

Memorandum

TO: Representative Peter Anthony
FROM: Ed Stanak
DATE: November 17, 2019
RE: Act 250 and the Mountains

This memorandum follows up on our November 5th conversation concerning the op-ed entitled “The Finite Mountains of Vermont “ which was published in vtdigger and the Herald-Times Argus on November 1 and 2, 2019, respectively . I sincerely appreciate your interest in considering taking steps to protect high elevation settings from imprudent development and subdivision . I look forward to working with you in this effort .

I agreed to further explain the term “mountains” as used in the op-ed with respect to the proposed 1,500 foot jurisdictional standard . You asked about the background for this sentence that was in the op-ed : “The 1,500 foot elevation contour has long been acknowledged as the area that begins to distinguish valleys from mountains .”

“ Mountains “

Existing Statutory and Regulatory Provisions

The op-ed utilized the term “mountains” in describing the high elevation settings above 1,500 feet which should be the subject of increased scrutiny as Vermont faces anticipated 21st century development and subdivision pressures and growth rates.

There is no definition of “mountain” in either Act 250 (10 VSA Chapter 151) or the rules promulgated over the decades by the former Environmental Board and its successor the Natural Resources Board. Nor is there any definition to be found elsewhere in Title 10 (“ Conservation and Development”).

The op-ed was premised on terminology found in an existing statutory provision of Act 250 which addresses areas of Vermont characterized by physical features that an average person might associate with mountainous features. This provision is categorized as “Headwaters” and is codified at 10 VSA 6086(a)(1)(A) . Criterion 1(A) of Act 250 states :

- (i) headwaters of watersheds characterized by steep slopes and shallow soils; or*
- (ii) drainage areas of 20 square miles or less; or*
- (iii) above 1,500 feet elevation; or*

(iv) watersheds of public water supplies designated by the Agency of Natural Resources; or
(v) areas supplying significant amounts of recharge waters to aquifers.

Over time, an expansive body of case law has evolved applying the provisions of Act 250 to the specific physical characteristics of tracts which are proposed for development or subdivision.

One such decision was Kiesel [5W1270-EB (1998)] which involved a proposed residential subdivision to be located above 1,500 feet in elevation in the Town of Waitsfield . This decision (although subsequently reversed on other grounds by the Vermont Supreme Court) provides an instructive analysis under criterion 1(A) - including careful consideration of Vermont's Water Quality Standards - of the potential undue effects of development in such a high elevation setting . Although the Environmental Board concluded that a land use permit could not be issued for the project, following appeal and a revised design, a permit was issued.

Other Act 250 precedents have evaluated developments and subdivisions in mountainous settings under other criteria such as 8 (rare and irreplaceable natural areas and aesthetics), 8(A) (necessary wildlife habitat) and 9(C) (forest soils) . [See , eg, Killington Ltd 1R0593-1EB and 1R0584-EB-1 (1990) ; Mt Mansfield Company 5L1125-10 (1995) ; Department of Forests, Parks and Recreation (Phen Basin) 5W0905-7 (2004)] .

There is no definition for “mountain” in either the United States Code or the Code of Federal Regulations. The United States Board on Geographic Names once stated that the difference between a hill and a mountain in the U.S. was 1,000 feet of local relief, but this standard was abandoned in the early 1970's. (See <https://www.usgs.gov/faqs/what-difference-between-mountain-hill-and-peak-lake-and-pond-or-river-and-creek>)

Other Perspectives

There are nonstatutory bases for the premise that the 1,500 foot elevation is a reasonable standard for acknowledging the transition from valley to “mountain” .

Recognition of the importance of Vermont's mountains can be traced back to the early settlement era. Vermont's first state naturalist Zadock Thompson wrote about the mountains in his “ Natural History of Vermont” (published in 1842 and added to in 1853). The 1853 edition of this volume (at page 3) includes a diagram of the “principal heights in Vermont” in the section on

“History” which discusses “mountains”. This diagram suggests that “summits” were considered to originate at elevations as low as 908 feet above sea level.

Thompson also shared an account (at page 4) of how the name “Verd-Mont” was adopted back in October 1763. After describing how Rev. Dr Samuel Peters and others traveled to the summit of Mount Pisgah and a “baptism” ceremony was performed in naming the vista that they viewed, Rev Peters declared :

*“ We have here met upon the rock Etam, standing on Mount Pisgah, which makes a part of the everlasting hill, the spine of Asia, Africa and America, holding together the terrestrial ball, and dividing the Atlantic from the Pacific ocean – to dedicate and consecrate this extensive wilderness to God manifested in the flesh, and to give it a new name worthy of the Athenians and ancient Spartans, - which new name is Verd Mont, in token **that her mountains and hills shall be ever green and shall never die.** “ (emphasis added, not in the original)*

A later state naturalist, Charles W. Johnson, discussed Vermont mountains in depth in his 1980 (revised in 1998) work “The Nature of Vermont” . He examined the geologic, forestry, wildlife habitat and recreational qualities of the mountains . After explaining the depletion of natural resources which substantially contributed to the massive migration of population out of Vermont in the 1850s, Johnson discussed the “land ethic” or “conservation conscience” that Vermonter George Marsh synthesized in his 1864 book “Man and Nature”. Johnson wrote that Marsh “...urged people to realize that our resources are not infinite and that nature works with countless interdependencies. He called for management of lands and wildlife with reason, prudence, and scientific knowledge. “ (at pages 56 and 57)

In conclusion, despite significant concerns for Vermont’s mountains during the 19th and 20th centuries, a definitive articulation of “mountain” never materialized. Vermonters are perhaps left with guidance provided by the late US Supreme Court Justice Potter Stewart when he once struggled for a definition for a word - albeit in a much different context than environmental/land use law - and concluded: “I know it when I see it. “ [See Jacobellis v Ohio 378 US 184 (1964)]

So even though we may not be able to state with certainty what a mountain is and at what contour it originates, we can say with a high degree of confidence that Vermonters know their mountains when they see them.

