

THE CHASE PAPER

The Chase Paper Competition, named for the late Jonathon B. Chase,* third dean of Vermont Law School, was established in 1989 by *Vermont Law Review* to recognize excellence in writing among the third year class at Vermont Law School. Each year, the law review selects one paper written by a member of the third year class to be the Chase Paper. *Vermont Law Review* is pleased to present the 1991 Chase Paper.

IN RE QUECHEE LAKES CORPORATION: MITIGATING AESTHETIC ENVIRONMENTAL DAMAGE OR AN EYESORE ON ACT 250 LAND USE PROTECTIONS?

Robert C. Granger**

While historically the determinants of design were based largely on practicality, tradition, and a strong consensus of community mores, our generation has relied on law.¹

INTRODUCTION

When the Vermont Supreme Court decided *In re Quechee Lakes Corporation* in July 1990, the opinion resolved nearly six years of protracted conflict between the State, a developer, and private landowners.² The dispute involved the issue of aesthetics under Vermont's comprehensive land use regulations, commonly known as Act 250.³ The case exemplifies a long-standing dilemma

* See *Dedication*, 13 VT. L. REV. 1 (1988) for a biographical sketch of Dean Chase.

** Law clerk for the Honorable Wade Brorby, Circuit Judge, United States Court of Appeals for the Tenth Circuit; J.D. 1991, *cum laude*, Vermont Law School; B.A. 1979, University of Maine at Orono.

1. Agency of Natural Resources Design Issues Study Committee, Interim Report 7 (June 1, 1990).

2. *In re Quechee Lakes Corp.*, 154 Vt. 543, 580 A.2d 957 (1990).

3. 1969 Vt. Laws 250 (codified at VT. STAT. ANN. tit. 10, §§ 6001-6092 (1984 & Supp. 1990)). The purpose of Act 250 is to protect and to conserve the state's environmental and natural resources and to insure that lands slated for development are devoted to uses which are not detrimental to the public welfare. The legislature established a system of land use permits to achieve these aims. Under Act 250, a developer must apply to the District Environmental Commission for a land use permit before starting construction. See VT. STAT. ANN. tit. 10, § 6081 (1984 & Supp. 1990); Vt. Environmental Board Rule 10 (1990) [hereinafter Vt. Env'tl. Bd. Rule]. The applicant must also provide notice of the proposed project to

which arose even before the legislature first promulgated Act 250 in 1969. On one hand, Vermont's public policies on land use and taxation serve as a catalyst for growth and development.⁴ Yet these policies result in "strong economic forces which run directly counter to [Vermont's] efforts at scenic preservation, and indeed to good environmental planning generally."⁵ This clash between economic growth and aesthetics is often resolved through the developer voluntarily limiting the scope of a project.⁶ Occasionally, however, formal proceedings are necessary to resolve the conflict. Case decisions often depend on which side of this balance the agencies that oversee the State's land use controls favor. *Quechee Lakes* epitomizes this conflict.

In *Quechee Lakes* the court unanimously upheld the Vermont Environmental Board's decision to grant the developer, Quechee Lakes Corporation (hereinafter "Quechee Lakes"), an amended land use permit which required substantial modifications to an already completed condominium project.⁷ The order only demanded that Quechee Lakes abate certain unapproved changes which violated the terms of the original land use permit.⁸ The Environmen-

statutorily defined parties. VT. STAT. ANN. tit. 10, § 6084 (1984 & Supp. 1990); Vt. Env'tl. Bd. Rule 14(A). Interested parties may request hearings on the proposed project. VT. STAT. ANN. tit. 10, § 6085 (1984 & Supp. 1990); Vt. Env'tl. Bd. Rules 13-18 (1990). In order to approve a development, the District Commission must find that the project will not adversely affect 10 statutorily defined areas, including controls on water and air pollution, soil erosion, traffic congestion, burdens on municipal services, scenic beauty and local or regional plans. VT. STAT. ANN. tit. 10, § 6086 (1984 & Supp. 1990). Act 250 applies to commercial and industrial development, as well as residential projects in specific circumstances. VT. STAT. ANN. tit. 10, § 6081 (1984 & Supp. 1990). Briefly, Act 250 requires land use permits for: (1) all developments above an elevation of 2,500 feet; (2) commercial and industrial projects or improvements involving more than one acre, if there are no local zoning and subdivision bylaws, or involving more than 10 acres if there are local regulations; (3) construction of housing projects with 10 or more units within a five mile radius of any point on the lot; (4) state or municipal projects involving more than 10 acres of land; and (5) the exploration, extraction or processing of fissionable source materials and drilling of wells for oil or gas. VT. STAT. ANN. tit. 10, § 6001(3) (Supp. 1990) (effective until July 1, 1991); Vt. Env'tl. Bd. Rule 2(A) (1990). In addition, permits are required when a person partitions land for the purpose of resale into 10 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. VT. STAT. ANN. tit. 10, § 6001(19) (Supp. 1990); Vt. Env'tl. Bd. Rule 2(B) (1990).

4. Norman Williams, Committee Chairman Remarks, in Agency of Natural Resources Design Issues Study Committee, Interim Report (Draft 2) (June 1, 1990).

5. *Id.*

6. Norman Williams & Tammará Van Ryn-Lincoln, *The Aesthetic Criterion in Vermont's Environmental Law*, 3 HOFSTRA PROF. L.J. 89 (1990).

7. *In re Quechee Lakes Corp.*, 154 Vt. 543, 580 A.2d 957 (1990).

8. *Id.* The District Three Environmental Commission issued Quechee Lakes Corporation a land use permit. State of Vermont Land Use Permit No. 3W0364 (Feb. 4, 1981) (au-

tal Board⁹ determined that the project would violate Act 250's aesthetic criterion unless remedial action was taken to reduce the negative visual impact the changes had on the scenic beauty of a picturesque valley.¹⁰

Critics view the court's opinion as further eroding common law property rights in favor of strict land use regulations.¹¹ Those favoring tighter aesthetic restrictions perceive the case as a partial control on the "condominium clusters [that] continue to march ad infinitum across the Valley."¹² Others believe that the Board and the court did not go far enough. At least one person involved in the Board's decision-making process felt that the decision did not adequately assert Vermont's right to control developers who willfully circumvent the procedural requirements of Act 250.¹³ The Board's lone dissent argued that review of the amended application should extend beyond the sixteen unapproved changes in the Quechee Lakes' project.¹⁴ The dissent maintained that the Board should

thorizing construction of the "Ridge Condominiums").

9. The Environmental Board is an independent regulatory body that provides administrative support to the Agency of Natural Resources, an agency which is primarily responsible for the protection of Vermont's environment and natural resources. VT. STAT. ANN. tit. 3, §§ 2802, 2878 (Supp. 1990). The Board consists of nine members appointed by the governor, with the advice and consent of the Senate. The chairman serves a two-year term and the eight members are appointed for four-year terms. VT. STAT. ANN. tit. 10, § 6021 (1984 & Supp. 1990).

10. *In re Quechee Lakes Corp.*, No. 3W0364-1A-EB, Findings of Fact and Conclusions of Law and Order at 13 (Vt. Env'tl. Bd., Feb. 3, 1987).

11. See James P. W. Goss, *Hear No Evil, See No Evil: In re Spencer and the Twilight of Judicial Scrutiny in Vermont*, 14 VT. L. REV. 501 (1990) (criticizing the increased trend in the late 1980's of Vermont state agencies to use state permit processes to challenge real estate development projects).

12. See *Murphy Farm and Newton Inn*, Nos. 3W0411-EB & 3W0439-EB, Findings of Fact and Conclusions of Law and Order at 24 (Vt. Env'tl. Bd., Nov. 4, 1985) (discussing the increased growth that threatens the scenic beauty of the Quechee Valley absent a comprehensive open space preservation plan). There are currently 809 condominiums in Hartford. Telephone Interview with Donald Standen, Tax Assessor for the Town of Hartford, Vt. (Apr. 5, 1991).

13. See *In re Quechee Lakes Corp.*, No. 3W0364-1A-EB, Findings of Fact and Conclusions of Law and Order at 16 (Vt. Env'tl. Bd., Feb. 3, 1987) (Bruce, dissenting).

14. *Id.* at 16 (Bruce, dissenting). Board member Bruce noted that:

While the Applicant has the right to construct the project in conformance with the original permit, it has no right to deviate from the permit terms and conditions. Perhaps minor variations could be overlooked, but the Board's findings contain numerous examples of [Quechee Lakes Corporation's] ignoring permit conditions and do not show justification for such deviations. Any one of these variances (even taken alone) might have tipped the scale and resulted in a denial to the original permit. The Applicant could have built the approved project, or it could have applied for an amendment, prior to

consider the "different project" actually built.¹⁵ Accordingly, the dissent argued that nothing short of full compliance with the terms of the original permit was satisfactory where the unapproved version of the project created an undue adverse impact on the natural beauty of the area.¹⁶ Such an approach could have forced Quechee Lakes to dismantle completely the six existing structures.¹⁷

Despite its ultimate decision, the Board indicated discomfort with the approval of Quechee Lakes' amended permit application. The Board expressed concern over the level of fairness given to interested parties, and its effect on public policy.¹⁸ The Board's opinion noted that such a decision might encourage developers to circumvent purposefully the land use permit process, thereby rendering pre-construction review essentially "meaningless."¹⁹ The court deferred to the Board's judgment by simply applying a deferential standard of review to the Board's findings of fact and reviewing the Board's conclusions of law.²⁰

The Board's dissenting and majority opinions are in stark con-

construction. It did neither. It built a different project . . .

Id.

15. *Id.*

16. *Id.*

17. Dissatisfaction with the project was not limited to the dissent. Landowners opposed to the condominiums argued that the Board should have ordered Quechee Lakes to remove at least one of the offending structures to mitigate the environmental damage and to ensure the integrity of Act 250. *In re Quechee Lakes Corp.*, No. 3W0364-1A-EB, Foster and Grossman Requests For Findings of Fact and Conclusions at 3 (Vt. Env'tl. Bd., Nov. 26, 1986); Letter from Dr. Bernard H. Grossman to Vermont Environmental Board (undated).

18. See *In re Quechee Lakes Corp.*, No. 3W0364-1A-EB, Findings of Fact and Conclusions of Law and Order at 13-14 (Vt. Env'tl. Bd., Feb. 3, 1987).

19. *Id.* To administer Act 250, Vermont is divided into nine districts, each of which is overseen by a District Commission comprised of three members from that district appointed by the governor so that two appointments expire in each odd numbered year. The District Commission conducts the initial review of land use permit applications. VT. STAT. ANN. tit. 10, § 6026 (1984 & Supp. 1990) (incorrectly listed as § 6025 in Supp. 1990).

20. *In re Quechee Lakes Corp.*, 154 Vt. 543, 552-55, 580 A.2d 957, 962-63 (1990) (noting that "where sufficiency of the evidence is questioned on appeal . . . [the] Court employs a deferential standard of review"). The court's scope of review is limited by statute. If supported by substantial evidence on the record as a whole, the court must accept the Environmental Board's findings of fact as conclusive. VT. STAT. ANN. tit. 10, § 6089 (Supp. 1990). Furthermore, this standard of review should be distinguished from the "clearly erroneous" standard applied to review of judicial findings of fact. A finding is "clearly erroneous" when *although there is evidence to support it*, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *In re Quechee Lakes Corp.*, 154 Vt. at 554 n.10, 580 A.2d at 963 n.10 (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948) (emphasis added)). See also 4 CHARLES KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 9.5 at 93-96 (1985 & Supp. 1990) (contrasting the two standards). See generally *In re Gallagher*, 150 Vt. 50, 52, 549 A.2d 637, 639 (1988).

trast. The dissent's strict reading of Act 250 stressed a need to adhere to advance planning, absent a compelling reason not to do so. The majority, on the other hand, assumed a "bandaid [sic] role, mitigating the impact of development which perpetuates patterns of growth incompatible with the traditional settlement patterns of Vermont."²¹

Close scrutiny of *Quechee Lakes* raises the issue of whether the Board fully adhered to the legislative intent of Act 250. This concern was not addressed by the court or by the parties on appeal. The dissent's approach, however, is superior for three reasons.

First, the dissent's belief that the project should have been reviewed as an entirely new project is both consistent with Act 250 and well-grounded in Board precedent.²² Second, as the majority noted, permitting a developer to use the amended permit process to gain approval of willful violations undermines the effectiveness of Act 250.²³ When used in the manner employed by *Quechee Lakes*, Environmental Board Rule 34, which governs the amended permit application process, is susceptible to abuse.²⁴ Allowing unbridled changes in a project without advance review undermines the basic purpose of Act 250, which provides for orderly planning and growth in Vermont.²⁵ Instead, it encourages developers to circumvent the procedural safeguards incorporated into Act 250's land use provisions when it is in their economic interest to do so.²⁶

21. See Agency of Natural Resources Design Issues Study Committee, Interim Report 15-16 (Draft 2) (June 1, 1990).

22. See *In re Tucker*, Declaratory Ruling No. 165-EB, Findings of Fact, Conclusions of Law and Order at 7. (Vt. Env'tl. Bd., Feb. 27, 1985). See also *infra* notes 55-58 and accompanying text.

23. *In re Quechee Lakes Corp.*, No. 3W0364-1A-EB, Findings of Fact and Conclusions of Law and Order at 14 (Vt. Env'tl. Bd., Feb. 3, 1987).

24. Environmental Board Rule 34 allows developers to seek approval of a "proposed change" in a project. Furthermore, Environmental Board Rule 35 provides that if the proposal contains substantial changes from the original land use permit, it "shall be considered as a new application." If it involves only material or administrative changes the application "may be subject to simplified review procedures." Vt. Env'tl. Bd. Rules 34-35 (1990).

25. See Legislative Findings and Declaration of Intent, 1969 Vt. Laws 250, § 1, reprinted in VT. STAT. ANN. tit. 10, § 6001 History (1984) (legislative history on purpose of Act 250).

26. In its amended permit application *Quechee Lakes* noted that "marketing considerations" and the delay inherent in obtaining a permit or amendment under the Act 250 process can have a "monumental effect on scheduling and interest payments." Application to Amend Permit, Ex. No. 2, *In re Quechee Lakes Corp.*, No. 3W0364-1A-EB (Vt. Env'tl. Bd., July 30, 1984) (sequence of and reason for construction changes). See *infra* notes 118-19 and accompanying text.

Finally, the decision not to penalize Quechee Lakes more harshly signifies the Board's uncertainty regarding the handling of a project built in violation of both its original permit specifications and Act 250's aesthetic criteria. The dissent's hard-line position receives support on two levels. First, although the legislature offered little guidance on how to cope with a case such as *Quechee Lakes*, the lawmakers provided for stiff penalties for those circumventing the land use planning process. The dissent's approach is wholly consistent with these provisions. Furthermore, the courts appear equally willing to uphold harsher statutory penalties against violators as the need for tighter land use regulation becomes more evident.²⁷

I. THE RIDGE CONDOMINIUMS APPEAL: A TORTUOUS ROUTE

In 1981, Quechee Lakes Corporation²⁸ obtained an Act 250 land use permit to construct a twenty-eight unit condominium on a high ridge overlooking the Quechee Valley.²⁹ The project, as originally designed, was to consist of five building units facing west, arranged end to end in an arc 280 feet above the valley floor.³⁰ A sixth unit would sit slightly higher on the ridge above the first five buildings.³¹ The six buildings combined were expected to cover approximately 19,600 square feet.³²

27. See *infra* note 150 and accompanying text.

28. As described by the Environmental Board:

Quechee Lakes is a four-season second home and recreation development located in a picturesque valley in the southwest corner of Hartford, Vermont. Established in 1970, the Quechee Lakes development plans eventually to build up to 2,500 housing units on 3,000 acres of land, including 500 or more condominium units and the balance as detached residences. Another 2,500 - 3,000 acres will be maintained as permanent open space, greenbelt and wildlife areas. Among its amenities, the resort offers two golf courses, a clubhouse, an artificial lake (Lake Pineo) with beach facilities, tennis courts, restaurants, and a small ski area with a ski lift, all within a 20-minute drive of Hanover, New Hampshire, and White River and Woodstock, Vermont.

In re Quechee Lakes Corp., No. 3W0364-1A-EB, Findings of Fact and Conclusions of Law and Order at 4 (Vt. Env'tl. Bd., Feb. 3, 1987). For a more detailed description of the Quechee Valley and the changes which have occurred since 1970, see *In re* Murphy Farm & Newton Inn, Nos. 3W0411-EB & 3W0439-EB, Findings of Fact and Conclusions of Law and Order (Vt. Env'tl. Bd., Nov. 4, 1985) (consolidated appeals and decision).

29. *In re* Quechee Lakes Corp., No. 3W0364-1A-EB, Findings of Fact and Conclusions of Law and Order at 4 (Vt. Env'tl. Bd., Feb. 3, 1987).

30. *Id.* at 4-5.

31. *Id.*

32. Under the terms of the original permit, Buildings One, Two, Five and Six were approved with widths of approximately 125 feet (when viewed from the west) and depths of

Quechee Lakes completed construction of the Ridge Condominiums in 1984, after making sixteen architectural revisions in the project without proceeding through the Act 250 review process.³³ The project as completed covers roughly 29,000 feet.³⁴ The changes included the addition of thirty-eight skylights, clerestory and other windows, four foot overhangs and wrap around decks.³⁵ Other changes included the enlargement of sliding glass doors, the reduction of roof pitches, the relocation of several buildings, and a

28 feet. Buildings Three and Four were approved with 100 foot widths and 28 foot depths. *Id.* at 4, 6.

33. *In re* Quechee Lakes Corp., No. 3W0364-1A-EB, Findings of Fact and Conclusions of Law and Order at 1-7 (Vt. Envtl. Bd., Feb. 3, 1987). See also Application to Amend Permit, Ex. No. 1, *In re* Quechee Lakes Corp., No. 3W0364-1A-EB (Vt. Envtl. Bd., July 30, 1984) (comparing construction changes with approved Act 250 application).

34. *In re* Quechee Lakes Corp., No. 3W0364-1A-EB, Findings of Fact and Conclusions of Law and Order at 4, 6 (Vt. Envtl. Bd., Feb. 3, 1987) (based on the figures provided in finding Nos. 3 and 7-E).

35. *Id.* at 5-7. The following summary describes the changes made by Quechee Lakes as detailed in the Environmental Board's Findings of Fact:

BUILDING LOCATION: The "footprints" of Buildings One, Two, and Four as built are almost identical to their approved locations. Building Three was rotated slightly downhill in a westerly direction. Building Five was also rotated in a westerly direction, but to a greater degree. The southwest corner of Building Six was rotated 25 feet toward the east to avoid a fracture in the ledge caused by the contractor's blasting.

BUILDING HEIGHT: The ridgeline heights of Buildings One through Five were lowered between 1 foot and 6 feet from the approved plans. The overall height of Building Six was raised 1½ feet.

GLAZING: Buildings One through Five each have 155.2 square feet of glass on their western facades, an increase of 42% over the approved 109.3 square feet. Building Six has 159.8 square feet of glazing on its west facade, a 46% increase over the approved plans.

SKYLIGHTS: During construction, 20 skylights were added to the western roof pitches of Buildings One through Four and 18 skylights were added to Building Five. The total amount of new glass increased 67.6% over the approved plans. Although Quechee Lakes coated the skylights with an anti-glare lacquer, the coating still permits light to pass in during the day, and out during the night.

WIDTH, DEPTH AND MASS: While the width of the buildings was essentially unchanged from the approved plans, the depth of the buildings was increased from 28 to 42 feet. The roof pitch was reduced from a pitch of 7:12 to 5:12 to accommodate the increased floor space without increasing the overall height of the buildings. The change in roof pitch also allowed the addition of the third tier of clerestory windows in Building Six. The developer also reduced the number of levels upon which the windows, balconies and roof lines were constructed, creating less diversity in the buildings' architectural lines than originally approved. The combined effect of all of these changes increased the perceived mass of the buildings. *Id.* See also *In re* Quechee Lakes Corp., 154 Vt. 543, 546-47, 580 A.2d 957, 959 (1990); *infra* note 49. Note: Although the Vermont Supreme Court's opinion noted that the depth of only three of the six buildings was increased, *In re* Quechee Lakes Corp., 154 Vt. at 546, 580 A.2d at 959, the Environmental Board's decision indicates that the depth increase applied to all six buildings. *In re* Quechee Lakes Corp., No. 3W0364-1A-EB, Findings of Fact and Conclusions of Law and Order at 6 (Vt. Envtl. Bd., Feb. 3, 1987).

fourteen foot increase in the depth of each building.³⁶

After the project was completed, Quechee Lakes filed an amended Land Use Permit Application with the District Three Environmental Commission on August 1, 1984.³⁷ By that time, most of the condominium units had been sold.³⁸ The Commission approved most of the requested changes in the original permit, but ordered Quechee Lakes to install non-glare glass in the downslope windows, remove the skylights on the western roof pitches, install a barrier on the access road behind Building Six, and undertake additional landscaping.³⁹

Quechee Lakes filed its Notice of Appeal to the Environmental Board on October 25, 1984, objecting only to the Commission's order to remove the skylights.⁴⁰ Three interested parties opposed to the project filed a cross appeal, arguing that Building Six should be torn down as a partial means of mitigating the aesthetic damage.⁴¹

The appeal followed a "tortuous route" through twenty-seven months of motions, conferences, Board hearings, and appearances in Windsor Superior Court.⁴² The sole issue on appeal focused on

36. *In re Quechee Lakes Corp.*, No. 3W0364-1A-EB, Findings of Facts and Conclusions of Law and Order at 7 (Vt. Env'tl. Bd., Feb. 3, 1987).

37. *Id.* Application Number 3W0364-1A-EB sought approval of the major architectural changes incorporated into the buildings detailed in *supra* note 35. The application sought approval for the elimination of lofts, split-entry design, full-height crawl spaces and access doors along with the addition of four foot overhangs, entry-level bedrooms, wraparound decks with side-doors, and the extension of living room areas. It also sought the construction of a rear access road for Building Six. *Id.* at 3, 7. See also Application to Amend Permit, Ex. No. 1, *In re Quechee Lakes Corp.*, No. 3W0364-1A-EB (Vt. Env'tl. Bd., July 30, 1984).

38. *In re Quechee Lakes Corp.*, 154 Vt. at 146, 580 A.2d at 959.

39. *In re Quechee Lakes Corp.*, No. 3W0364-1A-EB, Findings of Fact and Conclusions of Law and Order at 3 (Vt. Env'tl. Bd., Feb. 3, 1987).

40. *Id.* at 4. The Board granted co-applicant status to Ridge Condominiums, Inc. [hereinafter RCI], an association composed of the project's unit owners. RCI brought a cross appeal, challenging all of the mitigating conditions imposed by the Commission. *Id.* at 3.

41. *Id.* at 3-4. See also *In re Quechee Lakes Corp.*, No. 3W0364-1A-EB, Pre-filed Testimony of Beverly and Burton Foster at 1 (Vt. Env'tl. Bd., undated), reprinted in Appellee's Printed Case at 106 (undated) (noting that 250 families living in the Quechee Valley contributed to a fund to seek removal of Building Six to mitigate the environmental loss posed by Quechee Lakes' negligence); *In re Quechee Lakes Corp.*, No. 3W0364-1A-EB, Pre-filed Testimony of Dr. Bernard Grossman at 1 (Vt. Env'tl. Bd., undated), reprinted in Appellee's Printed Case at 112. The parties-in-interest are landowners in the Quechee Valley. In addition, Mrs. Foster serves as a trustee of the Quechee Land Owners' Association. *In re Quechee Lakes Corp.*, No. 3W0364-1A-EB, Findings of Fact and Conclusions of Law and Order at 3-4 (Vt. Env'tl. Bd., Feb. 3, 1987).

42. At the request of Quechee Lakes, the appeal was removed to Windsor Superior

whether the project, as built, created an undue adverse effect on the aesthetics of the Quechee Valley pursuant to Act 250.⁴³ Following a de novo hearing, the Board held that the project resulted in a detriment to public health, safety and general welfare under the aesthetic criterion of the Act.⁴⁴

In reaching its decision, the Board applied a two-prong analysis developed in a companion case involving Quechee Lakes.⁴⁵ First, the Board determined that the project had an "adverse impact" on the scenic and natural beauty of the surrounding landscape. Second, the Board found that the adverse impact created by the project was "undue."⁴⁶

Although this two-step test appears uncomplicated, the actual

Court on October 26, 1984. Beverly and Burton Foster, seeking to remove Building Six, filed a cross appeal on November 9, 1984. RCI filed cross appeals on November 1, 1984 and April 29, 1985, which challenged all of the mitigating conditions imposed by the District Commission. The Windsor Superior Court remanded the case to the Environmental Board for further proceedings on April 2, 1985. After a prehearing conference and a public hearing, the Board held its first hearing on the merits on May 29, 1985. The Board also conducted its first site visit on that day. Following a second prehearing conference on October 25, 1985, hearings on the merits resumed on January 4, 1986, and continued on March 26, June 4, and August 4 of that year. The Board conducted a second site visit on June 4, 1985. A third prehearing conference was held November 10, 1985, to review the parties' progress towards settlement. After several extensions failed to produce a settlement, the Board set November 26, 1985, as a deadline for submission of the parties' proposed Findings of Fact and Conclusions of Law. The Board held deliberative sessions on the merits of the appeal on January 7 and January 21, 1987. The Board determined that the record was complete on February 3, 1987 and thereafter issued its Findings of Fact and Conclusions of Law. *In re Quechee Lakes Corp.*, No. 3W0364-1A-EB, Findings of Fact and Conclusions of Law and Order at 1-2 (Vt. Env'tl. Bd., Feb. 3, 1987).

43. Act 250 provides that "[b]efore granting a permit, the board or district commission shall find that the subdivision or development . . . [w]ill not have undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas." VT. STAT. ANN. tit. 10, § 6086(a)(8) (1984 & Supp. 1990).

44. *In re Quechee Lakes Corp.*, No. 3W0364-1A-EB, Findings of Fact and Conclusions of Law and Order at 13 (Vt. Env'tl. Bd., Feb. 3, 1987). See also VT. STAT. ANN. tit. 10, § 6086(a)(8) (1984 & Supp. 1990).

45. In its *Murphy Farm and Newton Inn* decision, the Environmental Board established the factors to be considered in determining whether a particular project adheres to the aesthetic requirements of § 6086(a)(8). See *In re Murphy Farm and Newton Inn*, Nos. 3W0411-EB & 3W0439-EB, Findings of Fact and Conclusions of Law and Order at 18-24 (Vt. Env'tl. Bd., Nov. 4, 1985). The *Murphy Farm and Newton Inn* appeals were originally companion cases to the Ridge Condominium Project. The Board stayed further proceedings in the Ridge Condominium appeal pending the outcome of the *Murphy Farm and Newton Inn* proceedings. *Id.* at 1 n.2.

46. *In re Quechee Lakes Corp.*, No. 3W0364-1A-EB, Findings of Fact and Conclusions of Law and Order at 7-13 (Vt. Env'tl. Bd., Feb. 3, 1987) (citing *In re Murphy Farm and Newton Inn*, Nos. 3W0411-EB & 3W0439-EB, Findings of Fact and Conclusions of Law and Order at 17-20 (Vt. Env'tl. Bd., Nov. 4, 1985)).

inquiry requires a comprehensive analysis of the probable aesthetic impact likely to result from a proposed project. The 'cornerstone' of this analysis centers on whether the development will blend harmoniously with its surroundings. The Board takes into account the nature of the proposed project, the character and existing uses of the location, the current building styles, and the scenic values.⁴⁷

If these factors indicate that the proposed project is adverse to the existing character of the location, the Board moves to the second level of analysis. Under the second prong the Board inquires whether the project offends either a written community standard or the sensibilities of an average individual, or whether it ignores less obtrusive designs.⁴⁸

The Board confined its review to whether the changes themselves, as opposed to the project itself, resulted in an undue adverse effect on the natural beauty of the surrounding area.⁴⁹ Nevertheless, the entire Board was deeply offended by the project's intrusiveness on the Quechee Valley.⁵⁰ The unapproved changes,

47. The project must "fit" its context. Under the first prong of the test, the Board classifies the location generally as urban, suburban, village, rural or a recreational resort. The Board also considers the existing land uses, man-made structures, topography, vegetation and particular scenic values. The project must be architecturally compatible with existing building styles, considering scale, color and mass. Also, the visual impact which the project will create, especially on open spaces, is important to placement decisions. The Board disfavors projects that infringe upon high visibility land forms such as ridgelines, steep slopes, shorelines and floodplains, since such land forms are highly sensitive to change. *Id.* at 7-9 (citing *In re Murphy Farm and Newton Inn*, Nos. 3W0411-EB & 3W0439-EB, Findings of Fact and Conclusions of Law and Order at 17-19 (Vt. Env'tl. Bd., Nov. 4, 1985)).

48. As explained in *Murphy Farm and Newton Inn*, adverse impact is undue and violates § 6086(a)(8) if the Board determines that the project: (1) violates a clear, written community standard intended to preserve the aesthetics or scenic, natural beauty of the area as set forth in a local or regional plan, an adopted historic design district, or incorporated into a state or municipal scenic road designation; (2) offends the sensibilities of the average person as determined by the collective judgment of the Environmental Board; or (3) fails to incorporate available mitigating designs which a reasonable person would use to improve the harmony of the project with its surroundings. Such steps would include consideration of colors, materials, landscaping, less obtrusive building sites, mass or density of the project. *Id.* at 9-11 (citing *In re Murphy Farm and Newton Inn*, Nos. 3W0411-EB & 3W0439-EB, Findings of Fact and Conclusions of Law and Order at 19-20 (Vt. Env'tl. Bd., Nov. 4, 1985)).

49. *Id.* at 11. Noting that the original permit was not on appeal and that Quechee Lakes had a "vested right" to build the project as described in the original permit, the Board explained that it was impossible to judge the changes without considering the deviations in context with the Ridge project itself. *Id.* The Board explained that the issue "is not whether the Ridge project itself should be denied an Act 250 permit because it causes an 'undue adverse effect,' but whether the changes constructed by Quechee Lakes, when coupled with the original project, have such an effect." *Id.* at 12.

50. The Board explained that:

Due to its location at the top of a steep valley wall near the crest of the ridge,

"either singularly or when considered together," created an adverse impact on the local environment.⁵¹ As a result, the Board ordered Quechee Lakes to implement remedial steps to "substantially mitigate" the impact of the changes.⁵²

II. DISSENTING FOR A BROADER VIEW: *IN RE TUCKER*

Although the entire Board concurred that the project was offensive, one member sharply dissented on the scope of the Board's review. The majority asserted that it could only consider the offensive *changes* made to the original project because Quechee Lakes retained vested rights to build the original development.⁵³ The dissent, however, argued that the changes so significantly altered the character of the project that the Board should review the project in its entirety.⁵⁴ The Board's ultimate decision resulted from its interpretation of a single provision of Act 250. By contrast, the dissent's view was derived from a broad view of the jurisdictional structure and the policy intertwined within the entire regulatory

the virtually unrelieved mass of Buildings 1-5 when viewed from the west, and its general lack of vegetative screening, the Ridge project tends visually to dominate the Quechee Valley. Far from blending harmoniously into its surroundings, the Ridge tugs at the eyes of visitors, including the members of this Board. In summer or winter, on clear days or cloudy, during daylight or at night, the Ridge project makes its presence known. No other development in the valley has as much of an intrusive effect . . . The Board members shared a strong negative reaction to the visual impact of the project which extended far beyond a matter of personal taste.

Id. at 11-12.

51. *Id.* at 15.

52. *Id.* at 12. The Board explained that if Quechee Lakes Corporation and co-applicant RCI were to implement the proposed remedial changes, it would issue an amended permit approving the balance of the changes. Among the changes approved by the Board were the elimination of the lofts, the rotation of Buildings Three and Five, the addition of side doors and the addition of the rear entrance to Building Six. The Board also authorized the changes approved by the District Three Environmental Commission that were not challenged on appeal.

However, the Board ordered Quechee Lakes to: (1) remove the skylights installed on the western roof pitches of Buildings One through Five; (2) prepare plans to limit the total projected glass area of the western facades to the original permit limit of 109.3 square feet by either constructing solid balcony railings, replacing the windows or sliding glass doors with smaller units, eliminating the clerestory windows in Building Six, or constructing some similar device that would achieve the glazing limit; (3) prepare planting plans to break up the mass of the buildings; and (4) fund the hiring of an independent landscape architectural consultant to evaluate the adequacy of the plans to accomplish the objectives of the Board's order. *Id.* at 15-16.

53. *In re Quechee Lakes Corp.*, No. 3W0364-1A-EB, Findings of Fact and Conclusions of Law and Order at 11 (Vt. Env'tl. Bd., Feb. 3, 1987).

54. *Id.* at 16 (Bruce, dissenting).

scheme. This view is also supported by the Board's own precedent.

An examination of *In re Tucker*⁵⁵ exemplifies how the dissent in *Quechee Lakes* is harmonious with the Board's precedent and the jurisdictional structure of Act 250. Less than a year prior to *Quechee Lakes*, the Board ruled that amended permit reviews of alterations to a pre-existing project are generally limited to an examination of the alterations, and not the whole project itself.⁵⁶ However, the Board noted that if those changes "permeate the entire project," then jurisdiction extends to the entire project.⁵⁷ The Board confined the scope of its review in *Tucker*, believing that it was consistent with the jurisdictional limits established in the provisions of Act 250 governing pre-existing developments.⁵⁸ Under Act 250, permits are required for any substantial change in the "grandfathered" development itself.⁵⁹

In *Tucker*, the Board found that it did not have Act 250 jurisdiction over an entire gravel pit that had been in operation since 1972 because changes made to the pit's access roads and the installation of new equipment did not permeate the overall project.⁶⁰ Instead, the Board held it could require a new permit only for the changes in the project.⁶¹

The Board's decision not to review the Ridge Condominiums as a "new project" is inconsistent with the rule established by *Tucker*. The decision is also inconsistent with the Board's factual and legal findings concerning the *Quechee Lakes* project. Either the Board simply chose to ignore its holding in *Tucker* or it adopted an extremely narrow reading of the word "permeate." Essentially, the Board held that a fifty percent increase in the depth of the buildings, a sixty-seven percent increase in glazing,⁶² the ad-

55. *In re Tucker*, No. 5W0829-EB, Findings of Fact and Conclusions of Law and Order (Vt. Env'tl. Bd., June 2, 1986).

56. *Id.* (citing *In re Tucker*, Declaratory Ruling No. 165 at 7 (Vt. Env'tl. Bd., Feb. 27, 1985)).

57. *Id.*

58. VT. STAT. ANN. tit. 10, § 6081(b) (limiting review of developments commenced prior to June 1, 1970 to the issue of substantial changes). See also Vt. Env'tl. Bd. Rule 2(O) (1990).

59. VT. STAT. ANN. tit. 10, § 6081(b) (1984).

60. *In re Tucker*, Declaratory Ruling No. 165 at 5-7 (Vt. Env'tl. Bd., Feb. 27, 1985).

61. *Id.* at 6-7.

62. This figure includes the aggregate accumulation of glazing and skylights. Application to Amend Permit, Ex. No. 1, *In re Quechee Lakes Corp.*, No. 3W0364-1A-EB (Vt. Env'tl. Bd., July 30, 1984).

dition of wraparound decks, new roof pitches and overhangs, as well as other significant changes, did not pervade the entire project.⁶³

Unlike *Tucker*, Quechee Lakes' original permit was not exempt from Act 250 permit requirements since the Ridge condominiums were built after the statutory cutoff date for exempt status.⁶⁴ Therefore, the entire structure built by Quechee Lakes fell under the jurisdiction of the District Commission and the Board, justifying full review.⁶⁵ While Quechee Lakes retained a "vested right" to construct the project described in its original land use permit,⁶⁶ that right vested only to the extent it was not revoked for failure to comply with the permit conditions.⁶⁷

The Board had the power to revoke Quechee Lakes' original permit for building a project substantially different from the design described in its permit.⁶⁸ If the Board has broad jurisdictional control over the entire project for revocation purposes, it is almost certain that the legislature intended the Board to retain similar control over an entire project when considering its amended permit application to correct those same violations. This logic is consistent with the fact that the Board had the authority simply to reject the amended application.⁶⁹ Similarly, the Board could have instituted proceedings to abate the violations.⁷⁰ Any one of these three actions would likely have required removal of the structures due to the extent of Quechee Lakes' changes.⁷¹ Despite the fact that the Board members "shared a strong negative reaction to the visual impact of the project which extended far beyond a matter of

63. See generally *In re Quechee Lakes Corp.*, No. 3W0364-1A-EB, Findings of Fact and Conclusions of Law and Order (Vt. Envtl. Bd., Feb. 3, 1987).

64. VT. STAT. ANN. tit. 10, § 6081(b) (1984).

65. The District Commission's jurisdiction over Quechee Lakes' proposed development attached at the time of application for a land use permit. See generally VT. STAT. ANN. tit. 10, § 6083 (1984 & Supp. 1990). The legislature indicated its intent for the Commission and the Board to retain continuing jurisdiction by providing for duration limits on issued permits. See VT. STAT. ANN. tit. 10, § 6090 (1984) (see Supp. 1990 for 1985 amendment).

66. *In re Quechee Lakes Corp.*, No. 3W0364-1A-EB, Findings of Fact and Conclusions of Law and Order at 11 (Vt. Envtl. Bd., Feb. 3, 1987).

67. VT. STAT. ANN. tit. 10, § 6090(c) (Supp. 1990); Vt. Envtl. Bd. Rule 38(A) (1990); *In re Quechee Lakes Corp.*, 154 Vt. 543, 550, 530 A.2d 957, 961 (1990).

68. VT. STAT. ANN. tit. 10, § 6090(c) (Supp. 1990) (revocation); Vt. Envtl. Bd. Rule 38(A) (1990).

69. VT. STAT. ANN. tit. 10, § 6086 (Supp. 1990); Vt. Envtl. Bd. Rule 34 (1990).

70. VT. STAT. ANN. tit. 10, § 8221 (Supp. 1990) (formerly VT. STAT. ANN. tit. 10, § 6004 (1984 & Supp. 1990) (repealed 1989)).

71. See *infra* note 79 and accompanying text.

personal taste," the Board chose to forego penalties.⁷²

Strong policy reasons, consistent with a broad reading of Act 250's intent, provide additional support for the notion that the Board's jurisdiction should have extended to the entire new project. The ultimate goals of Act 250 are to protect the public welfare and Vermont's resources, in a manner consistent with planned economic development.⁷³ In light of these goals, it is contrary to the principles of statutory interpretation to limit the Board's authority for complete review of the entire offending project under the amended permit procedure, where it could achieve a similar result by pursuing enforcement remedies.⁷⁴ The Vermont Attorney General likewise agreed that the Board "could have done precisely what [the dissent] suggests and still have been within the bounds of the law."⁷⁵

A logical interpretation of the Board's jurisdiction, therefore, vests the Board with authority to achieve these goals through either the amended permit application review process or revocation. This is also consistent with the Board's jurisdiction over the entire project in terms of its original application.⁷⁶ While Quechee Lakes built a "project," it was not, in reality, the project that the Board approved.⁷⁷

The sixteen changes made to the Quechee Lakes condominiums pervade the entire project and contribute to a virtual "unrelieved mass" that visually dominates the valley.⁷⁸ Although each change could theoretically be evaluated separately from the rest of the project, little would remain of the basic structures themselves if each offensive part were eliminated.⁷⁹ The Board's own findings

72. *In re Quechee Lakes Corp.*, No. 3W0364-1A-EB, Findings of Fact and Conclusions of Law and Order at 12 (Vt. Envtl. Bd., Feb. 3, 1987).

73. Capability and Development Plan; Statement of Legislative Intent and Findings, 1973 Vt. Laws 85, §§ 6-7, reprinted in VT. STAT. ANN. tit. 10, § 6042 History (1984).

74. See *infra* note 132.

75. Appellee's Brief at 53, *In re Quechee Lakes Corp.*, 154 Vt. 543, 546, 580 A.2d 957, 961 (1990) (No. 3W0364-1).

76. See VT. STAT. ANN. tit. 10, § 6083 (1984 & Supp. 1990) (applications); VT. STAT. ANN. tit. 10, § 6081 (1984 & Supp. 1990) (required permits).

77. See *supra* notes 32-35 and accompanying text.

78. *In re Quechee Lakes Corp.*, No. 3W0364-1A-EB, Findings of Fact and Conclusions of Law and Order at 11-12 (Vt. Envtl. Bd., Feb. 3, 1987).

79. To visualize the extent of the changes, note that nearly 9,800 square feet of horizontal building space—the rough equivalent of three additional structures—would have been removed or redistributed if the Board had concluded that the unauthorized 50% depth increase in the buildings by itself had an undue impact on scenic beauty. Compare *In re*

do not suggest otherwise.⁸⁰ The Board held that the changes, singularly or collectively, contributed to the overall negative visual impact of the project on the valley.⁸¹ The Board's fragmented analysis failed to contemplate the full context and impact of the Quechee Lakes project as built. The Board agreed that "[n]o other development in the valley has as much of an intrusive effect," and concluded that if it were evaluating the project for the first time, it would have found its impact on the surrounding valley adverse.⁸²

The project as originally approved is presumed by regulation to comply with the Act 250 criterion.⁸³ The Board's displeasure with the project indicates that the unapproved changes significantly pervaded the entire character of the project. For this reason, as the dissent noted, it would have been more appropriate for the Board to view the project as an entirely "different project."⁸⁴

III. SEEKING AN ORDERLY PLAN IN THE PLANNING PROCESS

Retroactive approval of the bulk of Quechee Lakes' architectural changes through the amended permit procedure underscores a conspicuous grey area in Act 250: the issue of whether the amended permit process should be available to developers who willfully attempt to circumvent the regular procedural requirements of Act 250. On one hand, if the developer is foreclosed on policy grounds from using an amended permit to legalize its willful violations, then the Board's flexibility in dealing with the problem is limited as its only corrective recourse is to initiate proceedings either to abate the violations entirely or to revoke the permit. This, of course, raises questions regarding the propriety of forcing a developer to destroy an entire structure, and the potential for severe economic waste.

Conversely, however, even a partial approval of the violation

Quechee Lakes Corp., No. 3W0364-1A-EB, Findings of Fact and Conclusions of Law and Order at 4 (Vt. Env'tl. Bd., Feb. 3, 1987) (Finding No. 3) *with id.* at 6-7 (Finding No. 7(E)).

80. *Id.*

81. *Id.*

82. *In re* Quechee Lakes Corp., No. 3W0364-1A-EB, Findings of Fact and Conclusions of Law and Order at 12 (Vt. Env'tl. Bd., Feb. 3, 1987).

83. *See* Vt. Env'tl. Bd. Rule 31(B)(2) (1990) (findings of the District Commission in the original permit proceeding presumed valid).

84. *In re* Quechee Lakes Corp., No. 3W0364-1A-EB, Findings of Fact and Conclusions of Law and Order at 16 (Vt. Env'tl. Bd., Feb. 3, 1987) (Bruce, dissenting).

through Environmental Board Rule 34⁸⁵ grants the developer sanctuary from its own willful disregard of Act 250 and encourages future misuse. Even more disturbing, use of Rule 34 in this manner undermines the roles of the District Environmental Commission and the Environmental Board. The legislature empowered these agencies to bring order to the planning and development process. Post-construction requests for approval, however, transform these agencies into reverse planners charged with mitigating environmental wrongs. It is unlikely the legislature envisioned such a result.

A desire to control unbridled use of Vermont's environment prompted the legislature to pass Act 250 in 1969.⁸⁶ The legislature sought to direct growth away from destructive uses of the environment to uses compatible with the needs of Vermont residents.⁸⁷ To achieve this goal, the legislature mandated that the Environmental Board adopt a plan to guide a "coordinated, efficient and economic development of the state" consistent with its present and future needs and resources.⁸⁸ The plan called for growth that is best suited to "promote the health, safety, order, convenience, prosperity and welfare of the inhabitants [of Vermont], as well as efficiency and economy in the process of development."⁸⁹

In 1973, the legislature adopted its version of the Capability and Development Plan.⁹⁰ The legislature's version consisted of a

85. Vermont Environmental Board Rule 34 governs the amended permit process. Vt. Envtl. Bd. Rule 34 (1990). See also *supra* note 24.

86. The legislature recognized that "the unplanned, uncoordinated and uncontrolled use of the lands and environment of the state" resulted in destructive uses of the environment unsuitable to the needs of Vermont residents. Findings and Declaration of Intent, 1969 Vt. Laws 250, § 1, reprinted in Vt. STAT. ANN. tit. 10, § 6001 History (1984). In order to control growth, "and to insure that these lands and environment are devoted to uses which are not detrimental to the public welfare and interests," the legislature created the Vermont Environmental Board and District Environmental Commissions to regulate the use of lands under Act 250. *Id.*

87. See generally *supra* note 86 and accompanying text.

88. Vt. STAT. ANN. tit. 10, § 6042 (1984) (Capability and Development Plan).

89. *Id.*

90. Capability and Development Plan; Statement of Legislative Intent and Findings, 1973 Vt. Laws 85, §§ 6-7, reprinted in Vt. STAT. ANN. tit. 10, § 6042 History (1984). The plan established a list of policies to guide the administration of Act 250. Originally, the "policy plan" was intended to implement Act 250, which was to be followed by a more generalized state-wide land use plan. However, the scheme met political roadblocks. The legislature approved the first plan, but never settled on the second. As a result, "Act 250 has necessarily been administered for twenty years without planning guidance as to the future of specific areas—except such as may (or may not) be available from local and regional plans." Williams & Van Ryn-Lincoln, *supra* note 6 at 94 n.7.

comprehensive statement on nineteen separate areas of concern, ranging from such complex issues as the ability of the land to support development, to specific topics such as housing, scenic resources and waste disposal.⁹¹ Inherent in the legislature's statement of intent is the notion that the planning process should apply to development projects prior to, rather than after, their construction.⁹²

In *Quechee Lakes*, the Environmental Board acknowledged similar concerns in its decision.⁹³ Expressing its dissatisfaction with the circuitous route chosen by some developers to gain approval of willful permit violations, the Board wrote that it:

is deeply concerned that the amendment procedures provided in Board Rule 34 have been used by permittees who choose to ignore the requirements of the permit, construct whatever changes they believe are necessary or desirable at the time, and then simply file an amendment application when the changes are discovered. . . . [T]he Act 250 process is premised upon the concept that the parties to a permit application are entitled to rely upon an applicant's representations concern-

91. *Capability and Development Plan; Statement of Legislative Intent and Findings*, 1973 Vt. Laws 85, §§ 6-7, reprinted in VT. STAT. ANN. tit. 10, § 6042 History (1984). The 19 topic areas listed by the legislature include: (1) The Capability of the Land; (2) Utilization of Natural Resources; (3) Public and Private Capital Investment; (4) Planning For Growth; (5) Seasonal Home Development; (6) General Policies For Economic Development; (7) Specific Areas For Resource Development; (8) Planning For Housing; (9) Natural Resources Specifically Provided For; (10) Recreational Resources; (11) Special Areas; (12) Scenic Resources; (13) Conservation of Energy; (14) Taxation of Land; (15) Planning For Growth; (16) Public Facilities or Services Adjoining Agricultural or Forestry Lands; (17) Planning For Transportation; (18) Transportation Systems; and (19) Planning For Waste Disposal. *Id.*

92. Throughout Chapter 151 the legislature makes repeated references to Act 250 review of *proposed*, rather than completed, projects. See generally VT. STAT. ANN. tit. 10, §§ 6001-6092 (1984 & Supp. 1990). In an attempt to increase the level of participation in the planning process the legislature also provided statutory parties with due process rights of notice and the opportunity to be heard on development proposals. See VT. STAT. ANN. tit. 10, §§ 6044, 6084-6085 (1984 & Supp. 1990). The legislature's call for *prior* planning was made explicitly clear in its *Capability and Development Plan*. The legislature expressly noted that "[t]he capability of land to support development or subdivision provides a foundation for judgment of whether a *proposal* of development or subdivision is consistent with policies designed to make reasonable use of the state's resources and to minimize waste or destruction of irreplaceable values." *Capability and Development Plan; Statement of Legislative Intent and Findings*, 1973 Vt. Laws 85, § 7(a)(1) (Planning for Land Use and Economic Development) (emphasis added), reprinted in VT. STAT. ANN. tit. 10, § 6042 History (1984). See also Vt. Envtl. Bd. Rule 34 (1990) (noting that district coordinator will expeditiously review *proposed* changes in amended permit applications).

93. See *In re Quechee Lakes*, No. 3W0364-1A-EB, Findings of Fact and Conclusions of Law and Order at 13-14 (Vt. Envtl. Bd., Feb. 3, 1987).

ing the scope of the [originally] proposed project.⁹⁴

The Board listed additional problems with the use of Rule 34 for retroactive approval of violations. First, post-construction approval deprives the district commission of a meaningful review, which is designed to take place when the commission initially approves a project.⁹⁵ Second, statutory parties might be deprived of due process and their right to a fair hearing.⁹⁶ Both of these problems deeply troubled the Board since the Vermont Supreme Court overturned a 1978 land use decision on similar grounds.⁹⁷ As the court explained, the Act 250 process is intended, by a system of notice and hearings, to assure full consideration of land use proposals.⁹⁸ Precluding either the commission's complete discussion of a project, or circumventing public participation may "diminish the scrutiny given to land use under the statutory framework, because it allows for approval of development without the discussion provided for by the statute."⁹⁹

Third, reverse planning "undermines the integrity of the Act 250 process by encouraging applicants to use the amendment process as a device to renege on promises and representations made during the original application process."¹⁰⁰ Finally, seeking approval of a project as built requires the Board or District Commission to divine whether a particular change would have been approved had it been incorporated in the original plans.¹⁰¹

Against this backdrop, several reasons stand out which make

94. *Id.* (citing Knight Point State Park, Declaratory Ruling No. 77 at 3 (Vt. Envtl. Bd., Sept. 8, 1976)).

95. *Id.* at 13-14.

96. *Id.* at 14. A substantial change in the nature of a project might increase the number of persons entitled to party status by increasing the amount or types of land affected. It could also trigger the need for additional hearings on a proposed project to determine whether the changes conflict with any one of Act 250's other criteria. VT. STAT. ANN. tit. 10, § 6086 (1984 & Supp. 1990). See Vt. Envtl. Bd. Rule 14.

97. *In re Juster Associates*, 136 Vt. 577, 581, 396 A.2d 1382, 1384-85 (1978).

98. *Id.*, 396 A.2d at 1384.

99. *Id.*, 396 A.2d at 1385.

100. *In re Quechee Lakes Corp.*, No. 3W0364-1A-EB, Findings of Fact and Conclusions of Law and Order at 11 (Vt. Envtl. Bd., Nov. 26, 1986); See also Foster and Grossman Requests For Findings of Fact at 4 (parties opposed to condominiums charging that Quechee Lakes Corporation's unilateral decision to proceed with construction without an amended permit exemplified a cavalier disregard for the integrity, efficacy, and viability of the Act 250 process).

101. *In re Quechee Lakes Corp.*, No. 3W0364-1A-EB, Findings of Fact and Conclusions of Law and Order at 14 (Vt. Envtl. Bd., Feb. 3, 1987).

the Board's solitary dissent in *Quechee Lakes* the more reasoned approach for maintaining the integrity of Act 250. First, divesting developers of the right to use the amended permit process to gain approval of willful Act 250 violations would serve as a deterrent to similar violations in the future. The chance that a substantially modified project might receive de novo review in its entirety would provide a powerful financial incentive for developers to comply with Act 250's procedural requirements or face unprofitable penalties.¹⁰²

Second, an hard-line response to such violations would better promote the planning process enacted by the legislature.¹⁰³ Such an approach would encourage developers to strictly adhere to the conditions of their permits, and the entire review process would be given greater structure and credibility. Finally, it would better safeguard the environment from structures that have changed so substantially in character that they threaten the scenic or natural beauty of an area. Such an approach would not operate "as a no growth law, but as a law designed to improve the quality of growth."¹⁰⁴

Preventing the use of Rule 34 by willful violators is also consistent with the statute governing land use permits.¹⁰⁵ For example, the legislature made it clear that the permit process is neither discretionary or retrospective, declaring that "[n]o person shall . . . commence construction on a subdivision or development . . . without a permit."¹⁰⁶ The more reasonable use of Rule 34, when used in conjunction with this statute, is that Rule 34 is applicable to proposed, rather than completed projects.¹⁰⁷ In this regard, *Quechee Lakes* establishes a poor precedent. The decision allows violators to use Rule 34 in a manner which renders the Land Use Chapter virtually meaningless.¹⁰⁸ It inhibits Vermont's ability to minimize

102. See *infra* note 132 and accompanying text.

103. See *supra* note 86 and accompanying text.

104. Williams & Van Ryn-Lincoln, *supra* note 6, at 94.

105. VT. STAT. ANN. tit. 10, § 6081(a) (1984).

106. The statute applies to substantial changes of even exempted developments. VT. STAT. ANN. tit. 10, § 6081(a) (1984). Additionally, the legislature exempted certain well defined acts from this section, except those designed "to circumvent the purposes of this chapter." *Id.* at § 6081(a).

107. VT. STAT. ANN. tit. 10, § 6081 (1984 & Supp. 1990) (permits required prior to construction). See Vt. Envtl. Bd. Rule 34 (1990) (amended permit required for material or substantial changes).

108. The majority approach becomes more graphic when Act 250 criteria, other than aesthetics are considered. For example, if a developer constructed a project in an existing

the waste and destruction of irreplaceable natural resources.¹⁰⁹ Although the dissent noted that minor variations or mistakes could be overlooked, it argued that Quechee Lakes' recalcitrant attitude towards permit conditions rendered the case inappropriate for leniency.¹¹⁰

In summary, while subsequent approval of a project through an amended permit safeguards the violator, it severely undermines the procedural safeguards incorporated into Act 250 and the Environmental Board's own rules.¹¹¹ Such approval sends mixed signals to developers. Although the Board's opinion warned that violations conflicting with any of the section 6086 criteria will be viewed critically, it nonetheless signaled that at least some developers will not be penalized for failing to adhere to the procedural requirements in the application process.¹¹² Such a message lacks uniformity and conflicts with the Board's duty to bring order to the planning process. Quechee Lakes ignored the legitimate routes available to seek approval for changes in the project.¹¹³ As the dissent aptly noted,

deer yard contrary to the provisions established in § 6086(a)(8)(A) of title 10 (necessary wildlife habitat) and then applied for approval of the project through the amended permit application process, the damage to the environment has already been done. Such a result does not comport with the intent of Act 250 to promote growth through planned use of the state's resources with minimal impact on the environment. See *supra* note 92 and accompanying text.

109. See Capability and Development Plan; Legislative Statement of Intent and Findings, 1973 Vt. Laws 85, § 7(a)(1) (Planning For Land Use and Economic Development), reprinted in VT. STAT. ANN. tit. 10, § 6042 History (1984). See also *supra* note 86.

110. *In re Quechee Lakes Corp.*, No. 3W0364-1A-EB, Findings of Fact and Conclusions of Law and Order at 16 (Vt. Envtl. Bd., Feb. 3, 1987) (Bruce, dissenting).

111. See generally VT. STAT. ANN. tit. 10, §§ 6081-6089 (1984 & Supp. 1990); Vt. Envtl. Bd. Rules 1-51 (1990).

112. Of great concern is the developer who stands to gain more from violating Act 250 than he or she would stand to lose from mitigating any potential harms. Although Quechee Lakes will suffer some expense in removing the west-facing skylights, evidence objected to during the application process for an amended permit suggests that Quechee Lakes earned significant profits by making the unapproved changes. See *In re Quechee Lakes Corp.*, No. 3W0364-1A-EB, Pre-filed Testimony of Beverly and Burton Foster at 2 (Vt. Envtl. Bd., undated); *In re Quechee Lakes Corp.*, No. 3W0364-1A-EB, Pre-filed Testimony of Dr. Bernard Grossman (Vt. Envtl. Bd., undated). Quechee Lakes itself admitted that marketing considerations played a significant role in its decision. Application to Amend Permit, Ex. No. 2, *In re Quechee Lakes*, No. 3W0364-1A-EB at 1-2 (Vt. Envtl. Bd., July 30, 1984) (sequence and reason for construction changes).

113. Quechee Lakes could have sought: alterations to the conditions attached to its original permit (Vt. Envtl. Bd. Rule 31(A) (1990)); reconsideration of the application by the commission (Vt. Envtl. Bd. Rule 31(A) (1990)); an interlocutory appeal to the Board to resolve controlling issues of law (Vt. Envtl. Bd. Rule 43 (1990)); a de novo hearing by the Board on the permit conditions (Vt. Envtl. Bd. Rule 40 (1990) (appeals)), VT. STAT. ANN. tit. 10, § 6089 (Supp. 1990) (appeals)); removal of the action to Superior Court (VT. STAT. ANN.

the corporation built a different project instead.¹¹⁴ The Board's decision to accept Quechee Lakes' amended application, therefore, gives greater protection to the private developer than the legislature likely intended.¹¹⁵

IV. FOOTNOTE ONE OF *IN RE QUECHEE LAKES*: SIGNALING A NEED FOR STRICTER ENFORCEMENT

Quechee Lakes' disdain for Act 250 underscores a compelling argument for supporting stricter penalties.¹¹⁶ The legislature's mandate for an orderly planning and development process will be subverted as long as a developer's financial gain is better realized by circumventing Vermont's comprehensive Land Use Act rather than following the law's procedural requirements.¹¹⁷

Quechee Lakes advanced a two page document justifying its decision to substantially modify its Ridge condominium project

tit. 10, § 6089(a) (1984) (although this option was deleted by amendment in 1987; see § 6089(a) (Supp. 1990)); or an amended permit prior to construction of substantial changes (Vt. Env'tl. Bd. Rule 34 (1990)). An expeditious review for material changes not significantly affecting any of the Act 250 criteria is available in the amended permit application procedure. Vt. Env'tl. Bd. Rule 34(c) (1990); Vt. Env'tl. Bd. Rule 51 (1990). Quechee Lakes could have also sought: an advisory opinion on the proposed changes from the District Coordinator (Vt. Env'tl. Bd. Rule 3(C) (1990)); or a declaratory ruling from the Board (Vt. Env'tl. Bd. Rule 3(C) (1990)). Ultimately, Quechee Lakes could have challenged any decision of the Environmental Board through appeal to the Vermont Supreme Court. VT. STAT. ANN. tit. 10, § 6089(b) (1990).

114. *In re Quechee Lakes Corp.*, No. 3W0364-A1-EB, Findings of Fact and Conclusions of Law and Order at 16 (Vt. Env'tl. Bd., Feb. 3, 1987) (Bruce, dissenting).

115. The power of the Board to adopt rules derives from § 6025 of title 10. VT. STAT. ANN. tit. 10, § 6025 (1990). The statute provides that the rules may allow "less stringent procedures" only with respect to the application process, notice and hearing requirements of §§ 6083, 6084, and 6085. *Id.* § 6025(b)(1). The statute does not, however, loosen the requirement that the developer obtain a permit prior to construction under § 6081(a). See *id.* § 6025. Here, the Board based its ruling on the belief that Quechee Lakes retained a vested right to the original project. It should be reiterated, however, that Quechee Lakes had a vested right only to the extent the Board chose not to revoke the original permit for its violations.

116. Quechee Lakes knew that its changes to the project might be subject to Act 250 review, but on the advice of its attorneys, the corporation notified purchasers that it would "continue construction and sale of the Ridge Condominium units." Letter from Quechee Lakes Corp. to Purchasers (December 1983) (giving notice that "all purchasers take title to the Ridge Condominiums subject to the outcome of the legal action, and in the unlikely event that the plaintiffs prevail, some condominium units may be ordered torn down by the court").

117. See Legislative Findings and Declaration of Intent, 1969 Vt. Laws 250, § 1, reprinted in VT. STAT. ANN. tit. 10, § 6001 History (1984).

without first proceeding through the Act 250 review process.¹¹⁸ The document noted that marketing considerations, customer preferences, and the risk of lengthy delays inherent in the application review process all contributed to its unilateral decision to go ahead with the changes.¹¹⁹ Quechee Lakes' repeated violations, however, largely undercut its explanations. Footnote one of the Vermont Supreme Court's opinion graphically portrays the level of contempt that Quechee Lakes held for the Act 250 process. The court noted that the District Commission was "frankly dismayed" to discover that Quechee Lakes made even further changes in its condominium project after the amended permit hearings had commenced, including the addition of an access road.¹²⁰

The Environmental Board chose not to seek formal enforcement proceedings or levy penalties against Quechee Lakes for any of its willful violations.¹²¹ The Board's decision raises the issue of uniformity in enforcement. The Board has often initiated revocation proceedings for violations of land use permits such as failure to landscape,¹²² to keep dogs enclosed in a kennel at night,¹²³ to

118. See Application to Amend Permit, Ex. No. 2, *In re Quechee Lakes Corp.*, No. 3W0364-A1-EB, at 2 (Vt. Envtl. Bd., July 30, 1984) (sequence and reason for construction changes).

119. Quechee Lakes cited numerous reasons for its architectural changes. Quechee Lakes claimed that it encountered unexpected problems with the physical site and followed its contractor's suggestions to simplify construction. The corporation also noted its practice of "customizing" units to meet the expectations of purchasers, such as providing enlarged decks and living spaces, additional windows, and skylights. Stressing that timing is critically important to making sales and securing financing commitments by banks, Quechee Lakes explained:

Our primary consideration is the length of time it takes for the Act 250 process, from the time of application to a hearing date to the findings of fact and issuance of a permit or amendment. This has to be balanced with the construction delivery schedule and construction financing. A two month delay for an amended Land Use Permit can have a monumental effect on scheduling and interest payments.

Id. at 2.

120. *In re Quechee Lakes Corp.*, 154 Vt. 543, 546 n.1, 580 A.2d 957, 959 n.1 (1990).

121. In a letter, W. Gilbert Livingston, Executive Officer of the Vermont Environmental Board, notified Paul Buff, President of Quechee Lakes Corporation, of the alleged violation. He wrote, "[w]hile all of these deviations from the approved plans are not of sufficient severity to warrant criminal enforcement action, they all have contributed to the overall change to the aesthetics of the project" Letter from W. Gilbert, Executive Officer, Vermont Environmental Board, to Paul Buff, President, Quechee Lakes Corporation (May 7, 1984) (recommending that Quechee Lakes Corporation immediately apply to the District Commission for a permit amendment to authorize the changes).

122. *In re Green Mountain Heat Products, Inc.*, No. 8B0208-EB, Findings of Fact and Conclusions of Law (Vt. Envtl. Bd., Mar. 9, 1982) (imposing \$500 penalty).

123. *In re Puppy Acres Boarding Kennel*, No. 2W0568, Findings of Fact and Conclu-

install an acceptable restroom at a summer theatre,¹²⁴ to maintain a road and obtain a permit for a restroom,¹²⁵ to provide notice of project plans to a municipal commission,¹²⁶ to install a culvert,¹²⁷ and to extract excess gravel from gravel pits.¹²⁸

Although the Board has often initiated revocation proceedings in cases involving violations of comparable or lesser magnitude,¹²⁹ it did not do so with Quechee Lakes. In deciding what "enforcement tool" to use in a given situation, the Board considers "[t]he magnitude and number of violations, the impact of the violations upon the environment or the community, the knowledge and intent of the permittee or its successors in interest, the economic gain realized by the violator, and the responsiveness of the permittee to correct a violation."¹³⁰

Furthermore, although the Board has shown a willingness to rigidly apply Act 250's aesthetic criterion to proposed projects,¹³¹

sions of Law and Decision (Vt. Envtl. Bd., June 1, 1987) (imposing \$2,000 penalty for repeat violations).

124. *In re Blachly*, No. 5W0781-EB, Findings of Fact and Conclusions of Law and Order (Vt. Envtl. Bd., Sept. 13, 1985).

125. *In re Gregory*, No. 6G0220-5-EB, Findings of Fact and Conclusions of Law and Order (Vt. Envtl. Bd., July 12, 1985).

126. *In re Pelham North, Inc.*, No. 3W0521-EB, Findings of Fact and Conclusions of Law and Order (Vt. Envtl. Bd., April 24, 1989).

127. *In re Sigda Lumber, Inc.*, No. 2W0749-EB, Findings of Fact and Conclusions of Law and Order (Vt. Envtl. Bd., June 26, 1990).

128. *In re Callan*, No. 5W0550, Memorandum of Decision and Revocation Order (Vt. Envtl. Bd., Sept. 20, 1988). See also *In re Roger and Erma Rowe*, No. 1R0987-EB, Findings of Fact and Conclusions of Law and Order (Vt. Envtl. Bd., Aug. 24, 1988); *In re NJM Realty Ltd. Partnership*, No. 2W0312-EB, Memorandum of Decision and Order (Vt. Envtl. Bd., June 29, 1990).

129. See *supra* notes 122-128 and accompanying text.

130. *In re Crushed Rock, Inc.*, No. 1R0489, Findings of Fact and Conclusions of Law and Permit Revocation Order at 12 (Vt. Envtl. Bd., Oct. 17, 1986).

131. The Board has often rejected proposed projects because the development would have an undue adverse effect on the aesthetics of the surrounding environment. See *In re Tanager*, No. 3W0125-3-EB, Findings of Fact and Conclusions of Law and Order (Vt. Envtl. Bd., May 22, 1990) (permit disapproved, undue adverse effect and detrimental to public welfare); *In re McShinsky*, No. 3W0530-EB, Findings of Fact and Conclusions of Law and Order (Vt. Envtl. Bd., April 21, 1988) (permit denied, undue adverse effect), *aff'd*, 153 Vt. 586, 572 A.2d 916 (1990); *In re Northside Development, Inc.*, No. 4C0626-5-EB (Vt. Envtl. Bd., Dec. 29, 1988) (permit denied, undue adverse effect); *In re H.A. Manosh Corp.*, No. 5L0918-EB, Findings of Fact and Conclusions of Law and Order (Vt. Envtl. Bd., Aug. 8, 1988) (permit denied, undue adverse effect); *In re Landmark Development Corp.*, No. 4C0667-EB, Findings of Fact and Conclusions of Law and Order (Vt. Envtl. Bd., Jan. 22, 1988) (permit approved in part and denied in part); *In re Houston Farm Associates*, No. 5L0775-EB, Findings of Fact and Conclusions of Law and Order (Vt. Envtl. Bd., April 27, 1987) (modern condominium development out of context with last open meadow on Moun-

Quechee Lakes signals the Agency's reluctance to apply the same rigidity in aesthetic cases involving completed structures where the developer could suffer severe economic loss. The Board could have sought revocation of *Quechee Lakes*' permit, an injunction requiring compliance with the terms of the original permit, or criminal penalties.¹³² The Board could also have refused to approve the amended application.¹³³

Signaling that it might favor harsher penalties for land use permit violations, the Vermont Supreme Court noted that the Board has the power to simply revoke the developer's original permit when the developer violates the permit's "no changes" clause.¹³⁴ The dissent's hard-line approach to the *Quechee Lakes* problem is synonymous with the court's apparent willingness to forcefully deal with Act 250 violations.¹³⁵ Although the dissent did not expressly advocate enforcement or penalties per se, application of the dissent's suggested remedy would have required the same

tain Road in Stowe; permit conditionally approved); *In re Pratt's Propane*, No. 3R0486-EB, Findings of Fact and Conclusions of Law and Order (Vt. Env'tl. Bd., Jan. 27, 1987) (permit denied, but acceptable conditions for approval stated); *In re Thomas*, No. 2W0644-EB, Findings of Fact and Conclusions of Law and Order (Vt. Env'tl. Bd., Feb. 18, 1986) (permit denied, detrimental to public welfare); *In re Gurman*, No. 3W0424-EB, Findings of Fact and Conclusions of Law and Order (Vt. Env'tl. Bd., June 10, 1985) (permit denied, undue adverse effect); *In re Brattleboro Chalet Motor Lodge, Inc.*, No. 4C0581-EB, Findings of Fact and Conclusions of Law and Order (Vt. Env'tl. Bd., Oct. 17, 1984) (permit denied, undue adverse effect, but subsequent design revision approved with conditions); *In re Tardy*, No. 5W0534, Findings of Fact and Conclusions of Law (Vt. Env'tl. Bd., Mar. 21, 1980) (permit disapproved, undue adverse effect); *In re Wildlife Wonderland, Inc.*, No. 1R0117, Findings of Fact and Conclusions of Law (Vt. Env'tl. Bd., Oct. 17, 1974) (permit denied, undue adverse effect), *aff'd*, 133 Vt. 507, 346 A.2d 645 (1975). See also Williams & Van Ryn-Lincoln, *supra* note 6 (for a complete discussion on regulation of aesthetics under Act 250); Andrew M. Jackson, Note, *Leaving the Scene: Aesthetic Considerations in Act 250*, 4 VT. L. REV. 163 (1979).

132. See VT. STAT. ANN. tit. 10, § 6090(c) (Supp. 1990) (permit may be revoked by the Board in the event of violation of any condition attached to any permit); VT. STAT. ANN. tit. 10, § 8221(a) (Supp. 1990) (civil enforcement to ensure compliance) (formerly VT. STAT. ANN. tit. 10, § 6004 (1984) (repealed 1989)); Vt. Env'tl. Bd. Rule 38(A) (1990) (revocation); VT. STAT. ANN. tit. 10, § 6003 (1984 & Supp. 1990) (violation of Act 250 or Board rules punishable by fines, imprisonment, or both).

133. VT. STAT. ANN. tit. 10, § 6087 (1984 & Supp. 1990) (denial of permit for failure to meet aesthetic requirements of VT. STAT. ANN. tit. 10, § 6086(a)(8) (1984 & Supp. 1990)); Vt. Env'tl. Bd. Rule 30 (1990) (denial of permits).

134. *In re Quechee Lakes Corp.*, 154 Vt. 543, 546, 580 A.2d 957, 961 (1990) (noting that VT. STAT. ANN. tit. 10, § 6090(c) empowers the Board to revoke a land use permit for violating an attached condition that no changes be made in the project without prior approval of the District Commission).

135. *In re Quechee Lakes Corp.*, No. 3W0364-1A-EB, Findings of Fact and Conclusions of Law and Order at 16 (Vt. Env'tl. Bd., Feb. 3, 1987) (Bruce, dissenting).

outcome. Three arguments support the dissent's uncompromising position. First, a tougher stance by the Board would preserve the integrity of Act 250 by promoting uniform enforcement. Second, the dissent's argument is consistent with Vermont Supreme Court precedent. Third, it would reduce the latent adverse impact of visually offensive projects, which become more harmful to future planning through the process of segmented growth.

As with the other elements of Vermont's land use law, the Board's discretionary enforcement powers must be read in the context of the legislature's intent to establish land use controls. Although the Board has consistently applied this approach in reviewing projects that impose a significant impact on the public health,¹³⁶ it has done so half-heartedly in the area of aesthetic enforcement.¹³⁷ The extent of Quechee Lakes' willful violations, coupled with the project's critical placement in a "visually sensitive area" may well have warranted greater penalties than issued by the Board. The case, however, cannot be viewed in such idealistic isolation. Instead, the case must be examined relative to the aesthetic statute itself, as well as the statute's history, and how it was intended to interface with the other goals of Act 250.

When the legislature drew up its Capability and Development Plan it unequivocally specified its goal of "maximiz[ing] economic benefit with minimal environmental impact."¹³⁸ However, because it realized that an equal balance between the two aims could not always be achieved, the legislature premised its declaration by emphasizing that "development should be pursued selectively."¹³⁹ Included among Vermont's list of natural treasures is its pastoral and picturesque landscape, characterized broadly by the legislature as a "matter[] of public good."¹⁴⁰ Intent on preserving the scenic

136. See *In re Crushed Rock, Inc.*, No. 1R0489, Findings of Fact and Conclusions of Law and Permit Revocation Order (Vt. Env'tl. Bd., Oct. 17, 1986), *rev'd on other grounds*, 150 Vt. 613, 557 A.2d 84 (1988) (revoking permit of project which threatened public health and welfare).

137. See Williams & Van Ryn-Lincoln, *supra* note 6, at 93-94 (noting that in its early opinions, the Board merely mentioned that no problem was raised in connection with the aesthetic criterion; thereafter, as it gained confidence, the Board eventually produced its Quechee analysis).

138. Capability and Development Plan; Statement of Legislative Intent and Findings, 1973 Vt. Laws 85, § 7(6)(A), *reprinted in* Vt. STAT. ANN. tit. 10, § 6042 History (1984) (general policies for economic development).

139. *Id.*

140. Capability and Development Plan; Statement of Legislative Intent and Findings, 1973 Vt. Laws 85, § 7(a)(2), *reprinted in* Vt. STAT. ANN. tit. 10, § 6042 History (1984).

beauty, the General Assembly ordered that "[u]ses which *threaten or significantly inhibit* these resources should be permitted *only* when the public interest is clearly benefitted thereby."¹⁴¹ This language clearly favors conservation.

The legislature, however, gave little guidance on how to implement its mandate.¹⁴² It also made aesthetic control more difficult by placing the burden of proof on those opposed to a particular project, rather than on the applicant, who carries the burden for most other criteria under Act 250.¹⁴³ A further problem results from the subjectivity inherent in gauging aesthetics, although "it is not always true that *beauty is in the eye of the beholder*."¹⁴⁴

Although the Board appeared mindful of these considerations when weighing the economic and ecological benefits associated with the Ridge Condominiums, its decision favored the economist's side of the scale. Rather than deny an amended permit for a project that "tugs at the eyes of visitors" in an "aesthetically sensitive" area, the Board attempted to mitigate the damage rather than eliminate it completely.¹⁴⁵ This approach runs counter to the legislature's assertion that land uses which threaten Vermont's natural resources are warranted *only* where the public interest is clearly benefitted. The legislature's use of such restrictive language suggests that if the Board has the power to prevent potential harm to aesthetics, it has an obligation to do so.¹⁴⁶ Evidence introduced at Quechee Lakes' amended permit hearings suggest that the overall public benefit of the Ridge Condominiums was anything but clear.¹⁴⁷

141. *Id.* (emphasis added).

142. Vermont Agency of Natural Resources Design Issues Study Committee, Interim Report 5 (June 1, 1990) (Draft 2).

143. VT. STAT. ANN. tit. 10, § 6088 (1984).

144. See Vermont Agency of Natural Resources Design Issues Study Committee, Interim Report 6 (June 1, 1990) (Draft 2).

145. *In re Quechee Lakes Corp.*, No. 3W0364-1A-EB, Findings of Fact and Conclusions of Law and Order at 11-14 (Vt. Env'tl. Bd., Feb. 3, 1987).

146. Under Condition One of its original land use permit, Quechee Lakes was obligated to complete its project as depicted in the original plans. Condition Two prohibited Quechee Lakes from making changes in the project without prior approval by the District Three Environmental Commission. See *In re Quechee Lakes Corp.*, Permit No. 3W0364 (District Three Env'tl. Comm., Feb. 4, 1981); *In re Quechee Lakes Corp.*, No. 3W0364-1A-EB, Findings of Fact and Conclusions of Law and Order at 7 (Vt. Env'tl. Bd., Feb. 3, 1987); *In re Quechee Lakes Corp.*, 154 Vt. 543, 546, 580 A.2d 957, 961 (1990).

147. See Pre-filed Testimony of Beverly and Burton Foster (Vt. Env'tl. Bd., undated), reprinted in Appellee's Printed Case at 106, *In re Quechee Lakes Corp.*, 154 Vt. 543, 580 A.2d 957 (1990) (No. 3W0364-1A-EB) (Mrs. Foster, a trustee of the Quechee Land Owner's

Because the project's undue adverse aesthetic impact arose out of the developer's willful violation, the dissent's position is more closely aligned with the "quality of growth" and order sought by the legislature.¹⁴⁸ Furthermore, the dissent's position fulfills the Board's own proclamation in its earlier *Murphy Farm* decision that "visual intrusion must be reduced to the greatest practicable extent"¹⁴⁹

The second major argument in support of the dissent is that its reasoning finds persuasive backing in both Vermont Supreme Court precedent, and statutory and common law regulation of private and public land use outside the bounds of Act 250. The Vermont Supreme Court has displayed its willingness to uphold such orders despite their inevitable harsh results, and has warned that "any construction commenced by the developer prior to the issuance of all necessary permits . . . is commenced at his peril."¹⁵⁰

Similarly, the law governing variances and restrictive covenants is equally strict. Vermont's statute governing variances in municipal planning codes is narrowly drawn, allowing variances from zoning schemes only when five specific criteria are met.¹⁵¹ Generally, the statute provides for relief from unnecessary hardship where the physical conditions of the land render development under the terms of a zoning ordinance difficult or impossible.¹⁵² It specifically prohibits variances, however, where developers bring the hardship upon themselves.¹⁵³ Furthermore, as noted by one ob-

Association, testifying that 250 families contributed to a fund to support dismantling of at least one of the structures).

The Ridge Condominiums do contribute to the tax base of Hartford, however. Based on figures provided by the Hartford Town Lister's Office, there are 28 units in the Ridge complex, each paying an annual property tax rate of \$2.42 per \$100 of value. The list price on each unit varies depending upon its size and location. For example, the 1984 list price for Unit No. 1-B was \$199,500, and Unit No. 1-C listed at \$200,300. The Ridge condominiums represent only 3% of Hartford's 809 condominiums which make up 20% of the town's Grand List. Telephone Interview with Don Standen, Tax Assessor, Town of Hartford, Vermont (Apr. 5, 1991) (noting that the town's list values for the Ridge units were reduced nearly 20% in 1990 as a result of a decline in the overall condominium market and Quechee Lakes' pending Vermont Supreme Court appeal).

148. See Williams & Van Ryn-Lincoln, *supra* note 6, at 94 (noting that Act 250 has "been administered not as a 'no growth' law, but as a law designed to improve the quality of growth").

149. *In re Murphy Farm and Newton Inn*, Nos. 3W0411-EB & 3W0439-EB, Memorandum of Decision at 4 (Vt. Envtl. Bd., Jan. 13, 1986).

150. *In re McDonald's Corp.*, 146 Vt. 380, 385, 505 A.2d 1202, 1205 (1985).

151. VT. STAT. ANN. tit. 24, § 4468 (Supp. 1990).

152. *Id.*

153. VT. STAT. ANN. tit. 24, § 4468(a)(3) (Supp. 1990).

server, "a variance is an extraordinary exception to a zoning ordinance and therefore should be granted sparingly" and only when the reasons justifying approval are substantial, serious, and compelling.¹⁵⁴

The Vermont Supreme Court has strictly enforced municipal zoning codes. In one case the court summarily rejected a corporation's appeal for a variance where it built a plant in a residential zone without first ascertaining the location of town lines.¹⁵⁵ Noting that the appellant created its own hardship by waiting until after the plant was erected to apply for an exception to the zoning code, the court held that the corporation did not meet its burden of showing circumstances warranting a special exception.¹⁵⁶

Similarly, amended permits should be granted sparingly where substantial changes in a project might adversely affect one of the ten criteria under Act 250. Amended permit applications, like applications for a variance, also demand that prior notice be afforded so that the public enjoys a meaningful opportunity to respond to the proposal.¹⁵⁷ Policy considerations also dictate a need for limiting variances to unusual cases. The standards for granting variances are often imprecise, and enable "corrupt local interests to use the variance procedure as a means of dispensing special privileges to selected landowners, and hamper[] the courts in reviewing the action of administrative boards granting or denying variances."¹⁵⁸

The Vermont Supreme Court has been equally harsh in cases where landowners violate the terms of restrictive covenants. The court upheld an injunction requiring a defendant to remove the second story of his house where a covenant limited the property to single story structures.¹⁵⁹ The court remarked that "he who takes land with notice of such a restriction will not in equity or good

154. 6 R. POWELL, REAL PROPERTY, ¶ 872.2[1], at 79C-504 (1991).

155. *L. M. Pike & Son, Inc. v. Town of Waterford*, 130 Vt. 432, 296 A.2d 262 (1972).

156. *Id.* at 437, 296 A.2d at 266 (appellant failed to show that the plant's architecture and landscaping were harmonious with the neighborhood).

157. 6 R. POWELL, REAL PROPERTY, ¶ 872.2[1], at 79C-508 (1991).

158. *Id.* at 79C-508-09. See also L. McDOUGAL, PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING AND DEVELOPMENT 530-31 (2d ed. 1981). Note, however, that these concerns do not intimate wrongdoing on the part of the Environmental Board. Instead, the Board has often received praise and respect from the court and commentators. See *Williams & Van Ryn-Lincoln*, *supra* note 6, at 91 n.2.

159. *McDonough v. W. W. Snow Construction Co., Inc.*, 131 Vt. 436, 306 A.2d 119 (1973).

conscience be permitted to act in violation of the restriction."¹⁶⁰

The purpose in comparing these cases to *Quechee Lakes* is simple. If the court is willing to uphold private restrictions on land use, then public restrictions on land use should be equally enforced. The dissent's position embodies this principle, and appears to have the support of the court.¹⁶¹

The third major argument in support of the dissent focuses on the inherent dangers of mitigating the impact of undue adverse aesthetic damage, rather than eliminating the impact entirely. The problem is that the existing project will impact the aesthetics of future growth. When evaluating the aesthetic impact of a proposed project on a specific area, the Board looks to the project's potential impact on the scenic qualities and aesthetics "as they currently exist" in that area.¹⁶² Simply stated, the Board evaluates a proposed project's "fit" within the broad sweep of both natural and man-made features which contribute to the existing scenery.¹⁶³ In rejecting a claim that sought a narrower interpretation of Act 250's eighth criterion, the Board declared that "it lacks authority to judge projects ignoring patterns and styles of development which have been in place [for years]."¹⁶⁴

Although the Board encouraged those communities "wishing to stem the tide of incremental scenic intrusions" by implementing "a clear, written community standard intended to preserve the aesthetics" of the area,¹⁶⁵ a danger still exists. A proposed project in an area with no established plan, must be judged against the existing natural and man-made structures dominating the location. Herein lies the danger with mitigating, rather than eliminating, projects imposing an undue adverse effect on the aesthetics of an

160. *Id.* at 441, 306 A.2d at 122. See also *Welch v. Barrows*, 125 Vt. 500, 218 A.2d 698 (1966) (requiring defendant to remove two cabins constructed on lake shore lot subject to no building restriction in covenant).

161. See *supra* note 150 and accompanying text.

162. *In re* Murphy Farm and Newton Inn, Nos. 3W0411-EB & 3W0439-EB, Memorandum of Decision at 4 (Vt. Envtl. Bd., Jan. 13, 1986).

163. *Id.* at 4.

164. *Id.* at 4 (noting that absent "community expressions of aesthetic preference . . . [the Board] cannot make decisions in 1985 based upon conditions in 1974").

165. *Id.* at 4. Due to the corporation's extensive land holdings totaling 6,000 acres, the Board ordered *Quechee Lakes* to devise a comprehensive open space plan before applying for any new project approval. See *In re* Murphy Farm and Newton Inn, Nos. 3W0411-EB & 3W0439-EB, Findings of Fact and Conclusions of Law and Order at 24 (Vt. Envtl. Bd., Nov. 4, 1985).

area. Because the offending project is not completely removed, it is necessarily incorporated into future aesthetic assessments as subsequent developments are reviewed. In the case of Quechee Lakes, future projects in the vicinity of the Ridge development must be evaluated against a background of condominiums which already "visually dominate the Quechee Valley."¹⁶⁶ As the Board noted in *Murphy Farm*, this problem "demonstrates the pitfalls of segmented, 'piecemeal' review of phased development."¹⁶⁷ Ironically, in this case, even Quechee Lakes' experts agreed that the Ridge project has a profound visual impact on a sensitive area and "that it is not in context with its surroundings."¹⁶⁸

One additional point supports the use of enforcement remedies, such as revocation, rather than the amended permit process, to correct permit violations. Statutory revocation remedies might discourage lengthy challenges in court since permit violators have minimal statutory defenses against such actions. In addition, the State's position would be strongly supported in law.¹⁶⁹

On the other hand, appeals challenging the "reasonableness" of conditions attached to an amended permit give the violator greater statutory footing. Any mitigating condition must be "reasonable" by statute, thus inviting disputes over largely subjective factors such as aesthetics.¹⁷⁰ This is precisely what Quechee Lakes unsuccessfully challenged.¹⁷¹ Although the Board ultimately won the dispute, the process involved greater risk because the Board's

166. *In re Quechee Lakes Corp.*, No. 3W0364-1A-EB, Findings of Fact and Conclusions of Law and Order at 11 (Vt. Env'tl. Bd., Feb. 3, 1987).

167. *In re Murphy Farm and Newton Inn*, Nos. 3W0411-EB & 3W0439-EB, Findings of Fact and Conclusions of Law and Order at 24 (Vt. Env'tl. Bd., Nov. 4, 1985). The Board later clarified this point, noting that patterns of negative visual intrusions need not continue. Instead, applicants must take steps to reduce adverse impact even in areas that have previously experienced scenic intrusions. *In re Murphy Farm and Newton Inn*, Nos. 3W0411-EB & 3W0439-EB, Memorandum of Decision at 4 (Vt. Env'tl. Bd., Jan. 13, 1986). Nonetheless, new projects will still be judged in context with man-made intrusions already existing in a given location. *Id.*

168. *In re Quechee Lakes Corp.*, Nos. 3W0364-EB & 3W0365-EB, Findings of Fact and Conclusions of Law and Order at 7 (Vt. Env'tl. Bd., May 28, 1981).

169. See VT. STAT. ANN. tit. 10, § 6090(c) (Supp. 1990).

170. See VT. STAT. ANN. tit. 10, § 6087(c) (1984).

171. Even the Vermont Attorney General found it ironic that Quechee Lakes challenged the "reasonableness" of the conditions since the Board could have done precisely what the dissent suggested and required abatement of all the violations. See Appellee's Brief at 53, *In re Quechee Lakes Corp.*, 154 Vt. 543, 580 A.2d 957 (1990) (No. 3W0364-1A-EB).

goals might not have been met if the court questioned the sufficiency of the Board's evidence.¹⁷²

The dissent's position is supported both in law and policy because the Board found that the project violated Criterion Eight of Act 250 by adversely impacting the aesthetics of the area.¹⁷³ Although the dissent's remedy might have created a severe financial dilemma for Quechee Lakes, such hardship would have been self-induced.¹⁷⁴ Both the legislature and the courts have shown little sympathy for violations of similar land use controls where the hardship was self-inflicted.¹⁷⁵ It is unlikely the Vermont Supreme Court would have reversed the decision had the Board taken this approach.¹⁷⁶

Furthermore, the orderly planning and development process enacted by the legislature fails when it is transformed to a process of reverse planning and repair. The legislature's true plan under Act 250 envisioned only a panoramic forward view.

CONCLUSION

The Ridge Condominiums appeal concluded the Quechee Lakes trilogy of cases challenging the negative visual impact of large-scale condominium growth on the Vermont landscape. The three cases are best known for the Environmental Board's development of the two-pronged test for evaluating aesthetic qualities of development under Act 250's eighth criterion. Before *Murphy Farm* and *Newton Inn*, the Board had no comparable guide for judging the aesthetic impact of development. *Quechee Lakes* exemplifies an underlying uneasiness within the Environmental Board, however, on how to cope with those developers who ignore

172. See VT. STAT. ANN. tit. 10, § 6088(b) (1984) (burdens of proof). See also *supra* note 20.

173. See VT. STAT. ANN. tit. 10, § 6087 (1984 & Supp. 1990) (denial of permit application if Board finds the proposed subdivision detrimental to the public health, safety, or general welfare). See also Appellee's Brief at 53, *In re Quechee Lakes Corp.*, 154 Vt. 543, 580 A.2d 957 (1990) (No. 3W0364-1A-EB) (noting that Board could have revoked Quechee Lakes' permit); *In re McDonald's Corp.*, 146 Vt. 380, 385, 505 A.2d 1202, 1205 (1985). See also *supra* note 132.

174. Compliance with the dissent's favored remedy would have required Quechee Lakes to remove the structures and comply with the terms of its original permit. See *In re Quechee Lakes Corp.*, No. 3W0364-1A-EB, Findings of Fact and Conclusions of Law and Order at 16 (Vt. Envtl. Bd., Feb. 3, 1987) (Bruce, dissenting).

175. See *supra* notes 150, 153 and accompanying text.

176. See *supra* notes 134-35 and accompanying text.

the aesthetic limitations in Act 250. As *Quechee Lakes* illustrates, a developer may gain approval for portions of a project of dubious aesthetic value by illegally avoiding legitimate procedural hurdles that may have rendered a different or less profitable result.

When it promulgated Act 250, the legislature was aware of the inherent conflict between preservation of the environment, and the economic benefits of development. *Quechee Lakes* took it upon itself to balance compliance with Act 250 against the economic costs associated with proceeding through legitimate channels. However, the Act 250 process is not discretionary. Therefore, the Board's acquiescence to *Quechee Lakes*' subversion of the process weakens the ordered planning and environmental protection goals of Act 250.

Furthermore, the Board's inclination to mitigate, rather than eliminate aesthetic harm shows a predisposition toward limiting economic loss at the expense of the environment. The legislature clearly intended the opposite result, stating that development should be pursued selectively, and that land uses which threaten Vermont's landscape "should be permitted only when the public interest is clearly benefitted."¹⁷⁷ Although the legislature provided for severe penalties to combat blatant disregard for Act 250, the Environmental Board used none of them. *Quechee Lakes* highlights the Board's reluctance to invoke such remedies where subjective criteria determine, at least in part, the scope of the violation. Uniformity of enforcement is difficult to achieve with such an approach.

The dissent's position strikes a more equitable balance for all parties affected by *Quechee Lakes*' misuse of the Act 250 system. It also better promotes the extensive goals sought by the legislature and is worthy of a second look by both the Board and the Vermont Supreme Court.

POSTSCRIPT I

Two events since the Board's decision in *Quechee Lakes* may help the Environmental Board deal with legal challenges to aesthetic control. In 1989, the legislature enacted the Uniform Envi-

177. Capability and Development Plan; Statement of Legislative Intent and Findings, 1973 Vt. Laws 85, §§ 6-7, reprinted in VT. STAT. ANN. tit. 10, § 6042 History (1984).

ronmental Law Enforcement Chapter,¹⁷⁸ which was designed in part to "prevent the unfair economic advantage obtained by persons who operate in violation of environmental laws . . . [and to] provide for more even-handed enforcement of environmental laws."¹⁷⁹ In June 1990, a committee assembled by the Agency of Natural Resources to study aesthetics released a draft report that included proposed guidelines "that would be useful to administrators in implementing consistent policy and to applicants in preparing projects for approval."¹⁸⁰

Under the new environmental enforcement chapter, the legislature created a comprehensive and cooperative enforcement scheme between the Environmental Board and the Agency of Natural Resources. The chapter includes enhanced provisions for monitoring Act 250 compliance and investigating alleged violations.¹⁸¹ The legislature provided for uniform administrative penalties of up to \$25,000 for each violation and an additional \$10,000 for each day the violation continues with a cap of \$100,000.¹⁸² The legislature also mandated that the Board and the Agency of Natural Resources adopt rules defining classes of violations and a uniform range of penalties for each class.¹⁸³

Civil remedies were also enhanced. The law allows the State to seek injunctions and reimbursement for government expenditures in correcting violations as well as civil penalties of up to \$50,000, including additional assessments of \$25,000 for each day the violation continues.¹⁸⁴ The legislature also left in place criminal penalties, allowing up to two years imprisonment for each violation.¹⁸⁵

The draft report issued by the Agency of Natural Resources Design Issues Study Committee should also be of assistance to the Environmental Board. The Committee attempted to identify important environmental values and tendered a comprehensive set of guidelines to protect Vermont's scenic landscape. The report assessed Vermont's current condition and its development trends,

178. VT. STAT. ANN. tit. 10, §§ 8001-8017 (Supp. 1990).

179. VT. STAT. ANN. tit. 10, § 8001 (Supp. 1990).

180. Agency of Natural Resources Design Issues Study Committee, Interim Report 1 (June 1, 1990) (Draft 2).

181. VT. STAT. ANN. tit. 10, §§ 8001-8009 (Supp. 1990).

182. VT. STAT. ANN. tit. 10, § 8010 (Supp. 1990).

183. VT. STAT. ANN. tit. 10, § 8016 (Supp. 1990).

184. VT. STAT. ANN. tit. 10, § 8221 (Supp. 1990).

185. VT. STAT. ANN. tit. 10, § 6003 (1984).

the legislature's mandate to protect aesthetics as a natural resource, and policy considerations and conditions special to Vermont.¹⁸⁶

Stressing that protection of Vermont's scenic and natural beauty is intrinsically tied to our ability to harmonize the competing interests of growth and preservation, the Committee Chairman added one final caveat: "No one should expect this to work smoothly."¹⁸⁷

POSTSCRIPT II

Ridge Condominiums offered to comply with the Board's February 3, 1987 order to eliminate or substantially mitigate the unauthorized changes in the Ridge project by: (1) replacing the bubble skylights with new flat framed tempered glass; (2) reducing the total amount of visible glazing by installing additional spindles on the existing balcony rails and mounting VIMCO shades on the exterior side of the clerestory windows; and (3) "implementing a landscaping plan that takes into account the visual screening that has occurred by the growth of vegetation in the years since the Board reviewed the project."¹⁸⁸

On July 19, 1991, the Board rejected the plans submitted by Ridge Condominiums and ordered that: (1) the skylights on the western roof slopes of Buildings One through Five be removed by September 1, 1991, the area be covered with roofing shingles, and the entire roof area be stained a dark color; (2) Ridge Condominiums submit a new proposal for reducing the glazing on Buildings One through Six to a maximum of 109.3 square feet per building by August 2, 1991; and (3) backdrop screening be planted for Building Six and white pine trees be planted on the east side of Building Six and the west side of Building One.¹⁸⁹

186. See generally Agency of Natural Resources Design Issues Study Committee, Interim Report (June 1, 1990) (Draft 2).

187. Williams, *supra* note 4.

188. *In re* Quechee Lakes Corp., No. 3W0364-1A-EB, Memorandum of Decision at 2 (Vt. Env'tl. Bd., July 19, 1991).

189. *Id.* at 3-4. On August 13, 1991, the Board denied RCI's motion to reconsider, but did extend the deadlines set forth in the July 19, 1991 decision. *In re* Quechee Lakes Corp., No. 3W0364-1A-EB, Memorandum of Decision and Order (Vt. Env'tl. Bd., Aug. 13, 1991).