Board pointed out in its tenth-year study that growth in employment, income, investment, and population was more healthy in the 1970s than in the decade prior to the passage of Act 250. Some observers credit the Act with contributing to increased development by protecting features which attract investors and employers to Vermont. This was exactly the effect which Governor Davis envisioned when he charged the Environmental Control Commission with discovering "how we can have economic growth and help our people improve their economic situation without destroying the secret of our success, our environment."

While Act 250 is not believed to have precipitated a decrease in the quantity of development, it is considered to have generally improved the quality of development. In *Act 250: A Performance Evaluation,* this conclusion is summarized as follows:

> The participants in the June 6 workshop concluded that, on the whole, the program has met or exceeded the general goals of its creators and has served the state very well. There was general agreement that the Act 250 process has measurably improved the quality of development in the state over the past decade. One indication of this success is that despite a pace of growth in investment and population in the 1970s that is higher than the



pace of growth during the "development crisis" of the 1960s, most Vermonters do not feel that serious environmental harm is being done to the state or to their towns.

The process has helped to minimize the degradation of the state's natural resources from those developments which are subject to the Act's jurisdiction. But the Act's success in this area has been mixed. Most observers agree that the program has done a good job in the areas of air and water pollution, soil erosion, water conservation, and the protection of wildlife habitat. The Act has also promoted the protection of scenic and historic resources; in particular, the district commissions have worked cooperatively with developers on the creation of effective landscaping and screening plans. On the other hand, the Act has not been particularly effective in protecting the state's productive agricultural and forest lands from unnecessary conversion to other uses. In fact, through the so-called "ten-acre loophole," the Act may be hastening such conversion. Also, the Act has thus far not realized its potential to decrease unnecessary demands of new development on the state's energy resources.

The Tenth Anniversary Conference participants generally agreed that Act 250 has done a good job protecting towns as well as landowners and other citizens from potential undesirable effects of development projects. In general the conference participants felt that the district commissions have dealt quite effectively and fairly with citizens' concerns about pollution, traffic, aesthetics and other impacts of new development on nearby properties. Towns, school boards and other governmental entities have also been well protected from undue fiscal burdens from badly planned, over-scaled or badly-serviced developments and subdivisions.

No sophisticated analysis of the real dollar impacts of Act 250 has been made. The study most frequently cited in support of allegations that costs to developers are high was made in 1971 when the Act was only one year old and the nation was experiencing an economic recession. It is recognized by most observers that procedural complexity and delay pose a potential economic threat, but there have been few cases where the Act 250 process has been persuasively cited in this regard. Complaints about delays and costs have usually been attributable to other regulatory processes. Increase in costs can result from the imposition of stringent environmental controls which are generally required by other environmental laws. However, while better waste disposal systems may cost more

initially, they may well be less expensive in the long run in both the economic sense and the environmental sense. Knowing that the preparation of detailed site plans and technical information to meet several of the criteria is costly for larger projects, the Board has adopted a rule as cited above allowing developers to request advance review of compliance with criteria nine and 10, which require conformance with state, regional and local plans.

The Act 250 process is a state regulatory system: it was never intended to displace local planning. From its inception Act 250 has offered incentives to localities to plan and has relied on local plans as a standard for one of the criteria. The jurisdictional threshold is higher for towns which have adopted permanent zoning and subdivision ordinances, leaving these towns with more control over development decisions in their towns. Projects are evaluated for compliance with local plans.

The Municipal and Regional Planning and Development Act was amended in 1981 to give greater effect to regional plans in the Act 250 process. Projects must conform to relevant elements of regional plans to the extent that such elements are not in conflict with applicable local plans. For projects found to have substantial regional impact, regional plans are to prevail even if in conflict with local plans.

In addition to these incentives, the amendment of Act 250 based on the capability and development plan draft added a subcriteria 9(A) which encourages capital improvement planning by towns. The town and regional planning commissions are also statutory parties to all Act 250 applications in their jurisdiction. These incentives are a reflection of the feeling that planning should remain a local responsibility, a feeling which was instrumental in the decision not to adopt a statewide land use plan.

The effect of these incentives has been mixed. Since 1970 the number of adopted town plans has grown, but the effectiveness of these plans varies. Undoubtedly, Act 250 has led some local planning officials to abandon their efforts and let the state assume responsibility. The Environmental Board itself has noted the absence or ineffectiveness of local planning as one of the primary weaknesses of the Act 250 review process. Experience with administration has demonstrated that the provision for review of project conformity with local plans has very little use in towns with vague and ambiguous plans. Small developments and large-lot subdivisions which are not regulated by Act 250 are the responsibility of the town and in many towns the zoning and subdivision regulations deal inadequately with these projects. The results are costly scattered growth and loss of primary agricultural land, both of which are counter to goals of the capability and development plan. In some districts well-defined regional plans have contributed significantly to Act 250 review, but in others,

regional plans have not been specific enough to have effect. In some cases the lack of constituent town support undercuts plan authority for Act 250 purposes.

In response to this problem, efforts are being made by the State Planning Office, the Department of Community Affairs, regional planning representatives, and General Assembly members to substantially revise the Municipal and Regional Planning Act in a way which will enhance the effectiveness of these plans for Act 250 purposes. The intention is to strengthen these plans and make them more effective growth management tools. Means to increase cooperation between town and regional planning efforts are also being sought.

An associated problem is the consistency and quality of participation of local and regional planning officials in the Act 250 hearing process. As representatives of statutory parties, town and regional officials have the right to participate in hearings, and their testimony on some criteria can be critical to the interests of their communities. At present participation is irregular. Where the evidence which is needed to evaluate the impact of a development on a town is technical, state agencies try to help towns perform evaluations. As town and regional officials become more familiar with the process and realize the intention of the Act to support their plans, their involvement in the process increases. In light of the dependence of the Act 250 process on evidence presented at hearings, local information is badly needed. Consideration of the need for local participation is one of the primary concerns in establishing convenient locations and timing of public hearings.

Of at least equal importance to the effective and efficient functioning of Act 250 is the participation of state agencies. At the time Act 250 was passed, the decision was made not to create a staff of technical experts within the Board, but to rely on existing state agency staffs. The responsibility for technical evaluation of a project's impact in such areas as water quality, waste treatment, air pollution, erosion, highway access and congestion, economic costs and benefits, and many other matters, lies with the state agencies. The level of participation of the state agencies varies from agency to agency and is affected by personnel changes and shifts in internal agency administration and budgeting. The expert knowledge of the Agency of Environmental Conservation is of particular importance and in the early years of the program an environmental advisor was assigned to each of the districts in order to visit each site with the applicant and testify at hearings. In 1978 these assignments were largely discontinued. The result has been the virtual abandonment of site visits for technical review in advance of hearings. In addition to this staff deficiency, there is only one attorney assigned full-time to represent the state's interest

at hearings. The number of applications and appeals being heard by nine commissions and the Board makes this an almost impossible task for one person.

Linked to this problem of expert state testimony is the fact that the Board and the commissions are often presented with conflicting opinions on highly technical issues by state agency officials and experts representing the applicant. This puts Board and commission members in the difficult position of having to resolve issues about which they have no special knowledge.

Staff people and members of the Board and commissions agree that noncompliance with the Act and violation of permit conditions are the most critical administrative problems of the process. Many developers who comply with the process agree, noting that the noncompliance of other developers puts them at a competitive disadvantage. The sensitive review of each application usually results in the granting of a permit which is specifically conditioned to minimize the impacts of the project on values protected by Act 250. The inability of the enforcement system to ensure compliance with those carefully formulated conditions subverts the entire process. The unintentional and deliberate evasion of the entire Act 250 review process is a problem of equal magnitude. In the past the process has relied on voluntary compliance, but it is felt that the deliberate evasions require more effective and compelling enforcement procedures. The Board has recommended several ways to improve the process including the strengthening of the enforcement staff, increased public awareness of the process, the institution of more practical enforcement methods, provision of a broader array of penalties, and more accurate recording of the permits in land records.

The regional administration of Act 250 represents the intention of the legislature to leave the decision-making power for the state permit process at the local level. An important advantage of the process is that each project is considered in its regional context and the special needs and concerns of a district may be incorporated in the decisions. This regional flexibility is an essential feature of the process, but it is recognized that too much variety will indicate inconsistent and inequitable application of the statute. The need for general standards regarding the consistency, workability and equity of decisions at the district level is being partially met by the guidance which the Board offers in its decisions and declaratory rulings. The executive officer is responsible for encouraging more consistent decision drafting by the district coordinator. There is also an effort to provide orientation and training for commission members and their staff which will increase consistency.

The Board is actively seeking to clarify its position regarding the role of

master plans and incremental development plans in the permit process. The Board has a special process for industrial park applications which allows preliminary approval of the overall park plan prior to occupancy, making possible more limited review of the developments which are later proposed by prospective individual occupants of the park. A similar policy has not been established for other phased development, but the Board supports a planned approach to development and is seeking a method for evaluating master plans for large-scale projects which will serve the intentions of Act 250 as well as encouraging such long range plans.

In addition to the procedural issues discussed above, it has been recognized that there are substantive issues which the Act is currently dealing with ineffectively. As an indication of the legislature's concern for valuable and scarce resources, subcriteria were adopted through the capability and development plan which specifically provide for the protection of primary and secondary agricultural soils and require energy conservation measures in new developments. In spite of these legislative efforts, these resources are not receiving adequate protection.

While criterion 9(B) requires review of the impact of a project on primary agricultural soils, the Act's definition of development is generally considered to be contributing to the loss of this resource. The wording of the Act makes subdivisions of 10 or more lots of less than 10 acres in size subject to its jurisdiction while comparable subdivisions with lots of more than 10 acres are exempt. The creation of this 10-acre exemption was based on the assumption that large-lot subdivisions do not bring with them environmental or economic problems. Thirteen years of Act 250 administration have proved this assumption wrong and have indicated that large-lot subdivisions bring with them new problems. The fragmented ownership of valuable farm and forest land resulting from large-lot subdivisions makes economic and productive use of these resources unlikely. These projects escape sewage disposal review. From the municipal standpoint, they create burdens equal to if not greater than smaller projects. A change in Act 250 jurisdiction which will eliminate this exemption is a top priority of the Board.

If jurisdiction over a project is captured, the review of its impact on agricultural soils has only limited effectiveness. The conservation of primary agricultural land involves a whole realm of complex issues and requires a comprehensive public policy to fully respond to the issue. Act 250 review may be expected to have a role in that public policy, but cannot address the matter in a vacuum. Changes in the way in which Act 250 reviews impacts on primary agricultural soils may, in fact, be needed in order to enhance the effectiveness of Act 250 review. Under the present

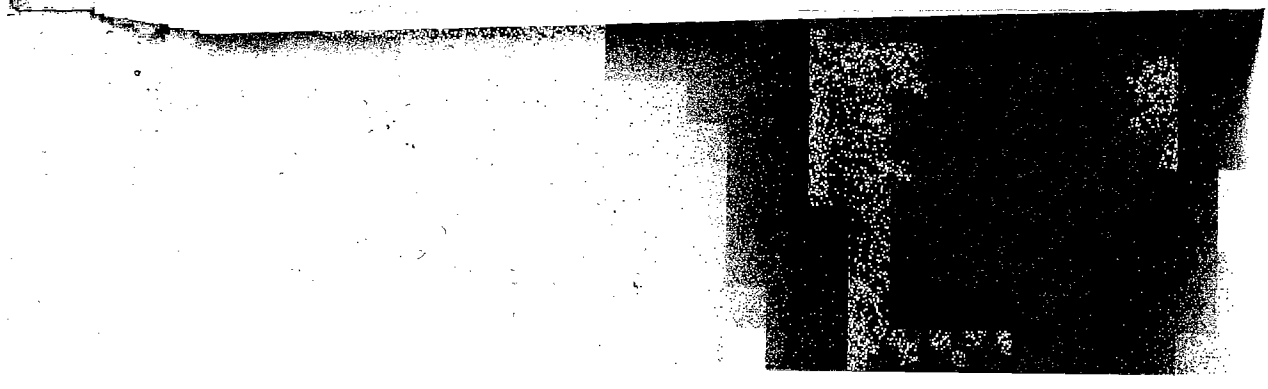
wording of the subcriterion, the commissions can only deny a permit if they find that the applicant cannot realize a reasonable return on the fair market value of his property without reducing the agricultural potential of the land. The current definition of fair market value and the economics of farming make it unlikely that even the most successful farm operation will necessarily generate what can be considered to be a reasonable return.

The commission must also find, before granting a permit, that the development has been planned in a way which will minimize the impact on the primary agricultural soils on the site. Despite ongoing efforts of state agencies and regional planning commissions to demonstrate to developers, local planners, and consumers the benefits of developments which utilize cluster planning, many local subdivision and zoning ordinances continue to require amendment to allow and promote this type of development.

Difficulties in implementing the energy conservation criteria of the Act have arisen because of rapidly changing conservation technology, shifting relative costs of fuel types, and disagreements among specialists over appropriate standards. After requesting conservation guidelines from the State Energy Office, the Board found widespread opposition to the adoption of what was feared to be inflexible formulas for evaluating energy systems. The effort was suspended. The Board has subsequently held hearings and conferences to consider alternate conservation strategies and to educate both the development community and Board and commissions members on effective conservation practices.

Despite acknowledged problems and shortcomings in the Act 250 process, the passage of three more years of Act 250 experience has done little to change the overall conclusion expressed in the opening paragraph of *Act 250: A Performance Evaluation:*

> Through the course of a decade of unprecedented state economic growth, the unique development permit process has proven its merit as a practical system for assuring orderly growth that is compatible with the state's exceptional natural and human heritage.



APPENDIX A

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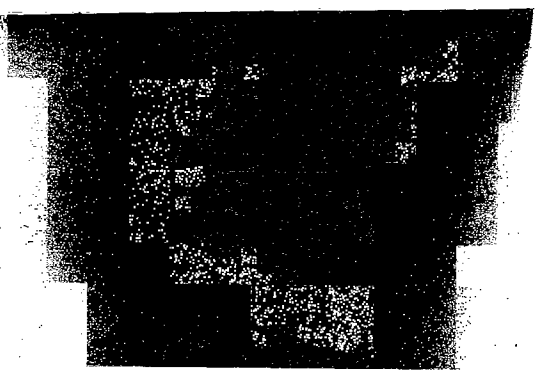

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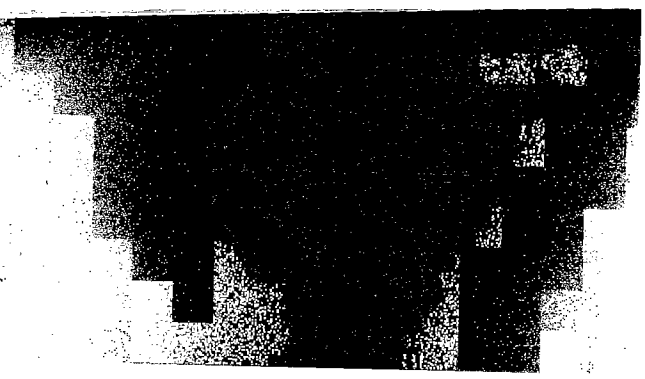

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APPENDIX B

ENVIRONMENTAL BOARD
ACT 250 STATISTICS
June 1970 - March 31, 1983

APPLICATIONS

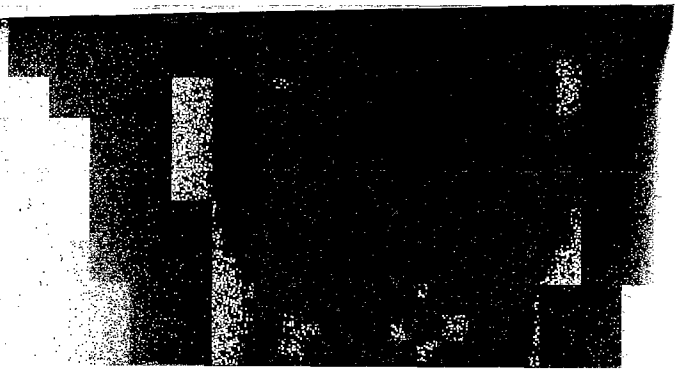
4,377	Applications
4,265	Acted Upon
3,902	Permits Issued
106	Denied (2.5% of those acted upon)
172	Withdrawn
112	Pending
85	Inactive Status

APPEALS

199	Appeals to the Board (4.7% of those applications acted upon)
24	Removed to Superior Court
80	Permits Issued by the Board
11	Permits Denied by the Board
77	Withdrawn/Settled
7	Pending
24	Removals to Superior Court
5	Pending Superior Court Cases (1 over 4 years; 3 over 1 year; 1 less than 1 year)
2	Overturned District Commission's decision
1	Denied permit
1	Remanded to District Commission, decision was appealed to the Supreme Court which remanded case to lower court; was dismissed
11	Dismissed/Settled
1	Permit amended
2	Court returned appeal to the Board
1	Permit issued

SUPREME COURT (Includes Declaratory Rulings)

29	Supreme Court Appeals
7	Reversed/Remanded
4	Pending

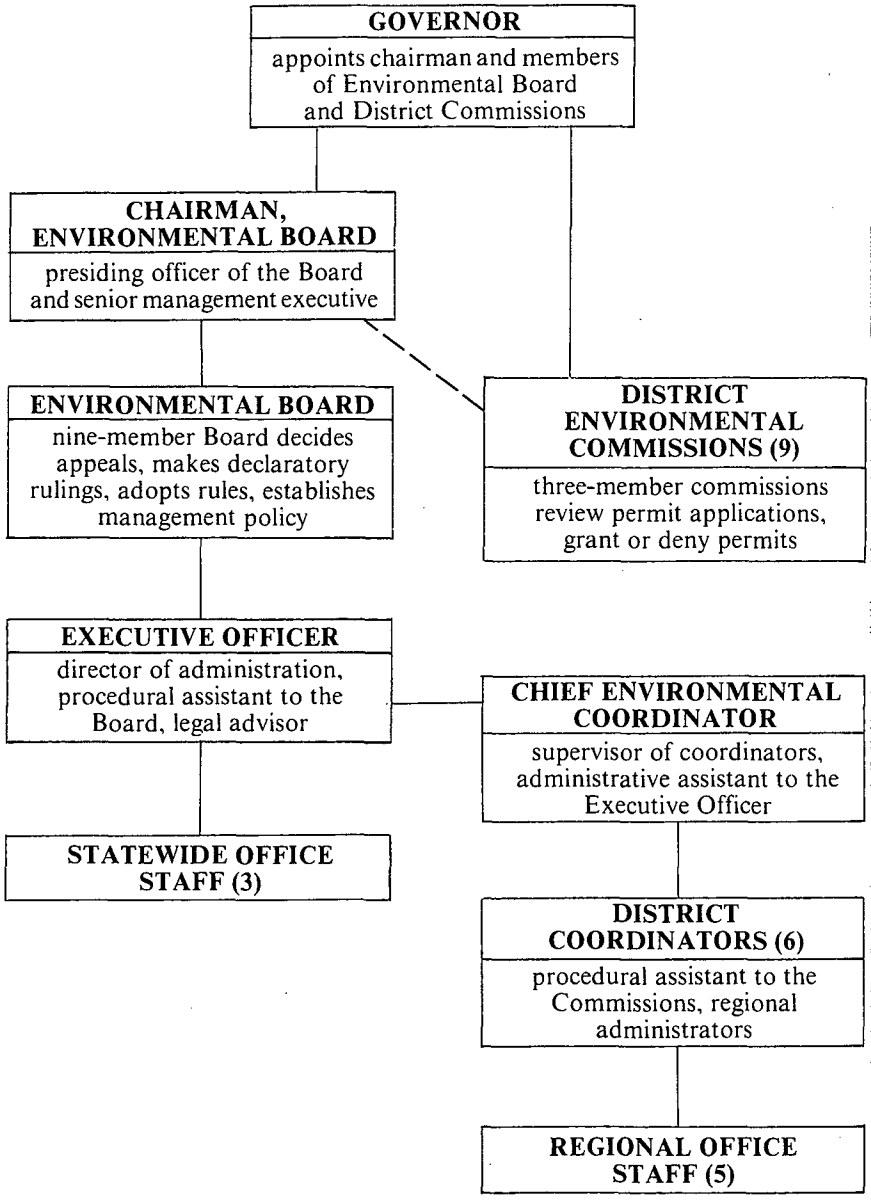


6	Upheld Board's decision
12	Settled/Dismissed

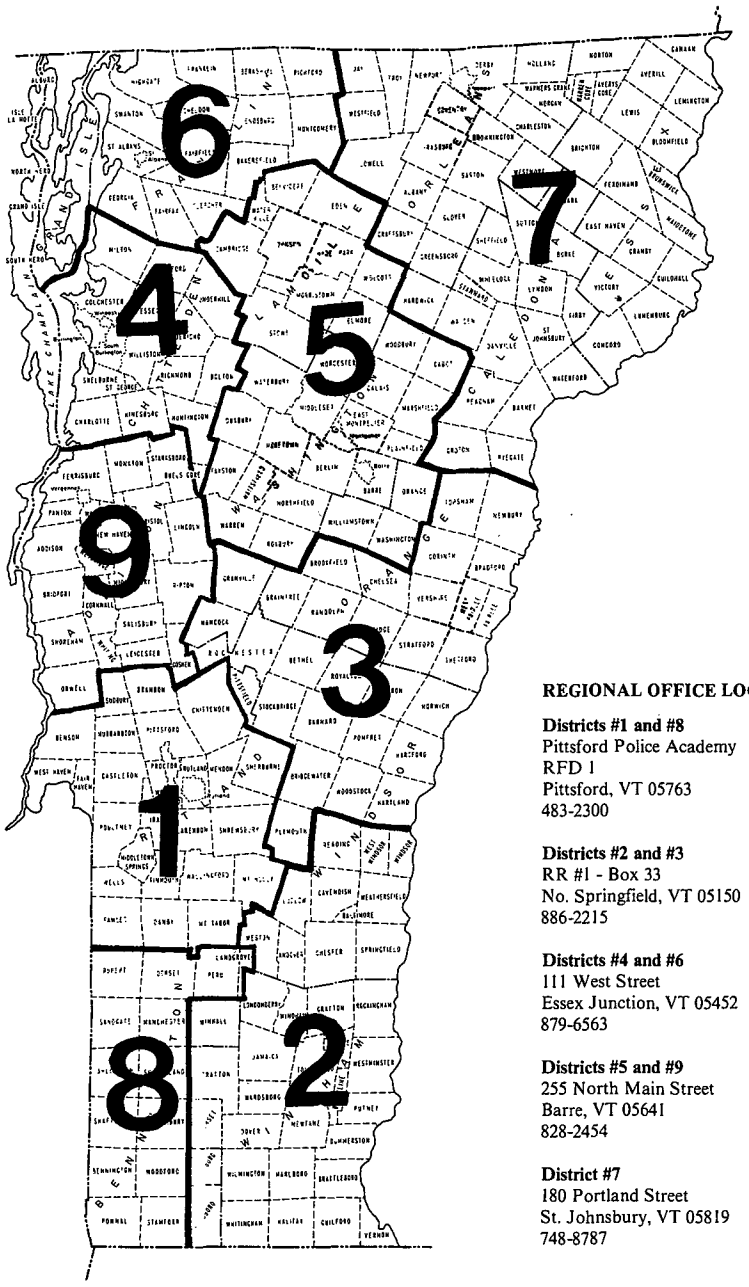
PERMITS ISSUED JANUARY 1, 1983 - MARCH 31, 1983

26.6%	issued within 30 days
43.3%	issued within 60 days
70.0%	issued within 90 days
83.3%	issued within 120 days

APPENDIX C
ORGANIZATION CHART



APPENDIX D
DISTRICT ENVIRONMENTAL COMMISSION BOUNDARY MAP



REGIONAL OFFICE LOCATIONS

Districts #1 and #8
Pittsford Police Academy
RFD 1
Pittsford, VT 05763
483-2300

Districts #2 and #3
RR #1 - Box 33
No. Springfield, VT 05150
886-2215

Districts #4 and #6
111 West Street
Essex Junction, VT 05452
879-6563

Districts #5 and #9
255 North Main Street
Barre, VT 05641
828-2454

District #7
180 Portland Street
St. Johnsbury, VT 05819
748-8787