Vermont Supreme Court Decision Reducing Act 250 Jurisdiction in "1 Acre Towns"

The Vermont Supreme Court issued its In Re Snowstone LLC decision in early September concerning jurisdiction over development in so-called 1 acre towns. This decision drastically reduces the review under Act 250 of proposed development in towns lacking the capacity to control growth and related impacts on natural resources. Motions for extension of time to file reargruments were then granted by the Court. The Court set October 8th as the deadline for the filing of submittals.

The Court's decision dealt with a proposal to operate a dimensional stone extraction quarry on a 0.64 acre portion of a 176 acre property in the town of Cavendish. The developer would also utilize a 0.29 acre access easement. The Supreme Court affirmed the jurisdictional conclusions of the Environmental Division but then reached beyond the lower court's analysis of 10 VSA 6001(3)(A)(ii).

1- The Court erroneously applied the jurisdictional analysis enacted by the General Assembly for state and municipal projects.

Paragraph 12 provides the Court's overall approach for the interpretation of statutory provisions. It is interesting to note that the Court did not rely upon the Court's own Act 250 specific precedent for the interpretation of statutory language as had been stated in the Court's very first Act 250 decision In Re Preseault 130 VT 343 (1972) at 348. Contrary to the Court's analysis in Snowstone, the reasonable and logical interpretation of the language of 10 VSA 6001(3)(A)(ii) is that the controlling term is "on" and the size of the land upon which the "construction of improvements" will take place. Instead, the Court erroneously applied the jurisdictional analysis enacted by the General Assembly for state and municipal projects wherein a calculation must be made of the amount of land to actually be "used" for the project purposes. This is the essence of the mistake in the Snowstone decision**.**

2- The interpretation made in Snowstone is inconsistent with the legislative findings and declaration of intent for Act 250.

The original provisions of 10 VSA Chapter 151 enacted by the General Assembly in 1970 were "woven of whole cloth". Thus, the legislature that clearly expressed its intent to address "unplanned, uncoordinated and uncontrolled" development was the same legislature that crafted the jurisdictional triggers for 1 and 10 acre towns. There is no dispute that legislature concluded it would be the entire tract of land to be be considered for jurisdiction in 10 acre towns (ie the towns with the maximum of local control mechanisms).Why would the same legislature have then enacted a lesser jurisdictional standard (ie only the footprint of actual "construction of improvements") in towns which had only minimal or no local control bylaws ? A reasonable interpretation of the statutory provisions for 1 acre towns is that the legislature would have wanted at least the same foundation for jurisdiction (ie the size of the land or tract) . That would be consistent with the stated objectives of Act 250. The interpretation made in Snowstone is inconsistent with the legislative findings and declaration of intent for Act 250**.**

Additionally, the Court is very aware from its prior precedents that substantive reviews of impacts under the criteria of Act 250 entail an assessment of the natural resources present on the tract (or land) . [See eg In re Southview 153 VT 171 (1989) (necessary wildlife habitat) and In re Spear Street Associates 145 VT 496 (1985) (prime ag soils)] . The Court's Snowstone decision defeats such assessments in 1 acre towns - exactly the towns most in need of District Commission oversight of proposed development .

3- Snowstone will result in the "administrative nightmare" that the Court itself had warned of in its 1982 In Re Agency of Administration decision.

The Snowstone decision topples more than 50 years of administrative practice for jurisdictional determinations in 1 acre towns . From a practical point of view, many proposals for development are brought forward for jurisdictional determinations when they are conceptual and site plans and other design specifications are not yet available. How will calculations be made to determine the exact amount of land to be disturbed per the Snowstone holding ? The Court's decision also raises profound implications for a potential wave of litigation to lift jurisdiction over permitted projects [at least those projects where jurisdiction was determined after the abrogation of Rule 2(A)(2)] and effects on the terms and conditions in existing land use permits, particularly those attached for the benefit of participating parties. Snowstone will result in the "administrative nightmare" that the Court itself had warned of in its 1982 In Re Agency of Administration 141 VT 68 (1982) decision.

4- The Court's anxiety about burdens and costs on small projects is misplaced.

The Court's concerns in paragraph 23 for burdens and costs that might be imposed on lemonade stands due to determinations of Act 250 jurisdiction are unfounded. Act 250 Rules 2(C) (3)(c) (ie exception for *de minimis* construction of improvements) and 51 (ie minor applications) provide readily available relief.

5-It was unnecessary for the Court to have delved into its analysis of 10 VSA 6001(3)(A)(ii)

As summarized in paragraph 10 of the decision, the issues brought on appeal were : 1) whether the principle of "involved land" applied to the facts of this case and 2) whether the principle of "control" extended a consideration of jurisdiction to the entire property through which the easement access would pass. As to the "involved land" issue, given how the relevant statutory provisions of 10 VSA 6001(3)(A)(ii) were enacted, most Act 250 administrators would agree that the principle of "involved land" – for better or worse- simply does not apply in instances of determining jurisdiction in the context of a 1 acre town. As to the "control" issue, in addition to the "arm's length" provisions in the sales contract in the case , most Act 250 administrators would agree that jurisdiction would be limited to the corridor within the access easement and that the entire parcel through which the access would pass would not be included. In any event, the Environmental Board's Stonybrook decision would have supported a request by the developer to limit jurisdiction to the 0.24 of an acre access corridor running through the

retained land based on the facts this case. The Court could have rendered its decision without proceeding to its consideration of the effects of abrogated Board rule 2(A)(2).

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