VERMONT LEGISLATION

FORMAL ENFORCEMENT OF ACT 250

INTRODUCTION

The permit application process of Vermont's Land Use and Development Law, commonly known as Act 250,[1] began on June 1, 1970.[2] Since that time, few Act 250 permit violations have been reported to the Environmental Board or the Agency of Environmental Conservation (AEC), both of which have authority to enforce Act 250.[3] Furthermore, the Board and the AEC rarely imposed significant criminal or civil sanctions in any of those reported cases.[4] Since 1974, the Vermont legislature has responded to this lack of Act 250 enforcement by repeatedly proposing, albeit unsuccessfully, amendments to Act 250's enforcement provisions.[5] Finally, in 1985, the legislature passed House Bill No. 80,[6] which amended title 10, section 6004, and added section 6005, Assurance of Discontinuance, and section 6006, Civil Penalty. The amendments and additions to Act 250 provide the Board with powerful enforcement tools—tools that were lacking throughout the previous fifteen years.

The purposes of this note are threefold: (1) to review the deficiencies in the pre-1985 Act 250 formal enforcement techniques;[7]

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1. 1969 Vt. Acts 250 (codified at VT. STAT. ANN. tit. 10, §§ 6001-6092 (1984)).

2. ENVIRONMENTAL BOARD, STATE OF VERMONT, MANAGING RURAL GROWTH—THE VERMONT DEVELOPMENT REVIEW PROCESS 1 (1983).

3. Memorandum of Understanding—Enforcement of Act 250, Environmental Board and Agency of Environmental Conservation 1 (April 7, 1982). The memorandum, a written agreement between the Board and the AEC, was necessary because only the AEC, not the Board, has the statutory power to formally enforce Act 250. Although the memorandum expired on March 24, 1984, both agencies informally acknowledge the validity of the memorandum. Phone conversation with Gil Livingston, executive officer, Environmental Board (October 3, 1985).

4. *See The Re-Enforcement of Act 250*, app. A, Proceedings of the Act 250 Conference (1983). The conference was held at Vermont Law School on May 13 and 14, 1982. Papers presented at the conference were compiled into the written proceedings. The students of Vermont Law School's Environmental Law Center wrote the paper entitled *The Re-Enforcement of Act 250.*

5. *Id.* at 1.

6. 1985 Vt. Acts 67 (codified at VT. STAT. ANN. tit. 10, §§ 6004-6006 (Supp. 1985) and VT. STAT. ANN. tit. 3, § 2822(d) (Supp. 1985)).

7. *The Re-Enforcement of Act 250, supra* note 4, at 29.

Act 250 contains both informal and formal enforcement techniques. The scope of this

(2) to present the new 1985 Act 250 formal enforcement laws and discuss whether the 1985 laws address any of the pre-1985 deficiencies; and (3) to examine any deficiencies not addressed by the 1985 laws and evaluate whether these deficiencies require future legislative attention.

I. Pre-1985 Formal Enforcement of Act 250

In its original form, Act 250 contained only two references to formal enforcement action that could be taken against permit violators.[8] First, criminal sanctions could be levied under section 6003, which provided that "[a] violation of any provision of this chapter or the rules promulgated hereunder is punishable by a fine of not more than $500.00 for each day of the violation or imprisonment for not more than two years, or both."[9] However, as of May 1983, the AEC had levied only one criminal fine for an Act 250 violation.[10] Because the state rarely invoked sanctions, section 6003 failed as an effective deterrent to Act 250 violators.

Act 250's second statutory enforcement tool was section 6004, which provided that "[i]n addition to the other penalties herein provided, the board may, in the name of the state of Vermont, institute any appropriate action, injunction, or other proceeding to prevent, restrain, correct or abate any violation hereof or of the rules promulgated hereunder."[11] The words "any appropriate action" have been interpreted by the Board and the AEC to include assurances of discontinuance (AODs),[12] bond or escrow agreements,[13] and civil actions.[14]

While "any appropriate action" has been interpreted to allow

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paper is limited to the formal techniques. "The formal procedures of enforcement are more adversarial in nature and include prosecution with court ordered fines, injunctions and imprisonment, while also including agency imposed assurances of discontinuance (AODs) and bond/escrow requirements." *Id.* Civil actions are not formal enforcement techniques under this definition, but nonetheless will be treated as such in this note.

8. Vt. Stat. Ann. tit. 10, §§ 6003, 6004 (1984) (amended 1985).

9. *Id.* at § 6004 (1984) (amended 1985).

10. *The Re-Enforcement of Act 250, supra* note 4, at 61.

11. Vt. Stat. Ann. tit. 10, § 6004 (1984) (amended 1985).

12. *The Re-Enforcement of Act 250, supra* note 4, at 41.

An assurance of discontinuance (AOD) is a written negotiated settlement between a violator and an Act 250 administrator. The AOD gives a violator a second chance to comply with the permit conditions, and the AOD gives an administrator hope that additional sanctions will not be required. *Id.*

13. *See The Re-Enforcement of Act 250, supra* note 4, at 46.

14. Memorandum of Understanding, *supra* note 3, at 2.

AODs as an enforcement tool, section 6004 did not give the Board the power to directly negotiate an AOD. The statute only permitted the Board to institute, not to impose, an AOD action.[15] To institute an AOD action, the Board requested the secretary of the Agency of Environmental Conservation to negotiate an AOD through the agency's statutory authority under title 3, section 2822(c).[16] Through a Memorandum of Understanding entered into on April 7, 1982, the Board and the AEC cooperated to implement Act 250 enforcement techniques.[17] Under section 2822(c)(4), only a violation of a court order was subject to civil penalties.[18] AODs, however, were not described as court orders under section 2822(c)(3).[19] Consequently, if a developer violated an AOD, the Agency of Environmental Conservation had to request that the attorney general or state attorney get a court order to stop the violation.[20] Furthermore, the AOD violation was prima facie proof of only statutory or regulatory violations.[21] If a developer violated an AOD permit condition, that violation was not prima facie proof, and the state prosecutor had a greater burden of proof in the subsequent court action.

The Board and the AEC also interpreted the broad "any appropriate action" language of section 6004 to include bond or escrow agreements.[22] To ensure that a developer follows permit conditions, the Board's administrative rules specifically provide for such agreements.[23] However, as was true with the sanctions previously mentioned, the state very rarely used bond or escrow agreements.[24] The Board required bonds or escrow accounts only under certain circumstances: when a developer requested a quarrying permit; when the payment of reclamation costs necessitated a surety device; when adjoining property owners requested a guarantee from the developer; when special sewage systems were utilized; or when the developer voluntarily filed a bond.[25]

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15. *The Re-Enforcement of Act 250, supra* note 4, at 53.
16. VT. STAT. ANN. tit. 3, § 2822(c)(3) (1972).
17. Memorandum of Understanding, *supra* note 3, at 1.
18. VT. STAT. ANN. tit. 3, § 2822(c)(4) (1972).
19. *Id.* at § 2822(c)(3) (1972).
20. *The Re-Enforcement of Act 250, supra* note 4, at 44.
21. VT. STAT. ANN. tit. 3, § 2822(c)(3) (1972).
22. *See The Re-Enforcement of Act 250, supra* note 4, at 46.
23. Vt. Envtl. Bd., Environmental Board Rules, R. 38 (amend. effective September 1, 1984).
24. *The Re-Enforcement of Act 250, supra* note 4, at 47.
25. *Id.* at 50.

Section 6004 also permitted the state to use injunctions to force compliance with Act 250.[26] However, as with all the sanctions mentioned under section 6004, an injunction must be sought by the attorney general through the statutory authority of the AEC.[27] Other problems inherent to injunctions are: (1) they are difficult to obtain because irreparable harm must be proven; (2) they may be ignored; (3) they cause additional delay, which may be economically advantageous to the developer; and (4) they do not prevent violations or rehabilitate any harm created.[28]

The final formal enforcement tool, civil actions, suffers from the same problems inherent in the injunction process. As previously mentioned, under section 6004 the Board only had the power to initiate an action. To initiate a civil proceeding, the Board notified the attorney general or the state attorney of the alleged violation.[29] Then, under the statutory authority of the Agency of Environmental Conservation, the state prosecutor obtained from the developer an assurance of discontinuance.[30] If the developer failed to comply with the assurance of discontinuance, the prosecutor would initiate a court action to force compliance.[31] If the developer then failed to comply with a subsequent court order, a contempt of court action might follow.[32] The result was a time-consuming court process. The developer could take advantage of the delay and benefit economically[33] by either constructing at lower costs, foregoing expensive Act 250 hearings, or employing an array of other cost-cutting devices. In addition, by the time the case finally reached the court the developer might have complied with Act 250 and obtained a permit.[34]

Pre-1985 formal enforcement of Act 250 was inadequate. The enforcement process against violators was time consuming, largely because the Board had to initiate legal action through the AEC, and actual prosecution occurred through the attorney general's office or the state attorney's office. Furthermore, judges were reluctant to issue severe sanctions; instead they opted for minor penal-

26. VT. STAT. ANN. tit. 10, § 6004, (1984) (amended 1985).
27. *The Re-Enforcement of Act 250, supra* note 4, at 58.
28. *Id.* at 58-59.
29. *Id.* at 54.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*

ties because Act 250 enforcement options were few and relatively limited in scope.[35] The 1985 Vermont legislature finally succeeded in its attempt to remedy the previous fifteen years of inadequate formal enforcement by the adoption of House Bill No. 80.

II. 1985 Formal Enforcement of Act 250

Under House Bill No. 80, the 1985 Vermont legislature amended the old law and added new formal enforcement provisions to Act 250.[36] Section 6003 retains the criminal sanctions in their pre-1985 form. However, section 6004 was amended and states:

> In addition to the other penalties herein provided, the board may, in the name of the state of Vermont, institute any appropriate action, injunction, or other proceeding to prevent, restrain, correct or abate any violation *of this chapter, or the rules promulgated under it or the terms or conditions of any permit issued under it, or any assurance of discontinuance accepted under it.*[37]

The amended statute allows the Board to institute any appropriate legal action, not only for violations of the Act 250 statutes and administrative rules but also for violations of permit terms or conditions, and any assurance of discontinuance.[38] The new law has two effects. First, the Board may institute a civil action if the developer has violated terms of the Act 250 permit. Previously, the Board could only institute an action if the developer violated an Act 250 statute or rule. Second, section 6004 allows the Board itself to institute an action for a violation of an AOD. Previously, an action to enforce an AOD could only be brought by the AEC.

The legislature also added section 6005, which provides:

> As a settlement of judicial proceedings or as an alternative to judicial proceedings, the board may accept an assurance of discontinuance of any violation of this chapter, or the rules adopted under it. Any assurance of discontinuance shall be in writing and a copy shall be sent to the attorney general. Evidence of a violation of such assurance shall be prima facie

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35. *See The Re-Enforcement of Act 250, supra* note 4, at 53, 61.

36. 1985 Vt. Acts 67.

37. Vt. Stat. Ann. tit. 10, § 6004 (Supp. 1985) (amending Vt. Stat. Ann. tit. 10, § 6004 (1984)) (Emphasis added to highlight the 1985 amendments).

38. *Id.*

> proof of violation of a statute, rule, or permit term or condition, as cited in the assurance.[39]

This new section directly addresses two previous problems with AODs: (1) it eliminates significant time delays by vesting the power to negotiate AODs with the Board itself; and (2) it makes a violation of an AOD prima facie proof of a violation of a permit term or condition.[40] Under the latter provision, a prosecutor is not required to prove an Act 250 permit violation ab initio.[41] The prima facie provision should expedite the Act 250 enforcement process.

House Bill No. 80 also adds section 6006, which states in pertinent part: "(a) The court may impose a civil penalty of not more than $10,000.00 for each intentional violation of a provision of this chapter or of the rules adopted, permit terms or conditions issued, or assurances of discontinuance accepted under this chapter."[42] Previously, the assessment of civil penalties under Act 250 was necessarily interpreted as coming under the broad "any appropriate action" or the "other proceeding" language of section 6004.[43] Section 6006 also adds additional civil sanctions for an *intentional* violation of Act 250's statutes, rules, permit conditions, or AODs.[44] The statute lists four factors to be considered by the court in levying a civil penalty for an intentional violation: (1) "the actual or potential economic gain obtained or to be obtained by virtue of the violation"; (2) "the deterrence of future violations"; (3) "the impacts of the violation or violations upon the values sought to be protected by" Act 250; and (4) "the history of these violations or other evidence of willful disregard for" Act 250.[45] Violation of a court order or AOD after a court-ordered date for compliance is a separate offense for each subsequent day of the violation.[46] Consequently, the court may assess the $10,000 fine several times over, thus resulting in a substantial penalty.

Section 6006 addresses several former problems with Act 250 enforcement. First, the intent of section 6006 is to deter inten-

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39. VT. STAT. ANN. tit. 10, § 6005 (Supp. 1985).
40. *Id.*
41. *The Re-Enforcement of Act 250, supra* note 4, at 45.
42. VT. STAT. ANN. tit. 10, § 6006 (Supp. 1985).
43. VT. STAT. ANN. tit. 10, § 6004 (1984) (amended 1985).
44. VT. STAT. ANN. tit. 10, § 6006(a) (Supp. 1985).
45. *Id.*
46. VT. STAT. ANN. tit. 10, § 6006(b) (Supp. 1985).

tional violations of Act 250. In its original form, Act 250 did not provide a civil sanction large enough to deter potential violators; as a result, several developers simply regarded the sanctions as a cost of doing business.[47] In Act 250's present form, developers may regard a sanction that imposes a maximum civil penalty of $10,000 for each intentional violation as too great a cost of doing business. Consequently, developers may be deterred from violating Act 250 permits. Secondly, if developers are aware that each day of noncompliance past an AOD completion date is a separate offense, they might be further deterred from violating Act 250 permits.

In summary, at least two of the four factors listed in section 6006 address former problems with Act 250 formal enforcement. As stated above, developers often internalized potential penalties as a cost of doing business. The first factor in section 6006 allows the court to consider a developer's potential economic gain and how that gain might have contributed to the developer's violation.[48] The second factor addresses the deterrent effect, which was previously lacking from Act 250 formal enforcement.[49]

III. Post-1985 Formal Enforcement of Act 250

Act 250 continues to suffer from a fundamental problem: it relies upon an unstructured system of land-use monitoring to bring permit violations to the attention of enforcement officials.[50] The result of the problem is obvious: if an unlawful Act 250 activity is not detected, "the enforcement of Act 250 fails immediately."[51] A less obvious result is that "[i]f a law is not enforced equally and fairly, members of a society may be less likely to accept and comply with the law."[52]

Presently, section 6004 leaves formal enforcement to the discretion of the Board. The Board's administrative rules make no reference to Board-initiated detection of alleged Act 250 violations.[53] However, the rules do refer to other modes of detection. Environmental Board Rule 38 states that a petition for revocation

47. *The Re-Enforcement of Act 250, supra* note 4, at 42.
48. Vt. Stat. Ann. tit. 10, § 6006(a)(1) (Supp. 1985).
49. *Id.* at § 6006(a)(2).
50. *The Re-Enforcement of Act 250, supra* note 4, at 8.
51. *Id.*
52. *The Re-Enforcement of Act 250, supra* note 4, at 11.
53. *See* Environmental Board Rules, *supra* note 23, at 1.

of a permit may be made "by any person who was a party to the application, by any adjoining property owner whose property interests are directly affected by an alleged violation, by a municipal or regional planning commission, or any municipal or state agency having an interest which is affected by the development or subdivision."[54] Therefore, parties directly affected by the permit violation may request that the permit be revoked. The Memorandum of Understanding states that "anyone can report a possible violation."[55] However, unlike Rule 38, any person may not petition for revocation; one may only report a violation. A survey taken in 1983 reported that of all pending Act 250 violations, fifty-eight percent were reported by both private citizens and town officials, and forty percent by state personnel; two percent were of unknown origin.[56] Even though the majority of violations are reported by both private citizens and town officials, the Board and the AEC have the actual technical resources and personnel to detect violations.[57]

The 1985 laws do not address this unstructured Act 250 reporting system. Changes in the system toward increased organization would most likely increase the number of reported violations. A permit monitoring program should be implemented either through the Act 250 statutes or administrative rules. The monitoring program could be administered by the personnel of the AEC and the Board.[58] However, the permit monitoring program should also encourage the continued, active participation by private citizens.

Conclusion

The 1985 amendments and additions to the Act 250 enforcement laws go a long way toward rectifying several problems associated with pre-1985 formal enforcement of Act 250 permits. Section 6004 gives the Board the power to initiate an AOD against a violator without first having to go through a prolonged court process. Section 6005 also facilitates the court process by allowing a violation of an AOD to be prima facie proof of an Act 250 violation. Section 6006 provides the Board with powerful civil enforcement

54. *Id.* at R. 38(A).
55. Memorandum of Understanding, *supra* note 3, at 2.
56. *The Re-Enforcement of Act 250, supra* note 4, at 12.
57. *Id.* at 20.
58. *Id.* at 23.

tools that may be levied against intentional violators of Act 250. Section 6004 still provides for somewhat undefined civil sanctions against negligent violators. Finally, section 6003, which has been retained in its pre-1985 form, provides criminal sanctions against Act 250 violators.

The new 1985 Act 250 amendments and additions as a whole provide a wide range of civil and criminal sanctions. The broad spectrum of formal enforcement techniques provides for penalties that can be molded to the particular type of violation involved. However, the 1985 laws will be as ineffective as the previous Act 250 enforcement laws unless a permit monitoring system is provided. Otherwise, many Act 250 violations will never be brought to the attention of the Board and the new 1985 laws will not be properly implemented.

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