LARGE DEVELOPMENT MEETS VERMONT'S ACT 250: DOES PHASING MAKE A MONSTER OR TAME IT?

INTRODUCTION

No one claims that developing in Vermont is easy. Vermont is small, both in size and population.[1] Much of its land is undevelopable due to prohibitive terrain such as steep hillsides and narrow river valleys.[2] And, most importantly, development in Vermont is subject to "Act 250," the main law regulating land use through a complex permitting process.[3] Act 250's process is a behemoth to the uninitiated. For example:

> The following scenario happens on a regular basis: XYZ Corporation is considering expanding its business to Vermont and has considered the Chittenden County area [around Burlington] as its first logical Vermont market. Our commercial brokerage firm gets a call from the company's real estate representative, who is interested in finding a site near Interstate 89 with easy access and good exposure. This person has worked all over the US but never in Vermont, and is calling us for advice and site guidance so he can quickly open a new facility next year. Typically, he is usually in for a surprise when he finds out how difficult, complex, and expensive the permit process will be.
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> The challenge is to get this company's representative to understand our complex development process without him getting so frustrated that he decides that the time and money spent in the permitting process is not worth pursuing and he walks away. Without a doubt, his company's expectations in terms of time and up-front dollars spent will be very optimistic. Our job is to introduce a healthy dose of realism.[4]

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1. Vermont's land mass is 9,273 square miles; only seven states are smaller. In both the 1980 and 1990 census Vermont ranked 48th; only Wyoming and Alaska had fewer people in the state. *See* WEBSTER'S II NEW RIVERSIDE DESK REFERENCE 35, 58-59, 61 (1992).

2. *See, e.g.*, Timothy McQuiston, *Q&A: Ewing Fits Nicely Into Environmental Board Hot Seat*, VT. BUS. MAG., June 1, 1995, at 11 (citing Vermont's "geography" as one reason the economy may be lagging). Vermonters sometimes joke that if their state were laid flat it would be as big as Texas.

3. *See infra* Part I.

4. Greg Dirmaier, *Developing in Vermont: A Yellow Light on the Road Ahead*, VT. BUS. MAG., July 1, 1997 at 36. The cost and time of obtaining an Act 250 permit is high. One study by the University of Vermont found that the average cost of obtaining an Act 250 permit during 1991-1992 was $172,649, and that the average time spent preparing and going through the process was 517 days. *See* Matthew Witten, *Report Says Act 250 Unfair to Small Companies*, VT. BUS. MAG., Jan. 1, 1994, at 57. On the other hand, some find this obstacle a virtue, arguing that while "the process is complicated and expensive[,] . . . for large, complicated projects, it should be." CONSTANCE E. BEAUMONT, SMART STATES, BETTER COMMUNITIES 282 (1996) (quoting Greg Brown, deputy commissioner of Vermont Department of Housing and Community Affairs). This is because Act 250 "puts a brake on massive developments that

Therefore, it is no surprise that when Vermont's economy turns sluggish, Vermonters point fingers at Act 250.[5]

Some place the blame directly on the Vermont Environmental Board as "an anti-growth Frankenstein Monster."[6] The Environmental Board and district commissions administer Act 250.[7] However, these bodies are hardly anti-growth. When the Board and commissions review a project that fails to meet all ten criteria of Act 250, they may either deny the project or reshape it into a statutorily viable project.[8] Statistically, the Board and commissions deny very few projects—only about two percent.[9] More often, they subtly reshape the project into conformity.[10] Moreover, the Board and commissions are more like Dr. Frankenstein than like his creation the Monster. That is, by making projects viable, they give life to what would otherwise be dead.

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might barrel forward elsewhere like a freight train." *Id.* at 284.

5. John Ewing, former Chairperson of the Environmental Board, said:

> I do think Act 250 has been identified in people's minds, to a certain extent, as the reason Vermont is sluggish from an economic standpoint. That Vermont is unfriendly to business; we're not like New Hampshire; we're not like New York; we don't get people in here in two weeks time; and don't hassle with regulations; so forth and so on and you know the scenario. The perception is that Act 250 makes it very difficult for people to [do] business in this state. . . . But, I think, also, it's a gross misperception that Act 250 has anything to do with sluggish economic activity in the state. That's not the reason. . . . That's just kind of a red herring. . . . It's tax policy, it's a lot of things, it's geography.

McQuiston, *supra* note 2, at 11. One developer said that "taxation, the permit process, and the perception that Vermont is more socialistic than capitalistic have kept some manufacturing out of the state, even as other companies have come in." Ed Barna, *At Last: A Decent Construction Season*, VT. BUS. MAG., Apr. 1, 1995, at 33. In addition, Vermonters have garnered an "anti-growth" label. *See, e.g.*, Malcolm Gladwell, *Wal-Mart Encounters a Wall of Resistance in Vermont; State is Last Frontier for National Superstore*, WASH. POST, July 27, 1994, at A03; John Greenwald, *Up Against the Wal-Mart*, TIME, Aug. 22, 1994, at 58.

6. BEAUMONT, *supra* note 4, at 283 (quoting John McClaughry, president of the Ethan Allen Institute in Concord, Vermont).

7. *See infra* Part I.

8. VT. STAT. ANN. tit. 10, § 6086(a) (1997) lists the criteria for granting an Act 250 permit. VT. STAT. ANN. tit. 10, § 6087 (1997) lists the reasons for which a permit may be denied. A permit may be conditioned pursuant to VT. STAT. ANN. tit. 10, § 6086(c) (1997). Conditions serve to reshape projects.

> The general scheme of Act 250 is one of anticipating the potential detrimental impacts that may result from development and construing a land use plan that seeks to reduce those impacts. Many of the conditions imposed under the act are directed at establishing a plan that is in conformance with the ten criteria and insuring that the development proceeds according to the plan.

2 RICHARD OLIVER BROOKS, TOWARD COMMUNITY SUSTAINABILITY: VERMONT'S ACT 250 § IX.C, at 10-11 (1997).

9. *See* John Ewing, *A Look Back Reveals the Nature of Act 250*, VT. BUS. MAG., Feb. 1, 1997 at 28 ("Denials of an application are uncommon; rather, permits are granted with conditions which protect environmental quality. Over the years the approval rate has averaged 98 percent.").

10. *See id.*

That which is given life—a reshaped project—is a Monster. But what sort of Monster is it? It may be like Mary Shelley's original Monster (Boris Karloff in the 1931 movie).[11] When set free, this Monster terrorized the mountainside and proved merit to the warning: "You have created a monster and it will destroy you."[12] Or the Monster may be like the one created by Young Frankenstein in the 1974 movie.[13] When set free, this modern-day Monster became a contributing member of society—tamed, in part, because he shared the brain of his creator.

This Note explores what kind of Monster emerges when projects are reshaped through the process of "phasing." Generally, phasing either sequences a large project through time or reduces the size of the project.[14] Part I of this Note relays the history of Act 250. Part II describes the particular challenge of fitting large development into the Act 250 process.[15] Part III analyzes two types of phasing: "phase-in" and "phase-down."[16] Finally, Part IV considers how phasing works with Environmental Board Rule 21 (EBR 21) to solve some of the challenges of large development under Act 250.[17]

This Note argues that the Monster resulting from phased development is not terrorizing Vermont's mountainsides, but rather is contributing to the Vermont community. The Monster may be ugly, and it may be imperfect, but it generally serves the purposes of Act 250.[18] More importantly, phasing exemplifies how far the Board and commissions will extend their creative abilities to accommodate large development within the Act 250 process.

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11. *See* MARY SHELLEY, FRANKENSTEIN (1818). The movie, FRANKENSTEIN (Universal Pictures 1931), directed by James Whale, starred Colin Clive as Dr. Henry Frankenstein, Mae Clark as his fiancée, and Boris Karloff as the Monster.

12. Dr. Waldman uttered this warning to Dr. Frankenstein in the 1931 movie. *See* FRANKENSTEIN (Universal Pictures 1931). Dr. Waldman had been Dr. Frankenstein's mentor at the University. *See id.* Ironically, the Monster destroyed Dr. Waldman; however, Dr. Frankenstein survived. *See id.*

13. *See* YOUNG FRANKENSTEIN (Twentieth Century Fox 1974), directed by Mel Brooks, starred Gene Wilder as the genetic and intellectual progeny of Dr. Henry Frankenstein, Madeline Kahn as his fiancée, and Peter Boyle as the Monster.

14. *See infra* Part III.

15. For purposes of this Note, "large development" is any project which is not qualified for "Minor Application" review pursuant to EBR 51(A) (1996) as a result of the project's size or complexity. *See infra* note 73 (describing how minor projects differ from major projects).

16. *See infra* Part III.

17. *See infra* Part IV.

18. The purpose of Act 250 is generally to promote orderly growth and development while regulating uses of lands and the environment. *See* Act No. 250, 1969 Vt. Acts (Adj. Sess.), § 1; *see also infra* Part I.

I. A BRIEF HISTORY OF ACT 250[19]

Vermont's state-wide land use statute,[20] commonly called "Act 250," creates a permitting process[21] by which a developer must show that his or her proposed development[22] meets ten specified criteria.[23] Act 250 is "the culmination of an effort to create a process that would subject subdivisions and other large developments in Vermont to administrative review to ensure economic growth without environmental catastrophe."[24]

In the 1960s, Vermont experienced tremendous development pressures,[25] largely due to construction of interstate highways.[26] These new developments

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19. The following section contains an overview of Act 250. For an in-depth analysis of Act 250's history, processes, and administration, see generally 2 BROOKS, *supra* note 8. For a complete analysis of Act 250's ten criteria, see generally 1 RICHARD OLIVER BROOKS, TOWARD COMMUNITY SUSTAINABILITY: VERMONT'S ACT 250 (1996).

20. *See* VT. STAT. ANN. tit. 10, §§ 6001-6108 (1997).

21. An Act 250 permit must be obtained in addition to, not in place of, other permits which verify compliance with federal, state, and local laws, such as zoning regulations and wastewater disposal.

22. Not all new development falls under Act 250 jurisdiction. *See* VT. STAT. ANN. tit. 10, § 6001(3) (1997). The focus of this Note is limited to development that does trigger Act 250 review. Development may properly be distinguished from construction. *See* Patricia Grace Hammes, *Development Agreements: The Intersection of Real Estate Finance and Land Use Controls*, 23 U. BALT. L. REV. 119, 132-36 (1993). However, this Note collapses the distinction in conformity with the Act's definition of "development" as, most broadly, "the construction of improvements." VT. STAT. ANN. tit. 10, § 6001(3) (1997).

23. These ten criteria, including their subcriteria, are listed in VT. STAT. ANN. tit. 10, § 6086(a)(1)-(10) (1997). Summarily, the statute requires that the project:

1. Will not result in undue water pollution or air pollution.
2. Will have a sufficient water supply.
3. Will not cause an unreasonable burden on an existing water supply.
4. Will not cause unreasonable soil erosion or runoff.
5. Will not cause unreasonable traffic congestion.
6. Will not cause an unreasonable burden on educational services.
7. Will not cause an unreasonable burden on other municipal services (fire, police, water, roads).
8. Will not have an adverse effect on scenic beauty, aesthetics, historic sites, or rare and irreplaceable natural areas; and will not destroy necessary wildlife habitat or any endangered species.
9. Will conform to the capability and development plan, including, for instance, limiting development on primary agriculture soils, using the best available technology for energy efficiency, and using cluster planning in rural growth areas.
10. Will conform to local and regional plans or capital programs.

CINDY CORLETT ARGENTINE, VERMONT ACT 250 HANDBOOK 6 (1993).

24. Southview Assocs. v. Bongartz, 980 F.2d 84, 87 (2d Cir. 1992), *cert. denied*, 507 U.S. 987 (1993).

25. These pressures included "a massive increase in second-home construction and other recreational development, particularly in the southern portion of the state and around ski areas." *Id.* For example, in 1969, developers planned to complete 19 vacation home subdivisions in the Town of Dover, which would have increased its population from 370 to 16,000 in just a few years. *See id.*

26. *See id.* Other contributing factors included "the increased popularity of skiing and other

generated tax dollars and contributed to increased property values, yet they also "threatened to destroy the very base of [their] existence: Vermont's relatively unspoiled environment."[27] Public concern about uncontrolled development "reached the high water mark" in 1968 when the International Paper Company announced plans to develop 20,000 acres of Southern Vermont wilderness into second-homes.[28]

In 1969, Governor Deane C. Davis responded to public concern over uncontrolled development by creating the Governor's Commission on Environmental Control.[29] Governor Davis charged the Commission with "determin[ing] how economic growth could be attained without environmental destruction."[30] The Commission grappled with two difficult questions. First, how should they effectuate proper land use controls?[31] The Commission adopted a system by which a state agency would review proposed development and determine whether the land was suitable for development by taking certain criteria into account.[32] Second, should the state directly impose regulatory power on large developments?[33] The Commission specifically

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outdoor activities, and what might be termed America's fascination with 'the country life.'" *Id.*

27. *Id.* at 87-88. For example, "[p]oorly planned vacation home subdivisions in mountainous areas—typified by steep slopes and thin soil cover—caused soil erosion, water pollution from sewage systems, and a decline in the aesthetic quality of the land." *Id.* at 88.

28. *Id.* at 88.

29. *See* Exec. Order No. 7 (1969). The Commission, chaired by Art Gibb, often is called the "Gibb Commission." An Advisory Committee of about 30 individuals, "all well-known in the field of environment and civic activities," assisted the Commission. Art Gibb & Sam Lloyd, *The Evolution of Act 250, in* VERMONT ENVIRONMENTAL BOARD: TWENTY-FIFTH ANNIVERSARY REPORT, 1970-1995, at 4 (1995). For a more detailed history, see generally 2 BROOKS, *supra* note 8, § V. For an analysis of the legal philosophy underlying Act 250, see generally Richard O. Brooks, *Legal Realism, Norman Williams, and Vermont's Act 250*, 20 VT. L. REV. 699 (1996) [hereinafter Brooks, *Legal Realism*].

30. *Southview Assocs.*, 980 F.2d at 88. It is important to recognize that "the focus of the Act is not on barring development but on molding it to minimize its environmental impact." *Id.* at 89. *See also* Norman Williams & Tammara Van Ryn-Lincoln, *The Aesthetic Criterion in Vermont's Environmental Law*, 3 HOFSTRA PROP. L.J. 89, 94 (1990) (stating that Act 250 has been administered "not as a 'no-growth' law, but as a law designed to improve the quality of growth"). U.S. Senator James Jeffords, who was Vermont's Attorney General in 1969 and who co-wrote the legislation for Act 250, recalled in a recent televised interview that Act 250 was specifically designed to control development, not to stop it. *See Vermont's Act 250 Twenty-Five Year Retrospective* (Vermont Educational Television, Oct. 20, 1995). This perspective was reiterated in the "Capability and Development Plan" adopted by the legislature in 1973. *See* VT. STAT. ANN. tit. 10, § 6042 (1997). This plan states, for example, that "economic development should be pursued selectively so as to provide maximum economic benefit with minimal environmental impact." *Id.* § 6042(6)(A); *see also* VERMONT NATURAL RESOURCES COUNCIL, ACT 250: A POSITIVE ECONOMIC FORCE FOR VERMONT (1992).

31. *See* Gibb & Lloyd, *supra* note 29, at 4.

32. *See id.* This proposal emerged from a memorandum prepared by Commission member Walter Blucher. *See id.*

33. *See id.* This was a significant issue for the Commission in 1969, which "wrestled with this problem all through the summer, and in September of that year made [its] decision." *Id.*

decided that large developments should be subject to state control.[34] The Commission's recommendations became a bill proposed as Act 250.[35] The Vermont legislature enacted Act 250 in 1970.[36]

The "final form"[37] of Act 250 took shape in 1973 when the legislature adopted the Capability and Development Plan.[38] Originally, Act 250 mandated three subsequent plans to supplement its "bare bones" structure with details and substance.[39] In theory, "the interim land capability plan would provide the description of land capabilities, the capability and development plan would provide the policies and the land use plan would put the two together and provide a mapped plan to guide Vermont's development."[40] The interim plan, adopted by the Environmental Board in 1972, formed a basis for the Capability and Development Plan.[41] The Capability and Development Plan included both amendments to the original Act 250 criteria[42] and legislative findings.[43] Although not criteria per se, these legislative findings are used to clarify and determine the meaning of criteria,[44] and to guide development.[45] The Legislature never adopted third plan, the Land Use Plan, and later amended the Act to remove the mandate for this plan.[46]

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34. *See id.*

35. *See id.* James Jeffords and John Hansen wrote the legislation. *See id.*

36. *See id.* at 5.

37. *Id.* While Act 250 has been amended since this "final form" took shape, subsequent amendments have been relatively minor. For a complete legislative history, see 2 BROOKS, *supra* note 8, § V.

38. *See* Gibb & Lloyd, *supra* note 29, at 5.

39. *Id.*

40. 2 BROOKS, *supra* note 8, § XI, at 5.

41. *See id.* § XI.B.

42. The amendment provided subcriteria to several criteria listed in VT. STAT. ANN. tit. 10, § 6086(a) (1997), including what are generally called Subcriteria 1(A), 8(A) and 9(A) through 9(L).

43. These findings are listed under VT. STAT. ANN. tit. 10, § 6042 (1997).

44. "[T]he Board properly may look to these findings as a source of legislative intent in determining the meaning of the criteria." *Re:* St. Albans Group and Wal*Mart Stores, Inc., No. 6F0471-EB (Altered), 1995 WL 404828, at *19 (Vt. Envtl. Bd. June 27, 1995). The Vermont Supreme Court validated this use of the findings when it, too, looked to them to determine the legislative intent of Criterion 9(A). *See In re* Wal*Mart Stores, Inc. and The St. Albans Group, 8 Vt. L. Wk. 233, 236, 702 A.2d 397, 403-04 (1997). For a contrary view of the *Wal*Mart* case, arguing that the Board's decision was based on sheer economic protectionism rather than guided by legislative intent, see Michael A. Schneider, Note and Comment, *The Vermont Barrier: How Economic Protectionism Kept Wal-Mart Stores, Inc. Out of St. Albans, Vermont*, 20 NOVA L. REV. 919 (1996).

45. *See* 2 BROOKS, *supra* note 8, § XI.C.

46. For commentary on why this plan failed, see Gibb & Lloyd, *supra* note 29, at 5. For an alternative view, see generally Brooks, *Legal Realism*, *supra* note 29. For an analysis of planning mechanisms in Vermont, see 2 BROOKS, *supra* note 8, § XI. For two concrete case studies in Vermont's current planning effort, see Jessica E. Jay, Note, *The "Malling" of Vermont: Can the "Growth Center" Designation Save the Traditional Village from Suburban Sprawl?*, 21 VT. L. REV. 929 (1997).

District commissions[47] and the Vermont Environmental Board[48] administer Act 250. A developer whose project triggers Act 250 files an application with the regional district commission.[49] The district commission is composed of three laypersons who are appointed by the governor for four year terms.[50] District commissioners evaluate the project according to the ten criteria.[51] A district commission may attach conditions to any granted permit.[52] The commission's decision may be appealed to the Vermont Environmental Board for a de novo review of contested findings.[53] The Board consists of nine members who are appointed by the governor for staggered four year terms.[54] Finally, certain parties may appeal the Board's decision to the Vermont Supreme Court.[55]

In summary, Vermont's Act 250 is a permit system, ordered by criteria and guided by legislative findings. The Vermont Legislature enacted Act 250 in response to "the unplanned, uncoordinated and uncontrolled use" of Vermont lands "which may be destructive to the environment and which are not suitable to the demands and needs of the people of the state of Vermont."[56] Act 250 was intended to "regulate and control the utilization and usages of lands and the environment to ensure that, hereafter, the only usages which will be permitted are not unduly detrimental to the environment, [and] will promote the general welfare through orderly growth and development."[57] The question is how well this system works with regard to large development.

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47. See 2 BROOKS, *supra* note 8, § VII for an exploration and analysis of the functions of the district commissions.

48. See *id.*, § VIII, for more information about the powers and functions of the Board.

49. See VT. STAT. ANN. tit. 10, § 6026 (1997) for a list of district commissions. Act 250 jurisdiction is a complex issue. For guidance on the threshold question of whether a project falls under Act 250 jurisdiction, see ARGENTINE, *supra* note 23, at 12-21. For a complete analysis of jurisdiction, see 2 BROOKS, *supra* note 8, § VI.

50. *See* ARGENTINE, *supra* note 23, at 8. "Generally, Commissioners have other jobs or are retired and are not active politicians. They are not required to have legal or natural resources education prior to serving their terms, although some do. District Commissioners are not salaried but receive a small per diem and expenses." *Id.*

51. See VT. STAT. ANN. tit. 10, § 6086(a)(1)-(10) (1997) for the criteria (and subcriteria). These criteria are summarized *supra* note 23. This Note will refer to these criteria as Criterion 5, Criterion 9(H), etc., according to the subsection number of section 6086(a) by which the criterion is listed.

52. *See* VT. STAT. ANN. tit. 10, § 6086(c) (1997). For more information on permits and conditions, see 2 BROOKS, *supra* note 8, § IX.

53. *See* VT. STAT. ANN. tit. 10, § 6089(a)(3) (1997).

54. *See id.* § 6021(a). Like district commissioners, Board members are not salaried but receive per diem and expenses. *See* ARGENTINE, *supra* note 23, at 10.

55. *See* VT. STAT. ANN. tit. 10, §§ 6085(c), 6089(b) (1997).

56. Act No. 250, 1969 Vt. Acts (Adj. Sess.), § 1.

57. *Id.*

II. LARGE DEVELOPMENT

Act 250 was created in reaction to the threats posed by large developments;[58] however, it has had mixed success regulating and controlling large developments.[59] The root of the problem is that of Act 250 and the large development clash in specific ways. Most fundamentally, the Act 250 process requires information—both to assess whether a project complies with the criteria and to mitigate or negate the impacts of a project. Because of the magnitude of adverse impacts typically surrounding large development, there is an especially great need for information. However, because of the complexity of large development, precise information is especially difficult to gather. In addition, the complexity of large development makes these types of projects even riskier for developers. Developers need certainty that the project is worth continuing, yet they also require flexibility to adjust to changing circumstances. This Part first considers the problem of information, and then considers the need for flexibility and certainty.

Act 250 assumes developability.[60] That is, it assumes that proposed projects can eventually comply with the Act's requirements.[61] Hence, the relevant questions are whether a proposed project complies, and, if not, how it can be reshaped into compliance. Yet this assumption of developability rests on a high threshold. To reach it, an applicant must provide specific, accurate, and complete information[62] about the particular site and its specific development proposal,[63] as well as the anticipated impact of developing the site in the proposed way.[64] Gathering this information is cumbersome and

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58. *See supra* Part I.

59. *See, e.g.*, 2 BROOKS, *supra* note 8, § XI.H, at 19 ("Unfortunately, the Act 250 planning and permitting provisions were not designed for review of large-scale development.").

60. *See id.* § V.D, at 10.

61. *See id.* This assumption is validated by the percentage of projects permitted. "Denials of an application are uncommon; rather, permits are granted with conditions which protect environmental quality. Over the years the approval rate has averaged 98 percent." Ewing, *supra* note 9.

62. *See* 2 BROOKS, *supra* note 8, § XI.G at 9-10.

63. *See* 1 BROOKS, *supra* note 19, § A.02, at 11.

64. "The general scheme of Act 250 is one of anticipating the potential detrimental impacts that may result from development and constructing a land use plan that seeks to reduce those impacts." 2 BROOKS, *supra* note 8, § IX.C, at 11.

expensive for developers.[65] Reviewing it is time consuming and onerous for district commissioners and Board members.[66]

Nevertheless, information is the backbone of the Act 250 process. It allows the Board and commissions to ascertain whether a project complies with Act 250's criteria[67] and provides the basis from which the Board and commissions calculate impacts.[68] This information largely determines what permit conditions will alleviate adverse impacts sufficiently for the project to comply with Act 250.[69] From this information, the Board and commissions draw concrete support for permit denial.[70] If the Board or commissions deny

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65. Much of the cost stems from hiring experts and gathering and preparing information. For example, an applicant will need: 1) an experienced attorney, to "guide you not only through the obvious 10 criteria of Act 250, but also through the 60-plus inconspicuous Environmental Board rules, as well as previous case precedent and procedure"; 2) an engineer "to design a site plan and get you through wetland traffic, soils, air pollution, etc issues"; 3) an architect "to either design your building or 'Vermontize' your existing design;" 4) various consultants in "agricultural, animal habitat, air quality, and archeology"; 5) an economist to "prove to the commission that your project will have minimal impact on the public investment of the neighboring communities," and to "look into a crystal ball to attempt [sic] identify [t]he [sic] scale of the secondary growth your project will spin off"; and 6) a public relations consultant "who can help you attempt to tell the community of your project's benefits and deflect the negative articles and editorials which will no doubt show up in the local and statewide press." Dirmaier, *supra* note 4.

66. *See* 2 BROOKS, *supra* note 8, § XI.G, at 10; *see also* Marcia R. Gelpe, *Citizen Boards as Regulatory Agencies*, 22 URB. LAW. 451, 462-65 (1990) (discussing the difficulty of assessing information based on technical judgments and complex legal authority); Bruce S. Jenkins, *The Role of the Courts in Risk Assessment*, 16 Envtl. L. Rep. (Envtl. L. Inst.) 10,187, 10,189 (1986) (describing the confusion between expert fact and expert opinion).

67. Pursuant to VT. STAT. ANN. tit. 10, § 6086(a) (1997), the Board or commission "shall find" that the proposed development meets all ten criteria before granting a permit. In order to make this finding, the Board relies on information provided by parties to the permit proceeding, particularly the applicant. The applicant must provide "a plan of the proposed development . . . showing the intended use of the land, the proposed improvements, the details of the project, and any other information required." VT. STAT. ANN. tit. 10, § 6083(a)(2) (1997). The Board "shall from time to time issue guidelines for . . . determining the information and documentation that is necessary or desirable." EBR 10(B) (1996). In addition, the Board or commission "may require such additional information or supplementary information as [it] deems necessary," including "supplementary data for use in resolving issues raised in a proceeding." *Id.*; EBR 20(A) (1996).

68. When the Board or commission issues a decision on an application, the decision "shall contain findings of fact and conclusions of law specifying the reasons for the decisions reached on all issues for which sufficient evidence was offered." EBR 30 (1996). The "Findings of Fact and Conclusions of Law" are the basis for the decision. *Id.*

69. Conditions may be issued pursuant to VT. STAT. ANN. tit. 10, § 6086(c) (1997). See 2 BROOKS, *supra* note 8, § IX.C for more information about permit conditions. Generally, "[w]ith respect to conditions, it has long been recognized that permit conditions are necessary where, in their absence, a permit denial would be required." Bull's-Eye Sporting Center, No. 5W0743-2-EB (Altered), 1997 WL 369448, at *4 (Vt. Envtl. Bd. May 8, 1997) (citing Stowe Club Highlands, No. 5L0822-12-EB, 1995 WL 405030 (Vt. Envtl. Bd. June 20, 1995), *aff'd, In re* Stowe Club Highlands, 166 Vt. 33, 687 A.2d 102 (1996)). Either "the Board . . . generates the necessary conditions based on an application of relevant facts to the Board's analysis of the potential impacts under a particular criterion in issue, . . . [or] the Applicants, or . . . the Appellants, . . . propose conditions to eliminate or reduce potential adverse impacts." *Id.*

70. *See* EBR 30 (1996) (quoted in part, *supra* note 68).

a proposal, they must give specific reasons for the denial, and the applicant may reshape the project to address those reasons.[71] Finally, the Board and commissions will measure a resubmitted project against information from the newly reshaped proposal.[72]

Despite the difficulty of gathering and assessing information for an Act 250 proposal, such information is especially vital for large development projects. Large projects are often presumed to have significant adverse impacts.[73] For this reason, the critical purpose of the permit process is to accurately assess adverse impacts and to adequately mitigate or negate these impacts. In some cases, the adversity of the impact can be mitigated by sequencing stages of the project through time, often called "phasing-in" the project.[74] In other cases, the adversity of the impacts can be negated by reducing the size or scope of the project, herein called "phasing-down" the project.[75] However, these mitigation techniques are only as good as the available information. For example, the district commission cannot accurately review or mitigate one phase of a project without knowledge of its context within a larger project.[76]

Not only is gathering information difficult, but it also becomes binding once set in a permit.[77] Although a developer may not have sufficiently

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71. Denials are pursuant to VT. STAT. ANN. tit. 10, § 6087 (1997). Reconsideration is pursuant to VT. STAT. ANN. tit. 10, § 6087(c) (1997) and follows the process outlined in EBR 31 (1996). *See also infra* Part III.C.2.

72. "The applicant for reconsideration shall certify . . . that the deficiencies in the application which were the basis of the permit denial have been corrected." EBR 31(B)(1) (1996). In addition, "[t]he findings . . . in the original permit proceeding shall be entitled to a presumption of validity in the reconsideration proceeding." EBR 31(B)(2) (1996).

73. The scope of this Note is limited to projects that cannot be designated "Minor" due to impacts stemming from their size or complexity. *See supra* note 15. Admittedly, there is no bright line between "Major" and "Minor" projects. "[I]f the district commission finds that there is a demonstrable likelihood that the project will not present significant adverse impact under any of the 10 criteria," then it can review the project as a "Minor Application." EBR 51(A) (1996). A "Minor" designation typically expedites the permit process because the Commission (1) prepares a proposed permit; (2) holds a public hearing only if one is requested; and (3) limits a hearing to specific contested criteria. *See* EBR 51(B) (1996). "While all the commissions have a set of standards by which they determine whether an application is minor or major, the decision is somewhat subjective." Witten, *supra* note 4.

74. *See, e.g.*, Clarence & Norma Hurteau, No. 6F0369-EB, 1989 WL 231278 (Vt. Envtl. Bd. Apr. 24, 1989); Poquette & Bruley, Inc., No. 6F0372-1-EB, 1989 WL 231285 (Vt. Envtl. Bd. May 24, 1989).

75. For examples of cases when a reduction in the project's size or scope would negate adverse impacts, see *Swain Development Corp.*, No. 3W0445-2-EB, 1990 WL 207486 (Vt. Envtl. Bd. Aug. 10, 1990) and *Waterbury Shopping Village*, No. 5W1068-EB, 1991 WL 177078 (Vt. Envtl. Bd. July 19, 1991).

76. *See, e.g.*, Rockwell Park Assocs. and Bruce J. Levinsky, No. 5W0772-5-EB, 1993 WL 347716 (Vt. Envtl. Bd. Aug. 9, 1993) (proposed project to lay sewer pipe in one tract of land was actually part of a larger project to develop a 425 acre parcel of land). This problem is called "fragmented review."

77. *See, e.g.*, Robert C. Granger, In Re Quechee Lakes Corporation: *Mitigating Aesthetic Environmental Damage or an Eyesore on Act 250 Land Use Protection?*, 17 VT. L. REV. 541 (1992) (advocating a "hard-line" position against projects constructed in violation of permit).

detailed information for review of her proposed large development, she may not want to bind herself to a detailed plan. Nevertheless, she may begin the Act 250 process in order to gain assurance that the project is worth developing. The resulting "Catch-22" works like this:

> On the one hand, if the developer invests substantial up-front monies for infrastructure for the entire project, the developer seeks assurance that the rest of the project, to be developed in stages, will be approved. At the same time, the developer seeks to maintain flexibility on "details," often dependant on future contracts and future conditions of the marketplace. However the [district c]ommission may not be in a position to respond with the issuance of a permit . . . . [It] may not be able to assess the impacts of the entire project under all ten criteria, based only upon infrastructure plans; since the project's detailed development may not yet be specified, its impacts may be unclear. However, the [district c]ommission and Board may not wish to reject out of hand the request for a large-scale developer for up-front assurances, since the quality of development may benefit from the developer's master plan approach, which uses private resources to estimate cumulative impacts and to plan and control development for a large site area.[78]

The Board and commissions have been "especially 'creative'"[79] in their search for a solution to this problem. For many years, the solution was umbrella permits.[80] Currently, the solution is partial findings and master plan review via EBR 21,[81] which results in a private-public partnership.[82] In the end, while the developer may incur higher costs,[83] he or she gains assurances and retains flexibility.[84] The Board and commissions effectively enter into the planning

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78. 2 BROOKS, *supra* note 8, § XI.H, at 19.

79. *Id.*

80. *See infra* Part IV.A.

81. *See infra* Part IV.

82. *See* RICHARD OLIVER BROOKS, NEW TOWNS AND COMMUNAL VALUES: A CASE STUDY OF COLUMBIA, MARYLAND 59-73 (1974) [hereinafter BROOKS, NEW TOWNS], for a case study of a new town development that resulted in a "complex technical private-public planning procedure" or "partnership" between a developer and local governments.

83. One study of "costs" paid by a Maryland developer in order to retain flexibility includes:

> (1) [P]ossible money payments [settlements] to private parties . . . , (2) agreement to cooperate with the county in its "slow-growth" policy, (3) agreement to assume some of the "public" costs of development, (4) delivery to the county of a surplus in revenue . . . , (5) acceptance of some traditional land use controls, (6) "protection" of the surrounding county, and (7) the granting of flexibility to General Electric in its own land use.

Id. at 66.

84. Nevertheless, "[r]arely will a large-scale development . . . progress exactly as planned.

process as negotiators rather than regulators,[85] and the public receives the benefits of a well-planned large development.[86]

III. ADDRESSING IMPACTS BY PHASING-IN OR PHASING-DOWN

This Part analyzes two means of mitigating the adverse impact of large development—phasing-in and phasing-down. This Part also considers the related problem of fragmented review, which may affect developability of subsequent projects or lead to miscalculation of cumulative impacts in projects with later phases.

A. Phasing-In

"Phasing-in" a project distributes its impacts over time to reduce its burden on a community.[87] Phasing-in usually attaches to permit conditions[88] stemming from a project's failure to meet Criterion 6 (educational services),[89]

Contracts often fall through and financial or other restraints may require some parts of a project to be eliminated or downsized." *In re Stowe Club Highlands*, 166 Vt. at 35, 687 A.2d at 106. Indeed, Act 250 permit withdrawals occur "for a myriad of reasons," often "due to market pressures or lack of strong financing." 2 BROOKS, *supra* note 8, § VII, at 35 n.2. (quoting a letter from Michael Zahner to Sen. John Carroll, Apr. 1, 1994).

85. *See infra* Part IV.

86. "[L]arge-scale developers are often more careful planners than local towns." 2 BROOKS, *supra* note 8, § XI.D, at 7.

87. *See* 1 BROOKS, *supra* note 19, § J.01.c.vi.A.4.

88. Failure to meet these criteria results in permit conditions—not denial of a permit. Under all criteria, the applicant must provide sufficient evidence for the district commission or Board to reach a conclusion. *See* ARGENTINE, *supra* note 23, at 39. With regard to Criteria 6, 7, and 9(A), this evidence must show the reasonableness of the burden imposed on local government by the project. *See In re* Wal*Mart Stores, Inc. & The St. Albans Group, 8 Vt. L. Wk. 233, 235, 702 A.2d 397, 402 (1997). An applicant who fails to meet this burden may be denied a permit. *See id.* However, where an applicant meets her burden of going forward, a permit may be conditioned but not denied on the basis of Criteria 6 and 7. *See* VT. STAT. ANN. tit. 10, § 6087(b) (1997). Moreover, the language of Criterion 9(A) specifically mentions that "the district commission or the board *shall impose conditions* which prevent undue burden upon the town and region in accommodating growth caused by the proposed development or subdivision." *Id.* § 6086(a)(9)(A) (emphasis added).

89. Criterion 6 requires that a new development "[w]ill not cause an unreasonable burden on the ability of a municipality to provide educational services." VT. STAT. ANN. tit. 10, § 6086(a)(6) (1997). Until recently, local education received funding primarily through local property taxes. *See* 1 BROOKS, *supra* note 19, § G.01. However, the Vermont Supreme Court recently ruled that this method of educational funding was contrary to the State Constitution. *See* Brigham v. Vermont, 166 Vt. 246, 692 A.2d 384 (1997). It is not yet clear what impact a new method will have upon Act 250 analysis of Criterion 6. For more information on the *Brigham* case, see Robert Gensberg, *The Road to Equal Educational Opportunity For Vermont Schoolchildren*, 22 VT. L. REV. 1 (1997) and Peter Teachout, *"No Simple Disposition": The Brigham Case and the Future of Local Control Over School Spending in Vermont*, 22 VT. L. REV. 21 (1997).

7 (municipal or governmental services),[90] and 9(A) (impact of growth).[91] Phased-in developments are typically housing subdivisions[92] where the immediate influx of new residents attracted by the project would require infrastructure and services before the long-term tax dollars generated by the project could fund improvements.[93] In other words, there are adverse impacts because the rate of growth is too fast. The solution to slow the growth to a pace that is compatible with community improvements,[94] or to simultaneously slow growth and fund improvements in sync with the growth rate.[95]

In Florida, the problem of growth outpacing infrastructure spurred "concurrency" legislation,[96] which "forbid[s] the granting of any land development permits unless public facilities will be concurrently available to

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90. Criterion 7 requires that a new development "[w]ill not place an unreasonable burden on the ability of the local governments to provide municipal or governmental services." VT. STAT. ANN. tit. 10, § 6086(a)(7) (1997).

91. Criterion 9(A) ("Impact of growth") states, in relevant part,

> In considering an application, the district commission or the board shall take into consideration the growth in population experienced by the town and region in question and whether or not the proposed development would significantly affect their existing and potential financial capacity to reasonably accommodate both the total growth and the rate of growth otherwise expected for the town and region and the total growth and rate of growth which would result from the development if approved.

Id. § 6086(a)(9)(A). Relevant costs include: education, highway access and maintenance, sewage disposal, water supply, police and fire services and other factors relating to the public health, safety and welfare. *See id.*

92. There are many Environmental Board cases providing examples of phased-in subdivisions. *See generally* Richard & Napoleon LaBreque, No. 6G0217-EB, 1980 WL 13822 (Vt. Envtl. Bd. Nov. 17, 1980) (a 20-lot subdivision in remote Isle La Motte was phased-in at a rate of three lots per year); Horizon Dev. Corp., No. 4C0841-EB, 1992 WL 214181 (Vt. Envtl. Bd. Aug. 21, 1992) (an 11-lot subdivision in Underhill also was phased-in at three lots per year); Poquette & Bruley, Inc., No. 6F0372-1-EB, 1989 WL 231285 (Vt. Envtl. Bd. May 24, 1989); Poquette & Bruley, Inc., DR #233, 1991 WL 52652 (Vt. Envtl. Bd. Jan. 9, 1991) (a development's occupancy was limited to seven units per school year). Also phased to mitigate adverse impacts, projects requiring extreme ground disturbance, such as gravel pits, mineral extraction, and landfills, develop only in sections with remedial measures following each phase. *See, e.g.*, Chittenden County Solid Waste Management Dist. Solid Waste Landfill, No. 4C0400-3-WFP (Am.), 1993 WL 103797 (Vt. Envtl. Bd. Mar. 18, 1993). *See generally* 1 BROOKS, *supra* note 19, § E.

93. Where a project affects a community that will not receive property tax dollars, phase-in may be coupled with or replaced by impact fees.

94. *See, e.g.*, *Poquette & Bruley, Inc.*, 1989 WL 231285; *Poquette & Bruley, Inc.*, 1991 WL 52652.

95. *See, e.g.*, Taft Corners Assocs., Inc., No. 4C0696-11-EB (Remand), 1995 WL 330754 (Vt. Envtl. Bd. May 5, 1995) (road improvements intended to accompany subsequent phases in order to accommodate increased traffic from each phase).

96. See FLA. STAT. ANN. § 163.3202(2)(g) (West 1997), which says, in relevant part, that new development orders and permits "are conditioned on the availability of these public facilities and services necessary to serve the proposed development," and that "a local government shall not issue a development order or permit which results in a reduction in the level of services for the affected public facilities below the level of services provided in the comprehensive plan of the local government." *See also id.* § 163.3180 for a list of relevant services.

meet the needs generated by that development."[97] Tersely stated: you "pay as you grow."[98] In Vermont, phase-in provides another solution to this problem: you grow as you pay. In both cases, communities ended up with needed infrastructure. The difference is that, in theory, concurrency may place a moratorium on new development, while phase-in does not.[99] In truth, concurrency requirements simply displaced development; they encouraged sprawling roadside and rural development since infrastructure in community centers was overburdened and too expensive to update.[100]

Phase-in works when the problem is rate of growth rather than growth itself. That is, phasing-in a large development does not answer whether the particular development belongs in the proposed location in the first place.[101] Allowing projects to phase-in extends development into new areas—albeit a little slower due to the phasing.

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97. David L. Callies, *The Quiet Revolution Revisited: A Quarter Century of Progress*, 26 URB. LAW. 197, 205 (1994). The Florida State and Regional Planning Act of 1994, as amended, also requires local governments to formulate a program for providing infrastructure, including assessing the need and location of public facilities as well as their projected cost. *See id.* Concurrency requirements have not been entirely successful in Florida. *See, e.g.*, Mary Dawson, *The Best Laid Plans: The Rise and Fall of Growth Management in Florida*, 11 J. LAND USE & ENVTL. L. 325 (1996); Michael Murphy, Note and Comment, *Property Rights and Growth Management in Florida: Balancing Opportunity and Responsibility in a Changing Political Climate*, 14 PACE ENVTL. L. REV. 269 (1996).

98. John Koenig, *Down to the Wire in Florida*, PLANNING, Oct. 1990, at 6.

99. Criterion 9(J), which requires a showing that "necessary supportive governmental and public utility facilities and services are available," may have been intended to create a strict approach, akin to Florida's. VT. STAT. ANN. tit. 10, § 6086(a)(9)(J) (1997). When this criterion was adopted, phasing was viewed as a growth control mechanism whereby "municipalities can control the timing and amount of development" by "controlling the supply of public service." 1 BROOKS, *supra* note 19, § J.08.a. As conceived, under Criterion 9(J), "[p]rojects are to be approved only after such services are available." *Id.* However, Criterion 9(J) has not been interpreted this way by the Board. *See id.* § J.08 at 1. "[R]ather than controlling growth, 9(J) operates through conditions to encourage developers to secure necessary services to accommodate growth." *Id.* § J.08 at 4. The Board may have interpreted Criterion 9(J) to comport with VT. STAT. ANN. tit. 24, § 4418 (1997) (Conditions to Plat Approval), which states that "[n]o plat may be approved unless the streets and other required public improvements have been satisfactorily installed . . . [or] the owner . . . [posts] a performance bond . . . in an amount sufficient to cover the full cost of said new streets and required improvements . . . and their maintenance." VT. STAT. ANN. tit. 24, § 4418 (1997).

100. *See* Douglas R. Porter, *State Growth Management: The Intergovernmental Experiment*, 13 PACE L. REV. 481, 499 (1993). *See also* Murphy, *supra* note 97, at 293 ("concurrency actually promoted urban sprawl rather than compact urban development, since development was now forced to 'leapfrog' into rural areas where adequate infrastructure already existed"); James H. Wickersham, Note, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, 18 HARV. ENVTL. L. REV. 489, 510 (1994) ("Indeed, the consequences of local concurrency may even be counterproductive, shifting development to neighboring communities that lack such controls and resulting in more dispersed development patterns on a regional scale.").

101. In addition, phasing-in a development delays but does not remedy aggregate effects. For example, an aggregate effect resulting in undue water or air pollution, including noise, under Criterion 1 will still be undue whether that aggregate attaches immediately or at some point in the future.

However, it is not clear that phase-in serves any unique role[102] or that it works better than other mitigating measures, such as impact fees[103] or developer-supplied improvements.[104] For example, if the problem is the limited capacity of a town's wastewater system, there is—from the perspective of the developer and the community—no rationale for requiring phase-in rather than impact fees. Indeed, it may be less of an economic loss for a developer to pay impact fees than to forego revenue over a long period of time.[105] Similarly, town residents may prefer two years of substantial construction hassles to twenty years of continual dust and noise. Nevertheless, the district commissions and the Board tend to prefer phase-in over impact fees,[106] probably because of the substantial transaction costs of assessing, administering, and monitoring the fees.[107]

Phase-in serves to mitigate adverse impacts on a community relating to rate of growth by sequencing the development through an extended period of time so that it is completed in stages. This technique is limited in its applicability; it addresses growth rate, but not the desirability or location of growth. As a result, district commissions and the Board frequently use phase-in as the preferred mitigation tool.

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102. Mitigating a sudden increase in school age children may be the one truly unique function of phase-in that cannot be offset by other mechanisms, especially where the new children span different grades enough to strain classrooms, but not enough to hire another teacher for a particular grade. An alternative solution might be student exchanges among town schools in a region, coupled with developer-subsidized busing, insofar as school funding becomes less tied to the resources of a particular township. *See supra* note 89.

103. Impact fees are a "monetary payment to the public to be used for the purpose of mitigating the impact of the proposed development." 2 BROOKS, *supra* note 8, § IX.C, at 12. Impact fees may be imposed or contracted. *See id.* For an example of impact fees negotiated and contracted between local polities and a developer, see *Finard-Zamias Assoc.*, No. 1R0661-EB, 1990 WL 263574 (Vt. Envtl. Bd. Nov. 19, 1990).

104. Other possible mitigation techniques include developer agreements, land donations, posting a bond, resident associations, restrictive covenants, and impact fees. *See* 1 BROOKS, *supra* note 19, §§ J.01.c.vi.A.1-5, H.04.a. Insofar as phase-in is intended to mitigate impacts rather than control growth, it is interchangeable with other mitigation techniques. Therefore, the question becomes why mitigate via phase-in? *See supra* note 99 and accompanying text (discussing Criterion 9(J) and how phasing could (or should) be used to control growth).

105. Board cases on phase-in tend to involve a developer who seeks to develop or occupy retroactive or cumulative allotments that were not fulfilled. *See generally Poquette & Bruley, Inc.*, 1989 WL 231285; *Poquette & Bruley, Inc.*, 1991 WL 52652 (allowing "cumulative" phasing but not "retroactive cumulative" phasing, and suggesting the significance of dollars lost to developers through phasing).

106. *See* 1 BROOKS, *supra* note 19, § G.03.c.ii, iii (noting that the Board first considers whether phasing will adequately mitigate before considering impact fees, and that the Board recognizes that "such fees should be levied sparingly"). *See also* 2 BROOKS, *supra* note 8, § IX.C, at 12-13 (discussing restrictions on imposition of impact fees).

107. *See* 2 BROOKS, *supra* note 8, § IX, at 12-13.

B. Phasing-Down

"Phasing-down" a development reduces its size or scope in order to negate those adverse impacts that stem from the project's size.[108] A developer may phase-down a project in anticipation of nonconformance with certain criteria[109] or after permit denial, in order to remedy nonconformance with certain criteria.[110] Criteria that large projects often fail include Criterion 5 (traffic),[111] Criterion 8 (aesthetics),[112] Criterion 9(A) (impact of growth),[113] Criterion 9(H) (costs of scattered development),[114] Criterion 9(K) (public

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108. This Note refers to the process of reducing a project's size as "phase-down." Although the process is frequent in Act 250 cases, as this Part will show, there is no commonly used term for this process.

109. For example, in *Elwood and Louise Duckless,* a proposed three-phase gravel pit was phased-down to only one phase, "Phase II." The applicants withdrew Phases I and III from district commission review after discussions with the assistant district coordinator. The reasons for withdrawal of these phases were that Phase I was too visible from a nearby restaurant and there was not enough detail in the application concerning Phase III. Ironically, on appeal, the Board denied the application because the Phase III site was actually a better site. *See* Elwood and Louise Duckless, No. 7R0882-EB, 1993 WL 267982 (Vt. Envtl. Bd. June 11, 1993); *see also Re:* St. Albans Group & Wal*Mart Stores, Inc., No. 6F0471-EB (Altered), 1995 WL 404828, at *5 (Vt. Envtl. Bd. June 27, 1995) (the applicants originally proposed a 126,000 square foot store but voluntarily phased-down the project to a 100,000 square foot store); Joyce Marcel, *C&S Keeps Vermont Connection, Even as it Looks South,* VT. BUS. MAG., Apr. 1, 1997, at 24 (a company phased-down an 800,000 square foot refrigerated warehouse to 202,000 square feet because of anticipated difficulty receiving an Act 250 permit; the permit was contested vigorously, took almost three years to receive, and was never used).

110. *See, e.g.*, Bernard and Suzanne Carrier, No. 7R0639-EB (Recons.), 1997 WL 557659 (Vt. Envtl. Bd. Aug. 14, 1997) [hereinafter *Carrier II*], discussed *infra* notes 152-213 and accompanying text; Swain Dev. Corp., No. 3W0445-2-EB, 1990 WL 207486 (Vt. Envtl. Bd. Aug. 10, 1990), discussed *infra* notes 138-46 and accompanying text.

111. Criterion 5 requires that a project "not cause unreasonable congestion or unsafe conditions with respect to use of the highways, waterways, railways, airports and airways, and other means of transportation existing or proposed." VT. STAT. ANN. tit. 10, § 6086(a)(5) (1997).

112. Criterion 8 requires that the proposed development "not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas." *Id.* § 6086(a)(8).

113. For Criterion 9(A), see *supra* note 91.

114. If a project is "not physically contiguous to an existing settlement," then Criterion 9(H) requires showing that "the additional costs of public services and facilities caused directly or indirectly by the proposed development or subdivision do not outweigh the tax revenue and other public benefits of the development or subdivision such as increased employment opportunities or the provision of needed and balanced housing accessible to existing or planned employment centers." VT. STAT. ANN. tit. 10, § 6086(a)(9)(H) (1997).

investments),[115] and Criterion 10 (local or regional plan).[116] In a small state like Vermont, large projects are often out of scale with their surroundings.[117] Such projects, or the "secondary growth"[118] they generate, can both overwhelm local infrastructure[119] and decimate a local tax base.[120]

For example, in *Waterbury Shopping Village*, the "main difficulty" under several criteria was the project's physical size.[121] The proposed project was an outlet shopping center located on a rural stretch of scenic Route 100 between an Interstate exit and the resort village of Stowe.[122] The district commission issued a permit, but the Board denied the project on appeal.[123] The proposed project was 144,000 square feet, more than four times the size of the area's next largest commercial building and more than twenty-five times larger than the area's typical commercial building.[124] The project's massive size was a weighty issue for the Board, which found that size impinged on Criterion 1(B) (waste disposal),[125] Criterion 5 (traffic),[126]

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115. Criterion 9(K) requires that a project not "unnecessarily or unreasonably endanger the public or quasi-public investment in" or "materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to" adjacent "governmental and public utility facilities, services, and lands, including, but not limited to, highways, airports, waste disposal facilities, office and maintenance buildings, fire and police stations, universities, schools, hospitals, prisons, jails, electric generating and transmission facilities, oil and gas pipe lines, parks, hiking trails and forest and game lands." *Id.* § 6086(a)(9)(K).

116. Criterion 10 states, in part, that a project must conform "with any duly adopted local or regional plan." *Id.* § 6086(a)(10).

117. *See* Williams & Van Ryn-Lincoln, *supra* note 30, at 152 ("[h]armony of scale is one of the most obvious and most important criteria of appropriateness" under Criterion 8).

118. "Secondary growth" refers to additional development caused, encouraged, or accelerated by a large development, such as a large retail project. *See Re: St. Albans Group & Wal*Mart Stores, Inc.*, 1995 WL 404828, at *12. For example:

> Wal*Mart stores have been a catalyst for secondary growth in the vicinity of the stores. These types of stores are generally highway-oriented development, and typically can include fast-food franchises such as Burger King and Kentucky Fried Chicken, pizza and sandwich shops, gas stations, banks, video rental stores, new shopping centers, and expansion of existing shopping centers.

Id.

119. *See, e.g.*, *Swain Dev. Corp.*, 1990 WL 207486, at *1 (finding that despite a developer's proposal to make road improvements, "[d]ue 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").

120. *See, e.g.*, *In re* Wal*Mart Stores Inc. & The St. Albans Group, 8 Vt. L. Wk. at 234, 702 A.2d. at 401 (recognizing that a municipality's ability to pay for the services listed under Criterion 9(A) depends on its tax base, and a proposed project's impact on existing retail stores can negatively affect a municipality's property values and, thus, its tax base).

121. Waterbury Shopping Village, No. 5W1068-EB, 1991 WL 177078, at *28, (Vt. Envtl. Bd. July 19, 1991).

122. *See id.*

123. *See id.*

124. *See id.* at *24.

125. Criterion 1(B) requires showing that a project "will meet any applicable health and

Criterion 8 (aesthetics),[127] Criterion 9(K) (public investments),[128] and Criterion 10 (local or regional plan).[129] The Board said, with regard to Criterion 8 (aesthetics), that proposed mitigation measures involving landscaping and lighting were insufficient to mask the real problem: the project was just too big.[130] The Board suggested that a smaller project of about 5,000 square feet would likely conform to Criterion 10 as well as Criterion 1(B).[131]

However, it is often unclear whether phasing-down a large development will make it compatible with Act 250. The large size of a development often intersects with the related issue of sprawl,[132] or "scattered development."[133]

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environmental conservation department regulations regarding the disposal of wastes, and will not involve the injection of waste materials or any harmful or toxic substances into ground water or wells." VT. STAT. ANN. tit. 10, § 6086(a)(1)(B) (1997).

126. For Criterion 5, see *supra* note 111.

127. For Criterion 8, see *supra* note 112.

128. For Criterion 9(K), see *supra* note 115.

129. For Criterion 10, see *supra* note 116.

130. The Board said:

> [T]he Applicant has failed to take available steps which a reasonable person would take to mitigate the adverse aesthetic impacts identified above. These impacts, which are in large part related to the size of the project, will still be perceived despite the mitigation measures which the Applicant has undertaken. Thus, a substantially smaller commercial project would be more likely to fit in with the nearby land uses and the historic settlement pattern, would generate less traffic, and might not require a traffic signal. Accordingly, the Applicant has failed to mitigate because it has not reduced the size of its project to a scale which comports with the project's context.

Waterbury Shopping Village, 1991 WL 177078, at *25.

131. While discussing Criterion 10, the Board said:

> Similar to the Board's conclusions under Criteria 8 and 9(K), the Board believes that the project's size is the main difficulty. Were the project less than 5,000 square feet, it would probably conform to the Regional Plan. Indeed, a much smaller project would have a much smaller wastewater design flow. As discussed above under Criterion 1(B), the size of the project's design flow is a source of significant concern.

Id. at 28.

132. "Sprawl" may be characterized as development which is: (1) "spread-out, low-density, and land consumptive"; (2) "located at the outer fringes of cities, towns, or suburbs"; (3) "characterized by segregated land uses"; and "dominated by, and dependant upon, the automobile." BEAUMONT, *supra* note 4, at 262. Act 250 uses the language of "scattered development" rather than "sprawl." *See infra* note 133. However, Vermonters are increasingly concerned with "sprawl," as evidenced by a 1997 report from the Vermont Natural Resources Agency on how sprawl has harmed the environment, and seek greater state control over development. *See* Nancy Bazilchuk, *Report Notes Sprawl's Impact; Environment, State's Character Suffer, Agency Says*, BURLINGTON FREE PRESS, Jan. 23, 1998, at B3; *see also* Kevin J. Kelley, *Life in the Suburbs Just Got Bigger*, VT. BUS. MAG., Feb. 1, 1997, at 31.

133. *See supra* note 114 (discussing Criterion 9(H) (costs of scattered development)). "Scattered development" is "not physically contiguous to an existing settlement." VT. STAT. ANN. tit. 10, § 6086(a)(9)(H). An "existing settlement" is:

> an extant community center similar to the traditional Vermont center in that it is compact in size and contains a mix of uses, including commercial and industrial uses, and, importantly, a significant residential component. It is a place in which

Large developments usually require large plots of land.[134] However, sufficiently large plots of land are not available in a traditional Vermont village center, since it is "compact in size" and "contains a mix of uses," which "largely are within walking distance of each other."[135] Even if a developer phases-down a large project, it will remain "scattered development" unless it locates in an existing settlement, such as a village center.[136] As such, the development will likely run afoul of a myriad of Vermont policies aimed at discouraging sprawl, such as interpretations of various criteria in Act 250 and regional plans.[137]

For example, in *Swain Development Corp.*, the Board denied a phased-down project on reconsideration.[138] The district commission initially approved the proposed 57,000 square foot shopping center in rural Hartland, but the Environmental Board denied the permit on appeal.[139] The project did not conform to Criterion 9(K) (public investments) due to its effect on Route 4, a rural and scenic highway.[140] Also, the project did not conform to

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> people may live and work and in which the uses largely are within walking distance of each other. The term specifically excludes areas of commercial, highway-oriented uses commonly referred to as "strip development." Compatibility in terms of size and use is relevant to determining if an existing group of buildings constitutes an existing settlement in relation to a proposed project.

*Re: St. Albans Group & Wal*Mart Stores, Inc.*, 1995 WL 404828, at *27. "Contiguous to an existing settlement" means within or immediately next to such a settlement. *Id.*

134. For example, the proposed Wal-Mart site in St. Albans was 44 acres. *See Re: St. Albans Group & Wal*Mart*, 1995 WL 404828, at *1. Downtown St. Albans consists of slightly less than 44 acres of land. *See id.*

135. *Id.* at 27.

136. *See generally Re: St. Albans Group & Wal*Mart*, 1995 WL 404828. Wal-Mart originally proposed a 126,000 square foot store located near an Interstate exit outside of St. Albans City. Wal-Mart phased-down its proposal to a 100,000 square foot store, yet still located it outside of the city. The essential question, asked by John Finn, St. Albans resident and former state senator, "Why couldn't Wal-Mart build a smaller store that fits into our downtown?" BEAUMONT, *supra* note 4, at 276. Wal-Mart's scaled down proposal was a mere token gesture that did not really address either the mammoth size of the project or its location. Wal-Mart addressed and solved these issues squarely in its Bennington and Rutland stores, both located in the cities and placed in existing retail space more appropriately sized to its setting. *See id.* at 282. For definitions of "existing settlement" and "scattered development," see *supra* notes 132, 133.

137. On the other hand, denial of large projects may also feed sprawl. In Vermont, denial of a large project may simply shift the project into a neighboring township, leaving the abandoned township with no tax revenue from the project, but with traffic and other ill effects. *See* BEAUMONT, *supra* note 4, at 266. In addition, denial of a large project located in or near a town center (perhaps because of traffic congestion or overburdened infrastructure) may shift development to outlying farm fields in the same way that "concurrency" requirements in Florida shifted growth. *See supra* note 100.

138. *See Swain Dev. Corp.*, 1990 WL 207486.

139. *See id.*

140. The Board said:

> For the foregoing reasons, the Board has determined that the proposed project fails to meet Criterion 9(K). In this regard, the Board notes that the highway impacts of this project are for the most part derivative of its size. A smaller project would appear to be unlikely to generate as much traffic or to require two driveways or a

Criterion 10 (local and regional plans), since the regional plan required large commercial projects to locate in existing villages or expansion areas.[141] With regard to both criteria, the Board cited the project's large size as the root of the problem.[142] The applicants phased-down the project to 39,000 square feet and returned to the district commission for reconsideration.[143] The district commission, as well as the Board, found that the smaller project had the same effect on Route 4, and that it was still a large commercial development located outside of a village center.[144] Hence, the project still did not conform to Criteria 9(K) and 10, and so the Board denied it on reconsideration since its deficiencies were not corrected by the phased-down proposal.[145] Thus, phasing-down a project may not make it conform to Act 250, despite Board statements referencing size as a root of the problem.[146]

Consequently, phase-down allows a project to conform to Act 250 when the project's large size is the *sole* obstacle to its compatibility with the Act. Because large size can impact on many criteria, phase-down can be an effective tool in gaining a permit. However, phase-down is extremely limited in its applicability because size is often intertwined with other factors contributing to nonconformity with Act 250, most notably sprawl. As a result, it may be difficult to assess whether size is the sole reason for a permit denial, or merely a contributing element.

C. Fragmented Review Via Phase-In or Phase-Down

If a proposed project is a segment of a larger project, and the larger project is not included in the proposal, review of the larger project has been "fragmented."[147] Fragmented review may arise because a developer seeks a

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traffic signal if one driveway is to be used. Thus, a smaller project would appear to be unlikely to materially jeopardize or interfere with the values protected by Criterion 9(K).

Id. at *26. For Criterion 9(K), *see supra* note 115.

141. The Board said, "In view of the strong statements in the Regional Plan that commercial development should be located in village centers, and the proposed project's large size, impact, and location in a rural district, the Board concludes that the proposed project does not conform with the Regional Plan." *Swain Dev. Corp.*, 1990 WL 207486, at *27 (Vt. Envtl. Bd. Aug. 10, 1990). For Criterion 10, see *supra* note 116.

142. *See supra* notes 140 and 141.

143. *See* Swain Dev. Corp., No. 3W0445-2-EB (Recons.), 1991 WL 281040, at *1 (Vt. Envtl. Bd. Dec. 6, 1991).

144. *See id.*

145. *See* VT. STAT. ANN. tit. 10, § 6087(c) (1997) (reconsideration of a permit denial requires that deficiencies have been corrected).

146. *See supra* notes 140 and 141.

147. "Fragmented review" has been used by the Board to describe review of a portion, but not all, of the land affected by a project. *See* Rockwell Park Assocs. & Bruce J. Levinsky, No. 5W0772-5-EB,

viable use of a portion of her land, but she has not sufficiently planned development on the remaining portions.[148] In such cases, the planned portion is often "Phase I," and the unplanned portion is set aside as "Phase II." Additionally, fragmented review may result when a developer acquires permits for one project without addressing other permits she intends to seek, or because she changes her project in incremental steps.[149] These cases, which may include phased-down or phased-in developments, arise when a planned or intended result is not put on the table for review. In this case, if a developer phases-down a project to comply with Act 250, the district commissions and the Board may question what the developer intends for the undeveloped portion.[150] If the developer intends for it to remain undeveloped, that is factored into the analysis.[151] In contrast, if she intends to develop it, separating the development into stages will lead to fragmented review. Because phasing essentially is separating a project into discrete portions, it is often coupled with fragmented review.

Bernard & Suzanne Carrier presents an example of the Board's concern with fragmented review and provides a focal point for discussion of the problems inherent in this piecemeal approach.[152] In *Carrier*, the applicants proposed reducing the scope of their project to gain a permit on reconsideration.[153] The original proposal was for a subdivision of nine lots on

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1993 WL 347716 (Vt. Envtl. Bd. Aug. 9, 1993); *see also* Agency of Transportation (Leicester Route 7), DR #153, 1984 WL 42376, (Vt. Envtl. Bd. June 28, 1984); Bruce J. Levinsky, DR #157, 1984 WL 42378 (Vt. Envtl. Bd. Aug. 8, 1984). The notion of fragmentation appears elsewhere. *See, e.g.*, Conservation Soc'y of S. Vt., Inc. v. Secretary of Transp., 508 F.2d 927, 936 (2d Cir. 1974) ("Upon careful consideration of the facts, and with a sensitive eye to the options often imperceptibly foreclosed by fragmented growth, ..."). In this Note, "fragmented review" refers to the Act 250 review—not to the process of review called "partial findings." *See infra* Part IV.B.

148. *See, e.g.*, *Duckless*, 1993 WL 267982 (phasing-down proposed gravel pit after discussion with assistant district coordinator because "there was not enough detail in the application concerning Phase III").

149. This process is called "plateau permitting." *See* Jon Anderson, *Zoning: Planning Commission Issues*, *in* MAJOR LAND USE LAWS IN VERMONT 73, 124 (1996). Anderson says:

> The only explanations for plateau permitting is [sic] that you don't know what you are doing (if you intend to do more, you should disclose it) or you are being dishonest. You're not sharing all that you know or intend with the regulators. You lose either way. It is a much better practice to alert people to potential concerns.

Id.

150. *See Re: St. Albans Group & Wal*Mart*, 1995 WL 404828, at *5. The "application for the proposed project initially pertained to an approximately 126,000 square foot retail store. During [the] appeal, the Applicants revised their proposal to consist of an approximately 100,000 square foot retail store. The Applicants intend to seek approval of the additional 26,000 square feet in the future." *Id.*

151. *See Re: Stowe Club Highlands*, 1995 WL 405030, *aff'd*, *In re*: Stowe Club Highlands, 166 Vt. 33, 687, A.2d 102 (1996) (denying property owner's proposed development of a lot which had been restricted as open space in an Act 250 permit condition, since the open space was one aspect of a mitigation plan for the overall development).

152. *See Carrier II*, 1997 WL 557659.

153. *See id.*; *see also* VT. STAT. ANN. tit. 10, § 6087(c) (1997) (reconsideration of a permit denial

the shore of Lake Memphremagog in Newport.[154] The district commission approved the project, but the Board denied the permit on appeal.[155] The proposal suffered from several deficiencies, including that it was not suitably planned to account for the sensitive natural areas of the site—both wetlands and shoreline.[156] Eight years later, applicants phased-down the project to three lots and resubmitted their proposal.[157] On redesign, they utilized the developable portion of the site away from the lake's edge and the wetland area, leaving the sensitive portion undeveloped.[158]

However, the applicants equivocated about whether the undeveloped tract would remain undeveloped. For example, the redesigned proposal labeled the parcel containing three developed sites, "Phase I," and the undeveloped parcel, "Phase II."[159] The applicants sought Board advice for the "development potential" of the undeveloped lots "in light of the 1990 decision."[160] In short, while they phased-down their project to Phase I, or three lots, the applicants did not relinquish the notion of developing the remaining six lots, or Phase II.[161]

The Board faced a dilemma. The *Carrier* proposal either phased-down the project, or it phased-in the project—it could not do both.[162] If Phase I represented the total development, then the undeveloped portion could be viewed as open space, buffer zone, or wildlife habitat, and factor into the analysis as a mitigation factor.[163] However, if Phase I was the first stage, and the complete development proposal was not presented, then fragmented review was necessary. The Board avoided fragmented review, choosing to

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requires that deficiencies have been corrected). For more about the process of reconsideration, see *infra* Part III.C.2.

154. *See Carrier II*, 1997 WL 557659.

155. *See* Bernard and Suzanne Carrier, No. 7RO639-EB, 1990 WL 212590 (Vt. Envtl. Bd. Oct. 5, 1990) [hereinafter *Carrier I*].

156. *See id.* The original proposal also failed to adequately address water supply (Criterion 1) and presented an undue, adverse aesthetic impact (Criterion 8). The redesigned project satisfied the Board's concerns about water supply, and the site, initially cleared of mature trees, had regenerated sufficient natural growth so that, with the assistance of landscaping, the redesigned project conformed to Criterion 8. *See Carrier II*, 1997 WL 557659.

157. *See Carrier II*, 1997 WL 557659.

158. *See id.*

159. *See id.*

160. *Id.* at *5; *see also id.* at *13 ("[T]he Applicants seek guidance in this proceeding on how they might develop the lots nearest the shoreline and wetland, Lots 1-6, [Phase II] in preparation for the design and submission of a Phase II development plan.").

161. *See generally id.*

162. The only other option is that the reconsideration proposal sought to phase-in an unspecified project different from the original. Given the natural limitations of this site—wetlands and shoreline—this Note presumes that phase-in of a new development would be analogous to phase-in of the original proposal.

163. *See, e.g.*, *Re: Stowe Club Highlands*, 1995 WL 405030, *aff'd*, *In re Stowe Club Highlands*, 166 Vt. 33, 687 A.2d 102.

view Phase I as the terminus of development and assessing the development on three lots in relation to the undeveloped six lots, finding that the proposal conformed to Act 250. [164] In addition, the Board took measures to insure that the undeveloped lots of Phase II would remain undeveloped.[165]

Carrier exemplifies the two problems with fragmented review under Act 250. Initially, the analysis of a proposed project, such as Phase I, differs according to its context, particularly in assessing its impacts. Therefore, a project viewed in isolation will have different cumulative effects[166] or impacts than the same project viewed in combination with subsequent projects.[167] Secondly, the analysis of a subsequent project, such as Phase II, will also differ according to its context. A subsequent project may become more likely to be developed once a prior project has been allowed.[168] Thus, where subsequent projects are actually phases of a single larger project, the Board should review the larger project as a whole to accurately insure that it complies with Act 250.

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164. The Board wrote:

> Thus, to the extent that the Applicants have asked the Board in this proceeding to consider Lots 1-6 [Phase II] as an undeveloped parcel in determining that Lots 7, 8 and 9 [Phase I] satisfy criteria 1(F) and 8, the Board advises the Applicants that they may have severely limited their opportunities to request a subsequent amendment to authorize Phase II development of Lots 1-6.

Carrier II, 1997 WL 557659, at *13.

165. The permit stated:

> The District Commission maintains continuing jurisdiction during the lifetime of this permit . . . . Further subdivision or development of the so-called "remainder" parcel (Lots 1-6) is expressly prohibited, except as provided herein, unless a permit amendment is obtained prior to the commencement of such subdivision or development. In the event that the Permittees elect to file a permit amendment application for Phase II of the Revised Project or any permit amendment application with respect to subdivision or development of the so-called "remainder" parcel (Lots 1-6), not only will such development be reviewed under the ten Act 250 criteria but as a preliminary matter it will be reviewed in accordance with the analysis set forth in the Vermont Supreme Court's decision in In re Stowe Club Highlands, No. 95-341, slip op. at 5 (Vt. Nov. 8, 1996), and, if applicable, any Board rule which may be adopted to implement the holding in that case.

Id. at *3.

166. Cumulative effect may be defined as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency . . . or person undertakes such other actions." 40 C.F.R. § 1508.7 (1998). In addition, it is important to note that "[c]umulative impact can result from individually minor but collectively significant actions taking place over a period of time." *Id.*

167. *See infra* Part III.C.1.

168. *See infra* Part III.C.2.

1. Cumulative Effects

Fragmented review cannot effectively address cumulative impact, because cumulative impact analysis involves an interactive process as well as an additive process.[169] That is, the net effect of a project is not necessarily equal to the sum of the effects from different parts of the project, such as phases.[170] Rather, cumulative impacts also include the interaction among effects.[171] If cumulative effects analysis were merely a sum of effects, then fragmented review would not matter: the sum would be the same. However, fragmented review cannot gauge how the effects of developing a full project interact with—and possibly compound—the effects of developing a prior phase of the project. Thus, fragmented review of the prior phase's effects will be inaccurate. The Board recognizes this problem: "Each project which comes through the Act 250 process usually only has a minor impact if looked at individually. Cumulatively, the impact may be enormous."[172]

The Board approved Phase I of the *Carrier* project with the express understanding that the undeveloped land, potentially Phase II, would remain undeveloped.[173] The Board's concern with Phase II included the fact that

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169. Assessing cumulative effects is complex:

> In simplest terms, cumulative effects may arise from single or multiple actions and may result in additive or interactive effects. Interactive effects may be either countervailing—where the net adverse cumulative effect is less than the sum of the individual effects—or synergistic—where the net adverse cumulative effect is greater than the sum of the individual effects. This combination of two kinds of actions with two kinds of processes leads to four basic types of cumulative effects.

COUNCIL ON ENVIRONMENTAL QUALITY, CONSIDERING CUMULATIVE EFFECTS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 9 (1997). In addition to the problem of figuring how cumulative effects interact, there are the additional problems of infinite time and finite knowledge:

> The natural world without human intervention is the cumulative, dynamic response to millions of years of reacting to itself and the physical world around it. Humans do not understand all of the intricacies of ecosystems . . . . Destroying that million years of nature's work is infinitely easier than restoring it . . . . To restore a truly natural ecosystem is beyond the capacity and knowledge of humans.

DONALD HARKER ET AL., LANDSCAPE RESTORATION HANDBOOK 63 (1993).

170. *See* COUNCIL ON ENVIRONMENTAL QUALITY, *supra* note 169, at 9.

171. Examples include "[o]rganic compounds, including PCBs, that biomagnify up food chains and exert disproportionate toxicity on raptors and large mammals," and "[d]ischarges of nutrients and heated water to a river that combine to cause an algal bloom and subsequent loss of dissolved oxygen that is greater than the additive effects of each pollutant." *Id.* Another example is acid rain, or sulfuric and nitric acid rainwater, resulting from the combination of sulfur oxides and nitrogen oxides, which are produced through burning fossil fuels. *See e.g.*, DAVID B. FIRESTONE & FRANK C. REED, ENVIRONMENTAL LAW FOR NON-LAWYERS 81-84 (2d ed. 1993).

172. Killington 43 Assocs., No. 1R0522-4-EB, 1986 WL 58724, at *6 (Vt. Envtl. Bd. Oct. 20, 1986).

173. *See Carrier II*, 1997 WL 557659, at *13.

Phase II contained the least developable land on the parcel.[174] Had the Board considered Phase I together with potential development of Phase II, it may have denied the permit due to the cumulative impact of the project.

In an earlier declaratory ruling, *Re: Bruce J. Levinsky*, the Board rallied against fragmentary review because of its impact on cumulative effect analysis.[175] In *Levinsky*, the applicant sought a "Phase II" permit to lay a sewer pipe.[176] The Board concluded that the "project" at issue was not merely the Phase II sewer line alone, but also the 425 acre tract of land connecting to the sewer line, or "Phase III."[177] The applicant justified review of Phase II alone because the Phase III subdivision had not reached final design stages and the sewer line was an economically viable project whether or not any future development occurred.[178] The Board was not convinced.

In *Levinsky* the Board explained that fragmented review could lead to inaccurate review of Act 250 criteria, since it "prevent[ed] a comprehensive review of total project impacts under each criteria."[179] Accurate review may reveal that an independently minor impact is actually enormous when viewed cumulatively.[180] The Board stated, "for example, the impact of individual project phases on a deer habitat may be de minimis impact when considered in a vacuum . . . the cumulative impact of all phases considered as a whole could rise to the level of 'significant imperilment' requiring evaluation under the three sub-criteria of Criterion 8(A)."[181]

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174. *See id.*

175. *See Levinsky*, 1984 WL 42378.

176. *See id.*

177. *See id.* at *3.

178. *See id.* at *1. This argument follows a line of reasoning from cases challenging segmentation—or fragmented review—of projects under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 (1994). With regard to NEPA, "[t]he courts have said that if construction of one part of a potentially larger project has independent 'local utility' and will thus not involve an irreversible or irretrievable commitment of government funds, the [review] may be limited in scope to that one part of the project." FIRESTONE & REED, *supra* note 171, at 39. "Local utility" may be explained as projects which "can stand as sound projects on their own " or those whose "construction would be a sound decision even if no further action were taken." *Id.*

179. *Levinsky*, 1984 WL 42378, at *4.

180. *See Killington 43 Assocs.*, 1986 WL 58724, at *6.

181. *Levinsky*, 1984 WL 42378, at *4. The Board adds, "This difficulty is also repeated in reviewing other Criteria." *Id.* Criterion 8(A) states:

> Necessary wildlife habitat and endangered species. A permit will not be granted if it is demonstrated by any party opposing the applicant that a development or subdivision will destroy or significantly imperil necessary wildlife habitat or any endangered species, and
>
> (i) the economic, social, cultural, recreational, or other benefit to the public from the development or subdivision will not outweigh the economic, environmental, or recreational loss to the public from the destruction or imperilment of the habitat or species, or
>
> (ii) all feasible and reasonable means of preventing or lessening the destruction,

The Board understood the consequences of inadequately considering cumulative effects.[182] Fragmentary review "would perpetuate, rather than abate, the problems which spurred the enactment of Act 250,"[183] namely:

> [T]he unplanned, uncoordinated and uncontrolled use of the lands and the environment of the state of Vermont has resulted in usages of the lands and the environment which may be destructive to the environment and which are not suitable to the demands and needs of the people of the state of Vermont.[184]

In conclusion, fragmentary review cannot adequately assess cumulative impact. Because cumulative effects may result in "devastating environmental effects,"[185] it is important that district commissions and the Board adequately assess cumulative impacts. To do otherwise would be contrary to the intent of Act 250: "to protect and conserve the lands and the environment of the state and to insure that these lands and environment are devoted to uses which are not detrimental to the public welfare and interests."[186]

2. Future Developability

The second problem with fragmented review is that a subsequent phase of a project may become more likely to be developed once a prior phase of the project has been allowed. In *Levinsky,* the Board elaborated on this problem:

> Criterion 9(B) relating to primary agricultural soils . . . requires a finding that "the applicant can realize a reasonable return on the fair market value of his land only by devoting the primary agricultural soils to uses which will significantly reduce their agricultural potential." Obviously, the fair market value of Mr. Levinsky's land is likely to change after the installation of a sewer line because on-site sewage disposal is presently an impediment to intensive development of the Rockwell tract . . . . Therefore, Petitioner's

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diminution, or imperilment of the habitat or species have not been or will not continue to be applied, or

(iii) a reasonably acceptable alternative site is owned or controlled by the applicant which would allow the development or subdivision to fulfill its intended purpose.

VT. STAT. ANN. tit. 10, § 6086(a)(1)(G)(8)(A) (1997).

182. Others have said that "the most devastating environmental effects may result not from the direct effects of a particular action, but from the combination of individually minor effects of multiple actions over time." COUNCIL ON ENVIRONMENTAL QUALITY, *supra* note 169, at 1.

183. *Levinsky*, 1984 WL 42378, at *5.

184. *Id.* (quoting Act No. 250, 1969 Vt. Acts (Adj. Sess.), § 1).

185. COUNCIL ON ENVIRONMENTAL QUALITY, *supra* note 169, at 1.

186. Act No. 250, 1969 Vt. Acts (Adj. Sess.), § 1.

> ability to secure a reasonable return on the value of the Rockwell tract and, ultimately, the question of whether prime agricultural soils will be converted to an alternative use *may be dramatically affected by the installation of the Phase II line.*[187]

The Board found that "[s]uch an outcome is neither fair nor proper" because a permit applicant should not "reap the benefit" of "artificially changing" the basic conditions the Board must evaluate.[188] The same conclusion may be reached under other criteria. For example, had the Board permitted the applicant's sewer-pipe project without regard for deer habitat on the adjoining 425 acre parcel, the project itself could affect the deer habitat. For example, if trees were cut down and human activity in the area increased, the deer might abandon the area altogether.[189]

The problem with promoting subsequent developability is that this piecemeal process does not allow adequate assessment or mitigation of, a larger project. The situation is analogous to "segmentation," or fragmented review under the National Environmental Policy Act ("NEPA").[190] When long range plans are reviewed only with regard to separate segments of development, review of later segments of development may be unfairly weighted toward developing the segment. This would result even if review of the later development in isolation would have resulted in a permit denial due to environmental harm.[191] Some reasons for the bias toward development include money already invested into prior developments in anticipation of future development,[192] and pressures on the undeveloped segment, since the latter impedes expectations (such as the right to travel on a superhighway) raised by prior developments.[193] Via segmentation, these factors, though artificially changed by the applicant, tend to carry more weight than natural or environmental losses.[194] In addition, mitigation of an entire project may be better conceived if the project is viewed as a whole rather than segmented.[195] For example, unlike a traditional housing subdivision, Planned Unit

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187. *Levinsky*, 1984 WL 42378 at *4 (emphasis added).

188. *Id.* The Board noted that this danger was present under Criteria 9(A), 9(B), 9(H), 9(K), and 9(L). *See id.* Additionally, context is a key factor in Criterion 8 analysis.

189. *See e.g.*, *Re*: Southview Assocs., No. 2W0634-EB, 1987 WL 93923 (Vt. Envtl. Bd. June 30, 1987), *aff'd*, 153 Vt. 171, 569 A.2d 501 (1989).

190. National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 (1994). *See also* FIRESTONE & REED, *supra* note 171, at 29-53.

191. *See* FIRESTONE & REED, *supra* note 171, at 38-39.

192. Often phrased as an "irreversible and irretrievable commitment of government funds." *See id.* at 39.

193. *See id.* at 38-39.

194. *See id.*

195. *See id.*

Developments that utilize clustered housing can leave significant open space for wildlife habitat.[196]

Fragmented review in the reconsideration process also causes bias toward development.[197] If an applicant seeks reconsideration—for example, after phasing-down a proposed project—the process favors an applicant by providing him with specific deficiencies and relieving him from twice presenting some evidence. When a fully planned project fails, the Board or district commission gives written reasons for that failure.[198] Applicants may then correct deficiencies and resubmit the project, as long as the deficiencies are correctable. "The reconsideration procedure . . . confers a substantial benefit on applicants" because "[i]t allows them to modify their projects to meet criteria pursuant to which their applications were found deficient without wholesale review of the modified project under all ten criteria."[199] The process limits review of the modified project to corrected deficiencies under the criteria for which the application was denied.[200] Otherwise, affirmative findings for the original project remain constant.[201]

The fragmented nature of the reconsideration process also focuses on "deficiencies" rather than on the resulting project.[202] In so doing, the process presumes—perhaps incorrectly—that corrected deficiencies will change the project enough that it becomes an acceptable proposal, yet not change it so much that the project requires a new evaluation under all criteria.[203] In other words, the process presumes that the project remains essentially

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196. *See* Anthony T. Stout, *Act 250 Jurisdiction, Scenic Beauty & Wildlife Habitat, in* ACT 250: RED FLAGS AND GREY AREAS §1 (1991); Michael Fedun, Note, *A Proposal for Improving Vermont's Statutory Requirements for Planned Unit Development*, 15 VT. L. REV 591, 607-12 (1990).

197. *See* VT. STAT. ANN. tit. 10, § 6087(c) (1997).

198. *See id.*

199. *Re:* Sherman Hollow, Inc., No. 4C0422-5R-1-EB, 1991 WL 276380, at *11 (Vt. Envtl. Bd. Nov. 19, 1991). Therein, the Board discussed the procedure for reconsideration and the distribution of benefits:

> While the statute and the rules clearly contemplate conferring a benefit on applicants, it is equally clear that to obtain this benefit, applicants must correct the deficiencies set out in the original permit denial. Section 6087(c) and Rule 31(B)(1) both state that certification of such correction is required. This is consonant with 10 V.S.A. § 6086(a), which requires that affirmative findings be made on all criteria prior to issuing a permit.

Id.

200. *See id.*

201. *See id.* A district commission may reopen findings at its discretion. *See id.*

202. *See id.*

203. This was the argument by those neighbors who appealed the reconsidered *Carrier* project. *See Carrier II*, 1997 WL 557659. These opponents argued that the Board should have reviewed the entire reconsideration proposal under all criteria, not merely those for which the project was deficient eight years earlier. *See id.* For a discussion of the issue of when small changes in a permitted project should require its complete reassessment, see, for example, Granger, *supra* note 77.

permittable.[204] This presumption shifted in *Carrier*, where the Board stated that any proposal for a permit amendment approving development of Phase II would be reviewed under all ten criteria.[205] Essentially, the Board stated that Phase II was not presumed permittable.

Despite this, the Board has refused to instruct applicants about what details would render a denied project acceptable. In *Carrier*, the applicants sought to promote the developability of Phase II by asking the Board's advice about what would make the parcel developable.[206] However, the Board has drawn a clear line between its reviewing role and planning: the Board does not participate in the planning process.[207] In *Carrier*, the Board replied that it "does not design projects for Applicants nor does it provide advisory opinions on what hypothetical elements of design would receive the Board's approval."[208] Rather, "[i]t is incumbent upon an applicant seeking Act 250 approval to design its own project."[209] Also, within its reviewing role, the Board cannot review hypothetical future development. Either a project is prepared sufficiently so that an applicant can provide detailed plans and concrete evidence for review,[210] or it is not.[211] If a project is not prepared, the Board and district commissions cannot make positive findings that the project meets all Act 250 criteria. The Board has refused to approve a general concept and issue a conditional permit,[212] because "Act 250 specifically

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204. *See infra* Part II.

205. *See Carrier II*, 1997 WL 557659.

206. *See id.*

207. *See, e.g., In re* Robert B. & Deborah J. McShinsky, 153 Vt. 586, 591, 572 A.2d 916, 919 (1990) ("Nor must the Board design an adequate project for an applicant or issue a permit and retain oversight to assure that the applicant is doing all that is 'reasonable and possible' to meet the relevant subcriteria.").

208. *Carrier II*, 1997 WL 557659, at *13 (citations omitted). The Board reiterated that it "does review specific proposals, supported by evidence." *Id.*

209. *Id.*

210. *See generally* Killington, Ltd. & Int'l Paper Realty Corp., No. 1R0584-EB-1, 1990 WL 212591, at *16 (Vt. Envtl. Bd. Sept. 21, 1990) [hereinafter *Killington II*] ("In the absence of the submission of any detailed plans for implementation of the proposed mitigation and evidence supporting Killington's contention that its general, conceptual proposals would succeed, we are unable to determine that Killington is applying and will continue to apply all feasible and reasonable means of preventing or lessening the destruction or imperilment of the wetland habitat.").

211. *See generally Levinsky*, 1984 WL 42378. There, the applicant and Board differed as to whether the Phase III development was sufficiently prepared for the Board to consider its effects. *See id.*

212. In *Killington II*, the Board wrote:

> Killington contends that the Board should issue a permit with a condition requiring submission of a mitigation plan, the details of which would be worked out later by Killington. The Board rejects this argument, as it has in other cases when it was asked to approve a general concept and issue a conditional permit . . . . We cannot find that Killington has proposed "all feasible and reasonable means of preventing or lessening the destruction or imperilment of the habitat" when it admits that its conceptual scheme must be refined into a specific plan, the details of which have not

requires the Board to make positive findings . . . of compliance with the statute . . . prior to issuance of a permit."[213]

In conclusion, fragmented review of phases promotes the development potential of subsequent stages in several ways. Once developed, a phase of a larger project may influence future assessment of the project by artificially changing factors in the Act 250 review process. In addition, piecemeal development may impede best available mitigation for the entire project. Lastly, the reconsideration process contributes to developability by conferring certain benefits and presumptions on the applicant.

The Board and district commissions are well aware of the dangers of fragmented review or separating out portions of a project for review. Fragmented review is often coupled with phasing—either phase-in or phase-down—because phasing entails separating a project into discrete portions. Fragmented review cannot effectively address cumulative impacts because analysis of cumulative impacts involves an interactive and additive process. In addition, fragmented review promotes developability of subsequent parcels, since prior development affects land and fractures ecosystems. On the other hand, the Board and district commissions have tried to adapt the requirements and processes of Act 250 to the reality and needs of large development. Phasing is one result of this adaption. Fragmented review, it seems, is an interconnected by-product of phasing. Is there an alternative?

IV. ENVIRONMENTAL BOARD RULE 21

Act 250 permits the Board to "classif[y projects] in terms of complexity and significance of impact"[214] and to "provide for simplified or less stringent procedures than are otherwise required."[215] Pursuant to this authority, the

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been determined, before it can be implemented.
Killington II, 1990 WL 212591, at *16.

213. *Id.*

214. VT. STAT. ANN. tit. 10, § 6025(b) (1997).

215. *Id.* § 6025(b)(1). This section also grants authority to "provide a procedure . . . [for determining] a minor application with no undue adverse impact." *Id.* § 6025(b)(3). Thus, the classification in terms of complexity allows for procedural simplification. On one hand, this classification creates a realistic project approval process. On the other hand, this classification may burden projects that are neither "simple" enough to trigger a minor application nor "complex enough to trigger EBR 21. For example, a minor application typically incurs substantially less cost because the procedure demands less information. *See generally* Witten, *supra* note 4. For a complex project, under EBR 11(F), the chair can waive the application fee if the impacts of the proposed project were reviewed under a master permit. *See* VT. STAT. ANN. tit. 10, § 6083a(f) (1997). Thus, an intermediate project may incur a disproportionate cost in obtaining an Act 250 permit.

Board adopted Environmental Board Rule (EBR) 21, which provides for approval of master plans and issuance of partial findings.[216]

EBR 21 aims to cure the dilemma for developers who seek certainty as well as flexibility in creating "complex development projects."[217] It allows "a greater degree of assurance" that future phases of a project "may be approved" via the master permit process.[218] In addition, EBR allows flexibility through partial findings of fact.[219]

This Part reviews the provisions of EBR 21 for master plans, and then addresses the provisions for partial findings. It then considers how EBR 21, coupled with phasing, solves some of the problems of large development.

A. Master Plans

Master plans for a development project factor into the review process in two ways.[220] First, the Board or district commission may require that a developer place a master plan on file.[221] Second, the applicant may seek review of a master plan.[222]

The Board and commissions may require an applicant to file a master plan of the project as either a permit condition[223] or during the review process.[224] When a master plan is a permit condition, it may be to ensure

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216. EBR 21 has gone through various incarnations throughout the years. The Board adopted the current version of EBR 21 on February 25, 1998. This current version, titled "Master Permit Policy and Procedure for Partial Findings of Fact," envisions the process followed in two 1997 cases involving Husky Injection Molding Systems, which this Note discusses *infra* Part IV.B and Part IV.C.

217. EBR 21 (1998).

218. *Id.*

219. *See id.* EBR 21 recognizes that "[p]recise planning and engineering data may not be available for each subsequent stage of the project and therefore final findings of fact will not be possible under all criteria" for those subsequent phases. *Id.* The district commission or Board can issue affirmative findings of fact for those criteria to which subsequent projects conform. *See id.*

220. This Note considers only master plans which are "the comprehensive site plan of a private large-scale developer seeking to plan a large industrial park, subdivision, new town or recreation area." 2 BROOKS, *supra* note 8, § XI, at 19. For a more complete discussion of master plans, see generally 2 BROOKS, *supra* note 8, § XI.H.

221. *See* 2 BROOKS, *supra* note 8, § XI.

222. *See generally* Greater Burlington Indus. Corp. & Husky Injection Molding Sys., No. 4C1007-1 (May 29, 1997) [hereinafter *Husky Master Plan*] (on file with author).

223. *See generally* Edwin & Avis Smith, No. 6F0391-EB, 1989 WL 231284 (Vt. Envtl. Bd. May 11, 1989) (master plan required as permit condition). For more information on permit conditions, see *infra* Part II, or 2 BROOKS, *supra* note 8, § IX.C.

224. *See, e.g.*, Killington, Ltd. & Int'l Paper Realty Corp., No. 1R0584-EB, 1986 WL 58714 (Vt. Envtl. Bd. Aug. 8, 1986) [hereinafter *Killington I*]. Pursuant to EBR 10(D), the district coordinator reviews applications for completeness. An application is complete "[w]hen the coordinator has received sufficient information to convene a hearing." *Id.* at *3. Pursuant to EBR 10(B), "[i]f the commission realizes at the outset of a hearing that there are significant gaps in the information submitted in an application, such that the commission cannot fairly and properly review the proposal, it may require this information to be

future mitigation[225] or to prevent subsequent deterioration.[226] When the review process requires a master plan, it may be to assess whether a project meets the criteria[227] or to determine the scope of review for a complex project.[228] In these situations, master plans provide information and context for the project undergoing review; the master plan itself is not under review. When master plans merely provide information and context, but have not been reviewed and approved, there are no vested rights in the master plan.[229]

On the other hand, an applicant may seek master plan approval through the procedure outlined in EBR 21.

> When an applicant intends to develop a project in stages according to an overall plan (a "master plan project"), the applicant may apply for a master permit authorizing the construction of improvements for those elements of the project for which affirmative findings can be made under all criteria of the Act. . . . In most instances, the initial review will focus on the project's scale, location and impacts under the so-called "natural resources" criteria of the Act . . . . As

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submitted before the hearing on the merits begins." *Id.* And, pursuant to EBR 20(A), a commission may "conclude . . . during the course of the hearing on the merits that additional information is needed," and "require that information be submitted." *Id.* These requirements are meant to promote efficiency. "If the information is not submitted, and the commission finds that the information is necessary to make an adequate evaluation of an application under the criteria . . . it must deny the application. It is therefore in the applicant's best interest to provide the commission with the information requested." *Id.*

225. *See* Manchester Commons Assoc., No. 8B0500-EB, 1995 WL 664491 (Vt. Envtl. Bd. Sept. 29, 1995). A master plan is "necessary to ensure that the restoration will continue in the future to mitigate the relocation's adverse effect on the ability of the public to appreciate and interpret the historic nature of the Walker House." *Id.* at *17.

226. *See* Ampersand Properties Ltd., No. 5L0892-EB, 1987 WL 93900 (Vt. Envtl. Bd. Feb. 24, 1987). A master plan was part of the goal "to allow minor alteration of the wetland and stream to accommodate Phase I but to ensure that substantial alteration of these areas in future development be minimized to the extent possible." *Id.*

227. *See infra* Part III.C (discussing the Levinsky project); *see also* Bull's Eye Sporting Ctr., No. 5W0743-2-EB (revised), 1996 WL 585942 (Vt. Envtl. Bd. Sept. 30, 1996) (stating scaled site plan required "since to more adequately assess compliance with criterion 8, the Board must have a more comprehensive description").

228. *See, e.g.*, Vermont Agency of Transp. (Rock Ledges) DR # 296, 1995 WL 405016 (Vt. Envtl. Bd. June 15, 1995). In this case, the Board could not determine the scope of review for the Agency of Transportation's (AOT) ledgework along the interstates. *See id.* Should AOT seek permits for individual projects, a combination of projects, or all ledgework as a whole? The Board required AOT to submit a "Ledgework Master Plan," describing in detail "all of the ledge treatment/work . . . for which AOT has conducted preliminary planning, or expects or intends to undertake along the Interstates." *Id.* at *1. The Master Plan should include not only planned and future projects, but an analysis of potential impacts under all criteria for future projects and an analysis of alternatives to each future project. *See id.* at *8.

229. *See In re* Green Peak Estates, 154 Vt. 363, 577 A.2d 676 (1990) (affirming Board's denial of Phases II and III of a residential development plan for failure to meet Criterion 10 (conformance to the regional plan), even though the district commission knew of the applicant's "conceptual plan" for the entire development, since (1) the commission's approval of Phase I was limited to Phase I, and (2) the applicant did not seek master plan approval or partial findings under Criterion 10 for Phases II and III).

> mentioned above, in order to gain construction approval for any element of the project including infrastructure, detailed information needs to be supplied under all criteria of the Act.[230]

Apparently, because the master permit allows construction only for phases which meet all ten criteria of the Act, vested rights attach to the permitted phase.[231]

Prior to 1993, the Board and commissions reviewed and approved master plans under an umbrella permitting procedure.[232] Umbrella permits "allow[ed] for the coherent development of needed infrastructure, the necessary sequencing of large-scale developments, and the establishment of 'up front' cumulative impact levels of the project."[233] However helpful umbrella permits may have been for "intelligent site planning,"[234] they were an imperfect tool. Initially, there was no clear statutory authority for this procedure.[235] In addition, commissions issued umbrella permits without "substantive review" of "true impacts" under certain criteria.[236] This practice "ran counter to the statutory framework of Act 250" which requires a finding "that the project complies with *all* of the criteria."[237] Moreover, issuance of "final findings" made it very difficult if not impossible to reopen criteria under which substantive review may never have occurred."[238] Finally, vested rights attached with umbrella permits—sometimes for twenty years, and sometimes for unreviewed criteria.[239]

It is not entirely clear how the present "master permit" system materially differs from an "umbrella permit." The difference seems to lie in the extent of review. Under the umbrella system, the problems of gathering information for subsequent phases of a large development clashed with a developer's need for flexibility. Specific, accurate, and complete information was not yet available, but the commissions allowed development to proceed rather than deny it. Now "[p]ermits cannot be issued for any uses that are not *specifically*

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230. EBR 21(1998).

231. It is not yet clear if vested rights attach to partial findings. Vested rights attach either when the board or district commission permits construction, after it issues affirmative findings under all criteria, or when it issues affirmative findings of fact under a particular criterion according to the procedure for partial findings. Partial findings of fact seem to be tentatively final. They expire after a certain time period if they are not renewed. *See id.* However, they seem to be "final" within the time period. *Id.*

232. *See* 2 BROOKS, *supra* note 8, § XI.H.02.

233. *Id.*

234. *Id.*

235. *See id.*

236. Letter from Elizabeth Courtney (Oct. 29, 1993), *quoted in* 2 BROOKS, *supra* note 8, § XI n.225.

237. *Id.*

238. *Id.*

239. *See id.*

identified in the permit application."[240] However, there is still a problem gathering specific information and a need for flexibility, as well as certainty. The procedure for partial findings addresses these problems.

B. Partial Findings

Section 6086(b) states that an applicant[241] may request the Board or district commission "to review any criterion or group of criteria . . . before proceeding to or continuing to review other criteria."[242] After this review, the Board or district commission may "either issue its findings and decision thereon, or proceed to a consideration of the remaining criteria."[243] The applicant may appeal a partial decision right way, or may wait until after the Board makes its final decision.[244]

Partial review provides several benefits for developers of complex projects. Initially, partial review facilitates the cost of providing information. Because commissioners and Board members are laypersons,[245] hearings do not

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240. *Id.* Of course, this has always been the mandate. Section 6086(a) states, "*Before* granting a permit, the board or district commission *shall find* that the subdivision or development" conforms to the ten criteria. VT. STAT. ANN. tit. 10, § 6086(a) (1997) (emphasis added).

241. *See* VT. STAT. ANN. tit. 10, § 6086(b) (1997). The Board or commission may initiate this proceeding even if the applicant does not request it. *See id.*

242. *Id.* Prior to 1990, VT. STAT. ANN. tit. 10, § 6086(b) allowed the Board and commissions to make partial findings on Criteria 9 and 10 only. *See* Mt. Mansfield Co., No. 5L1125-10-EB, 1994 WL 568545, at *2 (Vt. Envtl. Bd. Sept. 29, 1994). The various subcriteria of Criterion 9 proved unwieldy, both with respect to appeals, and because of the interconnection with other criteria. *See* Philip Gerbode & Jessie Laurie, No. 6F0357-EB, 1988 WL 220536 (Vt. Envtl. Bd. Jan. 5, 1988) (Chairman ruled that the Board had no jurisdiction to hear appeal of commission's partial review of a subcriteria of Criterion 9, but could review all of Criterion 9); Raymond F. Ross, No. 2W0716-EB, 1987 WL 93937 (Vt. Envtl. Bd. Nov. 2, 1987) (Commission could not make positive findings on Criteria 9 and 10 without information from Criteria 1 through 8). In 1990 the General Assembly amended section 6086(b) to allow partial findings only on Criterion 10. *See* Act No. 234, 1990 Vt. Acts (Adj. Sess.), § 1. In 1993, the General Assembly again amended section 6086(b) to its present form, although this amendment did not take effect until 1995. *See* Act No. 232, 1994 Vt. Acts (Adj. Sess.), §§ 32, 50.

243. VT. STAT. ANN. tit. 10, § 6086(b) (1997).

244. *See id.*

245. *See supra* Part I. While the layperson composition of the Board and commissions contributes to delay, such composition may be vital to the process. The Commission recommendations that became Act 250 did not suggest layperson participation. Instead, "Governor [Deane C.] Davis was adamant in his belief that control should be as close to the people as possible, and it was his recommendation that the permitting process be placed in the hands of local district commissions with appeal rights to the Environmental Board." Gibb & Lloyd, *supra* note 29, at 5. This idea "turned out to be essential to [Act 250's] passage and continued success." *Id.* Aldo Leopold would have agreed. Leopold argued that "developing an 'ecological consciousness' among the citizenry is an essential element to the evolution of a land ethic," and "assigning preservation of land to the government does not facilitate the development of an ecological conscience in the citizenry." James P. Karp, *Aldo Leopold's Land Ethic: Is an Ecological Conscience Evolving in Land Development Law?*, 19 ENVTL. L. 737, 742 (1989) (referencing ALDO LEOPOLD, A SAND COUNTY ALMANAC 243-51 (Ballantine Books 1966)).

run on consecutive days. Since hearings may be scattered across several months,[246] testimony of a particular expert may be needed at any given time. This means that applicants must amass, retain, and pay experts to attend the entire hearing process.[247] Through partial review, an applicant can manage information. For example, the applicant can group hearings around particular areas of expertise and thus require fewer billable hours from experts.

In addition, the partial findings process allows the Board or commission to take a more active role in shaping projects. The regular system results in a permit, a permit with conditions, or a denial. The Board or commission has little room for reshaping a project within this system—it can subtly reshape the project through conditions or it can deny the project with the expectation that the applicant will follow hints for reshaping its reconsideration proposal. Partial findings allow the Board or commission to issue its opinion about deficiencies in a project without the pressure of having the entire project on the table.[248]

For example, Husky Injection Molding Systems sought partial findings under most criteria on a master permit application[249] for a twenty year phased construction of a four million square foot industrial campus on 700 acres in Milton. For the most part, the commission was "unable to conclude" that the project complied with the criteria.[250] However, through the process, the commission signaled its concern with the master plan's ability to meet certain Criteria. For example, the commission expressed concern for adverse aesthetic effects under Criterion 8,[251] including secondary effects of the project.[252] The commission suggested an open space protection plan involving a cooperative effort among "local, regional, and state authorities, as well as private interests to develop a plan to permanently protect significant open spaces in the immediate vicinity of the project and in the region."[253] The commission was thus able to involve itself in the planning process of Husky's Master Plan. Also, the commission relied on Husky's ability to negotiate community planning. If this plan succeeds, the net result will be a private-

246. *See supra* note 4.

247. *See supra* note 65 for a list of some of the experts one might need.

248. *See generally* BEAUMONT, *supra* note 4, at 284 (questioning the wisdom of making planning decisions "when a specific development proposal is on the table, somebody has money on the line, and the clock is ticking").

249. *See Husky Master Plan*, No. 4C1007-1 (May 29, 1997) (on file with author). Husky did not seek partial findings under Criteria 9(A) and 9(H). *See id.*

250. The commission reached positive conclusions under Criteria 1(D), 8(A), 9(C), 9(D & E), 9(F), 9(G), 9(J), 9(L), 10, and, to a limited extent, 9(B). *See Husky Master Plan*, No. 4C1007-1 (May 29, 1997), at 8, 24, 26, 27, 28, 30.

251. *See supra* note 112 for Criterion 8.

252. *See Husky Master Plan*, No. 4C1007-1 (May 29, 1997), at 22.

253. *Id.*

public cooperative planning effort for the region.[254] The commission recognized the potential in this union:

> The Commission commends the applicants for submitting a long term Master Plan which provides a basis for anal[y]zing [sic] the impacts of a significant development project. The Husky Campus Master Plan represents an uncommon opportunity for an applicant to work together with local, regional, and state officials to create a proposal which provides for the best possible balance between economic development and maintaining Vermont's environmental quality.[255]

C. Solving the Problems of Large Development

EBR 21 provisions for master plan approval and partial findings are a promising tool for solving the problems of large development under Act 250, especially when these provisions are combined with phasing. For example, Husky submitted an application for Phase I approval at the same time that it sought partial findings on its Master Plan.[256] This combination served Husky well, allowing Husky to move forward with Phase I of the project without delay.[257] Husky retained flexibility for subsequent phases since these phases were not directly addressed, and gained greater certainty for subsequent phases by engaging the commission in the planning process, even though the master permit was not fully approved. In this manner, EBR 21 and phasing provide potential to address the needs of developers.

EBR 21 plus phasing also provides a solution to the problems stemming from impacts of large development. A master plan and subsequent phases comprise the essential components. A master plan provides geographic context and full development potential. Review of subsequent individual phases allows changes over time to factor into the analysis of development potential.

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254. *See* BROOKS, NEW TOWNS, *supra* note 82, at 58-76, for a case study of a "private-public" partnership that emerged from an effort to create a new town.

255. *Husky Master Plan*, No. 4C1007-1 (May 29, 1997), at 30.

256. *See* Greater Burlington Indus. Corp. & Husky Injection Molding Sys., Inc., No. 4C1007 (May 29, 1997) (on file with author).

257. Delay in the permitting process can amount to lost opportunity. *See* Chris Granstrom, *Wal-Mart Guns for Williston Commercial Park*, VT. BUS. MAG., Sept. 1, 1993, at 44 ("Delaying a project can be tantamount to killing it") (quoting Bill Cavanaugh). For this reason, it is a wise strategy to present both a Phase I proposal for approval and a Master Plan for partial findings. Some would argue that Husky's success relates more to the governor's favor than to its strategy. *See* Dirmaier, *supra* note 4. Nevertheless, Husky's strategy has merit for other potentially less favored applicants.

For example, successfully mitigating cumulative effects requires a full awareness of the scope of the impacts, including geographic scope and time frame.[258] The master plan provides that scope and context. In addition, successful mitigation of cumulative effects requires monitoring and adjusting mitigation techniques accordingly over time.[259] Phasing provides the opportunity to monitor and adjust over time.[260] Similarly, the danger of promoting future developability on land less suited for development will be minimized when the context for review includes a full scope and real time.[261]

Finally, partial findings provide a realistic method for review, and a way to manage the problem of providing sufficient information. More importantly, the partial findings mechanism engages the Board or commission in the planning process.[262]

CONCLUSION

Phasing is a unique tool that enables the Board or commissions to reshape a proposed project in order to help it meet the requirements of Act 250. Thus, through phasing, projects that would otherwise fail become viable development in Vermont. These reshaped projects—Monsters, by analogy—are decent creatures, albeit imperfect, because phasing is less than perfect as a mitigation technique. Phasing can mitigate or negate adverse impacts of large development on a community via phase-in or phase-down. However, phasing as a mitigation tool flirts with some dangers, such as the risks involved with fragmented review. Phasing is better when used in conjunction with EBR 21, partial findings, and master plan review. Used in this way, phasing helps to balance the needs of developers with the requirements of Act 250, allowing Monsters to become viable, productive members of the Vermont community.

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258. *See* COUNCIL ON ENVIRONMENTAL QUALITY, *supra* note 169, at 11-21.

259. *See id.* at 46-47.

260. In theory at least, phasing allows monitoring over time with regard to other phases of the project, the project's master plan, and subsequent development outside of the project.

261. See *supra* Part III.C.1 and III.C.2 for discussions of cumulative impacts and future developability.

262. This planning element provides the missing component of Act 250 without state interference in local community, and so it is more likely to be successful than previous planning efforts. *See supra* Part I.