DEVELOPMENTS IN VERMONT LAW

HEAR NO EVIL, SEE NO EVIL: *IN RE SPENCER* AND THE TWILIGHT OF JUDICIAL SCRUTINY IN VERMONT*

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INTRODUCTION

In the latter part of the 1980's, there has been an increasing tendency on the part of Vermont state agencies to take adversarial positions with respect to real estate development projects proceeding through various state permit processes. This trend has been particularly apparent in proceedings pursuant to Vermont's comprehensive environmental review statute, commonly known as Act 250.[1]

Act 250 requires developers of projects and subdivisions falling within its jurisdiction to apply for a state land use permit.[2] The permit application must be submitted to one of the nine district environmental commissions which act as quasi-judicial bodies to determine whether and under what conditions a land use permit

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* Citations used in this article are in accordance with the *Uniform Vermont Citations*, a publication of the *Vermont Law Review*, and commonly known as the *Green Book*. Copies are available by writing to Vermont Law Review, Vermont Law School, South Royalton, VT 05068, or by calling (802) 763-8303.

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1. 10 V.S.A. §§ 6001-6092 (1984 & Supp. 1989).

2. In short, permits are required under Act 250 for all developments above an elevation of 2,500 feet; commercial and industrial developments involving more than one acre (if within a town with zoning and subdivision bylaws then jurisdiction is triggered by developments involving more than ten acres); construction of housing developments with ten or more units within a five mile radius of any point on the lot; municipal projects involving more than ten acres of land or more than ten dwelling units; and the extraction or processing of fissionable source materials. 10 V.S.A. § 6001(3) (Supp. 1989); Environmental Board Rules Annotated, Rule 2(A) (1988) [hereinafter Vt. Envtl. Bd. Rules]. Permits are also required when a person partitions land for the purpose of resale into ten or more lots within a radius of five miles of any point on the lot, or within the jurisdictional area of the same district commission, within any continuous period of five years. 10 V.S.A. § 6001(19) (Supp. 1989); Vt. Envtl. Bd. Rule 2(B) (Aug. 1985).

may be issued for development or subdivision of land.[3] The applicant is required to give notice of its application to all of the so-called statutory parties.[4] These parties may request a hearing and present evidence in opposition to the project.[5] The Environmental Board Rules (Board Rules) also allow the commissions to grant party status to individuals who claim that they have an interest which may be affected by the project or who claim they can provide assistance to the commission in the hearing process.[6] A district commission, in granting or denying a permit, makes findings of fact and conclusions of law with respect to the project's conformity with certain criteria.[7] A commission's ruling may be ap-

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3. For the purpose of administering Act 250, Vermont has been divided into nine districts. 10 V.S.A. § 6026(a) (1984). "A district environmental commission is created for each district. Each district commission shall consist of three members from that district appointed . . . by the governor so that two appointments expire in each odd numbered year." 10 V.S.A. § 6026(b) (Supp. 1989).

4. Statutory parties include:

> (1) The municipality in which the project site is located, and the municipal and regional planning commissions for that municipality; and if the project site is located on a border, any Vermont municipality adjacent to that boundary and the municipal and regional planning commissions for that municipality;
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> (2) Any state agency directly affected by the proposed project, and any state agency receiving notice of the proceedings through the Interagency Act 250 Review Committee;
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> (3) Any adjoining property owner who requests a hearing, or who requests the right to be heard by entering an appearance on or before the first day of a hearing that has been previously scheduled; and
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> (4) Any other person who receives official notice of the proceedings from the board or district commission . . . as it deems appropriate.

Vt. Envtl. Bd. Rule 14(A) (1988).

5. 10 V.S.A. § 6085 (1984); Vt. Envtl. Bd. Rule 14 (1988).

6. Vt. Envtl. Bd. Rule 14(B) (1988).

7. These criteria require that the development or subdivision

> (1) will not result in undue water or air pollution;
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> (2) will have sufficient water available for the reasonably foreseeable needs of the subdivision or development;
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> (3) will not cause an unreasonable burden on an existing water supply;
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> (4) will not cause unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result;
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> (5) will not result in unreasonable congestion or unsafe conditions of highways or other means of transportation;
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> (6) will not cause an unreasonable burden on the ability of a municipality to provide educational services;
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> (7) will not place an unreasonable burden on the ability of the local governments to provide municipal or governmental services;
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> (8) will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas;
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> (9) is in conformance with a duly adopted capability and development

pealed by any party to the application to the Environmental Board (the Board),[8] but only statutory parties may subsequently appeal to the Vermont Supreme Court.[9]

State agencies, as statutory parties, are granted the most expansive type of party status. Those agencies "directly affected" by specific projects[10] may proceed through the full appeals process before the Board and the Vermont Supreme Court.[11] Thus, state

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plan and land use plan when adopted; and

(10) is in conformance with any duly adopted local or regional plan or capital program under Chapter 117 of Title 24.

See 10 V.S.A. § 6086 (1984 & Supp. 1989). A permit may not be denied solely for noncompliance with subdivisions (5), (6), and (7), but the commission may attach reasonable conditions and requirements to the permit to address any concerns which have been raised. 10 V.S.A. §§ 6086(c), 6087 (1984). The burden is on the applicant to prove compliance with criteria (1)-(4), (9), and (10), while with respect to subdivisions (5)-(8) the opposing party has the burden to prove an unreasonable or adverse effect. 10 V.S.A. § 6088 (1984).

8. The Environmental Board is an independent regulatory body that provides administrative support to the Agency of Natural Resources, an umbrella agency which is primarily responsible for the protection of Vermont's environment. 3 V.S.A. §§ 2802, 2878 (Supp. 1989). The Board consists of nine members appointed by the governor with the advice and consent of the Senate, and five appointments expire in each odd numbered year. 10 V.S.A. § 6021 (1984). The Board is authorized to set rules for itself to the extent granted by 3 V.S.A. §§ 801-848 (1985 & Supp. 1989). On an appeal from a district commission, the Board is required to hold a de novo hearing on any findings requested by any party. 10 V.S.A. § 6089 (Supp. 1989).

9. 10 V.S.A. § 6089 (Supp. 1989). For a more detailed discussion of Act 250's administration, see Note, *Act 250's "Necessary Wildlife Habitat" Definition: How Much Wildlife Does It Embrace?*, 12 VT. L. REV. 531 (1987); Note, *Formal Enforcement of Act 250*, 10 VT. L. REV. 469 (1985); Note, *The Effect of Act 250 on Prime Farmland in Vermont*, 6 VT. L. REV. 467 (1981); Note, *Vagueness and Overbreadth: The Constitutional Challenges to Vermont's Land Use and Development Law (Act 250)*, 5 VT. L. REV. 329 (1980); Note, *Party Status and Standing Under Vermont's Land Use and Development Law (Act 250)*, 2 VT. L. REV. 163 (1977).

10. *See supra* note 4 and accompanying text. As a matter of course, state agencies automatically receive notice of Act 250 applications through the interagency notification process (the so-called "Act 250 club") upon the filing of an application. Thus, agencies themselves make the decision regarding whether or not they are "directly affected" within the meaning of the Act without any realistic opportunity for challenge or appeal by applicants.

11. 10 V.S.A. § 6085(c) (1984); *see also* Vt. Envtl. Bd. Rule 14(A)(2) (1988), which seemingly expands the scope of potential agencies obtaining party status to "any state agency directly affected by the proposed project, *and* any state agency receiving notice of the proceedings through the Interagency Act 250 Review Committee." *Id.* (emphasis added). The Rule thus implies that the mere fact of receiving notice is enough to confer an agency with statutory party status on appeal. However, the statute likewise makes it clear that an agency is only entitled to notice in the first instance if it is "directly affected." 10 V.S.A. § 6084(b) (1984). This stands in contrast with the limited status granted to adjoining property owners under 10 V.S.A. § 6085(c) and the so-called Rule 14(B) parties. Rule 14(B) parties, known as "permitted parties," are parties that the Board or district commissions may permit if it is demonstrated that the parties' interest may be affected or that their participation will materially assist the Board. Such individuals have been held not to have the right to

agencies, and persons setting policy for those agencies, wield tremendous influence in the Act 250 permit process and consequently in the approval process for virtually every significant development in Vermont. Even a straightforward appeal by an agency to the Board from a district commission decision can result in a significant delay in commencing construction, resulting in potential adverse changes in market conditions, potential increases in capital costs and, ultimately, potential loss of a project.[12] More generally, state agencies might apply ambiguous technical provisions in their rules against the property owner, or as a matter of routine may take an adverse position on any application of consequence. Either approach can effectively turn the permit process into a method for implementing demographic philosophy rather than a system of allowing controlled and environmentally conscientious use of land, which was the original purpose behind Act 250.[13]

I. Recent Trends of Vermont State Agencies

The utilization of statutory party status which agencies presently enjoy in the Act 250 permit process has resulted in a number of disturbing trends in agency participation. These trends can be illustrated by a brief discussion of the activities of various state agencies.

A. Agency of Natural Resources, Department of Environmental Conservation Protection Division

As a technical compliance agency, the Department of Environ-

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pursue an appeal from the Environmental Board to the Vermont Supreme Court. *See In re* Adams & Co., 134 Vt. 172, 353 A.2d 576 (1976).

12. Jonathan Brownell, a Norwich attorney who helped write Act 250 nearly twenty years ago, is among a chorus of critics who say that the Act is thwarting business growth by making it too easy for opponents to stop a project or slow the process down to a point at which a developer can get frustrated and abandon the project. Rutland Herald, June 4, 1989, at 8, col.1. In addition, in February of 1989 Arthur Sanborn, Vermont's Economic Development Commissioner, wrote Governor Kunin a memorandum citing alleged lengthy delays caused by Act 250 review. *Id.* at 8, col.2.

13. Public Act No. 250, § 1 (1969 Vt., Adj. Sess.) provides in pertinent part that

> it is necessary to regulate and control the utilization and usages of lands and the environment to insure that, hereafter, the only usages which will be permitted are not unduly detrimental to the environment, will promote the general welfare through orderly growth and development, and are suitable to the demands and needs of the people of this state.

Id.

mental Conservation Protection Division[14] has been inflexible in applying the Environmental Protection Rules[15] (Protection Rules) to projects. The Division has, under these rules, asserted jurisdiction over certain development projects even though the rules themselves make it clear that no such jurisdiction should exist.[16] The applicant is usually not given the benefit of the doubt where soil tests reveal marginally favorable results or where ambiguous or self-contradictory wording in the Protection Rules could favor that applicant's position.[17] The district commissions have also made it a

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14. Under 3 V.S.A. § 2873 (1985 & Supp. 1989),

> [t]he department of environmental conservation is created within the agency of natural resources. The department is the successor to and continuation of the department of water resources and environmental engineering, and shall administer the water resources programs contained in Title 10, air pollution control and abatement as provided in Chapter 23 of Title 10; waste disposal as provided in chapter 159 of Title 10, and subdivision and trailer and tent sites as provided in subsection (c) of [3 V.S.A. § 2873].

Id. Associated with the Department of Environmental Conservation are engineers, who are responsible for the state's small-scale water and sewage programs, including permit issuance. DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, PLANNING RESOURCE GUIDE 119 (Jan. 1990).

15. *See* Environmental Protection Rule 1-01(B) (Sept. 10, 1982), which provides that

> [t]he purpose of these rules is to prevent health hazards, unsanitary conditions, and groundwater or surface water pollution caused by improper subdivision of land, construction and operation of campgrounds, mobile home parks and public buildings; or from water supplies or treatment and disposal of sewage from sources within the jurisdiction of these rules.

Id.

16. *See, e.g.*, letter from David R. Swift, Regional Engineer, to R. Brownson Spencer II, P.E. (July 15, 1988). Swift, the regional engineer for the Department of Water Resources Protection Division (the compliance agency for the Department of Environmental Conservation), stated that the Division has jurisdiction over the conversion of a twelve bunk ski dorm into a two bedroom and one bedroom apartment utilizing the same septic system, water supply, and plumbing. He asserted this even though Environmental Protection Rule 4-03(B) creates jurisdiction in this circumstance only in the event of "any alteration of or addition to water supply, sewage disposal, or plumbing facilities." *Id.* The Division has also taken the position that the addition of an apartment to a single family residence will require a public building permit pursuant to the Environmental Protection Rules, despite the fact that the jurisdictional definition specifically excludes "single family residences under individual ownership." Envtl. Protection Rule 4-02(A) (Sept. 1982).

The Water Resources Protection Division has also taken the position that a group of individuals gathered in a private person's dwelling on an irregular basis renders that dwelling a "public building" within the meaning of Protection Rule 4-02; as such, the dwelling requires a permit. Letter from David R. Swift, Regional Engineer, to Nehemiah Assoc. (July 28, 1988) (where the engineer took the position that a group of individuals gathered in a private home for bible study sessions made that home a "public building" requiring a permit). However, Environmental Protection Rule 4-02(A) (Sept. 10, 1982) nowhere encompasses private gatherings in a person's home as "places of employment, motels and hotels, restaurants, filling stations" or other uses typically deemed "public buildings." *Id.*

17. For example, Protection Rule 7-08(A)(1)(b) states that in-ground septic systems

standard practice to review subdivision projects proceeding through Act 250 against the Protection Division standards for soil and sewage disposal even when the Protection Rules are wholly inapplicable to a project and a Protection Division subdivision permit is not necessary (*e.g.*, as in the case of lots over ten acres in size).[18]

B. Agency of Development and Community Affairs, Department of Historic Preservation

Recently, the Division of Historic Preservation[19] has entered appearances in several major Act 250 proceedings in the southern part of Vermont where the lands in question were located along rivers or other larger water ways.[20] The Division has asked district commissions to impose permit conditions which either require intensive archaeological inventories of areas along these water bodies prior to development, or which would prohibit development on these lands entirely.[21] The Division has argued that simply because

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must have a primary and replacement area "which comply with all requirements." *Id.* Moreover, appendix 7(D) of the Environmental Protection Rules provides that "[n]o disposal field or replacement area shall be closer than 10 feet to one another." Envtl. Protection Rules, Appendix 7(D) (Sept. 10, 1982). However, Protection Rule 7-08(A)(1)(b) specifies that if a replacement trench is situated between primary trenches, the separation distance need only be four feet. This has led to an anomaly in the situation in which a system consists of only a single trench, *i.e.*, the required separation distance could be either four feet or ten feet. The Division routinely employs the ten foot number, thus taking the position most restrictive to a property owner faced with a small or difficult site.

18. Envtl. Protection Rule 3-02(D) (Sept. 10, 1982). *See also In re* Provencher, No. 8B0389-EB, Findings of Fact and Conclusion of Law (Vt. Envtl. Bd., Oct. 19, 1988), which involved a five lot subdivision on 530 acres of land with lots ranging from 28 to 340 acres in size. Both the District Commission and the Board insisted on review of the lots against Protection Division Regulations. *Id.*

19. The Division of Historic Preservation was created under 22 V.S.A. § 721 (1987). The Division is in charge of the research, protection, restoration, and rehabilitation of buildings, structures, objects, districts, areas, and sites significant in the history, architecture, archaeology, or culture of Vermont. 22 V.S.A. §§ 701-791 (1987).

20. *See, e.g., In re* Patten Corp. Northeast, No. 2W0762, Findings of Fact and Conclusions of Law (Dist. Envtl. Comm'n, No. 2, June 16, 1989); *In re* Tamarack, Application No. 2W077 (Dist. Envtl. Comm'n, No. 2, filed May 16, 1988).

21. *See, e.g., In re* Patten Corp. Northeast, No. 2W0762, Findings of Fact and Conclusions of Law (Dist. Envtl. Comm'n, No. 2, June 16, 1989) (where the District Commission required the permittees to develop a plan acceptable to the Division to protect potential archaeological resources prior to any construction or sale of the affected lots); *In re* Riverside Indus. Condominiums, No. 4C0313-EB, Findings of Fact and Conclusions of Law and Order (Vt. Envtl. Bd., Dec. 10, 1987). In *Riverside*, the Board denied a request for the revocation of Riverside's Land Use Permit after the Division and Riverside reached a settlement agreement. The agreement required Riverside to install a barrier between the development and alleged archaeological sites, and prohibited excavation or disturbance of any land in the

such lands are located adjacent to water bodies they could contain prehistoric Indian burial grounds or settlements and thus should not be disturbed in any way without a complete archaeological reconnaissance of the site.[22]

C. Agency of Natural Resources, Department of Fish and Wildlife

Habitat and game biologists from the Department of Fish and Wildlife[23] routinely request transfers of development rights, conservation easements, covenants, and other restrictions in any area in which a potential deeryard or deer wintering habitat exists.[24] While such areas had previously been assumed to be limited to land with both low lying pine cover and south facing slopes,[25] the

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area. *Id.*

22. *See In re* Patten Corp. Northeast, No. 2W0762, Land Use Permit (Dist. Envtl. Comm'n, No. 2, June 16, 1989). The same district commission which imposed the permit condition mandating an archaeological assessment in *In re Patten* denied such a request from the Division in *In re Tamarack*. This result was partly the product of the rule which imposes the burden of proof on the parties opposing an application. 10 V.S.A. § 6088(b) (1984). Thus, district commissions should not impose site assessment mandates if the only evidence introduced by the Division is its in-house archaeological profile. The Division has requested archaeological inventories, in some cases at a great cost to the applicants, even when it has been unable to produce any evidence of actual archaeological significance of the site. *See In re* Patten Corp. Northeast, No. 2W0762, Land Use Permit (Dist. Envtl. Comm'n, No. 2, June 16, 1989).

23. The Department of Fish and Wildlife, previously the Department of Fish and Game, is a department of the Agency of Natural Resources. 3 V.S.A. § 2831 (Supp. 1989). The Department is in charge of the protection, propagation control, management, and conservation of fish, game, and fur-bearing animals in the state. *See* 10 V.S.A. §§ 4041-4198 (1984 & Supp. 1989).

24. The Department is authorized to acquire interests in real estate, including development rights, conservation easements, and other acquisitions intended to foster wildlife management and other conservation purposes. 10 V.S.A. § 6302 (1984 & Supp. 1989). Examples of such acquisitions by the Department are found in *In re* Patten Corp. Northeast, No. 2W0762, Findings of Fact and Conclusions of Law (Dist. Envtl. Comm'n, No. 2, June 16, 1989) and *In re* J.P. Carrara & Sons, Inc., No. 1R0589-EB, Findings of Fact and Conclusions of Law and Order (Vt. Envtl. Bd., Feb. 17, 1988). In *Patten*, the applicant created a 436 acre conservation easement and agreed to several covenants in order to satisfy 10 V.S.A. § 6086(a)(8)(A) (Criterion 8(A)). In *Carrara*, the applicant, the state, and the town entered into a confidential developments rights agreement. The agreement specified that the applicant agreed to purchase the development and timber rights on approximately 300 acres of land and convey these rights to the state to mitigate the impact the applicants' project would have on the existing deeryard at a ratio of five acres preserved for every acre impacted.

25. The Fish and Wildlife Department stated that:

> [t]he state's ability to support specific populations of deer depends upon several factors, one of which is the availability of the animal's critical habitat. The strong influence of winter on the survival of Vermont's herd requires

Department takes the position that either of these two factors in isolation may in fact constitute a deer wintering area worthy of protection.[26] Applicants cannot rely upon published deeryard maps or bear habitat maps in assessing whether their potential site contains "significant" wildlife habitat. In some instances, the Department has completely repudiated its own written "no-impact" evaluation of a project site at the Act 250 hearing itself after the applicant has spent months and thousands of dollars in application, engineering and attorney fees (and other such costs), or actually purchased the property itself, in reliance on the Department's earlier determination.[27]

The Department also routinely attempts to encourage the imposition of restrictive covenants on wetland areas or areas that could be defined as wetlands under 10 V.S.A. § 6086(a)(1)(G) or as "necessary wildlife habitats" under 10 V.S.A. § 6086(a)(8)(A), but which do not appear on the Federal Wetlands Inventory Map or any other objective information source available to applicants.[28] This activity has largely been viewed as an effort to protect the

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> that particular attention be given to deer wintering areas (also known as deer yards). Deer migrate to and concentrate within these habitats to escape deep snow and inclement weather. *These purposes are most often served by lands comprised of one or more of the following—softwood cover, south or west facing slopes, and lower elevation.*

DEP'T. OF FISH AND WILDLIFE, DRAFT DEER MANAGEMENT PLAN FOR THE STATE OF VERMONT 10, 1990-95 (1989) (emphasis added).

26. *Id. See also In re* Provencher, No. 8B0389, Findings of Fact and Conclusions of Law and Order to Deny Permit, (Dist. Envtl. Comm'n, No. 8, July 24, 1987) (where the Department took the position that a south facing slope, without significant softwood cover, constituted a deer wintering area and, as such, a necessary wildlife habitat under Criterion 8).

27. *See In re* Catamount Cobble, No. 8B0405, Pre-hearing comments (Dist. Envtl. Comm'n, No. 8, May 23, 1989). In *Catamount Cobble*, the applicant requested and received a "no-impact" letter from the Department prior to submitting its Act 250 application and preparing its final site plan for a 64 lot subdivision. Letter from Scott R. Darling, Regional Engineer, to Catamount Cobble (March 13, 1987). At an initial hearing, the Department entered an appearance and despite the "no-impact" letter alleged that a subsequent review revealed that a beech stand displaying historical black bear usage existed a half mile from project site. The Department requested complete reconfiguration of the rear one-third of the property. *See also In re* Mountain View Ventures, No. 2W0815 (Dist. Envtl. Comm'n, No. 2, May 29, 1989) (application withdrawn Feb. 26, 1990), where the Department provided a no-impact letter to an applicant who then purchased the project site in reliance upon that letter. At the initial hearing, the Department entered an appearance and alleged that a significant deer wintering area existed on the site despite its prior determination. *Id.*

28. *See* 10 V.S.A. §§ 6086(a)(1)(G), (a)(8)(A) (1984 & Supp. 1989). *See also In re* Nehemiah Associates, No. 1R0672, Findings of Fact and Conclusions of Law and Order to Issue Permit (Dist. Envtl. Comm'n, No. 1, Dec. 27, 1989) (requiring a "no-build, no-cut buffer" and tree plantings around a wetland).

wetland or "wet area" itself for its intangible value even though until recently there were not any applicable wetlands protection regulations promulgated by the State which could be given force through Act 250.[29]

D. Impact of State Agencies on Land Use Planning

The above positions taken by state agencies in Act 250 proceedings acquire force of precedent when endorsed by the local district commissions and ultimately the Environmental Board which, like the directors of the state agencies themselves, are appointees of the Governor of the State of Vermont.[30] Thus, great potential exists for purposely utilizing the Act 250 and related permit processes as a way of implementing "growth control" politics rather than as a method of allowing growth which is environmentally sound.

As the pressure from the regulators upon the regulated increased, the Vermont Supreme Court continued to be an apparent bastion of rationality; on appeal, an Act 250 applicant subject to regulatory overreaching could have recourse to a forum of last resort.[31] The Court continued to apply the standard rule of construction that land use regulations, which are in derogation of common law property rights, must be strictly construed in favor of the property owner.[32] Applicants could still count on both a complete

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29. 10 V.S.A. § 6086(a)(1)(G) (Supp. 1989). On February 7, 1990, the Water Resources Board adopted the Vermont Wetland Rules pursuant to 10 V.S.A. § 905 (1984 & Supp. 1989). Prior to this date there were no permanent rules which could be utilized under *id.* § 6086(a)(1)(G) (Criterion 1(G)).

30. 10 V.S.A. § 6021 (1984) (members of the Environmental Board are appointed by the Governor with the advice and consent of the Senate); *id.* § 6026(b) (Supp. 1989) (Governor has sole discretion in the appointment of district commissioners). *See also supra* notes 3 & 8 and accompanying text.

31. 10 V.S.A. § 6089(a) (Supp. 1989). Section 6089(a) provides for appeals from the district commissions to the Board while subsection (b) provides for appeals to the Vermont Supreme Court from the Board. *See also supra* notes 8 & 9 and accompanying text.

32. *See, e.g., In re* Agency of Admin., 141 Vt. 68, 444 A.2d 1349 (1982) (striking Board Rule 2(D), which defines "construction of improvements," as being overbroad since it went beyond the clear intent of the enabling act and was not reasonably related to or necessary for its purposes); Smith v. Winhall Planning Comm'n, 140 Vt. 178, 436 A.2d 760 (1981) (adopting the minority rule that the filing of an application for a permit or issuance of the permit vest rights in the applicant against future changes in zoning regulations); Committee to Save the Bishop's House v. Medical Center Hosp., 137 Vt. 142, 400 A.2d 1015 (1979) (the wording of Board Rule 2(F) was held to be too vague in that it permitted a construction of involved land that authorizes the district commissions to assert Act 250 jurisdiction where the plain policy of the act indicates that the fate of a project should be left to local deci-

review of the record and opinions which could provide guidance for future applicants in preparing their applications.

II. *In Re Spencer* AND THE VERMONT SUPREME COURT

A. The Appellants' Challenge

The Vermont Supreme Court's practice of strictly construing land use regulations in favor of property owners has been severely eroded. In the last few years, the Court has adopted increasingly expansive interpretations of state and local governments' ability to regulate land use at the expense of traditional common law property rights.[33] In reviewing decisions of administrative agencies, the Court has not engaged in a deferential standard of review, but has written a blank check to agencies in their findings of fact and conclusions of law.[34] However, none of these recent cases could have

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sion); *In re* Adams & Co., 134 Vt. 172, 353 A.2d 576 (1976) (holding that a Rule 14(B) party's right to participate at both administrative levels did not extend to Vermont Supreme Court appeals); *In re* Preseault, 132 Vt. 471, 315 A.2d 244 (1974) (holding that where a proceeding has already been validly brought and pursued in good faith, the intervening adoption of a conflicting municipal plan cannot, by itself, prevent the granting of a permit which implements rights available under the previous law); Murphy Motor Sales v. First Nat'l Bank, 122 Vt. 121, 123, 165 A.2d 341, 342 (1960) ("[W]here a zoning ordinance provides merely that certain specified trades, businesses, or uses shall not be permitted in a specified zone any business other than those expressly excluded may be conducted therein, provided it is so carried on as not to be in and of itself a nuisance.").

33. *See, e.g., In re* McShinsky, No. 88-312 (Vt. Feb. 9, 1990) (affirming the denial of an Act 250 permit for a campground for recreational vehicles because the Board believed it would detract from the natural beauty of the area even though the project was strongly supported by the community); *In re* Pilgrim Partnership, No. 88-545 (Vt. Feb. 9, 1990) (upholding the denial of an application on grounds of traffic, even though the "congestion" in the area was preexisting, was not caused by the project, and would not be appreciably increased by the project); *In re* Southview Assoc., No. 87-313 (Vt. Dec. 1, 1989) (affirming the denial of an Act 250 permit under 10 V.S.A. § 6086(a)(8)(A) because the development would destroy ten acres out of a 280-320 acre deeryard which supported approximately twenty deer); *In re* Conway, No. 88-465 (Vt. Sept. 22, 1989) (remanding the case because the applicant did not give actual notice to an adjoining property owner despite the Assistant District Coordinator's statement that actual notice was not required); *In re* Vitale, No. 87-312 (Vt. April 21, 1989) (expanding the statutory definition of control for Act 250 jurisdiction to include practical control by looking at certain factors before and after the sale of the involved land); *In re* Ross, No. 87-565, slip op. (Vt. Jan. 27, 1989) (holding that a developer did not have vested interest in having its proposal considered under original town plan, by virtue of filing an incomplete application for limited review of its proposal by district commission while amendment of town plan was being considered); *In re* Hawk Mtn. Corp., 149 Vt. 179, 542 A.2d 261 (1988) (holding that the Environmental Board did not exceed its authority by requiring applicants for land use permit to obtain a water discharge permit even though the Agency of Environmental Conservation had waived the requirement).

34. *See, e.g., In re* McShinsky, No. 88-312 (Vt. Feb. 19, 1990); *In re* Pilgrim Partnership, No. 88-545 (Vt. Feb. 19, 1990); *In re* Vitale, No. 87-312 (Vt. April 21, 1989).

heralded the decision rendered by the Court in *In re Spencer*.[35] This case presents a striking indication of how far the Court is prepared to go to support land use regulation, particularly in the context of Act 250. The case also raises significant questions regarding the future role of the Court in providing judicial oversight of what, as noted above, is essentially a politically driven permit process.[36]

In *Spencer*, the appellants challenged the validity of Board Rule 2(A)(6), the so-called "800 foot road" Rule (the Road Rule),[37] and alleged that the Rule exceeds the enabling legislation of Act 250. The Road Rule provides for Act 250 jurisdiction over road improvements more than 800 feet in length or which serve more than five lots on either a parcel of land more than ten acres or one acre in size, depending on whether the municipality has local zoning and subdivision regulations.[38] The appellants in *Spencer* purchased 110 acres of land and subsequently sold seventeen acres to a third party. Access to the seventeen acre parcel was via a right-of-way which also provided access to the balance of the lands owned by Spencer and other persons to the east.

The purchaser of the seventeen acre tract constructed a 1,500 foot access driveway in accordance with town specifications to serve his property exclusively. Subsequently, the appellants and the owner of the seventeen acre tract filed an application for an Act 250 permit seeking to utilize this driveway to access an additional three acre lot to be subdivided from the seventeen acre parcel, and seven additional lots to be subdivided from land held by the appellants. Under the then current law, Act 250 jurisdiction

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35. No. 87-158 (Vt. June 2, 1989), *reh'g denied*, Entry Order, No. 87-158 (Aug. 22, 1989).

36. *See supra* notes 3, 8, 30 and accompanying text.

37. Environmental Board Rule 2(A)(6) provides:

> The construction of improvements for a road or roads, incidental to the sale or lease of land, to provide access to or within a tract of land of more than one acre owned or controlled by a person. In municipalities with both permanent zoning and subdivision bylaws, this jurisdiction shall apply only if the tract or tracts of involved land is more than ten acres. For the purpose of determining jurisdiction, any parcel of land which will be provided access by the road is land involved in the construction of the road. This jurisdiction shall not apply unless the road is to provide access to more than five parcels or is to be more than 800 feet in length. For the purpose of determining the length of a road, the length of all other roads within the tract of land constructed within any continuous period of ten years commencing after the effective date of this rule shall be included.

Vt. Envtl. Bd. Rule 2(A)(6) (1988).

38. *Id.*

arose solely by virtue of the Road Rule, which applied due to the road construction.[39]

The appellants received an Act 250 permit. However, a condition in the permit specified that none of the remaining unsubdivided lands of the appellants accessed by the driveway could be subdivided and no further use of the road made without the approval of, and hence a permit amendment from, the District Commission.[40] The appellants appealed this condition to the Environmental Board. On March 10, 1987, the Board issued its findings of fact and conclusions of law stating, in part, that the driveway was built for the commercial purpose of selling lots and that Act 250 jurisdiction attached pursuant to Rule 2(A)(6).[41] The Board went on to say that because of the construction of the driveway, Act 250 jurisdiction attached to all of the unsubdivided lands owned by appellants accessed by the driveway, and that those lands had to be included as "involved lands under the Rule."[42] As a consequence, any subdivision of the remaining land retained by the appellants would require an Act 250 permit. The appellants appealed to the Vermont Supreme Court.

The appellants argued that Rule 2(A)(6) is invalid because it administratively expands the jurisdiction of Act 250 beyond the scope of the statute.[43] The argument was premised on the principle of administrative law that rules promulgated by an administrative agency cannot exceed the bounds of pertinent enabling legislation.[44] This follows from the principle inherent in the doctrine of

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39. *In re* Spencer, No. 87-158, slip. op. at 1-2 (Vt. June 2, 1989).

40. *In re* Spencer, Land Use Permit No. 1R0576-1, at 1 (Dist. Envtl. Comm'n, No. 1, Dec. 23, 1985).

41. *In re* Spencer, No. 1R0576-1-EB, Findings of Fact and Conclusions of Law and Order at 4-5 (Vt. Envtl. Bd., Mar. 10, 1987).

42. *Id.* "Involved land" is defined by Rule 2(F)(1) as the entire tract or tracts of land upon which the construction of improvements occurs. Vt. Envtl. Bd. Rule 2(F)(1) (1988).

43. *Spencer*, No. 87-158, slip op. at 3.

44. *See, e.g.*, Manhattan Gen. Equip. Co. v. Commissioner of Internal Revenue, 297 U.S. 129, 134 (1936), *reh'g denied*, 297 U.S. 728 (1936), stating that:

> [t]he power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations is not the power to make law - but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.

Id. See also In re Vermont Gas Systems, Inc., 150 Vt. 34, 39, 549 A.2d 627, 630 (1988) (agency's rulemaking authority cannot support an expansive interpretation of its own powers); *In re* Agency of Admin., 141 Vt. 68, 75, 444 A.2d 1349, 1352 (1982) (administrative agency may not use its rulemaking power to exceed its legislative grant of authority).

separation of powers[45] that an administrative agency, as part of the executive branch of government, may not exercise a legislative prerogative of expanding its own jurisdiction without legislative authorization.[46]

The Vermont Supreme Court, on numerous occasions, has struck down administrative rules which exceeded the bounds of the pertinent enabling legislation.[47] In addition, the Court has employed this principle in the Act 250 context in striking down former Board Rule 2(D) "as being overbroad," and going beyond the clear intent of its enabling legislation by "not being reasonably related to, or necessary for, its purposes."[48]

In *Spencer*, the appellants noted that none of the statutory jurisdictional provisions refer to road construction or improvement as per se requiring Act 250 review;[49] Rule 2(D) would thus have to square with one of the statutory jurisdictional sections in order to be valid. Under Act 250, the activity requiring a permit must either be classifiable as a "subdivision" or "development."[50] "Devel-

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45. An administrative body "has only such powers as are expressly conferred upon it by the Legislature, together with such incidental powers expressly granted or necessarily implied as are necessary to the full exercise of those granted." Trybulski v. Bellows Falls Hydro-Electric Corp., 112 Vt. 1, 7, 20 A.2d 117, 120 (1941).

46. The Constitution of the State of Vermont, Chapter 2, Section 5, provides that "[t]he Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others." *See also* Vermont Educ. Bldgs. Fin. Agency v. Mann, 127 Vt. 262, 267, 247 A.2d 68, 71 (1968) ("The General Assembly cannot transfer its supreme legislative power to enact laws.") (citing Village of Waterbury v. Melendy, 109 Vt. 441, 199 A. 236 (1938)).

47. *See, e.g.*, Crossman Plumbing and Heating v. Commissioner of Taxes, 142 Vt. 179, 191-92, 455 A.2d 799, 804 (1982) ("[R]egulations of administrative agencies [] are subject to judicial review, and where they exceed the boundaries of the statutes they are designed to clarify or implement, we may strike them down . . . ."). *See also* Royalton College, Inc. v. Clark, 295 F. Supp. 365 (D. Vt. 1969); *In re* Vermont Welfare Rights Org., 132 Vt. 622, 326 A.2d 828 (1974); *In re* Allied Power & Light Co., 132 Vt. 354, 321 A.2d 7 (1974).

48. In *In re* Agency of Admin., 141 Vt. 68, 93, 444 A.2d 1349, 1361 (1982), the Court struck Board Rule 2(D), holding that the demolition of a state building did not constitute part of a larger plan of development triggering Act 250 jurisdiction.

49. 10 V.S.A. § 6001(3) (Supp. 1989) sets forth the statutory definition of what constitutes "development" for purposes of Act 250, while 10 V.S.A. § 6001(19) (Supp. 1989) defines the term "subdivision." These two terms are the principal operative definitions for purposes of triggering Act 250 jurisdiction under 10 V.S.A. § 6081(a) (1984), which states that "[n]o person shall sell or offer for sale any interest in any subdivision located in this state, or commence construction on a subdivision or development, or commence development without a permit." *Id.* There is an additional definition of "development" in 10 V.S.A. § 6001(a) (Supp. 1989) pertaining to auction sales. *See also* Vt. Envtl. Bd. Rules 2(A), (B) (1988) (defining the terms "development" and "subdivision").

50. 10 V.S.A. § 6081(a) (1984).

opment" is defined in part as the construction of improvements on a tract of land owned or controlled by a person involving more than ten acres of land within a radius of five miles of any point on any involved lands for commercial or industrial purposes, or on more than one acre of land in a municipality which has not adopted permanent zoning and subdivision regulations.[51] The foregoing definition is the only jurisdictional section of Act 250 which Rule 2(A)(6) could have been giving effect to in *Spencer*. Thus, if the Rule is to give rise to Act 250 jurisdiction under the facts of *Spencer*, it must substantially implement this provision of 10 V.S.A. § 6001(3) or else fail as "construction anew" rather than as "construing of" the law.[52]

Under the terms of Rule 2(A)(6), a road must provide access to more than five parcels or be more than 800 feet in length for jurisdiction to attach.[53] Construction of an 800 foot road itself, or just any road giving access to more than five parcels, cannot give rise to Act 250 jurisdiction under the strict language of the statute. An 800 foot long, three rod wide road presents a 39,600 square foot (800 feet by 49.5 feet) construction area,[54] less than even the one acre jurisdictional trigger for municipalities which do not have permanent zoning or subdivision regulations.[55] The actual discrepancy was even greater in *Spencer* where the road construction took place in a town which had both permanent zoning and subdivision regulations.[56] Thus, in *Spencer* the road construction had to have involved more than ten acres of land in order for jurisdiction to attach under the statute. The actual area of construction was 1,500 feet by 49.5 feet, or 1.7 acres, far less than the required ten acre

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51. 10 V.S.A. § 6001(3) (Supp. 1989). Due to the size, location, and number of subdivided lots, the activities of the appellants in *Spencer* could not have constituted "subdivision" activity within the meaning of 10 V.S.A. § 6001(19). The project did not involve construction above 2,500 feet in elevation, construction of ten or more housing units, construction for municipal purposes, drilling of oil and gas wells, or exploration for fissionable materials under 10 V.S.A. § 6001(3) (Supp. 1989), or an auction sale pursuant to 10 V.S.A. § 6001(a) (Supp. 1989).

52. *Agency of Admin.*, 141 Vt. at 76, 444 A.2d at 1352.

53. Vt. Envtl. Bd. Rule 2(A)(6) (1988).

54. Without further definition, a town or state highway is presumed to have a right-of-way width of three rods or forty-nine and one half feet. 19 V.S.A. § 702 (1987). An analogous presumption of a three rod right-of-way width may be made for a private road as well, particularly in *Spencer* where the road was essentially constructed to town highway standards.

55. 10 V.S.A. § 6001(3) (Supp. 1989); Vt. Envtl. Bd. Rule 2(A)(2) (1988).

56. *See In re* Spencer, No. 1R0576-1-EB, Findings of Fact and Conclusions of Law and Order, at 3 (Vt. Envtl. Bd., Mar. 10, 1987).

construction area necessary to trigger Act 250 jurisdiction.[57]

Even if the road was of sufficient size, its construction would still have to be for a "commercial or industrial purpose" under 10 V.S.A. § 6001(3) in order for jurisdiction to attach.[58] In *Spencer*, no industrial activity was to take place on the property. Thus, the only way that construction of the road could trigger Act 250 jurisdiction and still effectuate the statute would be if construction of the road were for a "commercial purpose."[59] While the statute does not define "commercial purpose," the Board defines the term in a way that excludes residential use of real estate.[60] The appellants thus argued that since the Road Rule, in conjunction with Rule 2(F)[61] does, in fact, bring noncommercial/industrial activity within Act 250 in areas below 2,500 feet in elevation, the rule exceeds its enabling legislation and should therefore be stricken.[62]

The appellants also maintained that Rule 2(A)(6) is equally unjustifiable under the jurisdictional provisions of Act 250 pertaining to "subdivision" activity. Under the law applicable at the time of the case, a "subdivision" for Act 250 purposes was defined as a

> tract or tracts of land, owned or controlled by a person, which has been partitioned or divided for the purpose of resale into ten or more lots within a radius of five miles of any point on any lot, and within any continuous period of ten years after

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57. 10 V.S.A. Section § 6001(3) (Supp. 1989).

58. *Id.* The only place residential usage of land is mentioned under 10 V.S.A. § 6001 regards construction of improvements for commercial, industrial, *or residential use* above the elevation of 2,500 feet. 10 V.S.A. § 6001(3) (Supp. 1989). None of the other "type neutral" definitions of "development" in Act 250 mention anything but construction "for commercial or industrial purposes, as triggering Act 250 jurisdiction." 10 V.S.A. § 6001 (1984 & Supp. 1989).

59. The specific exclusion by the Legislature of construction for residential purposes from all provisions of 10 V.S.A. § 6001(3) except for those dealing with construction above 2,500 feet leads to the presumption that the Legislature intentionally omitted residential uses of land from the balance of the jurisdictional sections dealing with general construction below 2,500 feet in elevation. *Cf.* Grenafege v. Department of Employment Sec., 134 Vt. 288, 290, 357 A.2d 118, 120 (1976) ("[W]here the legislature meant 'wages' to mean those earned in subject employment it said so, and that where it did not say so it intended no such restriction."). *See also In re* Downer's Estate, 101 Vt. 167, 142 A. 78 (1928).

60. Environmental Board Rule 2(L) defines "commercial purpose" as "the provision of *facilities, goods* or *services* by a person other than for a municipal or state purpose to others in exchange for payment of a purchase price, fee, contribution, donation or other object having value." Vt. Envtl. Bd. Rule 2(L) (1988) (emphasis added).

61. Vt. Envtl. Bd. Rule 2(F) defines "involved land" as areas in addition to the active area of physical construction. *See infra* note 74.

62. *In re* Spencer, No. 87-158, slip op. at 5 (Vt. June 2, 1989).

the effective date [of the Act].[63]

However, the Rule specifies that a road which is less than 800 feet in length will trigger Act 250 jurisdiction if it provides access to "more than five parcels" of land.[64] Thus, if the intent of the Rule was to create Act 250 jurisdiction over a road by virtue of its accessing a "subdivision," the Rule has the effect of expanding the jurisdiction of the Act beyond the statute by reducing the number of lots required for jurisdiction from ten to six.[65]

In summary, appellants argued that the Rule was invalid for three reasons. First, it extends Act 250 jurisdiction over construction areas even smaller than the ten acre minimum required by the statute.[66] Second, it brings construction of roads which are below 2,500 feet in elevation and which access parcels to be used for purely residential purposes within the scope of Act 250.[67] Finally, it has the practical effect of reducing the minimum number of subdivided lots required to trigger Act 250 jurisdiction from ten to six.[68] Since the Rule expanded Act 250 jurisdiction beyond that permitted by the statutory definitions of "development" or "subdivision," the appellants argued that the Court should strike down the Rule.

B. The Position of the Agency of Natural Resources

While no parties in opposition appeared before the Board or District Commission below, the State of Vermont Agency of Natural Resources interposed an appearance before the Vermont Supreme Court as appellee, not as amicus curiae.[69] The Agency took the position that Rule 2(A)(6) does validly implement the enabling legislation of Act 250.[70] It noted that the Rule repeats the statu-

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63. 10 V.S.A. § 6001(19) (1984).

64. Vt. Envtl. Bd. Rule 2(A)(6) (1988).

65. *Cf.* 10 V.S.A. § 6001(3), (19) (1984); Vt. Envtl. Bd. Rule 2(A)(6) (1988).

66. *See supra* notes 53-57 and accompanying text.

67. *See supra* notes 58-62 and accompanying text.

68. *See supra* notes 63-65 and accompanying text.

69. The Agency of Natural Resources has appeared before the Board on appeals from a District Commission decision even though the Board is part of the Agency for support service purposes. 3 V.S.A. § 2878 (Supp. 1989). This is supposedly due to the fact that the Agency itself has no adjudicatory role in Act 250, and because Board members are appointed by the Governor, not the Secretary of the Agency. *Cf. In re* Wildlife Wonderland, Inc., 133 Vt. 507, 517, 346 A.2d 645, 651 (1975).

70. Brief of Appellee Vermont Agency of Natural Resources at 5, *In re* Spencer, No. 87-158 (Vt. June 2, 1989) [hereinafter Brief of Appellee] (citing *In re* Agency of Admin., 141

tory words "construction of improvements" and then relates them to "a road or roads."[71] The Agency argued that the term "involved lands" encompasses all lands accessed by the road on the grounds that those lands "benefit" by having direct access from the road,[72] and therefore "bear some relationship" to the land on which the road was constructed.[73] Consequently, the Agency argued that such lands should be included in the required jurisdictional acreage simply because they are accessed by a road, and that the size of the actual area of construction was irrelevant for purposes of determining Act 250 jurisdiction. The Agency took this position even though "involved lands" is narrowly defined by the Board to exclude lands that are minimally related to the area of construction.[74]

The Agency also argued that the Rule is not invalid even though it allows Act 250 jurisdiction over residential uses of land below 2,500 feet in elevation.[75] It stated that the Court should ignore the Board's own definition of the statutory term "commercial purpose,"[76] and asserted that Rule 2(A)(6) contains an implied definition of "commercial purpose" in the language "incidental to

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Vt. 68, 444 A.2d 1349 (1982)).

71. *Id.* at 6.

72. *Id.* at 8.

73. *Id.*

74. The Board has defined the statutory term of "involved land" in Rule 2(F) to include:

> (1) The entire tract or tracts of land upon which the construction of improvements for commercial or industrial purpose occurs; and
>
> (2) Those portions of any tract or tracts of land within a radius of five miles owned or controlled by the same person or persons which is incident to the use of the project; and
>
> (3) Those portions of any tract or tracts of land within a radius of five miles owned or controlled by the same person or persons, which bear some relationship to the land actually used in the construction of improvements, such that there is a demonstrable likelihood that the impact on the values sought to be protected by Act 250 will be substantially affected by reason of that relationship.

Vt. Envtl. Bd. Rule 2(F) (1988). The Rule thus speaks in terms of the construction area or areas ultimately related to those disturbed areas, *e.g.*, in the case of a road, cul de sacs, drainage ditches, etc.

75. Brief of Appellee, *supra* note 70, at 12; *cf.* Vt. Envtl. Bd. Rule 2(F) (1988).

76. It is clear that under Rule 2(L) no "commercial purpose" was to be carried on at the site in *Spencer*. Rule 2(L) defines "commercial purpose" as "the provision of facilities, goods or services by a person . . . in exchange for payment of a purchase price, fee, contribution, donation or other object having value." Vt. Envtl. Bd. Rule 2(L) (1988). The State thus had to argue its substitute definition theory or else the use of the site could not be for "commercial purposes" and thus not within the jurisdictional provisions of Act 250.

the sale or lease of land."[77] The Agency's position was that there was nothing significantly different in the environmental impact of a road built to provide access to a gravel pit and a road built to provide access to a residential subdivision.[78] Consequently, the Agency urged the Court to uphold Rule 2(A)(6) as a valid implementation of the statutory jurisdictional provisions of Act 250.

C. The Court's Opinion

The Court ignored the arguments of both the appellants and the Agency, and sidestepped the question of whether Board Rule 2(A)(6) validly implements its enabling legislation. Rather, the Court held that the Legislature, in a 1985 law,[79] effectively incorporated the Board Rules into Act 250.[80] Consequently, the Court held that it was irrelevant whether or not Rule 2(A)(6) properly effectuated the statutory provisions of Act 250 because that Rule, like the other Board Rules, had been incorporated by the Legislature into Act 250.[81]

The language upon which the Court based its decision appears as a footnote to 10 V.S.A. § 6025, which empowers the Board to enact administrative rules.[82] That footnote refers to Public Act No. 52, § 5, effective May 15, 1985 (Act 52), which states that "[r]ules of the environmental board pertaining to the administration of Act 250 and adopted under subsection 6025(a) or 6086(d) of Title 10 are hereby ratified and shall apply retroactively from the date of adoption."[83] The Court held that the "[appellants'] argument fails for the simple reason that in 1985, the Legislature, in unambiguous terms, ratified all Board rules relating to the administration of Act 250, including Rule 2(A)(6)."[84] The Court went on to state:

> The definition of 'development' contained in Rule 2(A)(6), and ratified by the above public act, now has the same effect as would any law passed by the legislature in the first in-

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77. Vt. Envtl. Bd. Rule 2(A)(6) (1988).

78. Brief of Appellee, *supra* note 70, at 6. It is unclear whether the Agency's position survives even the most superficial scrutiny given the vast differences in vehicle weight, trip frequency, and time of operation between commercial and residential use.

79. P.A. No. 52, § 5 (Vt. 1985).

80. *In re* Spencer, No. 87-158, slip op. at 6 (Vt. June 2, 1989).

81. *Id.*

82. 10 V.S.A. § 6025 (Supp. 1989).

83. 10 V.S.A. § 6025 (Supp. 1989) (quoting P.A. No. 52, § 5 (Vt. 1985)). *See also Spencer*, No. 87-158, slip op. at 6.

84. *Spencer*, No. 87-158, slip op. at 6.

> stance. It has effectively become part of the Act 250 legislative scheme codified at Chapter 150 of Title 10.[85]

The Court reached its holding by applying the "plain meaning rule" of statutory construction to the language of Act 52.[86] The Court noted, correctly, that its primary duty was to ascertain the intent of the Legislature in promulgating Act 52.[87] However, it then held that the language of the Act "is clear, and it is the duty of this Court to determine the legislature's intent in passing [Act 52, § 5] according to the plain meaning of the terms of the statute."[88]

The Court determined the plain meaning of the word "ratify" to mean "to approve and sanction; to make valid; to confirm; to give sanction to."[89] It went on to hold that "[b]y the clear language in section 5, the legislature intended to approve and sanction all rules of the Environmental Board adopted under 10 V.S.A. §§ 6025(a) and 6086(d) prior to May 15, 1985. This Court must, therefore, enforce the Act according to its terms."[90]

D. Analysis of the Court's Opinion

In its opinion, the Court intermingled two different potential theories of the case and treated them as the same. On the one hand, it stated that the Rule, along with all the Board Rules, had "effectively become part of the Act 250 legislative scheme codified at Chapter 150 of Title 10."[91] For that reason, the Rule "now has the same effect as would any law passed by the Legislature in the first instance."[92] This language indicates that the Court believed that the Legislature in Act 52 intended to incorporate the Board Rules directly into Act 250 itself. Under this rationale, the Rule, and presumably all the Board Rules, are effectively elevated to the status of legislation in the first instance—*i.e.*, they are no longer administrative rules, but are now statutes.

However, the Court's opinion also suggests a consequence

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85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* (quoting BLACK'S LAW DICTIONARY 1135 (5th ed. 1979).
90. *Id.* (citing Leno v. Meunier, 125 Vt. 30, 33, 209 A.2d 485, 488-89 (1965)).
91. *Id.*
92. *Id.*

which is at odds with the notion that the Legislature intended to enact the Board's Rules wholesale as statutes. The Court, in interpreting the definition of the word "ratify" in Act 52, held that

> Rule 2(A)(6), adopted pursuant to § 6025(a), has been approved by the legislature as a valid exercise of the Board's power to promulgate rules for the administration of Act 250. The Board did not err by finding that, pursuant to Rule 2(A)(6), Act 250 applied and a permit was therefore required for the project.[93]

This language implies that the Court was basing its decision on the premise that Act 52 simply ratified Rule 2(A)(6) and the Board's Rules in general as properly adopted rules only, and not as statutes. Under this latter rationale, the Court, after holding that Rule 2(A)(6) was properly adopted as a rule by the Board as a procedural matter, should have reached the substantive issue of whether that Rule properly effectuated its enabling legislation. The above two rationales were not stated in the alternative in the opinion.[94] One is left to wonder whether the Court viewed these theories as consistent with each other even though they lead to wholly different results when applied.

These anomalous results flow from the fact that the Court elevated the plain meaning rule over the cardinal principle of statutory interpretation—to ascertain the true intent of the Legislature. The Court has held on several occasions that the rules of construction may and should be discarded where they would interfere with or prevent ascertainment of the actual intent of the Legislature in promulgating the statute under review.[95]

The Court reached its holding even though it had before it

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93. *Id.* at 7.

94. *See Id.*

95. In Hill v. Conway, 143 Vt. 91, 463 A.2d 232 (1983), the Vermont Supreme Court stated that "the fundamental rule [is] that we must ascertain and give effect to the true intent of the Legislature for it is that intent which constitutes the law." *Id.* at 93, 463 A.2d at 233 (citation omitted). The Court went on to note that "[r]ules of construction are not laws, hard and inflexible, which *must* be applied in a given situation simply because it is possible to do so . . . . [A] statute is to be construed as to carry out the legislative intent, though [it] may seem contrary to . . . the letter of the statute or its literal sense." *Id.* at 93-94, 463 A.2d at 233 (quoting State v. Baldwin, 140 Vt. 501, 511, 438 A.2d 1135, 1140 (1981)). The Court has taken the position that when reading a statute literally leads to an unreasonable result, the Court should make every effort to look behind the language in discerning legislative intent. *See* Vermont Dev. Credit Corp. v. Kitchel, 149 Vt. 421, 424, 544 A.2d 1165, 1168 (1988); Nobel v. Delaware & Hudson R.R., 142 Vt. 156, 159, 453 A.2d 1109, 1111 (1982); Harden v. Vermont Dep't of Taxes., 134 Vt. 122, 124, 352 A.2d 685, 687 (1976).

clear evidence that the Legislature, in passing Act 52, had no intention of incorporating the Board Rules wholesale into the statutory scheme. The transcripts from both the House and Senate Natural Resources and Energy Committees Hearings (House and Senate Hearings) on the bill,[96] which later became Act 52, demonstrate that the Court's ultimate holding is not consistent with the legislative intent behind Act 52.

The primary purpose of Act 52 was to eliminate appeals to the superior courts as an alternative route of appeal from a district commission decision.[97] Section 5 of the Act was derived from a provision in House Bill 299, which was submitted to the Legislature as a simple "housekeeping measure."[98] It is clear from the House and Senate Hearings transcripts that the Board considered section 5 almost as an afterthought in connection with the bill.[99]

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96. *House Natural Resources and Energy Committee Hearing* 2-16 (Mar. 18, 1985, Vt. Bien. Sess.) [hereinafter *House Hearing*]; *Senate Natural Resources and Energy Committee Hearing* 51-56 (Apr. 10, 1985, Vt. Bien. Sess.) [hereinafter *Senate Hearing*].

97. *See, e.g.*, Sen. Jour. 272 (Apr. 2, 1985, Vt. Bien. Sess.) (reporting that the House passed H. 299, "[a]n act requiring all Act 250 appeals from the district commissions to be heard before the Environmental Board.").

98. The Senate and House Committee Hearings featured the testimony of Darby Bradley, who at the time was the Chairman of the Environmental Board. The *House Hearing* reads in part as follows:

> Representative Reynes: Darby, I want to get a couple more sentences of explanation on the record here concerning *this housekeeping amendment* on the Administrative Procedures Act. What was it that happened? . . .
> Mr. Bradley: Yes, under [Act 250] as we now have it we are authorized to adopt rules under Sections 801-808 of the Administrative Procedures Act. The Administrative Procedures Act was substantially rewritten a couple of years ago, and a lot of the sections about rulemaking authority got moved out of . . . 805. 805 got moved to 819 or something. So, the argument has been in a couple of cases that since we no longer - we are allowed to adopt rules only to the extent of the authority granted to agencies under 801-808. Since there is no longer rulemaking authority in those Sections, we no longer have any rulemaking authority. So, we are proposing to delete the reference to those sections and instead reference the entire chapter so if again in the future it is amended new, then it would automatically get picked up.

House Hearing, *supra* note 96, at 12-13. The Senate Hearing included the following exchange:

> Representative Bassett: And, Section 3 simply updates references to rules which had been moved to a different section. So, it just refers to the chapter than the particular rule.
> Senator Gibb: Yeah, that's just a housekeeper.

Senate Hearing, *supra* note 96, at 53.

99. The *Senate Hearing* reads in part:

> Stephen Sease: There is one last aspect of H. 299 that perhaps you might want to question Peter about, but it clarifies rulemaking ability of the board. And, that aspect is also addressed in Darby Bradley's letter to the committee

The sole reason for the provision that ultimately became section 5 was that the Board's rulemaking authority had come under attack due to certain amendments to the Administrative Procedures Act (APA).[100] The version of Act 250 in effect at that time granted the Board authority to adopt rules pursuant to 3 V.S.A. §§ 801-808.[101] However, since promulgation of that section of Act 250, the APA had been substantially amended so that the pertinent language enabling administrative agencies to promulgate rules was moved to a different section of the APA.[102] The sole reason that the Board sought legislative ratification of its Rules was to confirm that its rules in effect at that time had been properly adopted as rules under the APA, not to incorporate them into Act 250 as part of the statute. The Legislature thus did not intend in Act 52 to make a "judicial" determination that the Board Rules substantively effectuated their enabling legislation, but intended merely to clarify that they had been properly adopted procedurally.[103] Despite the fact that evidence of the legislative intent of Act 52 was before the Court in the form of committee transcripts, the Court chose to confine its scrutiny solely to the four corners of Act 52, finding that its terms and language were unambiguous and did not require further inquiry.[104]

Regardless of what the actual holding in *Spencer* may be, the decision presents a number of difficult issues for both the Board and land use practitioners in attempting to understand the nature and effect of the Board Rules in the future. It may also present major problems for the Court itself in trying to maintain a coher-

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under dated of April 10. Several years ago the General Assembly rewrote the Administrative Procedures Act but inadvertently, I suspect, failed to revise the Environmental Board's ability to adopt rules pursuant to the Administrative Procedures Act. In the intervening couple of years the Board has made rules changes relying on the unrevised authority in its specific statute. *That further portion of H.299 would clarify that the board does indeed have the authority to adopt rules under the present writing of the Administrative Procedures Act and would ratify the rules adopted by the board.*

Senate Hearing, supra note 96, at 57-58 (emphasis added).

100. *See House Hearing, supra* note 96, which reads in part:

Mr. Bradley: [I] hope that if you do take action on this one if you could also add in the section reference to the Administrative Procedures Act in another section. *There's a question of whether our rulemaking authority got repealed by the amendment to the Administrative Procedures Act.*

House Hearing, supra note 96, at 8 (emphasis added). *See also supra* notes 98-99.

101. *See supra* note 98.

102. *Id.*

103. *Id. See also supra* notes 98-100 and accompanying text.

104. *In re* Spencer, No. 87-158, slip op. at 6 (Vt. June 2, 1989).

ent and rational scheme of statutory construction. As noted above, the Court has stated that where the general rules of statutory construction would interfere with the Court's ability to construe a statute in accordance with actual legislative intent, those general rules should not be utilized.[105] Thus, the Court under its own prior holdings should not have mechanically employed the plain meaning rule. Instead, it should have gone directly to the legislative history embodied in the transcripts of the House and Senate Hearings in interpreting the meaning of Act 52. Those transcripts would not have led to any of the rationales supporting the decision in *Spencer*. Moreover, under the Court's own holding in the case, the plain meaning rule is only to be applied where the language of the statute is clear and its terms unambiguous.[106] However, if one accepts the Court's reasoning that the intent of Act 52 was to give Rule 2(A)(6) "the same effect as would any law passed by the legislature in the first instance,"[107] then a significant anomaly appears on the face of Act 52. Specifically, the Legislature did not assign a section to that Act in the statutory framework of Act 250—it appears simply as a footnote without any statutory reference in the official compilation. Thus, immediate ambiguity regarding the intent of the Legislature arises from the face of the law itself: had the Legislature intended to create such a sweeping, substantive revision of Act 250, it would have at least assigned it a section in the statute. Therefore, the Court should have gone behind the bare language of the statute for two reasons. First, the Court would have more thoroughly accomplished its task of ascertaining the legislative intent behind Act 52 by utilizing the House and Senate Hearings transcripts it had before it. Second, the lack of ambiguity necessary for the Court to properly utilize the plain meaning rule was not present in the case.

In examining the language and the potential consequences of the Court's decision, one is left with three possible interpretations of *Spencer*. The first is that the Court properly applied the legislative history and held that Act 52 effectively renders Rule 2(A)(6) a properly adopted administrative rule. If that is the case, then the holding of *Spencer* is at odds with the result. If Rule 2(A)(6) was properly adopted as a Rule, then the Court should have proceeded to consider the case on the merits, *i.e.*, whether the substance of

105. *See supra* note 95 and accompanying text.
106. *Spencer*, No. 87-158, slip op. at 6.
107. *Id.*

the Rule effectuated the enabling statute it was intended to implement.

A second possible interpretation of the Court's opinion is that the Court deemed the word "ratify" in Act 52 to mean that the Legislature itself had determined that Rule 2(A)(6) and the other Board Rules properly effectuate the enabling legislation of Act 250, and that Act 52 was promulgated for this purpose. Thus, the Court's interpretation would not be necessary insofar as the Legislature already declared that Rule 2(A)(6) properly effectuated its enabling legislation. However, such an interpretation raises fundamental separation of powers considerations.[108] Under the Vermont Constitution, the Legislature is empowered to enact legislation,[109] and cannot delegate this power to any other branch of government.[110] Thus, with limited exceptions, acts of the Legislature are statutes only, and cannot function as quasi-judicial reconciliations of executive and legislative branch enactments.[111] If one begins with the premise that it is the province of the courts to determine what the law is, then the Legislature would be impinging upon a judicial function by making a judgment of whether the administrative rules of an agency of the executive branch properly effectuate legislative enactments.[112] This type of legislative intrusion has been rejected as being constitutionally inconsistent with a tripartite system of government.[113] Thus, this interpretation of *Spencer* is very problematic.

Finally, the third and most tenable interpretation of the Court's opinion is that section 5 of Act 52 effectively elevates the

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108. *See supra* notes 44-48 and accompanying text.

109. Vt. Const. ch. II, §§ 2, 6.

110. *See* State v. Auclair, 110 Vt. 147, 4 A.2d 107 (1939). It is a fundamental principle of the American constitutional system that the legislative, executive, and judicial departments of governments are separate from each other, and therefore such functions of the legislature as are purely and strictly legislative cannot be delegated but must be exercised by it alone. *Id. See also* Village of Waterbury v. Melendy, 109 Vt. 441, 199 A. 236 (1938).

111. *See supra* note 46 and accompanying text.

112. *See* Soloman v. Atlantis Dev., Inc., 145 Vt. 70, 483 A.2d 253 (1984). In *Soloman*, the Court ruled that an act which provided that no court could set aside any judgment, decree, or order by the superior court on the grounds that the participation of assistant judges was improper constituted a retroactive limitation of a court's jurisdiction over cases that had been commenced prior to the enactment of the act and was unconstitutional because it violated the separation of powers principle. *See also* State v. Jacobs, 144 Vt. 70, 75, 472 A.2d 1247, 1250 (1984) (stating that it is not a legitimate function of a court to expand a statute by implication because to do so would constitute judicial legislation).

113. *See id*; Kennedy v. Chittenden, 142 Vt. 397, 457 A.2d 626 (1983); *In re* House Bill 88, 115 Vt. 524, 64 A.2d 169 (1949); State v. Audain, 110 Vt. 147, 4 A.2d 107 (1939).

status of Board Rules to that of Act 250 legislation. Under this rationale there would have been no issue in *Spencer* of whether or not Rule 2(A)(6) effectuated its enabling legislation because the Rule itself constituted such legislation. If this is the actual holding of *Spencer*, then future Board Rules cannot contradict or differ materially from the Rules in effect on May 15, 1985 for the same reason that the appellants in *Spencer* argued that Rule 2(A)(6) itself was invalid—if the Rules as of that date are enabling legislation in the first instance, then any rules promulgated by the Board after that date must conform with them.[114]

The potential ramifications of this third interpretation may cause an administrative nightmare for the Board. Among the Rules changed by the Board since May 15, 1985 are those pertaining to evidence at hearings,[115] conduct of hearings,[116] presumptions and compliance with other statutes,[117] and interlocutory appeals to the Board from district commissions.[118] However, the greatest potential for administrative problems lies in the 1988 and subsequently proposed amendments to Rule 11,[119] which set application fees for Act 250 permits. The 1988 amendments effectively doubled the fees charged applicants for projects under the version of the rule in effect on May 15, 1985. As of February of 1990, another fee increase amendment was being considered by the Board to offset the effects of Vermont's fiscal dilemma.[120] If Act 52 incorporated the Board Rules into Act 250, then new Rule 11 is void as it changed the fee structure in effect on May 15, 1985. As a consequence, the difference between the fees collected under new Rule 11 and those which would have been collected under former Rule 11 would have been illegally assessed and should now be recoverable by every applicant who has paid a permit application fee under the new rule. The mere possibility of such a construction seems to argue for inquiry beyond the four corners of the statute in ascertaining legislative intent. Nevertheless, the Court in denying the appellants' Mo-

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114. Appellant's Motion for Reargument at 4, *In re* Spencer, No. 87-158 (June 15, 1989).

115. Vt. Envtl. Bd. Rule 17 (1988).

116. *Id.* Rule 18

117. *Id.* Rule 19.

118. *Id.* Rule 43.

119. *Id.*

120. The Board is presently requesting public comment on its proposal to amend Environmental Board Rule 11 by increasing application fees. *See* Rutland Herald, Feb. 22, 1990, at 19, col. 5.

tion for Reargument stated summarily that the Motion failed "to identify points of law or fact previously overlooked or misapprehended."[121]

CONCLUSION

The Vermont Supreme Court in *Spencer* turned the process of statutory construction on its head. Rather than beginning with the proposition that the rules of construction are intended to be used solely for the purpose of ascertaining legislative intent, the Court disregarded clear evidence of legislative intent in order to vindicate a rule of construction. In rendering an opinion which arguably lends itself to any of the three interpretations suggested above, the Court has created more problems than it has solved. If the Board Rules constitute legislation in the first instance, then the Court has severely impaired the Board's rulemaking ability by forcing the Board to seek legislative ratification every time it wishes to materially alter or change a rule in effect as of May 15, 1985. If the Court held that Rule 2(A)(6) was properly promulgated, it should have then proceeded to the substantive issue of whether Rule 2(A)(6) did in fact effectuate its enabling legislation. If the Court is suggesting that the Legislature may declare that an administrative rule substantially effectuates one of its own enactments, then the Court is essentially holding that the Legislature may properly exercise a judicial function in reconciling apparently conflicting actions of the executive and legislative branches of government. In light of all of the evidence and arguments that the Court had before it, it should have inquired into the legislative intent behind Act 52, held that the only purpose of the act was to confirm the proper adoption of the Board Rules as rules, and then considered whether Rule 2(A)(6) effectuated the jurisdictional sections of Act 250.

Beyond the academic exercise of attempting to deal with the Court's decision, there are long-term practical implications for applicants who are considering whether to proceed through the permit process. There is already "a widespread perception throughout Vermont that the administration of Act 250 in some instances has been discriminatory or inefficient."[122] In light of this perception,

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121. Entry of Order, *In re* Spencer, No. 87-158 (Aug. 22, 1989).

122. GOVERNOR'S COMMISSION ON THE ECONOMIC FUTURE OF VERMONT, PATHWAYS TO PROSPERITY: A STRATEGIC OUTLOOK 24 (Nov. 1989).

the Court should become more active in overseeing the actions of the other two branches of government, particularly under Act 250 where decisions in large part are made by political appointees. The net effect of *Spencer*, like other recent Vermont Supreme Court decisions in the land use area,[123] is that there is no forum left in which the proper rules of construction for land use regulation are given life.

The consequences of this absence of oversight may already be evident. In the late summer of 1989, the Board reported that it had experienced a significant drop in the number of new Act 250 applications received.[124] In the fall of 1989 and winter of 1989-90, there has been a noticeable decrease in state tax revenues, and the present administration has begun to assume a crisis posture due to a projected revenue shortfall and budget deficits.[125] Vermont's deepening financial crisis has become further apparent in both the Governor's call for increased taxes to offset the revenue decline, and the House and Senate Appropriations Committees' efforts to engage in budget cuts to meet the anticipated shortfall.[126] In addition, the number of real property transactions, an important indicator of the Vermont economy, were markedly lower in the summer and winter of 1989 versus the same periods for 1988.[127] One is left to wonder if the public's perception of the Act 250 permit process is reflected in the decreasing number of applicants willing to risk capital and other resources in attempting to proceed through it. The resulting negative ramifications for other vital issues such as affordable housing, continued low unemployment, and a healthy economy are obvious to the most naive economic observer.

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123. *See supra* note 33.

124. "Act 250 applications fell twenty-two percent from May through July 1989, compared to the same period of a year ago. The dollar value of those applications dropped forty-one percent." Sline, *Slower Economy is Seen*, Rutland Herald, Oct. 1, 1989, at 1, col. 1. The Environmental Board reports that from July to December of 1988 it received $411,494.62 in fees, but from July to December of 1989 it received only $296,058.40. ENVIRONMENTAL BOARD, NUMBER OF APPLICATIONS AND ESTIMATED CONSTRUCTION COST (March 1990).

125. Governor Kunin stated in her budget address that "[n]ever in the last 13 years of revenue collection history, have we had such slow revenue growth in the first 6 months of the year." Rutland Herald, Text of Governor's Budget Address, Jan. 6, 1990, at 15, col. 2.

126. Seidel, *Panel Still Figuring '91 Budget*, Burlington Free Press, Mar. 29, 1990, at B1, Col. 5; Seidel, *Senate's Attention Turns to Finance*, Burlington Free Press, Mar. 19, 1990, at 1, col.2.

127. State budget analyst Richard Gebhart said that the number of property transactions in the first five months of fiscal year 1989 (July-November) had declined twenty-one percent compared to the same period in 1988. Pfeiffer, *Real Estate Decline Lowers Funds for Growth Law*, Rutland Herald, Dec. 8, 1989, at 13, col. 5.

With decisions such as *Spencer*, the perception that the Act 250 process is "discriminatory or inefficient"[128] is reinforced. Applicants, practitioners, and the regulators themselves are left with little guidance as to what the true state of the law is in this area, with the practical result that the regulators may well do whatever they want until the situation is clarified. The Court should reverse its trend toward abstention from review of administrative action and reassert itself as a non-political forum of last resort for the property owners dealing with state administrative agencies. However, it may well take a recession, rising unemployment, and a sour business climate to finally convince all three branches of Vermont's government that they must offer more than platitudes in achieving a true balance between development and the environment in Vermont.[129]

128. *See supra* notes 12, 122 and accompanying text.

129. GOVERNOR'S COMMISSION ON THE ECONOMIC FUTURE OF VERMONT, PATHWAYS OF PROSPERITY: A STRATEGIC OUTLOOK 24 (Nov. 1989).