

ACT 250'S "NECESSARY WILDLIFE HABITAT" DEFINITION: HOW MUCH WILDLIFE DOES IT EMBRACE?

INTRODUCTION

Act 250's¹ wildlife habitat provisions² [hereinafter Criterion 8(A)] recently have provided the basis for permit denials in one Vermont Environmental Board³ and two District Environmental Commission decisions.⁴ Disgruntled applicants are appealing these decisions on both constitutional and statutory grounds.⁵ One of these appeals, *In re Southview Associates*,⁶ is currently on the Vermont Supreme Court docket. The court in deciding this case will address, inter alia, the Environmental Board's [hereinafter the Board] current interpretation of "necessary wildlife habitat."⁷ The

1. Act 250 is the common name which denotes Vermont's Land Use and Development Law. VT. STAT. ANN. tit. 10, §§ 6001-6092 (1984 & Supp. 1987). In essence, Act 250 requires a person to obtain a permit before commencing construction of a development or subdivision. *Id.* § 6081 (1984). The permit application is initially reviewed by one of nine district environmental commissions. *Id.* §§ 6026, 6083 (1984 & Supp. 1987). A permit will not be issued unless the subdivision or development satisfies Act 250's land use planning criteria. *Id.* § 6086. Parties may appeal, de novo, the District Environmental Commission's ruling to the Vermont Environmental Board [hereinafter the Board]. *Id.* § 6089. Ultimately, Board decisions are appealable to the Vermont Supreme Court. *Id.* § 6089. For a more detailed discussion on Act 250's administration see Note, *The Effect of Act 250 on Prime Farmland in Vermont*, 6 VT. L. REV. 467, 468-74 (1981). See also Note, *Party Status and Standing Under Vermont's Land Use and Development Law (Act 250)*, 2 VT. L. REV. 163, 163-75 (1977). For an analysis of Act 250 enforcement see Note, *Formal Enforcement of Act 250*, 10 VT. L. REV. 469 (1985).

2. VT. STAT. ANN. tit. 10, § 6086(a)(8)(A) (1984).

3. *In re Southview Assocs.*, No. 2W0634-EB, Findings of Fact and Conclusions of Law and Order (Vt. Envtl. Bd., June 30, 1987), *appeal filed*, No. 87-313 (Vt. July 24, 1987).

4. *In re Killington, Ltd.*, No. 1R0584, Findings of Fact, Conclusions of Law, and Order (Dist. Envtl. Comm'n No. 1, July 14, 1987), *appeal filed*, No. 1R0584-EB (Vt. Envtl. Bd., Aug. 13, 1987); *In re Norman R. Smith, Inc.*, No. 1R0593-1, Findings of Fact, Conclusions of Law and Order (Dist. Envtl. Comm'n No. 1, May 18, 1987), *appeal filed*, No. 1R0593-1-EB (Vt. Envtl. Bd., June 8, 1987).

5. See, e.g., Applicants' Notice of Appeal at 2, *In re Killington Ltd.*, No. 1R0584-EB (Vt. Envtl. Bd., filed Aug. 13, 1987). The applicants are not only challenging the District Environmental Commission's construction and application of Criterion 8(A) but are also contending that the permit denial amounts to a taking of property without just compensation, violating the fifth amendment of the Constitution. *Id.*

6. *In re Southview Assocs.*, No. 87-313, (Vt. filed July 24, 1987).

7. Although briefs have not yet been filed in *In re Southview Assocs.*, the appellants, in the absence of "extraordinary circumstances," only may raise issues before the court which previously were raised before the Board. VT. STAT. ANN. tit. 10, § 6089(c) (Supp. 1987). This restriction also applies to constitutional issues. See *In re Burlington Hous. Auth.*, 143 Vt. 80, 81-82, 463 A.2d 215, 217 (1983). Accordingly, the appellants in *In re Southview Assocs.*

court's disposition of this issue, ultimately will determine the amount of wildlife habitat that legitimately can come under the protection of Criterion 8(A) review.

This note focuses primarily on a proper interpretation of "necessary wildlife habitat." Toward that end, the Board's interpretation of "necessary wildlife habitat" is traced over the past several years. In addition, this note compares the Board's interpretation with that advocated by some Act 250 applicants. Ultimately, this note concludes that the Board's current interpretation is not only logical but is necessary to give full effect to Act 250's contemplated scheme for protecting wildlife habitat.

I. CRITERION 8(A) OF ACT 250

Criterion 8(A) is only implicated when a development significantly imperils either "necessary wildlife habitat" or an "endangered species."⁸ Hence, the definition of "necessary wildlife habitat" is critical to both permit applicants and opponents. Act 250 defines necessary wildlife habitat as "concentrated habitat which is identifiable and is demonstrated as being decisive to the survival of a *species of wildlife* at any period in its life including breeding and migratory periods."⁹ This very definition, however, has spurred the current dispute over the reach of Criterion 8(A).

may raise only the statutory issues which were brought before the Board. See *In re Southview Assocs.*, No. 2W0634-EB, Findings of Fact and Conclusions of Law and Order at 1-3 (Vt. Env'tl. Bd., June 30, 1987), *appeal filed*, No. 87-313 (Vt. July 29, 1987). These issues include the Board's interpretation of "necessary wildlife habitat" and the application of Criterion 8(A)'s restrictions to the proposed development. *Id.* "Necessary wildlife habitat" is defined in section 6001(12) of Act 250. See *infra* text accompanying note 9.

8. Criterion 8(A) of Act 250 provides:

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, 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)(8)(A) (1984) (emphasis added).

9. VT. STAT. ANN. tit. 10, § 6001(12) (1984) (emphasis added).

The disagreement stems from the ambiguity in the phrase "a species of wildlife."¹⁰ Some applicants suggest that this phrase does not embrace habitat which, although decisive to a specific local wildlife population, is not decisive to that species' survival in Vermont.¹¹ This restrictive interpretation would allow some habitat to be destroyed, without Criterion 8(A) review, as long as the species dependent on that habitat exists elsewhere in the state.¹²

In contrast, the Board interprets "necessary wildlife habitat" as that habitat which is decisive to only a portion or segment of a state wildlife population.¹³ In other words, if a local wildlife population is dependent on the habitat, it is "necessary wildlife habitat" pursuant to Act 250 regardless of whether that wildlife species is thriving elsewhere in the state. Board decisions which have followed this inclusive interpretation of "necessary wildlife habitat" are discussed in the following section.

II. ENVIRONMENTAL BOARD INTERPRETATIONS OF "NECESSARY WILDLIFE HABITAT"

The Board's current interpretation of "necessary wildlife habitat" began in *In re Peter Guille*.¹⁴ There, the Board summarily concluded that one area of the proposed development was "necessary wildlife habitat" because it included a critical winter deer-yard.¹⁵ Subsequently, in *In re Quechee Lakes Corp.*,¹⁶ the Board reiterated that a winter deeryard can constitute "necessary wildlife habitat."¹⁷ In reaching this conclusion, the Board observed that "[d]eer wintering areas ("deeryards") are critical habitat for the survival and well-being of white-tailed deer in Vermont."¹⁸

10. *Id.*

11. See *In re Southview Assocs.*, No. 2W0634-EB, Findings of Fact and Conclusions of Law and Order at 2 (Vt. Env'tl. Bd., June 30, 1987), *appeal filed*, No. 87-313 (Vt. July 24, 1987); Applicant's Notice of Appeal at 2, *In re Killington Ltd.*, No. 1R0584-B (Vt. Env'tl. Bd., filed Aug. 13, 1987); Applicant's Notice of Appeal at 1, *In re Norman R. Smith, Inc.*, No. 1R0593-EB (Vt. Env'tl. Bd., filed June 8, 1987).

12. See *infra* text accompanying notes 37-39.

13. See *infra* text accompanying notes 40-43.

14. No. 2W0383-EB, Findings of Fact and Conclusions of Law (Vt. Env'tl. Bd., Mar. 18, 1980).

15. *Id.* at 9.

16. No. 3W0364-EB, Findings of Fact, Conclusions of Law and Order (Vt. Env'tl. Bd., Mar. 28, 1981).

17. *Id.* at 1.

18. *Id.*

This inclusive interpretation of "necessary wildlife habitat" wavered momentarily in *In re White Sands Realty Co.*¹⁹ In this decision, the Board granted a permit authorizing the construction of a twenty-lot subdivision on approximately 246 acres despite Vermont Fish and Game Department testimony that a critical portion of a deer wintering area lay within the proposed project.²⁰ Conflicting testimony between the applicant and the state indicated that between ten and one hundred deer utilized the area.²¹ Both parties agreed, however, that the area was not critical to the survival of the species of white-tailed deer.²²

Because the applicant also proposed a wildlife habitat management plan to mitigate adverse effects on the deer wintering area, the Board found that the proposed subdivision would not significantly imperil "necessary wildlife habitat."²³ Consequently, the project did not implicate Criterion 8(A).²⁴ Implicit in the Board's decision was a determination that the area in question did not constitute "necessary wildlife habitat" despite state testimony to the contrary.²⁵ This decision raised doubt as to what interpretation the Board supported.

In light of the potential consequences of a restrictive interpretation of "necessary wildlife habitat," the Agency of Environmental Conservation filed a motion for reconsideration which the Board subsequently granted.²⁶ On reconsideration the Board clarified its earlier interpretations of "necessary wildlife habitat": "[A] 'necessary wildlife habitat' as defined in 10 V.S.A. § 6001(12) need not be decisive to the survival of the *entire* population of a species of wildlife but must be critical only to the survival of a portion of

19. No. 3W0360-EB, Findings of Fact and Conclusions of Law (Vt. Env'tl. Bd., Oct. 19, 1981), *amended*, No. 3W0360-EB, Findings of Fact and Conclusions of Law (Vt. Env'tl. Bd., Feb. 25, 1982).

20. *Id.* at 1, 6.

21. *Id.* at 7.

22. *Id.*

23. *Id.*

24. *Id.*

25. The Board conditioned the permit on the applicant's maintenance of a ten-year wildlife management plan. *Id.* However, the Board ordered that if at the end of this ten-year period the opponents established that the area constituted "necessary wildlife habitat," the plan would be extended for another ten years. *Id.* It appears that the Board's decision turned on finding an absence of "necessary wildlife habitat" rather than finding no significant imperilment of that habitat.

26. *In re White Sands Realty Co.*, No. 3W0360-1-EB, Findings of Fact and Conclusions of Law at 1 (Vt. Env'tl. Bd., Feb. 25, 1982).

the population which is dependent upon the identified habitat."²⁷ The Board then modified its first *White Sands* decision and found that the winter deeryard in question did constitute "necessary wildlife habitat."²⁸ Nevertheless, the Board affirmed the issuance of the permit because it found that the proposed subdivision with its concomitant wildlife management plan would not destroy or significantly imperil the "necessary wildlife habitat."²⁹

Despite the Board's explicit rejection of a restrictive interpretation of "necessary wildlife habitat" in *White Sands*,³⁰ the issue continues to be raised by Act 250 applicants.³¹ Soon, however, in *In re Southview Associates*, the Vermont Supreme Court will address and should finally resolve this issue.³²

In *In re Southview*, the Board denied an Act 250 permit for a thirty-three unit residential development on eighty-eight acres solely because the proposed development failed to satisfy Criterion 8(A).³³ The property in question contained forty-four acres of dense conifers which constituted part of a larger 300 acre winter deeryard.³⁴ The proposed development would destroy ten acres of

27. *Id.* at 4.

28. *Id.* In its amendment to the first *White Sands* decision, the Board modified its condition for the issuance of the permit. The Board again ruled that the wildlife habitat management program be implemented for ten years. However, if at the end of those ten years an opposing party established that the area *continued* to be "necessary wildlife habitat," the plan would be extended for an additional ten years. *Id.*

29. *Id.* It is questionable whether this is an appropriate way to consider a wildlife management plan. The Criterion 8(A) threshold is met when a development or subdivision significantly imperils or destroys "necessary wildlife habitat." VT. STAT. ANN. tit. 10, § 6086(a)(8)(A) (1984). The statutory definitions of development and subdivision do not include wildlife management mitigation plans. *Id.* §§ 6001(3), (19). Further, there is a difference between a development scheme which will not significantly imperil "necessary wildlife habitat" because of its design and a development scheme which will not significantly imperil necessary "wildlife habitat" only because a wildlife management plan is implemented. The latter requires continuing affirmative duties to implement the wildlife management plan. It is solely the implementation of this plan which precludes Criterion 8(A) review.

Moreover, subcriterion 8(A)(ii) provides for rejecting a permit when an applicant does not or will not implement all "reasonable means of preventing or lessening the . . . imperilment of . . . the habitat." *Id.* For the text of this provision see *supra* note 8. Thus, wildlife management plans are more appropriately considered under this subcriterion.

30. *In re White Sands Realty Co.*, No. 3W0360-1-EB, Findings of Fact and Conclusions of Law at 4 (Vt. Envtl. Bd., Feb. 25, 1982).

31. See decisions cited *supra* notes 3-4.

32. No. 87-313 (Vt. filed July 24, 1987).

33. No. 2W0634-EB, Findings of Fact and Conclusions of Law and Order at 1 (Vt. Envtl. Bd., June 30, 1987), *appeal filed*, No. 87-313 (Vt. July 24, 1987).

34. *Id.* at 3.

the conifer stand.³⁵ In addition, the Board found that no other deeryards existed within a 10.7 square mile area.³⁶ The Board determined that the survival of the approximately twenty deer using the deeryard hinged on the existence of the softwood cover.³⁷

Initially, in *In re Southview*, the applicant urged the Board to reconsider its previous interpretations of "necessary wildlife habitat."³⁸ The applicant contended that the correct interpretation should be that a significant portion of a wildlife species must be threatened before the Criterion 8(A) threshold is met.³⁹ The applicant argued that the legislature intended that some "deer habitat can be destroyed . . . as long as *some* deer remained."⁴⁰

The Board emphatically rejected this interpretation. It agreed with the state that such a construction would lead to the absurd result of subjecting only the landowner who proposed to develop the last winter deeryard to Criterion 8(A):⁴¹ "the state deerherd would have to be on the verge of extinction before Criterion 8(a) would apply."⁴²

The Board then narrowed the issue to determine if the deeryard within the property is decisive to the survival of the deer that use it.⁴³ If that is answered affirmatively then the property in question is "necessary wildlife habitat."⁴⁴

Turning to the merits of the application, the Board concluded that the softwood cover on the Southview property is decisive to the survival of the deer that use it. Therefore, "necessary wildlife habitat" existed on the property.⁴⁵ The Board then held that the development, as proposed, would significantly imperil or destroy

35. *Id.* at 4.

36. *Id.* at 3.

37. *Id.* at 9.

38. *Id.* at 8.

39. The applicant contended that the word "significantly" in the Criterion 8(A) phrase "significantly imperil necessary wildlife habitat" refers to the number of animals rather than the destruction of habitat. *Id.* This argument is an offshoot of the typical restrictive interpretation of "necessary wildlife habitat." Nevertheless, it is even more spurious because "significantly" clearly qualifies habitat rather than the number of animals.

40. *Id.* (emphasis in original).

41. *Id.*

42. *Id.*

43. *Id.* at 8-9.

44. *Id.*

45. *Id.*

this "necessary wildlife habitat."⁴⁶ With the threshold requirement established, the development became subject to subcriteria review.⁴⁷ Ultimately, the Board rejected the permit application because it violated two of the Criterion 8(A) subcriteria.⁴⁸

Two other permit applications, both involving Killington Ltd. and black bear habitat, are currently on appeal before the Board.⁴⁹ In both cases, the applicants are challenging the Board's inclusive interpretation of "necessary wildlife habitat."⁵⁰ The applicants contend that "necessary wildlife habitat" is not a habitat which is "decisive merely to the survival of any particular bears which are dependent on it."⁵¹

46. *Id.*

47. *Id.* One member of the Board dissented arguing that deer are not endangered in Vermont. He predicted that the high rate of farms going out of business would result in farmland abandonment providing increased browse for white-tailed deer. *Id.* at 12 (Burnham, dissenting). Apparently, this Board member interprets "necessary wildlife habitat" restrictively rather than inclusively.

48. *Id.* at 9-10. As to subcriterion (ii), the Board observed that the primary benefit to the public from the development would be an increased tax base to the town. *Id.* at 9. However, the Board concluded that the evidence did not suggest that the town needed additional revenue. *Id.* In contrast, the Board concluded that the societal harm from the destruction of the "necessary wildlife habitat" would be significant. *Id.* In reaching this conclusion, the Board recognized both the tangible benefits from hunting and "the more intangible benefit [to the public] of knowing the deer exist." *Id.*

Addressing subcriterion (ii), the Board held that the applicants had not employed all feasible means of lessening the destruction of "necessary wildlife habitat." *Id.* The Board noted that several alternative sites within the property could be developed with significantly less impact than the presently proposed subdivision. *Id.* Furthermore, the Board observed that the applicant's economic objection to these alternatives were irrelevant to Act 250 compliance: "There is no language in Criterion 8(A) that suggests that the legislature intended that an applicant's previous investment in a property should bear on whether a permit should be issued." *Id.* at 11.

49. See Applicants' Notice of Appeal, *In re Killington, Ltd.*, No. 1R0584-EB (Vt. Env'tl. Bd., filed Aug. 13, 1987); Applicants' Notice of Appeal, *In re Norman R. Smith, Inc.*, No. 1R0593-1-EB (Vt. Env'tl. Bd., filed June 8, 1987).

50. See Applicants' Notice of Appeal at 2, *In re Killington, Ltd.*, No. 1R0584-EB (Vt. Env'tl. Bd., filed Aug. 13, 1987); Applicants' Notice of Appeal at 1, *In re Norman R. Smith, Inc.*, No. 1R0593-1-EB (Vt. Env'tl. Bd., filed June 8, 1987).

51. Applicants' Notice of Appeal at 2, *In re Killington, Ltd.*, No. 1R0584-EB (Vt. Env'tl. Bd., filed Aug. 13, 1987). See also Applicants' Notice of Appeal at 1, *In re Norman R. Smith, Inc.*, No. 1R0593-1-EB (Vt. Env'tl. Bd., filed June 8, 1987). The applicant in *In re Norman R. Smith* goes as far as suggesting that the habitat in question cannot be decisive to the survival of black bear because the bear population is currently healthy enough to support an eleven week long hunting season. *Id.* At best, this observation begs the question. It is because of the bear habitat that now exists that the black bear population can now support a hunting season. Allowing habitat to be destroyed solely because the population is healthy enough to be hunted ignores the fact that it is the quality of the habitat which determines the existence of wildlife populations. The applicant's argument turns sound wildlife management practices on its head by justifying habitat destruction whenever a spe-

As the above decisions indicate, a restriction of the Board's current interpretation of "necessary wildlife habitat" could have profound consequences on the reach of Act 250's wildlife habitat protection provisions. The next section focuses on whether the Board's interpretation is consistent with the meaning of the statute.

III. ANALYSIS OF ENVIRONMENTAL BOARD'S INTERPRETATION

The Vermont Supreme Court requires that a challenge to an administrative agency's interpretation of a statute must overcome a strong presumption in favor of the agency's conclusion: "[C]onstruction of statutes by those charged with their execution will be followed unless there are compelling indications that the construction is wrong."⁵² Accordingly, those challenging the inclusive interpretation of "necessary wildlife habitat" must proffer an alternative interpretation persuasive enough to overcome the traditional deference afforded to an administrative agency's statutory construction.⁵³

Generally, statutory interpretation begins with an analysis of the statute's plain meaning.⁵⁴ The inquiry, however, does not end there. The Vermont Supreme Court has often recognized that "[i]n construing a statute . . . [the] Court will not excerpt a phrase and follow what purports to be its literal reading without considering the provision as a whole."⁵⁵ In other words, "the true meaning of the legislature is to be ascertained not from a literal sense of the

cies exhibits signs of healthiness. This claim ignores the fact that a wildlife species can often best be protected without preserving the lives of all of its individual members. See Hardin, *Sentiment, Guilt, and Reason in the Management of Wild Herds*, 40 *COEVOLUTION Q.* 22, 26 (1983). Whether a species is stable enough to be hunted should have nothing to do with assessing whether "necessary wildlife habitat" exists. It is not hunting which threatens wildlife in Vermont but rather habitat destruction against which Act 250 purports to protect. See, e.g., *Vermont's Fish and Wildlife Habitat Threatened*, HABITAT HIGHLIGHTS (Winter 1986) (available from Vt. Fish & Wildlife Dep't).

52. *In re Agency of Admin.*, 141 Vt. 68, 74-75, 444 A.2d 1349, 1352 (1982) (citing Committee to Save the Bishop's House v. Medical Center Hosp. of Vt., 137 Vt. 142, 150, 400 A.2d 1015, 1019-20 (1979)). "We approach this review of administrative agency action with a gingerly step. Bathed in a singleness of concern and anointed with an aura of expertise, administrative actions have traditionally kept reviewing courts an arm's length away. This court has been no exception." *In re Agency of Admin.*, 141 Vt. at 74, 444 A.2d at 1351.

53. *Id.* See also *In re Spear St. Assocs.*, 145 Vt. 496, 499, 494 A.2d 138, 140 (1985).

54. See, e.g., *Hill v. Conway*, 143 Vt. 91, 93, 463 A.2d 232, 233 (1983).

55. *State v. Trucott*, 145 Vt. 274, 282, 487 A.2d 149, 154 (1984). See also *Proulx v. Parrow*, 115 Vt. 232, 236, 56 A.2d 623, 626 (1948); *Brammall v. Larose*, 105 Vt. 345, 349, 165 A. 916, 917 (1933).

words used, but from a consideration of the whole and every part of the statute, the subject matter, the effect and consequences and the reason and spirit of the law."⁵⁶ Even if it is assumed that the literal meaning of "necessary wildlife habitat" contemplates the effect on the whole species rather than a portion of the species, this interpretation must still be congruous with Act 250 or it must be rejected.

Reading the "necessary wildlife habitat" definition along with Criterion 8(A), it becomes apparent that a broad interpretation is necessary to give life and meaning to the statute. If "necessary wildlife habitat" were interpreted to mean only that habitat decisive to the species as a whole rather than portions of it, then Criterion 8(A)'s requirements would be implicated only when the last members of a Vermont wildlife species were threatened by a development.⁵⁷ Criterion 8(A) would then be inapplicable until the damage to the habitat was irreversible.

Furthermore, such a restrictive interpretation would virtually insure that whenever a "necessary wildlife habitat" exists, the permit application will not satisfy subcriterion (i). To illustrate, subcriterion (i) requires that a permit not be issued when the societal costs from the habitat destruction exceed the societal benefits from the development.⁵⁸ If this subcriterion did not apply until the species within the state were threatened by the development or subdivision it would be unlikely that the benefits of the development would outweigh the social costs. Therefore, a restrictive interpretation of "necessary wildlife habitat" would render subcriterion (i)'s balancing requirement effectively nondiscretionary. This could not have been the legislature's intention because the statute delineates a scheme for thoroughly inquiring into the societal costs and benefits of a proposed development or subdivision.

Moreover, as the Board observed in *In re Southview Associates*, a restrictive interpretation of "necessary wildlife habitat" would render Criterion 8(A)'s reference to "endangered species" redundant.⁵⁹ That a statute should not be interpreted to render

56. *Noble v. Fleming's Estate*, 121 Vt. 57, 59, 147 A.2d 889, 890 (1959).

57. See *In re Southview Assocs.*, No. 2W0634-EB, Findings of Fact and Conclusions of Law and Order at 8 (Vt. Env'tl. Bd., June 30, 1987), *appeal filed*, No. 87-313 (Vt. July 24, 1987).

58. VT. STAT. ANN. tit. 10, § 6086(9)(8)(A)(i) (1984).

59. *In re Southview Assocs.*, No. 2W0634-EB, Findings of Fact and Conclusions of Law and Order at 8 (Vt. Env'tl. Bd., June 30, 1987), *appeal filed*, No. 87-313 (Vt. July 24, 1987).

any provision superfluous is an elementary rule of statutory construction.⁶⁰ Accordingly, the restrictive interpretation of "necessary wildlife habitat," which renders the statute's reference to "endangered species" superfluous, should be rejected.

In contrast to a restrictive interpretation of "necessary wildlife habitat," the Board's inclusive interpretation is complementary to Criterion 8(A) in its entirety. The Board's interpretation allows the subcriteria to be dispositive as to when a permit is issued.

This allows a sensible inquiry into the effects of the proposed development on wildlife populations and consideration of alternative development plans. Although a development or subdivision proposal triggers Criterion 8(A) review by significantly imperiling "necessary wildlife habitat," it does not necessarily mean that a permit will be denied. An opposing party still retains the burden of satisfying the subcriteria. While a small number of deer or other wildlife species may satisfy the Board's interpretation of "necessary wildlife habitat," it is less likely that a development opponent could establish that the social costs of the habitat destruction would outweigh the benefits of the development pursuant to sub-criterion (i).

Similarly, the fewer animals dependent on the habitat, the less likely it is that opponents could show, pursuant to subcriterion (ii), that all reasonable means of preventing or lessening the habitat imperilment are not being applied. What is reasonable to mitigate habitat imperilment for twenty deer may not be reasonable for two deer. Further, even if the development imperils a few deer, sub-criterion (ii) alone would not prohibit a permit from being issued as long as reasonable mitigation means are implemented.

CONCLUSION

Act 250 mandates consideration of a development's effect on "necessary wildlife habitat." A literal interpretation of Act 250's own definition of "necessary wildlife habitat," however, suggests

In defining "endangered species" Act 250 refers to the Protection of Endangered Species Act. See VT. STAT. ANN. tit. 10, § 6001(5) (1984). In the Protection of Endangered Species Act, endangered species are defined, inter alia, as "species whose continued existence as a viable component of the state's wild fauna or flora is in jeopardy." *Id.* § 5401(6).

60. 2A SUTHERLAND STATUTORY CONSTRUCTION § 46.06 (4th ed. 1984). "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous . . ." *Id.*

that only habitat which is decisive to the survival of a whole species of wildlife is embraced by the statute's safeguards.

This literal interpretation, nevertheless, is incongruous with the statute as a whole and, therefore, should be rejected. Specifically, if this interpretation were implemented, Act 250's wildlife habitat protections would be virtually nugatory in the vast majority of proposed developments. In addition, because a literal interpretation of "necessary wildlife habitat" would impute a meaning that is very similar to "endangered species" the interpretation would render Criterion 8(A)'s protection of "endangered species" superfluous.

In contrast, the Environmental Board interprets "necessary wildlife habitat" as that habitat which is decisive to a portion of a species of wildlife. Because the burden of proof is always on those parties opposing a development, the Board's interpretation of "necessary wildlife habitat" by no means precludes development. Rather, this interpretation allows closer scrutiny of a development and compels a balancing between growth and preservation harmonious with Act 250's general policy.

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