Central Vermont Regional Planning Commission

Board of Commissioners
Tuesday, March 8, 2016
7:00 p.m.
Steakhouse Restaurant
1239 US Route 302, Berlin, VT

Note Change of Location

(Directions Attached)

5:00-7:00 pm – Open House for Laurie Emery's Retirement, includes hors d'oeuvre
7:00 pm – Board of Commissioners Meeting

AMENDED AGENDA

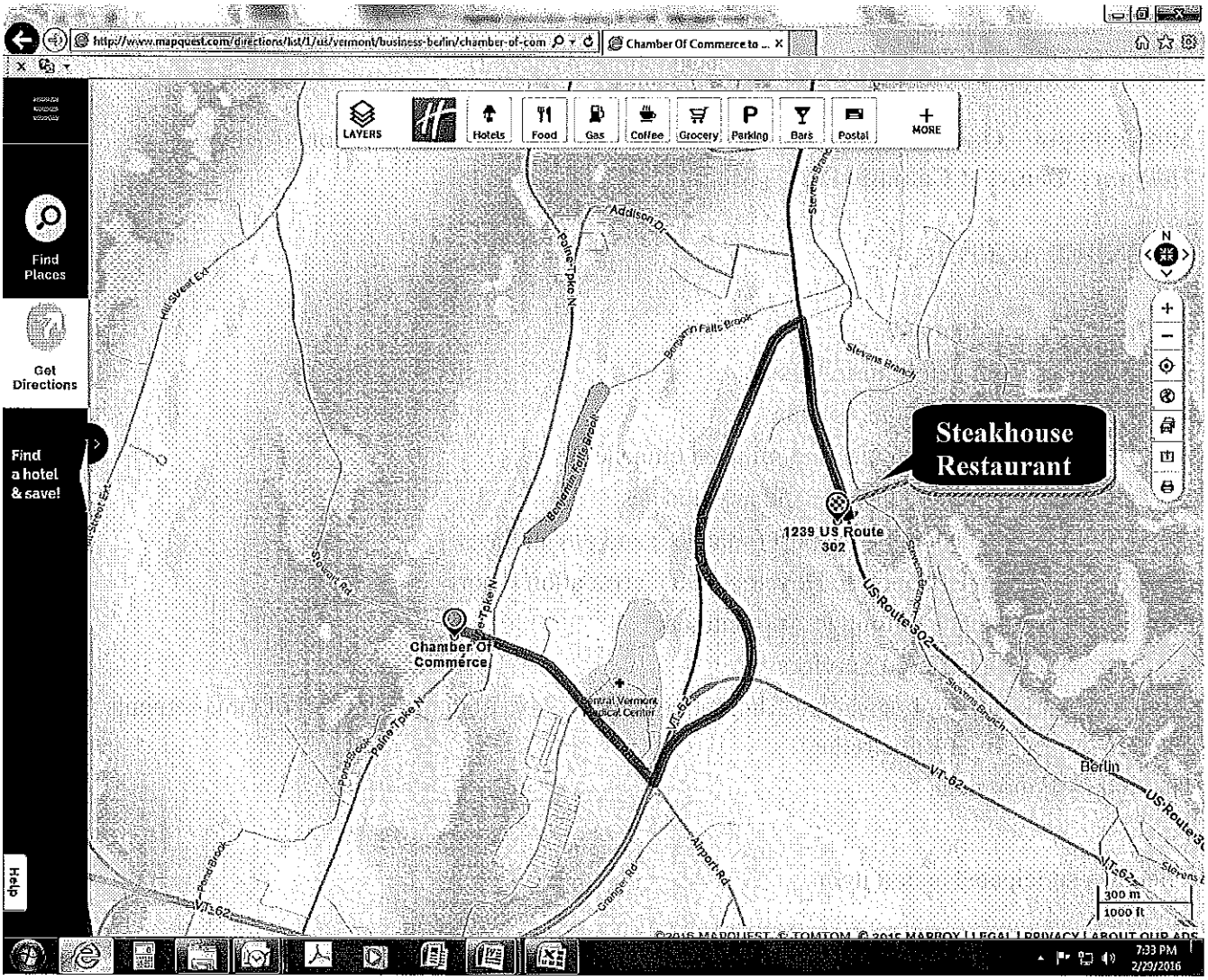
1. **7:00** Public Comments
2. **7:05** Presentation to Laurie Emery
3. **7:10** Adjustments to the Agenda
4. **7:12** February 9, 2016 meeting minutes (attached)*
5. **7:15** Staff Reports (attached) and any updates
6. **7:20** Executive Director's report (attached) and any updates
7. **7:30** Central VT Economic Development Corporation report
8. **7:35** Nominating Committee Appointment*
9. **7:40** Municipal Shared Services
   Workshop on Legislative Alternatives and H. 249, Regional Council of Governments
10. **8:20** Amicus Brief Participation*
11. **9:00** Adjournment

* denotes anticipated action item

Directions to the Steakhouse Restaurant

- Take exit 7 off I-89.
- Go thru 3 sets of traffic lights. Always staying in the right lane.
- After going under the 3rd set of traffic lights bear to the right at the fork in the highway. (Sign reads "Montpelier exit only")
- Follow the road to the bottom of the hill.
- At the bottom of the hill turn right at the traffic light onto US Route 302 east.
- Go to 2 more sets of traffic lights.
- Turn right into the Burger King/Vermont Lottery entrance at that 2nd traffic light.
- Upon leaving the highway take a quick left and proceed along the front of the Lottery building.
- We are the next building beyond the Lottery complex

This map shows the route to travel from the Commission's usual meeting location at the Central Vermont Chamber of Commerce to the March meeting location at the Steakhouse Restaurant.



STATE OF VERMONT

SUPERIOR COURT — ENVIRONMENTAL DIVISION
Docket No. 130-8-13 Vtec

IN RE: B&M Realty, LLC]
]

TWO RIVERS-OTTAUQUECHEE REGIONAL COMMISSION'S POST-TRIAL MEMORANDUM

Two Rivers-Ottauquechee Regional Commission (the Regional Commission) submits the following post-trial memorandum to address each of the issues set forth in the Appellant's Statement of Questions dated August 8, 2013. This memo is intended to supplement the more detailed discussion of legal issues in the Regional Commission's pre-trial memo. Each of Appellant's statements of issue is set forth in italic type. The Regional Commission's response and analysis then follows.

Based on the evidence and applying well-settled law, the Court should find that the project would have substantial regional impact, and does not conform to the Two Rivers-Ottauquechee Regional Plan (the Regional Plan). The Act 250 permit should therefore be denied.

1. *"Whether this project satisfies the standards of or will cause or result in a detriment to public health, safety or general welfare under Criterion 5 (Traffic Safety and Congestion), and whether it will cause unreasonable congestion or unsafe conditions with respect to transportation."*

The Appellant's expert witness, David Saladino, admitted at trial that the project would cause unreasonable congestion and unsafe conditions at the intersection of U.S. Route 4 and Interstate 89 Exit 1. The left turn on to Route 4, from the northbound exit, now functions (rather, dysfunctions) at the lowest level of service (LOS) and at maximum capacity.

That intersection is also categorized by the Vermont Agency of Transportation (VTrans) as a high crash location. More than half of the recent reported vehicle crashes there occurred at the afternoon peak hour when motorists tried to force themselves into already congested lines of traffic. Testimony of David Saladino.

Mr. Saladino calculated that the project would push the intersection 16 percent beyond its maximum capacity, and would triple the waiting time for motorists making left turns. In short, without appropriate mitigation, the project would severely exacerbate highway conditions that are already unsafe and miserably congested.

Mr. Saladino proposed a five-point plan that he believes would mitigate the impacts of the project. Exhibit 1006 at 3. The five points are:

- Undertaking a speed study on U.S. Route 4;
- Construction of a westbound left-turn lane at the Exit 1 southbound ramps prior to completion of Phase 1A;
- Construction of a westbound right-turn lane on U.S. Route 4 into the site prior to completion of Phase 1B;
- Construction of an eastbound left-turn lane on U.S. Route 4 into the proposed site prior to completion of Phase 2; and
- Contributing a "proportional share" to signalization of Exit 1, with the share, methodology and timing of installation to be determined at some unspecified future time.

No party disputed the adequacy of these proposals as a package for mitigating the otherwise-intolerable impacts of the project on traffic safety and congestion. However, the timing of the mitigation proposal is highly problematic. The mitigation would only be effective if the new infrastructure of turning lanes and signals were in place when traffic generated by the project enters and exits U.S. Route 4.

There was no explanation provided by Mr. Saladino as to why the construction of eastbound left-turn lane on U.S. Route 4 should be delayed until Phase 2. His traffic

counts show the need for this work in connection with the project currently before the Court. The evidence strongly supported requiring this mitigation measure to be functioning prior to completion of Phase 1B – rather than deferring the construction until some unspecified future time when the permittee returns to seek a permit for a new phase.

The issue for the Court is how to assure, if the project were approved,[1] that the necessary infrastructure improvements are in place prior to completion of construction of each designated project sub-phase.

The Appellant tried to provide such assurance by offering a conditional "letter of intent" (LOI) by VTrans to issue a permit for some of the mitigation construction (at the project's entrance) at some future time. As Mr. Saladino acknowledged in cross examination by Mr. Rataj, the LOI does not address the congestion and safety issues associated with the northbound off ramp at Exit 1. Nor does the LOI address signalization of the Exit 1 off ramp.

Given the acknowledged magnitude of the traffic problems, the applicable mitigation must be completed before the various project phases add new streams of traffic to Route 4. The permit conditions should therefore require that before any construction commences for Phase 1A, the developer must file an affidavit certifying unconditionally that all necessary permits and financing have been obtained for construction of a westbound left turn lane at the US 4/I-89 Exit 1 Southbound Ramps

[1] By addressing the traffic issues, the Regional Commission does not intend in any way to suggest that the project should be approved. The project should be rejected under Criterion 10. However, because the traffic issues were raised, this memo addresses the Criterion 5 and 9(k) issues separately from Criterion 10.

intersection for the traffic entering I-89 Southbound. Copies of all such permits must be filed with the affidavit.

A similar condition should be imposed with respect to a westbound right turn lane on US 4 into the proposed site, prior to commencement of construction of Phase 1B.

Finally, a condition should require that prior to any construction of Phase 1C, the developer must file evidence demonstrating to the satisfaction of the District Environmental Commission (i) that an eastbound left turn lane into the site and (ii) signalization of the northbound Exit 1 off ramp, will both be completed prior to completion of Phase 1C.

2. *"Whether this project satisfies the standards of or will cause or result in a detriment to public health, safety or general welfare under Criterion 9(K) (Development Affecting Public Investments), and whether the project will unreasonably endanger the public or quasi-public investment or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to any adjacent public facility."*

See discussion under Question 1. As with Criterion 5, the requirements of Criterion 9(k) could only be satisfied if strict permit conditions assure that the proposed infrastructure upgrades are completed timely.

3. *"Whether this project satisfies the standards of or will cause or result in a detriment to public health, safety or general welfare under Criterion 10 (Conformity with the Regional Plan)."*

The applicable sections of the Regional Plan were identified in the Regional Commission's pre-hearing memo, and those sections were excerpted in the appendix to that memo. The Regional Plan[2] was introduced into evidence as Exh. 1001.

The legal bases for enforcing specific provisions of the Regional Plan in Act 250 were also addressed at length in the pre-trial memo at 11-12.

The project does not conform to the following mandatory provisions of the Regional Plan:

- "First in importance in formulation of the proposed land use pattern for the region is consideration of the existing settlement pattern....This existing settlement pattern has demonstrated itself to be of a sociological, psychological, and aesthetic benefit to the region, while at the same time providing a system of centers both efficient and economical for the conduct of business enterprise and for the provision of social and community facilities and services. This pattern **must** be protected and enhanced and is supported by state planning law." Regional Plan at 26 (emphasis supplied); App. B, Maps 3-4; Exhibit B.

- "Major growth or investments **must be** channeled into or adjacent to existing or planned settlement centers and to areas where adequate public facilities and services are available." Regional Plan at 27 (emphasis supplied).

- "Any development planned for interchange development **must be** constructed to... discourage creation or establishment of uses deemed more appropriate to regional growth areas." Regional Plan at 46-47 (emphasis supplied).

- This interchange [Exit 1] is **not an appropriate location** for a growth center. Regional Plan at 51 (emphasis supplied).

- Principal retail establishments **must** be located in Town Centers, Designated Downtowns or Designated Growth Centers to minimize the blighting effects of sprawl and strip development along major highways and [to] maintain rural character." Regional Plan at 33 (emphasis supplied).

The Regional Plan specifically and clearly identifies "Regional Growth Areas." Regional Plan at 27 & 283; Appendix B, Maps 3 & 4.

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[2] In its Decision on Motion dated October 7, 2014, this Court held that the version of the Regional Plan applicable to this application is the one adopted in 2007. All references in this Memorandum are to the 2007 Regional Plan.

This Project's 120,000 square feet of commercial development is major growth and would exceed by an estimated 71 percent the non-residential growth in the nearby growth center of Quechee that occurred during a recent seven-year period. Testimony of Elizabeth Humstone; Exh. A.

The proposed development site is not designated in the Regional Plan as a Regional Growth Area, and it does not have any existing or planned public facilities and services. The site is 1.5 miles from municipal water and sewer service, and at least three miles from the State Designated Quechee Village, the State Designated Growth Center of Hartford and the Designated Downtown of White River Junction. Quechee Village is the nearest Regional Growth Area designated in the Regional Plan. Testimony of Humstone.

The Regional Plan contains specific provisions for development of interstate interchanges generally, as well as for this specific interchange. These policies unambiguously state that Exit 1 is not an appropriate location for a growth center.

The Regional Plan addresses potential growth on this site and on other lands near Exit 1 as follows:

> The southbound interchange is a sprawling commercial area with access roads intersecting the on- and off-ramps. There is a proposal to develop a portion of the 135 acre parcel behind the commercial enterprises on the west side of Route 4. This land is zoned as Quechee Interstate Interchange (QII) and Rural Lands 5 (RL5) in the Town of Hartford's zoning regulation. **Development around the southbound interchange must be planned based around access points that do not degrade the functionality of U.S. Route 4 or the I-89 on- and off-ramps** . . . .
>
> **This interchange is not an appropriate location for a growth center.** White River Junction, the Regional Center and a Vermont Designated Downtown, is located 3.5 miles to the east. Development at this interchange should be of a type that does not displace the development and investment that has occurred in the regional center. The types of land development appropriate for this interchange include residential, appropriately-scaled traveler-oriented

uses, and other similar uses that are not intended to draw on regional populations. Regional Plan at 51; App. at A-13 (emphasis supplied).

The Regional Plan requires that "[p]rincipal retail establishments **must** be located in Town Centers, Designated Downtowns, or Designated Growth Centers to minimize the blighting effects of sprawl and strip development along major highways and [to] maintain rural character." Regional Plan at 33; App. at A-8 (emphasis supplied). The Project is not located in a Designated Downtown or Designated Growth Center as those terms are used in the definition of Regional Growth Areas in the Regional Plan.

The project's application does not specify the exact mix of retail and office space, but there is no dispute that retail would be a major component of the use of the ten new buildings proposed for the site. Mr. Pitrowiski testified that the retail component of this project will exceed 40,000 square feet. None of this retail component has been identified as ancillary to another primary use. John Pitrowiski, the Appellant's witness who described the project at trial, highlighted the project's long pedestrian "arcade" as similar to Church Street in Burlington. The Court surely can take judicial notice that Vermont's best known shopping district provides an intensive retail environment at the street level with upstairs offices and apartments.

In sum, the Regional Plan **requires** that major developments like this one with its mixture of 120,000 square feet of retail, office and housing development be located in Town Centers, Designated Downtowns or Designated Growth Centers, and **must not** be located at Exit 1. This mixed-use Project is clearly and unambiguously proposed for the wrong place. The Regional Plan makes adequate provision for projects of this scale

and type in other locations, including within the Hartford Designated Growth Center, a >2,000 acre regional growth area.

4. "What is the statutory definition of the term "substantial regional impact" for purposes of applying a regional plan under Criterion 10?"

Regional commissions are required to define, in their regional plans, the types of development that would cause "substantial regional impact, as the term may be used with respect to [the] region." 24 V.S.A. § 4345a(17).

That is, the statute expressly requires regional commissions to adopt their own standards for defining what would cause a substantial impact in their particular region. This statutory delegation to individual regional commissions recognizes their expert competence as planners. The Legislature also specifically recognized the competence of regional commissions in providing research and guidance for designation of growth centers:

> Regional planning commissions, pursuant to section 4345a of this title, are uniquely positioned to assist municipalities with growth center planning. To this end, at the request of a municipality contemplating growth center designation, the regional planning commission shall provide technical assistance in support of that designation. 24 V.S.A. 2793c(d).[3]

In delegating to regional commissions the responsibility for defining growth that would have substantial regional impact, the Legislature also recognized that the type of project which would cause substantial regional impact may vary considerably among regions. A project that would put heavy demands on public services in Essex County might be run-of-the mill in Chittenden County.

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[3] Indeed, Two Rivers-Ottauquechee Regional Commission assisted the Town of Hartford in designating a Growth Center in Hartford that is appropriate for the type of mixed-use commercial and residential growth that the applicant in this case proposes to put outside a designated growth area.

In short, there is no single statutory definition of "substantial regional impact" – the Legislature required individual regional commissions to develop their own definition, suitable for each particular region, as part of each regional plan.

The statute also requires this Court to give "due consideration" to the definition in the regional plan in connection with Act 250 review. 24 V.S.A. § 4345a(17) ("[t]his definition shall be given due consideration, where relevant, in state regulatory proceedings")(emphasis supplied).

This Court on appeal is therefore required to determine whether the Project would have substantial regional impact based on the Regional Plan's definition.

5. *"Whether the applicable Two Rivers-Ottauquechee Regional Commission (TRORC) Plan's definition of 'substantial regional impact' is justified as a matter of law."*

The Appellant has not advanced with clarity any theory as to why the Regional Plan's definition of "substantial regional impact" is legally flawed. As explained above, the Regional Commission has been statutorily delegated the responsibility for defining "substantial regional impact" as part of the Regional Plan. So one can hardly argue that the definition is *ultra vires*.

Nor can it be plausibly claimed that Regional Plan's definition is constitutionally infirm. The Regional Plan carefully defines projects that would have substantial regional impact by specifying eight, non-exclusive criteria. Chapter XIII(A); Regional Plan at 268–70.

Land use regulations must provide appropriate conditions and safeguards to guide the decision maker. Ordinances that fail to provide adequate guidance and allow unlimited discrimination will be invalidated, but courts will "uphold standards even if they are general and will look to the entire ordinance, not just the challenged subsection,

to determine the standard to be applied." *In re Pierce Subdivision Application*, 2008 VT 100, 184 Vt. 365 (rejecting challenge to zoning ordinance on equal protection and due process grounds.) *See also In re Appeal of JAM Golf, LLC*, 2008 VT 110, 185 Vt. 201 (city plan was so lacking in specific standards that it could not be enforced).

In this case, the criteria in the Regional Plan for determining "substantial regional impacts" are very specific. For example, the Regional Plan sets numerical standards for the number of square feet in a project, the incremental increase in traffic and in numerous other categories. Indeed, it is the very specificity of the standards that appears to concern the Appellant. The Appellant disagrees with the criteria chosen by the Regional Commission. That is a policy dispute, not a legal infirmity.

When authority is delegated to an administrative agency, the scope of judicial review of agency action is highly deferential. *In re Williston Inn Group*, 2008 VT 47, ¶11, 183 Vt. 621, 624 ("absent a clear and convincing showing to the contrary, decisions made within the expertise of administrative agencies are presumed to be correct, valid, and reasonable")(summarizing Vermont cases that apply this deferential standard "out of respect for the expertise and informed judgment of agencies").

In sum, Appellant has not advanced any substantial argument that the Regional Plan's definition is unjustified as a manner of law, nor provided any factual record upon which the Court could conclude that the Regional Commission's definition of substantial regional growth is arbitrary or otherwise contrary to law.

6. *"Whether there are substantive differences between the TRORC Plan adopted May 30, 2007 and effective July 4, 2007 (the 'TRORC 2007 Plan') and the TRORC Plan in effect since July 27, 2012 (the 'TRORC 2012 Plan') as they apply in the instant case."*

This Court's Decision on Motion dated October 7, 2014 held that the Regional Plan applicable to this Act 250 appeal is the 2007 version. Whether there were changes made in subsequent versions of the Regional Plan is irrelevant to review of the current application. The trial notes of the undersigned also indicate that the 2012 Regional Plan was not admitted into evidence.

7. *"In resolving conflicts between the provisions of a regional plan or a municipal plan relevant to the determination of any issue in proceedings under 10 V.S.A. chapter 151 pursuant to 24. V.S.A. §4348(h), which party has the burden of demonstrating that the project under consideration in the proceedings would have a "substantial regional impact"?*

This question is answered by 10 V.S.A. § 6088(a), which assigns the burden "of proof" to the applicant in connection with Act 250's Criterion 10. The determination of substantial regional impact is part of the Court's review under Criterion 10, and therefore the burden falls on the applicant.

8. *"In resolving conflicts between the provisions of a regional plan or a municipal plan relevant to the determination of any issue in proceedings under 10 V.S.A. chapter 151 pursuant to 24. V.S.A. § 4348(h), should the regional plan be given effect if the applicable regional planning commission has not met its obligations to review and consult with the host municipality regarding the municipality's planning efforts pursuant to 24 V.S.A. § 4350?"*

This Court's Decision on Motion dated October 7, 2014 held that the Regional Plan applicable to this Act 250 appeal is the 2007 version, and the Plan is in evidence. In addition, 24 V.S.A. § 4483 imposes a two-year statute of limitations for challenges to regional plans for "purported procedural defects."

Even if this issue were not barred by prior decision and statute (which it is), there is no evidence upon which to find a procedural defect in the adoption of the 2007 Regional Plan.[4]

9. *"Whether there is a substantial regional impact as a matter of fact from this proposed development."*

This project would create a substantial regional impact based on the following criteria set forth in the Regional Plan at A-15 & A-16:

The project would modify existing settlement patterns by locating in an area which does not now contain development of similar type or scale. Criterion 1(b.). The area around the site has a gas station and convenience store, a small office building and scattered residential uses. There is no development in the area now of the type and scale that is proposed.

The project would modify existing settlement patterns by resulting in activities currently served or planned for by development elsewhere in the region. Criterion 1(c).

The project would require substantive capital improvements to the regionally significant U.S. Route 4. Criterion 2(d). The applicant's witness on traffic impacts testified that turning lanes and a signalized intersection would be required as a result of the traffic impact of the project.

The project would significantly affect existing capacity of regional public facilities by contributing five percent or more to the peak hour LOS D on a regionally significant local or State highway in or immediately adjacent to regional growth areas. Criterion

[4] If the Appellant had attempted to make a record on this issue, the Regional Commission's executive director, Peter Gregory, was in the courtroom and prepared to testify about the relevant consultations between the Regional Commission and Town of Hartford.

2(b). Mr. Saladino acknowledged that the project would cause the traffic in the intersection of Routes 4 and 5 in White River Junction (shown as LOS D on the third to last page of the appendix to Appellant's Exh. 1006) to increase by more than 5 percent. That is the major intersection in a state Designated Growth Center within the Town of Hartford. He also acknowledged that the traffic at the intersection of Exit 1 and U.S. Route 4 would increase by more than 5 percent as a result of the project.[5]

The project involves construction of more than 20,000 square feet of commercial floor area – and indeed exceeds this standard in the Regional Plan by a factor of six. Criterion 6(b).

The Regional Plan defines a substantial regional impact as a project that satisfies *any* of these criteria. Introduction (F), at A-3.

There can be no question on this record that the proposed project would create a substantial regional impact under multiple criteria of the definition set forth in the Regional Plan.

10. *"What version of the Regional Plan is appropriate to use in the Criterion 10 analysis -- the TRORC Plan adopted July 30, 2003 and effective July 30, 2003 (the 'TRORC 2003 Plan'), the TRORC 2007 Plan, or the TRORC 2012 Plan?"*

This issue was decided by the Court's Decision on Motion dated October 7, 2014. The 2007 Regional Plan must be the basis of the Criterion 10 analysis in this case.

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[5] As discussed *infra* at 2-3, the project would also overwhelm the capacity of the Exit 1 intersection with U.S. Route 4. Mr. Saladino's 2013 report (Exh. 113) concluded that the project would reduce the LOS at the intersection from LOS E to LOS F. Reduction of level of service from E to F is a criterion under the Regional Plan for identifying a substantial regional impact. Under Mr. Saladino's updated report, the level of service at the intersection was found to have already fallen to LOS F. The applicant may argue in effect that this criterion no longer applies because traffic in the intersection has become so bad that the project will no longer change the LOS. The Court need not reach this issue because it is undisputed that traffic will increase in this dysfunctional intersection by more than 5 percent as a result of the project.

11. *"Whether the TRORC 2003 Plan, the TRORC 2007 Plan, and/or the TRORC 2012 Plan were appropriately ratified and approved by the Two Rivers-Ottauquechee Regional Planning Commission (the 'TRORC Commission') and, if not, whether such Plans are applicable under Act 250 criterion 10."*

The Appellant withdrew this question. Appellant's Pre-Hearing Memorandum dated March 9, 2015, at 3. In any event, the 2007 Regional Plan has been received into evidence, and the Appellant would be barred by 24 V.S.A. § 4483(b) from challenging the adoption procedures eight years after adoption.

12. *"Can regional plans permissibly restrict 'principal retail establishments' to only Town Centers, Designated Downtowns, or Designated Growth Centers in their municipalities; or is such zoning function reserved to such municipalities?"*

The Appellant has not advanced with any clarity a legal theory by which a mandatory provision of a regional plan, applied in Act 250 review under Criterion 10 to a project with substantial regional impact, is nonetheless legally unenforceable because a town could also regulate the same use under its zoning authority.

If Appellant articulates such a theory, the Regional Commission will respond. In the leading Criterion 10 case of *In re Green Peak Estates*, 154 Vt. 363 (1990), a single-family residential development in the Town of Dorset, proposed for an elevation above 2,500 feet, was denied an Act 250 permit under Criterion 10 because the project would violate express provisions of the Regional Plan. The location of single-family, residential housing is the quintessential subject of municipal zoning regulation. Yet the Supreme Court in *Green Peak* did not hesitate to deny a permit when the location of the housing did not conform to the requirements of the Regional Plan.

13. "What is the applicable definition of 'principal retail establishments' as stated in the TRORC Plan(s)?"

The Regional Plan does not specifically define "principal retail establishments." Appellant's counsel cross-examined Ms. Humstone, a professional planner, about this planning term. She explained that principal retail establishments are retail businesses that represent the primary use of a leased or owned space, as opposed to ancillary or accessory retail uses that are just one part of the occupancy of a space.

To the extent that Appellant may argue that the term is ambiguous, it can be readily understood in the context of the Regional Plan as a whole.

The Regional Plan provisions for Exit 1 state clearly: "The types of land development appropriate for this interchange include residential, appropriately-scaled traveler-oriented uses, and other similar uses that are not intended to draw on regional populations." Regional Plan at 51.

Major growth or investments must be channeled into or adjacent to existing or planned settlement centers and to areas where adequate public facilities and services are available. Regional Plan at 27.

The Regional Commission does not believe there is any ambiguity about the meaning of this widely-used planning term. Even if there were some ambiguity about the exact meaning of the term "principal retail establishments," surely that term, when read in combination with the other requirements of the plan, is "sufficiently clear to guide the conduct of an average person, using common sense and understanding, who considered the question." *In re John J. Flynn Estate and Keystone Dev. Corp.*, #4C0790-2-EB, 2004 WL 1038110, *19 (Vt. Envtl. Bd. May 4, 2004)(setting standards

for determining when provisions of a Regional Plan should be considered mandatory and enforced in Act 250).

14. "Do the uses contemplated by the developer constitute 'principal retail establishments'"?

The application seeks a permit for "development of up to 120,000 leasable square feet of commercial space." Exhibit 1 at 1. As noted previously, Mr. Pitrowiski testified that the retail component of this project would exceed 40,000 square feet. Neither the Act 250 application nor the zoning permit issued by the Town of Hartford (Exhibit 27) imposes any limitations on the type or number of retail uses that could be developed in the project. The only apparent limitation on retail uses is the size of the footprint of individual buildings, which would be approximately 8,500 square feet.

In the absence of any restrictions on the nature of retail use, and with the availability of tens of thousands of square feet for lease on site, the project would be available for principal retail uses such as Dollar Stores, grocery stores, clothing stores, outlet stores, drug stores, liquor stores and similar establishments.

CONCLUSION

With genuine respect to the Appellant in this case, it appears from the testimony of Mr. Milne that the project team was focused on municipal zoning concerns during the development period, and failed to consider the requirements of the regional plan until they were heavily invested in the project. This is unfortunate on many levels, and the Regional Commission regrets that such investments were <u>not</u> proposed in one of the Regional Growth Areas specified in the Regional Plan.

However, this misjudgment by the development team is not evidence of ambiguity in the requirements of the Regional Plan. Mr. Milne acknowledged in cross examination that his team was unaware that the Vermont Environmental Board in 1990 had denied an Act 250 permit for a shopping mall proposed for U.S. Route 4 based on failure to conform to the same policies in the Regional Plan at issue today, although in an earlier version.[6] The Board in that case held:

> The Two Rivers-Ottauquechee Regional Plan contains strong statements that commercial uses should be located in existing village and hamlets or in designated village and hamlet expansion areas. The Regional Plan also states that development in rural districts should be commensurate with rural living. The proposed project is located in a rural district and not in those areas designated for commercial activity. Its large size and impact are not commensurate with rural living. *Swain Development Corp.*, #3W0445-2-EB, 1990 WL 207486, (Vt. Envtl. Bd., Aug. 10, 1990), at 1.

The mall project that was denied an Act 250 permit in 1990 involved 56,700 square feet – less than half the size of Phase 1 of this project. *Id.* at 2.

The commitment of the Regional Commission to planning for regional growth in designated growth areas has been consistent for more than 25 years. And the clarity with which these mandatory policies are expressed has only increased since the Hartland Mall application.[7]

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[6] The Environmental Board also denied the Hartland Mall Project due to the congestion and unsafe conditions it would create on U.S. Route 4. "The proposed project will materially jeopardize or interfere with the function, safety, and efficiency, and the public's use and enjoyment of, Route 4, a public highway. The insufficient gaps for left turns from Route 4 into the western project driveway will likely result in serious accidents with potential for physical injury. Congestion on Route 4 in the area of the western driveway will materially interfere with the efficiency and function of Route 4 as well as diminishing the rural qualities and therefore the public's enjoyment of that highway. Due to the project's large size, no permit conditions were found which can mitigate the impacts on Route 4 without themselves resulting in impacts which do not comply with Act 250." *Swain Development Corp.*, #3W0445-2-EB, 1990 WL 207486, (Vt. Envtl. Bd., Aug. 10, 1990), at 1.

[7] Most recently, the Regional Commission participated in an Act 250 application for a Dollar Store at I-89 Exit 3. In *DG Strategic II, LLC*, Application 3W1048 (Dist. 3 Envtl. Comm'n, May 11, 2012), District Commission #3 unanimously denied the application on a finding that the project did not conform to the Regional Plan.

Allowing a commercial development of this scale at this location would create a substantial regional impact, and would violate mandatory requirements of the Regional Plan. The applicant cannot carry its burden to demonstrate compliance with 10 V.S.A. § 6086(a)(10). Accordingly the application must be denied.

Dated: April 6, 2015

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Rough Draft of Amicus Brief

Statement of the Case

This case involves the application by B&M Realty, LLP (hereinafter, "B&M" or "Applicant") for an Act 250 Land Use Permit for a major commercial development located at the Quechee/Exit 1 Interchange in Hartford, Vermont. B&M's application states that the development will include "120,000 leasable square feet of commercial space and 9 multifamily residential units." ***PC*** at __. This amount of space exceeds by 70% the amount of all commercial space developed in Quechee Village over the seven year period between 1998 and 2005. Tr. at 153. There is no indication in the application itself or on the supporting plans that clearly differentiates the commercial space between retail and office uses, but testimony given during the hearing below indicated that approximately 43,000 square feet of the development would be occupied by retail space, 60,000 to 65,000 square feet would be occupied by office space, and a restaurant would occupy an additional building. Tr. at 45. In fact, the plans that B&M submitted with its application indicate that the commercial space may be used interchangeably for retail or office use. _____. By any measure, however, B&M's proposed project represents a major development and includes ten buildings with footprints of between 4,500 s.f. and 8,500 s.f. each, organized around a central pedestrian arcade. _____. B&M's witness described the project as "a smaller version of Church Street [in Burlington]." Tr. at 39, 42.

B&M has proposed to locate its project in an area that the applicable regional plan, the Two Rivers Ottauquechee Regional Plan (hereinafter, "TRORC Regional Plan" or "Regional Plan"), has designated as an Interchange Area. Tr. at 162. The project site is on Vermont Route 4, and is located approximately two miles from Quechee Village, and five miles from White River Junction. Tr. at 18. The surrounding area is a rural area with limited development

consisting of a gas station/convenience store, a small office building and surrounding rural residential uses. Tr. at 149.

The District #3 Environmental Commission denied a land use permit for the project. In its Findings of Fact and Conclusions of Law and Order dated July 3, 2013, the District Commission found, in relevant part, that the project was not in conformance with the Regional Plan. ***PC*** at __. Specifically, the District Commission found that the inclusion of 43,000+/- of retail space did not conform with the Regional Plan requirement that "principal retail establishments must be located in Town Centers, Designated Downtowns, or Designated Growth Centers," because the project was not located in one of those defined areas.

On appeal to the Vermont Superior Court, Environmental Division (the "Environmental Court"), the Environmental Court reversed the District Commission's denial of a land use permit. ***PC*** at __. With respect to Criterion 10, the Environmental Court concluded that "each provision [of the Regional Plan] is either an unenforceable policy aspiration or provides restrictions in applicable to the Project." ***PC*** at __. The court did not state that the policy requirement for the location of "principal retail establishments" was an unenforceable policy aspiration, but determined that it did not apply to the project. The court examined the definition of "principal" and based on that definition alone concluded that "the phrase 'principal retail establishment' means a project where retail is the chief, leading, or most important use." ***PC*** at __. (emphasis added). The court also concluded that other policy statement in the plan, including the policy stating that "any development planned for interchange development must be constructed to . . . discourage creation or establishment of uses deemed more appropriate to regional growth areas, were merely aspirational goals and not enforceable.

Following the Environmental Court's decision, The Two Rivers Ottauquechee Regional Commission duly filed its appeal to this court.

Standard of Review

Argument

1. When read in the context of the entire Regional Plan, including its reason, purpose and consequences, the policy statements in a regional plan are clear, unambiguous and enforceable.

The overall goal of planning in Vermont is "to encourage the appropriate development of all lands in this State by the action of its constituent municipalities and regions." 10 V.S.A. § 4202(a). The specific statutory goals of regional planning in Vermont are to "guid[e] and accomplish[] a coordinated, efficient and economic development of the region which will, in accordance with the present and future needs and resources, best promote the health, safety, order, convenience, prosperity and welfare of the inhabitants as well as efficiency and economy in the process of development." 10 V.S.A. § _____.

Successful regional planning is a predicate to making appropriate development and land use decisions in Vermont. Planning on a regional level is especially important as Vermont's society grows and expands. As Vermont's economic, land use and transportation patterns have evolved over the last century, the political boundaries established by municipalities long ago are no longer relevant to businesses' or residents' activities, to say nothing of environmental resources such as air and water. The economy and lifestyle of contemporary Vermont require its residents to travel beyond their home towns and throughout their home regions on a daily basis.

Many businesses, as well, draw on employees, clientele, and resources throughout an entire region. In this paradigm, development and land use decisions often create impacts on communities that extend far beyond the host municipality. As a result, planning on a regional scale is necessary to meaningfully influence impacts associated with development, land use, and transportation in Vermont. "Good planning ensures that the human and financial resources of government are coordinated effectively to meet the most pressing needs of the diverse population, municipalities, and regions of the state." *Vermont By Design, Challenges and Recommendations on Improving the Structure of Planning in Vermont*, Vermont Council on Planning (2006), p. 5. "Planning is the essential tool to maintain the quality of life for which the state is famous, and to support the infrastructure needed for the state to successfully participate in the global economy of the future." *Id.*

Basing development decisions on a duly adopted regional plan is the best way to achieve the community's goals and visions for future land use. Failure to successfully base development decisions on a well-developed plan can have serious consequences. The U.S. Census bureau projects that in the next 35 years the nation's population will grow by 80 million people, from 319 million today to almost 400 million in 2050. U.S. Census Bureau, 2014 National Projections. Projections indicate that over 70 million new homes and 100 billion square feet of nonresidential space will be necessary to accommodate this growth. John R. Nolon and Jessica Bacher, *Zoning and Land Use Planning*, Real Estate Law Journal, Fall 2008, p. 234. Professor John R. Nolon, with Pace University Law School's Land Use Law Center, has noted as follows:

> This growth cannot be allowed to proceed randomly – not without great cost to our economy, environment, and public health. This is neither an ideological nor a political issue. The consequences of haphazard development are not popular with the vast majority of Americans. They complain about the results of current growth patterns: an increase of asthma and obesity among the young,

> traffic congestion that stalls commuters, insufficient housing for the workforce and the elderly, the decline of cities as economic and cultural centers, threats to drinking water quality and quantity, reduced habitats and wetlands, higher incidences of flooding, rampant fossil fuel consumption, and an ever-larger carbon footprint.

Indeed, the opportunities to create societal benefits that are presented by successful planning, and the consequences of failure to plan or failure to effectively implement a plan, are reflected in the Vermont legislature's stated policy goals for planning, which include, *inter alia,* the following goals:

> promote the public health, . . . to promote prosperity . . . to protect residential, agricultural, and other areas from undue concentrations of population and overcrowding of land and buildings, from traffic congestion, from inadequate parking and the invasion of through traffic, and from the loss of peace, quiet, and privacy; to facilitate the growth of villages, towns, and cities and of their communities and neighborhoods so as to create an optimum environment, with good civic design; to encourage development of a rich cultural environment and to foster the arts; and to provide means and methods for the municipalities and regions of this State to plan for the prevention, minimization, and future elimination of such land development problems as may presently exist or which may be foreseen and to implement those plans when and where appropriate.
>
> 10 V.S.A. § 4302.

If a regional plan is to achieve its statutory goal of encouraging the appropriate development of lands in Vermont, an adopted plan must not only be developed, but it must also be implemented and given effect. In Vermont, one way in which regional plans are given effect is in the Act 250 permitting process. Act 250 Criterion 10 requires that "before granting a permit, the District Commission shall find that the subdivision or development . . . [i]s in conformance with any duly adopted local or regional plan or capital program under 24 V.S.A. chapter 117." 10 V.S.A. § 6086(a)(10). The requirement for project approvals and zoning

regulations to be in conformance with, or to be consistent with, a comprehensive plan is central to modern planning practice and is widely recognized throughout the United States—this concept is known as the "consistency doctrine." *See, e.g., The Consistency Doctrine: Merging Intentions with Actions*, Lara A. Lucero, AICP, Zoning Practice, Issue No. 8, August 2008. The purpose of the consistency doctrine is to ensure that implementation of planning decisions, including issuance of development permits, gives effect to purposes behind planning—if development decisions are not be consistent with the plan, then why plan. *Id.*

There are a number of reasons why the requirement for consistency with a regional plan is necessary for sound planning policy:

> First, from the macro level, consistency is seen as a way of improving the results of land-use regulations and public infrastructure investments, focusing on the need for efficiency and environmental protection. At the micro level, consistency deals with the fairness accorded landowners and neighbors in the regulatory process because connecting development decisions to the comprehensive plan is considered a touchstone for judicial review and a means of guaranteeing that political influence is not allowed to run roughshod over the individual or community interests.
>
> Lara A. Lucero, AICP, *The Consistency Doctrine: Merging Intentions with Actions*, Zoning Practice, Issue No. 8, August 2008.

Given the statutorily directed purpose of regional plans as important tools for identifying appropriate land use strategy and guiding development decisions, identifying and adhering to specifically stated, directive policies is essential to effectively implement the land use goals for the state. In the context of Act 250, Criterion 10, the court identifies directive policies that are to be given effect as those policies that are stated in language that is "clear, unqualified, and creates no ambiguity." *In re MBL Assocs.*, 166 Vt. 606, 608, 693 A.2d 698, 700 (1997).

To determine whether specific language in a regional plan constitutes a specifically stated and enforceable policy, "[p]rovisions of a regional plan, like zoning ordinances, should be construed according to the ordinary rules of statutory construction." *Id.* at 606. As with zoning ordinances, when interpreting a regional plan the Court is required to "examine not only the plain language of a zoning ordinance, but also the whole of the ordinance in order to try to give effect to every part, and will adopt an interpretation that implements the legislative purpose." *In re Tyler Self-Storage Unit Permits,* 2011 VT 66, ¶10, 190 Vt. 132, 27 A.3d 1071, (citing In re Nott, 174 Vt. 552, 553, 811 A.2d 210, 211-12 (2002) (mem.) (internal quotations omitted). As such, it is essential that the Court construe provisions in a regional plan "to determine and give effect to the intent of the drafters." *In re Tyler Self-Storage*, 2011 VT 66, ¶13. "The legislative intent is most truly derived from a consideration of not only the particular statutory language, but from the entire enactment, its reason, purpose and consequences." *Id.* (citing *Delta Psi Fraternity v. City of Burlington*, 2008 VT 129, ¶7, 185 Vt. 129, 969 A.2d 54).

Regional plans, by their nature, contain much more than just specifically stated policies. Vermont statute requires that regional plans contain, among other things, statements of policies, maps, analysis, a program for the implementation of the regional plan's objectives, and a statement indicating how the regional plan relates to development trends. 24 V.S.A. § 4348a (Elements of a Regional Plan). As one commentator has noted,

> Plans today are complex documents, consisting of policy statements, data and analytical material that support the policy statements, and maps that may reflect policy, data, or analysis. . . . The policy section of a plan generally consists of goals, objectives, and policies. Goals are broad statements of desired outcomes or intent. Objectives are more specific identifying concrete achievements toward which public policy will be bent and providing a measuring stick to evaluate success in achieving goals.

> . . . Policies are specific statements intended to achieve a goal or objective.
>
> *Id.* at 94.

All of the information in a plan, however, is important. While policy statements are intended to be the actionable components of a plan, the entire contents of a regional plan provide the context and information necessary to properly implement the policy statements.

Reading the policies in a regional plan in the context of the purposes and goals behind regional plans is also important for proper implementation of the policies. With respect to the specific provisions in the Regional Plan at issue in this case—namely the policies directing certain development to established settlement areas—it is important to recognize that Title 24, Chapter 117 provides the specific goal "[t]o plan development so as to maintain the historic settlement pattern of compact village and urban centers separated by rural countryside." 24 V.S.A. § 4302(c).

Against this backdrop, the TRORC Regional Plan contains specifically stated, directive policies that apply to the area of the proposed development. The TRORC Regional Plan specifically defines and identifies by reference to a map the various zones or areas in which land uses are planned to occur. In particular, the Plan identifies the area in which the proposed development is located as an Interchange Area. The Interchange Policies in the Plan include a policy that "[a]ny development planned for interchange development must be constructed to . . . discourage create or establishment of uses deemed more appropriate to regional growth areas." The rules of construction require that this language cannot be read in a vacuum independent of the balance of the almost 300 page Plan or divorced from the purposes of the Plan. When examining what uses are "deemed more appropriate to regional growth areas," reference must first be made to the definition of "regional growth areas," on page 27 of the Plan. The Plan

defines "regional growth areas" to include seven types of developed areas: "Regional Center, Town Centers, Village Settlements, Hamlet Areas, Designated Growth Centers, Designated Downtowns, and Designated Village Centers" – all of which areas are specifically delineated on the Regional Plan maps. The Regional Plan also identifies appropriate uses for each of the types of regional growth areas. These areas may then be compared with the uses identified as appropriate for an Interchange Area to determine which uses are deemed more appropriate for "regional growth areas" than Interchange Areas. Among the uses that the Plan identifies as appropriate for "regional growth areas" but not for Interchange Areas is the use of "principal retail establishments". Specifically, the Regional Plan provides that "[p]rincipal retail establishments must be located in Town Centers, Designated Downtowns, or Designated Growth Centers to minimize the blighting effects of sprawl and strip-development along major highways and maintain rural character." Conversely, the Regional Plan states that "[t]he types of development appropriate for [the Quechee/Exit 1] interchange include residential, appropriately-scaled traveler-oriented uses, and other similar uses that are not intended to draw on regional populations.[1]" When these provisions are read in the context of the Regional Plan and its enabling legislation, the intent of the Regional Plan drafters is clear.

Although the Environmental Court found that the phrase "principal retail establishment" did not apply to the applicants project, there is no dispute that the policy that requires that "[p]rincipal retail establishments must be located in Town Centers, Designated Downtowns, or Designated Growth Centers to minimize the blighting effects of sprawl and strip-development

[1] Given that the amount development proposed by the applicant is ___ times the amount of development that has occurred in the Village of Quechee over the seven year period from _____ to ____, it defies reason to expect that the proposed development would be able to succeed unless it intended to draw on the regional population. _____. Certainly the 120,000 square feet of commercial space is more than the residents in 9 apartment units is likely to be able to support. _____.

along major highways and maintain rural character" is a specific, clearly stated, and enforceable policy statement. The court, however, placed too much emphasis on its analysis of the word "principal" and ignored the word "establishment". *See In re Tyler Self-Storage Unit Permits*, 2011 VT 66, ¶10, 190 Vt. 132, 27 A.3d 1071 (criticizing environmental court's use of definitions to analogize retail rentals to a retail store or shop where applicant's proposed facility "would offer neither goods nor services for sale or rent."). "Establishment" means "a place of business or a residence with its possessions and staff." American Heritage Dictionary, www.ahdictionary.com (emphasis added); *see also* http://www.merriam-webster.com/dictionary/establishment ("a place of business or a residence with its furnishings and staff."). An establishment is not equivalent to an entire multi-use development. Applicant's proposed development that proposes over 40,000 square feet of retail and a central pedestrian arcade for shoppers clearly is designed to contain principal retail establishments, which are among the specific uses that are deemed more appropriate for regional growth areas. Accordingly, applicant's proposed development in the Interchange Area must be developed to discourage these uses—applicant's proposal would not only not discourage, but would encourage principal retail establishments to locate in the Interchange Area in violation of the specifically stated policy of the Regional Plan.

2. _____

Regional planning has been an essential element of Vermont's land use development strategy since the 1960s. The first regional planning law was enacted in 1957 and authorized two or more towns to form a regional commission. 1957, No. 286; *See Vermont By Design, Challenges and Recommendations on Improving the Structure of Planning in Vermont,* Vermont

Council on Planning (2006), p. 10. In 1965 the law was amended to require a minimum of five towns to form a regional planning commission. *Id.* At that time, few towns in Vermont had their own town plan or any local zoning control. The establishment of regional planning commissions enabled many Vermont towns to develop town plans and adopt zoning. For example the Windham Regional Commission was launched in 1965 with 17 member towns. Greg Brown, *The Windham Regional Commission, Celebrating 50 Years, 1965-2015,* p. 2. At that time, only one member town, Brattleboro, had a town plan, and only three member towns, Brattleboro, Marlboro, and Bellows Falls village, had zoning bylaws. *Id.* at 3. By 1970, nine WRC member towns had adopted town plans and twenty one had some form of zoning. *Id.* at 5.

Notwithstanding the important role played by regional planning commissions, prior to the passage of Act 250 regional plans were only advisory documents. During this time period, unplanned development, or development that could not be impacted by an advisory regional plan, created a host of problems. The opening of I-89 and southern portions of I-91 created pressure for development, especially around ski areas. The lack of coordinated environmental regulations and land use controls was apparent. During a 1969 tour of subdivision developments around ski areas in Wilmington and Dover, "Governor Davis learned that some subdivision lots were a quarter to half acre in size on 10-15 degree slopes, that water was promised to lot buyers in some subdivisions but no water source was identified, that on-site septic was resulting in sewage overflow on steep slopes, that some subdivision roads could not accommodate fire trucks or school buses, that development on high elevation sites had significant ecological impacts, that town services and officials were overwhelmed by developers' demands on them, and much more." Greg Brown, The Windham *Regional Commission, Celebrating 50 Years, 1965-2015,* p. 8 (taken from an article written by Bill Schmidt, former Executive Director of the Windham

Regional Commission). Ultimately, Act 250 was passed to address these issues, and the inclusion of Criterion 10 transformed Regional Plans from advisory documents into enforceable documents.

Today regional planning commissions serve many important functions that are coordinated through and implemented by their respective regional plans. Vermont's 11 Regional planning commissions play essential roles in federal and state planning and development of transportation projects, land use decisions, emergency management, environmental protection, brownfields redevelopment, energy planning, and community and economic development. Vermont Assoc. of Planning & Development Agencies, Annual Report, Fiscal Year 2015, p. 3. Vermont's regional planning commissions have been awarded over $11 million from the US EPA for brownfield redevelopment, and in FY 2015 used local and state dollars to leverage over $7 million in additional funds to support community projects. *Id.* at 3, 11.

In order to successfully carry out these functions, it is essential that the regional planning commissions have the strong support of and good working relationships with their member towns. Regional planning commissions develop good working relationships with and gain the support of member towns by working with their member towns to develop regional plans that address the needs of their entire region. Because of the need for regional plans to be developed by consensus, a regional plan is necessarily a political document and must be general enough to allow application across the entire region.[2]

Regional planning in Vermont today is not a top-down exercise where the vision of a centralized government is developed and imposed without the input of local or regional communities. The process enabled by Vermont statutes specifically contemplates community

[2] Of the 11 regional planning commissions in Vermont, the smallest encompasses 10 member municipalities, and the largest encompasses 54. Vermont Association of Planning and Development Agencies, Annual Report, Fiscal Year 2015.

involvement in the development of a regional plan. 10 V.S.A. § 4342 requires that "[a] regional planning commission shall contain at least one representative appointed from each member municipality, and 10 V.S.A. § 4345a(15) requires a regional planning commission to hold public hearings when preparing a regional plan. Ultimately, plan adoption requires "not less than a 60 percent vote of the commissioners representing municipalities," and even after a 60% vote a majority of the municipalities in the region may veto the plan. 24 V.S.A. 4348(f). Thus, regional plans in Vermont's democratic society are expressions of the common visions, goals and policies for future development and land use as developed by the consensus of the affected communities.

Indeed, given the tradition of strong municipal control in Vermont political culture, it is likely that any attempts to transform planning into a centralized, top-down directive will be met with resistance. Act 250 initially contemplated the development of a state land use plan that would guide the location of larger developments. Greg Brown, The Windha*m Regional Commission, Celebrating 50 Years, 1965-2015,* p. 9. Although a state land use plan was developed, however, the plan met with resistance was never adopted in the face of growing backlash against centralized land use control. *See id.* at 10-11.

The Environmental Court's decision in this matter elevates non-contextual analysis of policy statements over the clear expressions of meaning and intent in the plan when read as a whole. The Environmental Court, for example, found that the policy that "[a]ny development planned for interchange development must be constructed to . . . discourage creation or establishment of uses deemed more appropriate to regional growth areas" failed to provide sufficient guidance on what uses are "appropriate." PC at ___. The court failed to read the plan as a whole to identify the appropriate uses. If the level of detail required by the Environmental

Court is upheld, it will force regional plans to be drafted more like zoning codes if they are to have any applicability. Changing regional plans from planning documents to zoning ordinances will likely be seen as a move toward regional or county wide zoning and possibly as a move toward regional or county governments—a change that has been fiercely resisted in Vermont in the past. In the face of such a change, member towns may elect not to re-join their regional planning commission. Loss of member towns would undermine the effectiveness of regional planning commission would impair the ability of regional planning commissions to effectively serve Vermont's communities with the coordinated planning activities that have become central to Vermont's land use development strategy.

Conclusion

CERTIFICATE OF COMPLIANCE

Nathan H. Stearns, Hershenson, Carter, Scott & McGee, P.C., Counsel for Southern Windsor County Regional Planning Commission, _____, and _____, hereby certifies that this brief is in compliance with the word count limit of 9,000 words, pursuant to VRAP 32(a)(7)(A)(i). According to the word count of Microsoft Word 2010, the text of this brief (excluding Statement of Issue, Table of Contents, Table of Cases and Other Authorities, Certificate of Compliance, and signature blocks) contains _____ words.

_____

Nathan H. Stearns, Esq.