

LEAVING THE SCENE: AESTHETIC CONSIDERATIONS IN ACT 250

In the last decade, the Vermont General Assembly has enacted several statutes which explicitly recognize the need to protect and preserve Vermont's natural scenic beauty.¹ Vermont's Land Use and Development Act, Act 250,² is the best known of these. Act 250 requires a permit for construction of large scale developments and for development in certain ecologically sensitive areas.³ Before a

1. Junkyards legislation, VT. STAT. ANN. tit. 24, § 2254 (1975) ("[T]he legislative body may also take into account the clean, wholesome and attractive environment which has been declared to be of vital importance to the continued stability and development of the tourist and recreational industry of the state and general welfare of its citizens . . ."); Mobile Home Parks legislation, *id.* tit. 10, § 6201 (1973) (legislative findings) ("The state's scenic resources have contributed greatly to its economic development, by encouraging native Vermonters to remain in the state and by attracting tourists, new industries, and new cultural facilities; and such scenic resources thus help to support existing and new businesses and recreational establishments, to encourage new investment, to increase employment and real income in the state . . . [U]nrestricted proliferation of new mobile homes . . . has in some cases tended to destroy the scenic qualities of that environment . . ."); Acquisition of Interests in Land by Public Agencies legislation, *id.* § 6301 ("[T]o preserve and enhance Vermont's scenic natural resources; to strengthen the base of the recreation industry and to increase employment, income, business, and investment . . ."); Scenic Protection Council legislation, *id.* § 421 (legislative findings) ("[I]t is the policy of the State of Vermont to protect its scenic resources because of their intangible contribution to the welfare of its citizens and visitors and for their tangible contributions to the economic well-being of the State."); Tourist Information Services legislation, *id.* § 482(4) ("The scattering of outdoor advertising throughout the state is detrimental to the preservation of those scenic resources, and so to the economic base of the state . . ."); Land Use and Development legislation, *id.* § 6001 (findings and declaration of intent) ("[T]he unplanned, uncoordinated and uncontrolled use of the lands and the environment of the state of Vermont has resulted in usages of the lands and environment which may be destructive to the environment and which are not suitable to the demands and needs of the people of the state of Vermont . . .").

2. VT. STAT. ANN. tit. 10, §§ 6001-6091 (1973).

3. *Id.* § 6081. Briefly, a development means the construction of improvements on a tract of land of more than ten acres for industrial or commercial purposes, or the construction of housing projects of ten or more units. *Id.* § 6001(3) (Cum. Supp. 1978). A short description of the Act 250 procedures may be helpful to the reader.

Vermont is divided into nine areas. *Id.* § 6026. Each area has a three-member district commission (appointed by the governor), *id.*, and a district coordinator as an administrative assistant to the commission. ENVIRONMENTAL BOARD, AGENCY OF ENVIRONMENTAL CONSERVATION, VERMONT'S LAND USE AND DEVELOPMENT LAW: ENVIRONMENTAL BOARD REGULATIONS ANNOTATED rule 1(B)(1) [hereinafter cited as ENVIRONMENTAL BOARD REGS. ANN.]. The commission holds hearings and makes findings of fact and conclusions with respect to certain criteria, VT. STAT. ANN. tit. 10, § 6086(a) (Cum. Supp. 1978); the commission must either grant or deny the permit application in accordance with its findings, *id.* § 6086(d); the

permit is issued, one of nine district commissions in the state must determine that the proposed development satisfies ten criteria enumerated in the statute.⁴

Criterion eight specifically provides for the protection of Vermont's beauty⁵ by requiring the commission to find that the development "[w]ill not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas."⁶ The General Assembly, however, has

commission may grant the permit upon satisfaction of conditions enumerated by the commission, *id.* § 6086(c); the state has an appellate board, the Environmental Board, *id.* § 6021(a) (1973), to which a dissatisfied party may appeal, *id.* § 6089 (Cum. Supp. 1978); the Board consists of nine members appointed by the governor, *id.* § 6021(a) (1973). There is, in addition, final recourse to the Vermont Supreme Court, *id.* § 6089(b) (Cum. Supp. 1978).

4. VT. STAT. ANN. tit. 10, § 6086(a) (Cum. Supp. 1978) states in part that prior to granting a permit, the district commission must find that the subdivision or development:

(1) Will not result in undue water or air pollution.

.....
 (2) Does have sufficient water available for the reasonably foreseeable needs of the subdivision or development.

(3) Will not cause an unreasonable burden on an existing water supply, if one is to be utilized.

(4) Will not cause unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result.

(5) Will not cause unreasonable congestion or unsafe conditions with respect to use of the highways, waterways, railways, airports and airways, and other means of transportation existing or proposed.

(6) Will not cause an unreasonable burden on the ability of a municipality to provide educational services.

(7) Will not place an unreasonable burden on the ability of the local governments to provide municipal or governmental services.

(8) Will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas.

.....
 (9) Is in conformance with a duly adopted capability and development plan, and land use plan when adopted.

.....
 (10) Is in conformance with any duly adopted local or regional plan or capital program under chapter 91 of Title 24.

See ENVIRONMENTAL BOARD REGS. ANN., *supra* note 3, at rule 13.

5. VT. STAT. ANN. tit. 10, § 6086(a)(8) (Cum. Supp. 1978). All of the criteria to an extent protect the beauty of Vermont, but do so more indirectly. Among the concerns in the other criteria are water and air pollution, water supply, soil erosion, all of which could affect the vegetation which provides the *vert* in Vermont. Other considerations include unreasonable congestion on the highways, and provision of adequate municipal and educational services. To the extent these considerations limit development, and thus require less use of Vermont land, they consequently leave more of Vermont's natural landscape intact.

6. *Id.*

left it to the district commissions to determine exactly what this language means.⁷ Unfortunately, but not surprisingly, this unspecific draftsmanship has led to different interpretations of criterion eight.⁸ Thus a developer unhappy with a commission's treatment of the aesthetics of a proposed development could use this inconsistency of interpretation and application of criterion eight to attack the validity of this portion of Act 250.⁹

The objectives of this note are threefold: 1) to demonstrate some of the inconsistencies in the interpretation and application of the "scenic and natural beauty" and "aesthetics" language in criterion eight,¹⁰ 2) to explore possible challenges to the constitutional validity of criterion eight, and 3) to suggest mechanisms to remedy these possible constitutional infirmities of criterion eight. Because aesthetic regulation is crucial to Vermont, as the General Assembly has found,¹¹ the future validity of criterion eight is of great importance.

Other criteria in Act 250 pose similar problems for the district commissions,¹² and the administration of those criteria may also be subject to inconsistencies and challenge. Although the ensuing analysis may be equally applicable to these other criteria, this note will focus on the language of criterion eight.¹³

7. The statute offers no guide—other than the language itself—for administering this criterion. See text accompanying notes 15 & 41 *infra*.

8. See text accompanying notes 14-40 *infra*.

9. In *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 346 A.2d 645 (1975), a developer claimed that criterion eight was unconstitutional because it embodied a delegation of legislative power to an administrative agency without adequate standards and because it authorized the taking of property without compensation. *Id.* at 519-20, 346 A.2d at 653. The Vermont Supreme Court declined to address the constitutional question because the disposition of the case did not require it. *Id.* A concurring opinion filed by Justice Larrow did not reach the constitutional question either. *Id.* at 521, 346 A.2d at 654. The constitutionality of criterion eight thus appears to remain open to challenge after this case.

10. This writer has made a survey of how the district commissions have treated "undue adverse effect on scenic or natural beauty," and "aesthetics." The "historic sites, or rare and irreplaceable natural areas" language is not part of the survey.

11. See note 1 *supra*.

12. See, e.g., criteria 1 (undue water and air pollution) and 4 (unreasonable soil erosion). VT. STAT. ANN. tit. 10, § 6086(a)(1), (4) (Cum. Supp. 1978).

13. The regulation of aesthetics is particularly subject to inconsistent application, see note 49 and accompanying text *infra*, and is therefore unusually vulnerable to challenge. Moreover, there are more detailed statutory guides given for some of the other criteria which allows them to be applied more consistently. See criteria 1, 2, 4 & 9, VT. STAT. ANN. tit. 10, §

I.

Given the language and subject matter of criterion eight, it is not surprising that it has fostered inconsistent application.¹⁴ There is a two-step definitional process a district commission must go through in applying the language of criterion eight,¹⁵ which makes consistent application unlikely. First, a commission must determine what is meant by "aesthetics" and "scenic or natural beauty,"¹⁶ then it must decide what constitutes an "undue adverse effect" on them.¹⁷ With nine district commissions, it is not hard to imagine dissimilar conclusions emerging from this twofold process.

To illustrate the potential inconsistencies of this two-step process, assume that district commission X concludes that the color planned for a developer's building would create an undue adverse effect on the aesthetics of the area. District commission Y might differ with commission X in two respects. It could determine that the color of a building was not within the meaning of "aesthetics" as the legislature meant it, or it could decide that the particular color would not be unduly adverse in effect.

Notwithstanding such potential for unpredictable interpretation and application, outright denial of an Act 250 permit for aesthetic¹⁸ reasons is quite rare.¹⁹ Generally, any shortcoming of the

6086(a) (1), (2), (4), (9) (Cum. Supp. 1978).

14. The history of aesthetic regulation reveals a judicial reluctance to uphold such regulation for fear of inconsistent and arbitrary application. See note 49 *infra*.

15. For a discussion of the plain meaning of this section of the statute, see Walter, *The Law of the Land, Development Legislation in Maine and Vermont*, 23 ME. L. REV. 315, 328 (1971).

16. VT. STAT. ANN. tit. 10, § 6086(a)(8) (Cum. Supp. 1978). Aesthetics is a broad term describing all things that are beautiful. "[R]elating to the beautiful as distinguished from the merely pleasing, the moral, and especially the useful and utilitarian." WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 34 (1971). Scenic or natural beauty more specifically describes the beauty of a landscape or a particular geographic or botanical phenomenon. "[A] view of picturesque spots and expanses especially in open country: the general aspect of a landscape." *Id.* at 2028. This first step is a legislative rule-making function. See text accompanying notes 73 & 74 *infra*.

17. VT. STAT. ANN. tit. 10, 6086(a)(8)(Cum. Supp. 1978). This is an adjudicative power. See text accompanying notes 73 & 74 *infra*.

18. For the purposes of this note, aesthetic considerations shall mean considerations regarding the "scenic and natural beauty" and "aesthetics" language of criterion eight.

19. There are a handful of cases in which proposals were denied for aesthetic reasons at the district level. *In re Winhall Trust*, Application No. 2W0219 (1974) (convention center at

proposed development under criterion eight is remedied by the imposition of various conditions on a permit approved by the district commission.²⁰ These conditions are designed to reduce or eliminate the adverse aesthetic impacts which would otherwise be caused by the proposed development. They are imposed on the large majority of Act 250 permits.²¹ These aesthetic conditions take many forms, and an approved permit often reveals the favored interests of a particular commission.²²

Substantial landscaping and subdued lighting for parking are conditions often imposed on permits for shopping centers.²³ Buffer zones and the screening of developments with natural growth are also aesthetic conditions regularly imposed.²⁴

Stratton ski resort was denied a permit mainly because of the high visibility of the 80 foot structure, reversed in the Bennington County Superior Court, Docket No. C22-74-BM (1976); *In re Hillwinds, Inc.*, Application No. 2W0302 (1975) (a nine unit housing development in an open area was denied a permit); *In re Courtney Nau*, Application No. 2W0259 (1974) (a subdivision in an open corn field was denied a permit; an amendment to the Environmental Board rules exempted the development from Act 250 compliance); *In re John L. McKenna*, Application No. 1R0156 (1974) (Volvo dealership proposal in rural setting, denial appealed to Environmental Board where the development was exempted from Act 250 compliance); *In re Wildlife Wonderland*, Application No. 1R0117 (1974) (a permit was issued by the district commission for a wild animal farm development, on appeal the Environmental Board denied the permit); *In re Cody Enterprises*, Application No. 500036 (1971) (drive-in theater screen could be seen from highway, application was withdrawn after denial).

20. "It is true that a major impact of criterion eight is not that it denies permit applications, but that it imposes conditions relating to aesthetics in many cases." Interview with Ken Senecal, Executive Secretary of the Environmental Board, in Montpelier, Vt. (Feb. 1977).

21. Interview with Peter Zilliacus, ex-District II Environmental Commissioner, in Brattleboro, Vt. (Oct. 1977).

22. Apparently each district commission has its own predilections. One district is known as the "cedar shake commission." Interview with Robert Brown, District I Environmental Coordinator, Rutland, Vt. (Oct. 17, 1977). Others are known for their emphasis on ski area or restaurant amenities. Interview with Paul Nergaard, District V Environmental Coordinator, Waterbury, Vt. (Oct. 24, 1977). At least one commission does not think that it is its business to tell developers how to make their projects more attractive. Interview with Curtis Carter, District IV Environmental Coordinator, Essex Junction, Vt. (Oct. 24, 1977).

23. For the mall in Rutland, Vt., there was approximately \$43,000 of landscaping and lighting work done. *In re Justgold Holding Corp.*, Application No. 1R0048 (1973); interview with Robert Brown, *supra* note 22. Mr. Brown indicated this expense was substantially greater than would otherwise be expected. See also *In re Omega Shopping Center, Inc.*, Application No. 8B0168 (1977).

24. The Glen Martin development plan had to be modified to allow for additional trees and larger parking lot islands. *In re Glen Martin*, Application No. 4C0237 (1976). In *In re White Pigment Corp.*, Application No. 9A0042 (1976), a twenty foot minimum buffer zone of

Signs have been regulated under criterion eight, as well as under other municipal or state regulations. The District IX Commission required that a sign be externally lighted,²⁵ and the District V Commission demanded that the Holiday Inn organization display a less imposing version of their trademarked sign.²⁶

Development plans have been altered and conditions imposed with respect to colors and architectural design as well. For example, one district commission told a discount retailer that his sign could have no more than three colors.²⁷ Another commission asked a shopping center developer to submit other plans for design of his buildings; the original plans were for a box-shaped facility, and the building was eventually approved upon the addition of a mansard roof of cedar shakes.²⁸

It seems unlikely that every district commission would favor externally lighted signs, developments screened with a row of trees, or cedar shake mansard roofs. With such a wide range of potential conditions, uniform application of the words "aesthetics" and "scenic or natural beauty" would be an impossibility without other standards to guide the commissions.²⁹ This is not to argue that

trees was required on all sides of a waste rock disposal area adjacent to a quarry. Interview with Peter Zilliacus, *supra* note 21.

25. *In re* Antonio Pomerleau, Application No. 9A0032 (1975). Nevertheless, the local planning commission thought the sign should be internally lighted, and the district commission did not enforce its condition.

26. *In re* Oakhill Corp., Application No. 500050 (1974). The commission made no mention of the visibility of the 80 unit motel building. Interview with Paul Nergaard, *supra* note 22.

27. *In re* Rome Family, Application No. 1R0228-1 (1977). In *In re* Vermont Marble Company, Application No. 1R0271 (1977), the district commission placed the following condition on the permit approval: "The proposed facility shall be of uniform (one) color, and that color shall be an earth-tone hue." The applicant filed a motion to strike the condition, asking the commission to reconsider and eliminate the color condition. The commission granted the motion to strike. The commission had not heard any argument at the hearing regarding colors, but had imposed the condition anyway.

28. *In re* Lumas Grossman, Application No. 700034-1 (1973). Interview with Peter Zilliacus, *supra* note 21.

29. It could be argued that the legislature did not intend to have the law applied consistently, but rather intended to have some community standards imposed in each district similar to community standards of obscenity. See *Miller v. California*, 413 U.S. 15 (1973). This would allow an undeveloped district to monitor growth by selecting its own aesthetic standards. Nevertheless, the three members of each district commission are appointed by the Governor, not elected, VT. STAT. ANN. tit. 10, § 6026(b) (Cum. Supp. 1978); hence, the standards of a community are not necessarily represented by its own district commission.

uniform application of standards must yield a uniform result, for sterile and mechanical uniformity would be undesirable. Consideration of local conditions should always be a factor in criterion eight determinations, but the extreme cases of inconsistent results could be prevented by clarifying regulations and guidelines without divesting the district commissions of their local control.

Inconsistent application of criterion eight is most apparent where developments of a certain type in a similar setting are treated in the most dissimilar ways. In undeveloped rural areas, for example,³⁰ one gasoline station next to Interstate 89 was permitted to construct its regular modern station without aesthetic modification.³¹ Yet, forty or fifty miles away, along the same highway, plans for another gasoline station had to be considerably revamped to prevent adverse effects on that area of "first impression."³² Along Route 7 (a major state highway), a proposed development was rejected altogether because the area was scenic and completely untouched by development.³³

The "swath" impact of cut ski trails has never been addressed,³⁴ yet for a utility company's proposal this impact was a great enough concern to place a limiting condition on the permit.³⁵

Within a district, administration of criterion eight can be equally inconsistent.³⁶ In District VI the aesthetic considerations

30. This example illustrates the three separate decisions possible under the two-step definitional process. See text accompanying notes 17 & 18 *supra*. The first commission did not include in its findings that the fact that an area is undeveloped is an aesthetic consideration by itself. The second found it necessary to consider the adverse effects on such an area. The third commission found that any development in such an area would have an undue adverse effect.

31. This is a Mobil station in Randolph, Vt. Interview with Ken Senecal, Executive Secretary of the Environmental Board, Montpelier, Vt. (Oct. 4, 1978).

32. *In re* Mobil Oil Corp., Application No. 4C0042 (1972); interview with Curtis Carter, *supra* note 22.

33. *In re* John McKenna, Application No. 1R0156 (1974). The commission suggested the applicant should construct his Volvo dealership closer to Rutland where there was considerable strip development already. The application was exempted from Act 250 compliance on appeal to the Environmental Board.

34. Interview with Paul Nergaard, *supra* note 22.

35. *In re* Central Vermont Public Service Corp., Application No. 1R0222 (1976), which sought a permit for an electricity distribution line in Sherburne. No tree cutting was permitted beyond ten feet on either side of the line.

36. Commissions may also differ in the degree to which they require permit holders to

were not addressed at all in the hearings on a proposed sixty foot square metal storage garage in a scenic area, and no conditions were placed on the permit approval.³⁷ In a less scenic area of the same town, however, the developer of a smaller metal building had to change the building's color scheme for approval.³⁸

Some of these inconsistencies may be due to the early commissioners working with a new law. Although these problems may have faded with experience,³⁹ administrative aggressiveness or timidity is an important factor affecting the administration of criterion eight.⁴⁰ Therefore, discrepancies are likely to continue, depending on the particular aesthetic postures assumed by the nine district commissions.

II.

The method of applying criterion eight may be summed up as a bargaining process in limbo, by which the district commissioners attempt to use the broad language of criterion eight to coax developers into providing aesthetic amenities, without knowing exactly the limits to which they can or should push the developers.⁴¹ If the developer feels he has been pushed too far, an appeal process is

comply with the conditions imposed. For example, one large development along a major highway was required to post bond and expend \$43,000 in landscaping. *In re Justgold Holding Corp.*, Application No. 1R0048 (1973). Another large development was not required to post bond; the developer in 1977 had not yet complied with the landscaping requirement stated in his permit. *In re Ward Fuller*, Application No. 300013 (1971). Interview with Schuyler Jackson, ex-Chairman of the Environmental Board, Burlington, Vt. (Nov. 1977). This was the Bolton, Vt., trailer park for which a landscaping program was a condition of approval for the development along Interstate 89.

37. *In re Morse's Dairy, Inc.*, Application No. 6L0171 (1977). Interview with Paul Nergaard, *supra* note 22.

38. *In re Draper & Beemin*, Application No. 6L0170 (1977). Interview with Paul Nergaard, *supra* note 22.

39. Interview with Ken Senecal, *supra* note 31.

40. Interview with Schuyler Jackson, *supra* note 36. It was suggested that the degrees to which Rutland Mall was landscaped and Bolton Trailer Park was not is due in part to administrative aggressiveness. Interviews with Robert Brown, *supra* note 22, and Schuyler Jackson, *supra* note 36.

41. Interview with Peter Zilliacus, *supra* note 21. Commissioners were cautious not to push too far fearing a successful constitutional challenge in criterion eight's formative years. *Id.* See text accompanying notes 46 & 47 *infra*. It is apparent however, from the sweeping language of criterion eight, that the legislature intended the courts to interpret and limit it within constitutional bounds.

available by which the developer may seek a *de novo* review either by the Environmental Board, the statewide review body under Act 250, or by the superior court.⁴² The normal course is to take an appeal to the Board,⁴³ although the Board has not been especially lenient toward developers appealing the imposition of aesthetic conditions.⁴⁴

Arguably, the uncertain extent of a district commission's proper authority invites constitutional challenge to criterion eight. The Vermont Supreme Court, however, has not yet been required to consider such a challenge.⁴⁵ A challenge to the imposition of an aesthetic condition or a denial of a permit for aesthetic reasons might include the following arguments:⁴⁶ 1) that criterion eight as an aesthetic regulation is beyond the police powers of the state; 2)

42. VT. STAT. ANN. tit. 10, § 6089(a) (Cum. Supp. 1978). The Environmental Board is established in *id.* § 6021 (1973). Appellate review by the board may inject some uniformity of administration; however, most developers find it easier and less time consuming to change their plans to accommodate the aesthetic conditions imposed by the district commissions than appealing to the Environmental Board. Interview with Paul Nergaard, *supra* note 22. For questions regarding standing in these proceedings, see Note, *Party Status and Standing Under Vermont's Land Use and Development Law (Act 250)*, 2 VT. L. REV. 163 (1977).

43. This is true at least as to criterion eight appeals. Since the applications are normally approved with conditions, the developer pursuing an appeal may find it easier, or less costly, to appeal to the Board for removal or alteration of the imposed conditions rather than to the superior court. See *In re Estate of John R. Colgan*, Application No. 1R0157 (1974), in which approval of a logger's cutting operations was conditioned upon his not cutting any trees within 75 feet of the center of the Long Trail, a statewide hiking path running through the logging site. An appeal was made to the Environmental Board where the restrictions were removed. Appeal to the court system from the board level is made directly to the Vermont Supreme Court. VT. STAT. ANN. tit. 10, § 6089(b) (Cum. Supp. 1978).

44. In *In re Oak Hill Corp.*, Application No. 1R0048 (1973) and *In re Mobil Oil Corp.*, Application No. 4C0042 (1972), the Environmental Board upheld strict conditions imposed below.

45. *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 346 A.2d 645 (1975), was the closest the Vermont Supreme Court came to deciding this issue. See note 9 *supra*.

46. An appeal to the Vermont Supreme Court might also include an assertion that the findings were not supported by the facts, that the condition imposed does not reduce the negative impacts, or that the condition is unnecessary for the effect desired. In *In re Vermont Marble Co.*, Application No. 1R0271 (1977), the applicant filed a motion with the district commission to reconsider and eliminate a condition that the proposed building be an earth-tone hue rather than the proposed white color. Among the arguments presented were: that the darker hue would clash with the predominantly white setting of the marble quarry, that the settling of white dust from the marble works on the dark building would cause the building to appear old and unmaintained, and that white is the predominant color during the long winter months. Upon reconsideration the commission granted the motion. Motion, In the matter of Vermont Marble Co., Application No. 1R0171 (August 1977).

that the criterion delegates legislative rulemaking and judicial decision making powers without adequate standards to guide the administering agency; 3) that the criterion delegates an adjudicative power in unconstitutionally vague language.⁴⁷ It may be helpful to explore the strengths or weaknesses of these arguments in assessing the chances of a successful challenge.

A. *Aesthetic Regulation and the Police Power*

Criterion eight could be assailed on the ground that it is an improper matter for regulation and, thus, a taking of property without compensation.⁴⁸ The argument is that beauty is an improper matter for regulation because aesthetic choices are inherently subjective and impossible to apply except in an arbitrary and capricious manner.⁴⁹ Arbitrary and capricious application of the law thwarts constitutional guarantees of due process,⁵⁰ and early state court decisions struck down aesthetic regulations as invalid *per se*.⁵¹

47. The *Wildlife Wonderland* case included the first and second arguments. Brief of Appellant, *In re Wildlife Wonderland*, 133 Vt. 507, 356 A.2d 645 (1975).

48. *Id.* A taking may occur indirectly through excessive regulation. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). See also *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962). The taking argument is presented in Brief of Appellant at 23, *In re Wildlife Wonderland*, 133 Vt. 507, 346 A.2d 645 (1975).

49. "The cut of the dress, the color of the garment worn, the style of the hat, the architecture of the building or its color may be distasteful to the refined senses of some; yet government can neither control nor regulate in such affairs." *Curran Bill Posting and Distributing Co. v. City of Denver*, 47 Colo. 221, 227-28, 107 P. 261, 264 (1910).

Perhaps one of the best statements of the subjectivity argument is in *City of Youngstown v. Kahn Bros. Bldg. Co.*, 112 Ohio St. 654, 661-62, 148 N.E. 842, 844 (1925).

It is commendable and desirable, but not essential to the public need, that our aesthetic desires be gratified . . . [T]he public view as to what is necessary for aesthetic progress greatly varies. Certain Legislatures might consider that it was more important to cultivate a taste for jazz than for Beethoven, for posters than for Rembrandt, and for limericks than for Keats. Successive city councils might never agree as to what the public needs from an aesthetic standpoint, and this fact makes the aesthetic standard entirely impractical as a standard for use restriction upon property. The world would be on a continual see saw if aesthetic considerations were permitted to govern the use of the police power.

See also Note, *Beyond the Eye of the Beholder: Aesthetics and Objectivity*, 71 MICH. L. REV. 1438 (1973).

50. *DeWitt v. Brattleboro Zoning Bd. of Adjustment*, 128 Vt. 313, 319, 262 A.2d 472, 476 (1970). See *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526, 528 (1917).

51. See note 49 *supra*.

The current attitude of the courts toward aesthetic regulation differs from one jurisdiction to the next, but *per se* invalidation is no longer the rule of thumb.⁵² Jurisdictions adopt one of three positions:⁵³ that aesthetic considerations may take no part in police power regulation; that aesthetic considerations may under some circumstances be the foundation of regulation; and that aesthetic considerations are proper *per se*.

Courts that adopt the first position, that regulations may not be based on aesthetic considerations, normally do not strike down aesthetic regulations.⁵⁴ Usually they will uphold such regulations if there can be discovered an incidentally, even though unlikely, associated traditional police power concern, like health or safety.⁵⁵ Thus even the least receptive jurisdictions will often uphold regulations that are aesthetic in nature.

A court adopting the second position makes a partial acceptance of aesthetic considerations as a basis for regulation, yet will not accept all ordinances that are based on such concerns.⁵⁶ Most jurisdictions adopting this second position employ one or more of three supporting rationales: a) aesthetics alone are insufficient to support regulations but may always be a supplementary support;⁵⁷ b) the particular aesthetic regulation is inseparably intertwined with more traditional police power considerations,⁵⁸ most often economic wel-

52. Annot., 21 A.L.R.3d 1222 (1968). See also 1 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 11.02 (1974); Note, *Beyond the Eye of the Beholder: Aesthetics and Objectivity*, 71 MICH. L. REV. 1438, 1440 (1973).

53. Annot., 21 A.L.R.3d 1222 (1968).

54. *Id.*

55. A prime example of this is an early sign regulation case in Illinois, *Thomas Cusack Co. v. City of Chicago*, 267 Ill. 344, 350, 108 N.E. 340, 343 (1914), *aff'd*, 242 U.S. 526 (1917). The Illinois Supreme Court upheld a sign location regulation on the dubious health and safety grounds that signs might fall over and cause personal injury, might provide a hideout for criminals or a shelter for immoral activities, and other similar evils.

56. See note 52 *supra*.

57. *Kenyon Peck, Inc. v. Kennedy*, 210 Va. 60, 168 S.E.2d 117 (1969). *Perlmutter v. Greer*, 259 N.Y. 327, 332, 182 N.E. 5, 6 (1932). "Beauty may not be queen, but she is not an outcast beyond the pale of protection or respect. She may at least shelter herself under the wing of safety, morality, or decency."

58. *State ex rel. Wilkerson v. Murray*, 471 S.W.2d 460, 463 (Mo. 1971), *cert. denied*, 404 U.S. 851 (1971): "[A]esthetic reasons . . . are . . . 'inextricably intertwined' with most of the other reasons" that give adequate support for the law. *United Advertising Corp. v. Borough of Metuchen*, 42 N.J. 1, 3, 198 A.2d 447, 449 (1964): "There are areas in which

fare considerations of tourist or historic areas; and c) certain land uses very commonly regarded as ugly⁵⁹ may be forbidden since there is little chance for the kind of subjective application that courts feared in the earliest of cases.⁶⁰

A few jurisdictions have reached the last position, the recognition of aesthetic considerations as a regulatory foundation coequal with the more traditional police power concerns of health, safety, and morals.⁶¹ Although there is a trend toward adoption of this position,⁶² most jurisdictions have drawn up short of its complete acceptance.

The present attitude of the Vermont Supreme Court toward aesthetic regulation is uncertain, but earlier case law seems to place Vermont squarely within the second position. In 1943, in *Vermont Salvage Corp. v. St. Johnsbury*,⁶³ the court recognized that although "aesthetic considerations alone may not warrant police regulation, they may be taken into account where other elements are present to justify regulations."⁶⁴ Under this theory the presence of a traditional police power consideration would validate the regulation. A

aesthetics and economics coalesce, areas in which a discordant sight is as hard an economic fact as an annoying odor or sound."

59. *United Advertising Corp. v. Borough of Metuchen*, 42 N.J. 1, 5, 198 A.2d 447, 449 (1964), referring "not to some sensitive or exquisite preference but to concepts of congruity held so widely that they are inseparable from the enjoyment and hence the value of property," concluded that the aesthetic impact of billboards, being an economic fact that might bear heavily on the enjoyment and value of property, was a relevant zoning consideration. *State v. Buckley*, 16 Ohio St. 2d 128, 132, 243 N.E.2d 66, 70 (1968): "An unfenced or inadequately fenced junkyard is generally patent and gross, and not merely a matter of taste."

60. See text accompanying notes 49-51 *supra*.

61. *People v. Stover*, 12 N.Y.2d 462, 191 N.E.2d 272, 250 N.Y.S.2d 734 (1963), *appeal dismissed per curiam*, 375 U.S. 42 (1963); *Cromwell v. Ferrier*, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967); *Oregon City v. Hartke*, 240 Or. 35, 400 P.2d 255 (1965).

62. See *Westfield Motors Sales Co. v. Town of Westfield*, 129 N.J. Super. 528, 324 A.2d 113 (1974) (zoning ordinance regulating signs was valid as ordinance enacted solely for aesthetic purposes); *State v. Vestal*, 281 N.C. 517, 189 S.E.2d 152 (1972) (court noted growing body of jurisdictions recognizing aesthetic concerns alone as adequate police power support). For a more extensive review, see *Annot.*, 21 A.L.R.3d 1222 (1968); 1 N. WILLIAMS, *supra* note 52, at § 11.16.

63. 113 Vt. 341, 34 A.2d 188 (1943).

64. *Id.* at 352, 34 A.2d at 195. See text accompanying note 57 *supra*. In *Vermont Salvage*, the Vermont Supreme Court invalidated a regulation prohibiting junkyards within plain view of a public highway because it was primarily an aesthetic regulation. The reason given to support the law—welfare of children's safety—had no bearing on or connection with the locational aspect of the regulation. *Id.*

strong traditional support for criterion eight is that protection of the beauty of the state encourages the economic vitality⁶⁵ of the tourist industry upon which Vermont depends.⁶⁶ Act 250 itself claims protection of the environment is important for the economic growth and welfare of the state.⁶⁷ Hence, this regulation should not be invalidated for lack of a concurrent police power consideration.

The Vermont Supreme Court may have moved toward the position that aesthetic purposes alone are sufficient to uphold regulation.⁶⁸ Several factors point to this. First, judicial attitudes toward

65. Regulation for the economic well being of the state is within the police power. *Andrews v. Lathrop*, 132 Vt. 256, 262, 315 A.2d 860, 863-64 (1974).

66. See VERMONT DEP'T OF BUDGET AND MGMT., VERMONT FACTS AND FIGURES 141, 375 (3d ed. 1975). In a recent speech Governor Snelling emphasized the importance of the tourist industry to Vermont. "Seven and a half million visitors will have traveled to Vermont by year's end . . . [They] will spend \$420 million, making the travel industry the second most important in terms of income in Vermont, accounting for more than 19,000 jobs . . ." Address by Governor Snelling to the Vermont Hotel Motel Restaurant Ass'n, Stratton Mountain, Vt. (Oct. 24, 1978).

67. VT. STAT. ANN. tit. 10, § 6001 (1973) (findings and declaration of intent): "It is necessary to regulate . . . usages of land . . . to insure that, hereafter, the only usages which will be permitted are not unduly detrimental to the environment, [and] will promote the general welfare through orderly growth and development." VT. STAT. ANN. tit. 10, § 6042 (1973) states in part: "which will . . . best promote the health, safety, order, convenience, prosperity and welfare of the inhabitants, as well as efficiency and economy in the process of development."

68. If the Vermont Supreme Court also adopted a strict policy of requiring specific standards for aesthetic legislation to provide for its proper administration, it would be taking the most reasonable approach. This is so because it would deal directly with the subjectivity problem of aesthetic regulation. The subjectivity of aesthetic regulation is not cured by the adoption of the various first and second stage rationales. Thus, even with the help of an economic welfare consideration, many aesthetic judgments are essentially subjective. As an illustration, consider the ordinance that requires all houses built in a residential community to conform to the character of the houses in the area. See *Reid v. Architectural Bd. of Review*, 119 Ohio App. 67, 192 N.E.2d 74 (1963). The court might uphold the ordinance on the ground that it would protect the economic vitality of the community. The choice is nevertheless subjective, even if it has the effect of maintaining some welfare consideration. Just as easily, the municipality could have decided to require variation instead of conformity in the architectural styles of new buildings, and supported it with the same protection of the local economy rationale (many architectural review ordinances now require some variation of styles in residential housing plans. R. BABCOCK, *BILLBOARDS, GLASS HOUSES, AND THE LAW* (1977). See also 1 N. WILLIAMS, *supra* note 52, at § 71.18 (1974), for such a statute).

Contrast the view that aesthetics are not subjective. Shafer, Hamilton & Schmidt, *Natural Landscape Preferences: A Predictive Model*, 1 J. LEISURE RESEARCH 1 (1969) (empirical study in which 250 randomly chosen adults were asked to rank photographs of landscapes in order of scenic beauty); Kaplan, Kaplan & Wendt, *Rated Preference and Complexity for Natural and Urban Visual Material*, 12 PERCEPTION & PSYCHOPHYSICS 352 (1972) (test group

aesthetic regulation have been more favorable since 1943.⁶⁹ More specifically, Vermont's three neighboring states' courts strongly support aesthetic regulations.⁷⁰ Moreover, the Vermont General Assembly, since 1943, has enacted many statutes that are aesthetic in nature.⁷¹

Finally, the Vermont Supreme Court has hinted that it would be inclined to uphold Act 250 aesthetic regulation.⁷² It seems probable, therefore, that a broad-based attack on criterion eight as an improper police power concern would be unsuccessful.

B. *Nondelegation*

The second and third challenges assert that criterion eight is a delegation of legislative and adjudicative powers without adequate guiding standards and a delegation of an unconstitutionally vague adjudicative power, respectively. With Act 250, the General Assembly has delegated both legislative and adjudicative powers to the district commissions and the Environmental Board.⁷³ The definition of the words of the statute is a legislative function, and the interpretation of what Act 250 means in a particular setting and for a specific development in the permit process is an adjudicative function.⁷⁴

ranked slides depicting nature scenes, urban scenes, and scenes combining both natural and artificially created features).

69. Since then the Supreme Court decided the landmark case, *Berman v. Parker*, 348 U.S. 26 (1954), which suggests aesthetics are proper police power concerns. See also Note, *Beyond the Eye of the Beholder: Aesthetics and Objectivity*, 71 MICH. L. REV. 1438, 1440 (1973), and Annot., 21 A.L.R.3d 1222 (1968).

70. *People v. Stover*, 12 N.Y.2d 462, 191 N.E.2d 272, 250 N.Y.S. 794 (1963), *appeal dismissed per curiam*, 375 U.S. 42 (1963); *John Donnelly & Sons, Inc. v. Outdoor Advertising Bd.*, 369 Mass. 206, 339 N.E.2d 709 (1975); *Opinion of the Justices*, 103 N.H. 268, 169 A.2d 762 (1961).

71. See statutes cited note 1 *supra*.

72. "[W]e may take judicial notice of an increasing concern within the State over the use and development of land as a natural resource, a concern to which the legislature has responded in other instances with appropriate legislation. No. 250 of the Public Acts of 1969 (Adj. Sess.);" (emphasis added). *Andrews v. Lathrop*, 132 Vt. 256, 261, 315 A.2d 860, 864 (1974). See also *Micalite Sign Corp. v. State Highway Dep't*, 126 Vt. 498, 236 A.2d 680 (1967), which suggests that protection of scenery by sign regulation is valid, and Chief Justice Holden's dissenting opinion in *National Advertising Co. v. Cooley*, 126 Vt. 263, 270, 227 A.2d 406, 410 (1967), which makes reference to "scenic landscape."

73. See notes 16 & 17 *supra*, and accompanying text.

74. An agency may be given "legislative and/or judicial authority—the legislative power

The principle method for attacking delegations written in uncertain language is by the intelligible standard rule.⁷⁵ Adjudicative delegations, in addition, may be challenged as void for vagueness;⁷⁶ delegations of legislative rulemaking powers should not be subject to this vagueness challenge.⁷⁷ Although the intelligible standard and vagueness tests represent distinct constitutional challenges,⁷⁸ they deal with a common problem, uncertainty in statutory language. The two doctrines thus cover much of the same ground,⁷⁹ but they shall be dealt with separately for the sake of clarity.

1. *Intelligible Standards*

The nondelegation of powers doctrine requires that a delegation of authority from a branch of government to an agency must be accompanied by intelligible standards for execution of that authority.⁸⁰ The standards are to prevent the delegatee agency from di-

to promulgate rules and regulations having the force of law and/or the judicial power to decide individual cases." B. SCHWARTZ, *ADMINISTRATIVE LAW, A CASEBOOK* 73-74 (1977). Two functions, however, are worked out simultaneously in the permit procedure by the district commissions and cannot be isolated from one another.

75. W. GELLHORN & C. BYSE, *ADMINISTRATIVE LAW* 104 (6th ed. 1974) [hereinafter cited as GELLHORN & BYSE].

76. *Id.* In most cases the same result would be reached under either test because the tests are similar. *Id.* at 105-06.

77. The intelligible standard rule underscores the need for sufficiently meaningful directions to the administrative delegate so that after he has acted a court can determine whether he acted consistently with the legislative direction. This is applicable to both legislative and adjudicative delegations. The void for vagueness rule stresses the need for directions to the regulated group so they may avoid the statute's sanctions. Thus, laws which delegate rule-making powers should not be attacked by the vagueness doctrine because such laws speak only to an administrative agency and not to a regulated group. *Id.* at 104-06.

78. The void for vagueness doctrine stems from due process protections, GELLHORN & BYSE, *supra* note 75, at 104, and the nondelegation doctrine derives from the separation of governmental powers, see note 80 *infra*.

79. See J. MASHAW & R. MERRILL, *INTRODUCTION TO THE AMERICAN PUBLIC LAW SYSTEM* 225 (1975) [hereinafter cited as MASHAW & MERRILL]. In the United States Supreme Court, the nondelegation of power doctrine has not been used to invalidate a congressional act since the 1930's, see note 82 *infra*, but a number of the considerations in that doctrine are now addressed with the vagueness analysis, see note 116 *infra*.

80. *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 343 (1974). See also *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). The doctrine of nondelegation of powers derives from the implicit separation of powers in the United States and state constitutions. This derivation from Vermont's Constitution, VT. CONSR. ch. II, § 5, was clearly established in *Waterbury v. Melendy*, 109 Vt. 441, 199 A. 236 (1938).

rectly exercising legislative or judicial powers itself.⁸¹ Although the doctrine may be extinct in federal law cases,⁸² it is still alive in state courts.⁸³ In light of the fact that aesthetic regulation necessarily involves subjective judgments,⁸⁴ the need for standards to guide an administrator in the application of criterion eight is compelling.⁸⁵

The traditional analysis of delegation, as applied in the Vermont case of *State v. Auclair*,⁸⁶ maintains that a delegation of power: 1) may vest an agency with a wide discretion, but such discretion must not be arbitrary or unrestrained, and 2) must have a basic "policy and rule of action" to guide the agency created to administer the law.⁸⁷

Vesting an agency with the power to determine what is an "undue adverse affect" on the "scenic or natural beauty" or the "aesthetics" of an area borders on vesting complete, unrestrained discretion in the agency.⁸⁸ Although "natural or scenic beauty"

81. *Id.*

82. K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2.01 (1972). See also *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 352-53 (1974) (Marshall, J., dissenting). But see MASHAW & MERRILL, *supra* note 79, at 223-24.

83. K. DAVIS, *supra* note 82, at § 2.06. See *People v. Tibbets*, 56 Ill. 2d 56, 59, 305 N.E.2d 152, 155 (1973); *State Compensation Fund v. De La Fuente*, 18 Ariz. App. 246, 250-51, 501 P.2d 422, 426 (1972); *Stucki v. Plavin*, 291 A.2d 508 (Me. 1972); *Schakel v. Review Board*, 142 Ind. App. 475, 235 N.E.2d 497 (1968); *Walden v. Hart*, 243 Ark. 650, 420 S.W.2d 868 (1967). The reason for differing state and federal attitudes toward delegation problems may be that the states do not face the legislative complexities that face Congress, which must leave many technical details to the administrative agencies. Also, states may not draw as high caliber an administrator as would a federal agency, and state courts may be less willing to trust their state's administrative agencies to exercise powers restrained only by minimal standards. See B. SCHWARTZ, ADMINISTRATIVE LAW § 20 (1976).

84. See note 49 *supra*.

85. A challenge for lack of standards is not new to the realm of aesthetic regulations. See *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975) (challenge to an historic preservation ordinance for the Vieux Carre district).

86. 110 Vt. 147, 4 A.2d 107 (1939). See also *In re Montpelier & B.R.R.*, 135 Vt. 102, 369 A.2d 1379 (1977).

87. *Id.* 110 Vt. at 163, 4 A.2d at 114. The court found the term "natural market area" in the state Milk Price Control Act sufficiently definite to enable the Milk Control Board to delineate control districts on a map.

88. In *Maher v. City of New Orleans*, 516 F.2d 1051, 1062 (5th Cir. 1975), the circuit court of appeals found that certain steps had been undertaken to assure application of an historic preservation ordinance within constitutional bounds. They included: 1) the Louisiana Constitution ("to protect the quaint and distinctive character of the area," LA. CONST. art. XIV, § 22A), the Vieux Carre Ordinance ("to preserve buildings that have architectural and historic

brings a pastoral image to mind, and is arguably a more precise phrase than "aesthetics," both terms give little guidance to the agency regarding what the General Assembly meant by these terms.⁸⁹ Furthermore, the words "undue adverse effect" give no indication of what the legislative body intended to prohibit.⁹⁰ As said in *Auclair*, if the duty is imposed by words that are so general that they furnish no guide or by words without an established meaning at common law, the statute is unconstitutional.⁹¹

The absence of a meaningful standard, however, may not be dispositive of the delegation problem. Many state courts, Vermont among them, are moving away from an insistence on statutory standards to an emphasis on other procedural safeguards.⁹² In recent cases, the Vermont Supreme Court has indicated that arbitrary and capricious agency action resulting from uncertain delegatory language can be prevented by an agency's adopting its own rules which guide the administration of the law.⁹³

value"), and a ruling by the Louisiana Supreme Court ("preserve the antiquity of the whole French and Spanish quarter, the tout ensemble, by defending this relic against iconoclasm or vandalism") in *City of New Orleans v. Pergament*, 198 La. 852, 858, 5 So. 2d 129, 131 (1941); 2) the ordinance was specific where possible (floodlights, over hanging balconies, and signs, *Vieux Carre Ord.* §§ 56-11, 56-13, 56-17 to 56-33); 3) the administrative agency was required to be peopled by experts offering complementary skills, experience and interests relating to historic New Orleans; 4) and elaborate decision-making and appeals process; 5) an abundant and accurate compilation of documents, old city plans, photographs and a recent impartial architectural and historical study of the structures in the area.

The guidance given district commissioners in Vermont under criterion eight falls far short of these precautionary steps. The Vermont Supreme Court has not interpreted criterion eight of Act 250, nor has the Agency for Environmental Conservation spelled out its meaning specifically where possible. See text accompanying notes 94-96 *infra*. The commissioners—gubernatorial appointees—are not necessarily experts on aesthetics.

Also, there is nothing comparable to the architectural studies, available to the New Orleans reviewers, for the scenically beautiful areas and aesthetics of Vermont to which the commissioners may refer.

89. See text accompanying notes 14-17 *supra*.

90. There are no guiding examples given in Act 250 or the ENVIRONMENTAL BOARD REGS. ANN. of what an adverse effect is, nor of circumstances where an adverse effect is undue.

91. *State v. Auclair*, 110 Vt. 147, 164, 4 A.2d 107, 115 (1939).

92. *Finks v. State Highway Comm'n*, 328 A.2d 791, 796 (Me. 1974); *Barry & Barry, Inc. v. Department of Motor Vehicles*, 81 Wash. 2d 155, 500 P.2d 540 (1972); *Watchmaking Examining Bd. v. Husar*, 49 Wis. 2d 526, 182 N.W.2d 257 (1971); *Vermont Home Mortgage Credit Agency v. Montpelier Nat'l Bank*, 128 Vt. 272, 278, 262 A.2d 445, 453 (1970). See generally B. SCHWARTZ, *supra* note 83, at § 23; K. DAVIS, *supra* note 82, at § 2.06. It has been urged that courts should require administrative officers to articulate the standards and prin-

The Environmental Board has been aware of the potentially arbitrary application of criterion eight. In 1974 it drafted two sets of regulations to aid district commissions in their application of this portion of Act 250.⁹⁴

Unfortunately, the proposed rules met with great disapproval at public hearings, and attempts to implement these regulations were abandoned.⁹⁵ Thus there are presently nine district commissions independently determining what criterion eight terms mean, and applying them without any policy or rule of action established either by the legislature, the Vermont courts, or the agency itself.

principles that govern their discretionary decisions in as much detail as is possible. *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 598 (D.C. Cir. 1971).

93. *Audette v. Greer*, 134 Vt. 300, 360 A.2d 66 (1976); *Vermont Home Mortgage Credit Agency v. Montpelier Nat'l Bank*, 128 Vt. 272, 279, 262 A.2d 445, 449-50 (1970); *Royalton College, Inc. v. State Bd. of Educ.*, 127 Vt. 436, 449, 251 A.2d 498, 506-07 (1969).

94. The first, drafted on May 3, 1974, was broader in scope but less specific than the second. It covered such topics as: *siting* ("incorporate landscape features and avoid destruction of natural characteristics such as grades, water courses and vegetation," Rule B-2); *design* ("color, materials, sizes, heights, and forms should not conflict with characteristics of the site and surrounding area," Rule B-3); *lighting* ("general rule, yard lighting should not average more than .06, approximately, watts per square foot and have an intensity of 2 maintained footcandles. High rise omnidirectional lighting or spot lights are not acceptable," Rule B-4); *landscaping* ("screening for purpose of totally obscuring development is not generally acceptable practice, principal purpose is to integrate development with its surroundings," Rule B-5); *signs* ("large rooftop, fascia, high intensity, multi-colored, or interior lighted signs will be precluded unless it is adequately shown that such signs will not be visible beyond the boundary of the property," Rule B-6); *strip development* ("will not be permitted beyond those areas already substantially developed into undeveloped areas," Rule B-7); and other criteria. ENVIRONMENTAL BOARD, AGENCY OF ENVIRONMENTAL CONSERVATION, PROPOSED AMENDMENTS—RULES OF THE ENVIRONMENTAL BOARD (May 3, 1974).

The second, drafted August 26, 1974, dealt only with signs and lighting, but the lighting standards were very specific and sophisticated. This rule broke developments into four classes, assigning to each class standards relating to six different lighting characteristics. ENVIRONMENTAL BOARD, AGENCY OF ENVIRONMENTAL CONSERVATION, APPENDIX B, DRAFT #2 (Aug. 26, 1974).

95. Interview with Schuyler Jackson, *supra* note 36. Mr. Jackson believed that the public felt the regulations were a further encroachment upon development rights and that this led to the overwhelming public disapproval.

Even though the proposed rules are mentioned here as an example of a cure for constitutional infirmities, it should be recognized that such rules serve a more basic purpose. The adoption of supplementary administrative regulations in this area would serve to advance the important policy goals that favor well-considered decision making and even-handed application of the statutory language. Notwithstanding the possibility of a successful constitutional challenge, these ends are important enough in themselves to support the adoption of clarifying regulations.

For these reasons, this section of Act 250 could be considered an unconstitutional delegation of legislative and adjudicative powers.⁹⁶

2. Vagueness

Act 250 requires of its administrators a legislative task, definition of the act; and a judicial function, application of the act to specific developments.⁹⁷ Delegations of adjudicative power may violate the due process doctrine of "void for vagueness."⁹⁸ Although the void for vagueness doctrine has been used most notably for invalidating criminal statutes,⁹⁹ it has also been applied to noncriminal statutes.¹⁰⁰ Under the due process clause,¹⁰¹ a noncriminal statute is unconstitutionally vague if its language does not convey sufficiently definite warning of proscribed conduct when measured by common understanding and practices.¹⁰²

96. Statutes can often be saved by the judicial branch by interpretation or by adoption of external standards. MASHAW & MERRILL, *supra* note 79, at 231; Comment, *Reconciliation of Conflicting Void-for-Vagueness Theories Applied by the Supreme Court*, 9 Hous. L. REV. 82, 94 (1971), but there are problems with this mode of saving statutes. The separation between legislative and judicial functions becomes less distinct, and this may invite the legislature to pass laws drawn in uncertain language. It then becomes the judiciary's duty to finish the legislature's job—something for which it is not designed and has not the resources. The statute can also be remedied by the General Assembly or the Environmental Board. See note 129 *infra*.

97. See notes 16 & 17 *supra*, and accompanying text.

98. GELLHORN & BYSE, *supra* note 75, at 104.

99. See, e.g., *Miller v. California*, 413 U.S. 15 (1973), an obscenity case. See generally *Miller v. California and Paris Adult Theater I v. Slaton: The Obscenity Doctrine Reformulated*, 6 COLUM. HUMAN RIGHTS L. REV. 219 (1974); Annot., 16 L. Ed. 2d 1231 (1967) (indefiniteness of language as affecting the validity of criminal legislation and common law crimes); Annot., 96 L. Ed. 374 (1952).

100. Annot., 40 L. Ed. 2d 823 (1974).

101. U.S. CONST. amend. XIV, § 1. There is no corresponding "due process" clause in the Vermont Constitution. It does provide, however, that a person cannot be deprived of his liberty, "except by the laws of the land," VT. CONST. ch. 1, art. 10. The phrase "the laws of the land" has been held to be synonymous with "due process" of law. *State v. Stimpson*, 78 Vt. 124, 62 A. 14 (1905). Also, in *State v. Cadigan*, 73 Vt. 245, 251-53, 50 A. 1079, 1081 (1901), the Vermont Supreme Court suggested that the fundamental protections provided in the first, fourth, and seventh articles of the Vermont Constitution covered the same ground as did the due process and equal protection clauses of the United States Constitution.

102. In *Jordan v. De George*, 341 U.S. 223, 231-32 (1951), the test stated for determining whether a noncriminal statute is unconstitutionally vague is whether the language of the statute conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. In *State v. Bartlett*, 128 Vt. 618, 622, 270 A.2d 168, 170 (1970), the Vermont Supreme Court adopted the *Jordan* noncriminal statute test for

The Vermont Supreme Court emphasizes the consideration of warning and fair notice in determining vagueness questions.¹⁰³ In *State v. Bartlett*,¹⁰⁴ the Vermont Supreme Court said that the fair notice requirement "is satisfied if, upon reasonable inquiry, a person of ordinary intelligence is made aware of the nature of the prohibitions."¹⁰⁵ Nevertheless, the court did note other considerations for determining fair notice: that the sufficiency of notice should be examined in light of the conduct with which a defendant is charged,¹⁰⁶ and that "[n]o one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes."¹⁰⁷

Applying this "fair notice" requirement to a potential violation of criterion eight,¹⁰⁸ it can be forcefully argued that this requirement is satisfied by the mandatory administrative determinations¹⁰⁹ called for by the Act 250 application process.¹¹⁰ No statutory penalty

vagueness even though they had a criminal prosecution (an abortion statute in Vermont) before them. There is little if any difference between the tests of vagueness for noncriminal and criminal statutes. *Compare* Annot., 40 L. Ed. 2d 823, § 3 (1975), with *McGowan v. Maryland*, 366 U.S. 420, 428 (1961).

103. In *State v. Giant of St. Albans, Inc.*, 128 Vt. 539, 547, 268 A.2d 739, 744 (1970), the Vermont Supreme Court, citing *United States v. Harriss*, 347 U.S. 612, 617 (1954), laid down the standard that a criminal statute must give a person fair notice that his contemplated conduct is forbidden. The Vermont Supreme Court makes no distinction between criminal and noncriminal vagueness tests. See note 102 *supra*.

104. 128 Vt. 618, 270 A.2d 168 (1970).

105. *Id.* at 622, 270 A.2d at 171.

106. *Id.* at 622, 270 A.2d at 170. The court cited *United States v. National Dairy Products Corp.*, 372 U.S. 29, *rehearing denied*, 372 U.S. 961 (1962), for this premise. Since the illegal conduct of *Bartlett* was found to be "wilful," the court refused to consider a vagueness challenge noting that "wilful evasion is inconsistent with surprised innocence." 128 Vt. at 623, 270 A.2d at 171.

107. 128 Vt. at 622, 270 A.2d at 170 (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)). See note 117 *infra*. Although the vagueness test is arguably the same for criminal and noncriminal statutes in Vermont, see note 102 *supra*, Act 250 carries a two year maximum penalty for violation. VT. STAT. ANN. tit. 10, § 6003 (1973).

108. No development can be approved if it is found that the development will have an undue adverse effect on the scenic or natural beauty, or aesthetics of the area. VT. STAT. ANN. tit. 10, § 6086(a)(8) (Cum. Supp. 1978).

109. See note 3 *supra*.

110. The decision in *Miller v. Schoene*, 276 U.S. 272 (1928), provides a helpful analogy. A Virginia statute made it unlawful to own a cedar tree infected with cedar rust disease. Nevertheless, no sanction could be levied unless the owner of the host tree ignored a prior determination by a state entomologist that the tree was infected. The Supreme Court held that the plaintiff's vagueness objections were without weight since no penalty could be suf-

can be incurred by an applicant until after the administrative agency fixes by specific action the lawfulness of his planned conduct.¹¹¹ Thus, the developer will be told exactly what the language of criterion eight means in relation to his own development, and he will not have to guess the meaning of the law.

On the other hand, the developer might argue that pursuing such administrative proceedings *after* property has been purchased and plans have been drawn amounts to requiring one at the peril of losing property or even liberty¹¹² to speculate as to the meaning of the statute. Nevertheless, a landowner has no absolute right to develop his property for a particular purpose,¹¹³ and the requirement of administrative proceedings similar to those of Act 250 is not uncommon in land development.¹¹⁴ Given these arguments and the way fair notice has been interpreted in the Vermont Supreme Court,¹¹⁵ arguably a developer has been given all the protections due process requires.

It has been noted that in United States Supreme Court cases, an analysis of the vagueness issue cannot simply be explained in terms of "fair notice," but involves the consideration of five factors:¹¹⁶ 1) the nature of the individual freedom menaced,¹¹⁷ 2) the

ferred in advance of the ascertainment of the statute's applicability. Similarly, no Act 250 application faces sanctions prior to completion of the application process. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* 151 (1962), cited in GELLHORN & BYSE, *supra* note 75, at 106 (fair warning factor not significant where statute is not self enforcing).

111. Thus the applicant may only violate the statute willfully. Willful offenders cannot allege that a statute is vague. *State v. Bartlett*, 128 Vt. 618, 623, 270 A.2d 168, 171 (1970).

112. It has been suggested that aesthetic regulations, especially architectural review ordinances, impinge upon first amendment rights. S. Williams, *Subjectivity, Expression and Privacy: Problems of Aesthetic Regulation*, 62 MINN. L. REV. 1 (1977).

113. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

114. It is common to require extensive plans for subdivision of property. See 2 E. YOKELY, *ZONING LAW AND PRACTICE* §§ 12.3-12.6 (3rd ed. 1965). Moreover, a developer could ask a district commission prior to purchase whether a piece of land was so beautiful as to preclude any development at all. VT. STAT. ANN. tit. 10, § 6083 (Cum. Supp. 1978).

115. The Vermont Supreme Court places great emphasis on actual notice to the plaintiff, as evidenced by the "wilful" language in *State v. Bartlett*, 128 Vt. 618, 623, 270 A.2d 168, 171 (1970).

116. Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 94-95 (1960) [hereinafter cited as Amsterdam]. These additional considerations, especially the fourth, seem to compensate for the death of the delegation doctrine. See note 82 *supra*, and accompanying text.

117. First amendment rights are given greater protection. "[T]his court has intimated

probability that the freedom will be violated,¹¹⁸ 3) the deterrent effect of the existence of the law,¹¹⁹ 4) the practical power of the court to supervise the administration of the statute,¹²⁰ and 5) the necessity of upholding the regulation in the absence of a more precise articulation.¹²¹

If the Vermont Supreme Court were to analyze criterion eight in this fashion,¹²² instead of the more strict fair notice analysis in *Bartlett*, a finding of vagueness is a more likely result. The court could conclude, arguably, that four of the five factors favor a finding of vagueness. Only the first factor weighs against this conclusion because the freedom menaced here is more akin to a property right than the more zealously protected first amendment freedoms.¹²³ The last four factors weigh in favor of the conclusion that the language of criterion eight is unconstitutionally vague. Considering the second factor, an improper deprivation of rights is more likely because an agency decision maker is less skilled than a court of law in balancing the individual's interest in liberty or property against the state's interest in regulating conduct.¹²⁴ Under the third factor, it may be argued that some conduct which merits protection might be

that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." *Smith v. California*, 361 U.S. 147, 151 (1959). See also *Napro Development Corp. v. Town of Berlin*, 135 Vt. 353, 376 A.2d 342 (1977) (freedom of speech protected from vague language).

118. This is regarded as a function of the *kind* of tribunal empowered to make the potentially infringing value judgments, with favor for judicial over administrative determinations. Amsterdam, *supra* note 116, at 94.

119. Here the court considers the degree to which potential risk of violation deters protected conduct; *e.g.*, the *in terrorem* effects of legislation limiting free speech.

120. This consideration requires the court to ask whether there is a specific enough standard of guilt with which the court can review a previous lower court decision. This issue is discussed in *United States v. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921). See Comment, *Reconciliation of Conflicting Void-for-Vagueness Theories Applied by the Supreme Court*, 9 Hous. L. Rev. 82, 93 (1971), for a discussion of the effect of scienter on the requirement of ascertainable standards.

121. The Supreme Court has sustained inexact statutory language where more precise articulation would have been incapable of practical administration. Amsterdam, *supra* note 116, at 95.

122. Vermont has not been averse to adopting Supreme Court analyses of vagueness. See notes 103, 106 & 107 *supra*.

123. Compare note 112 and note 117, *supra*.

124. See note 118 *supra* and accompanying text.

prohibited by the mere existence of the law.¹²⁵ The last two factors provide the strongest support for a finding of vagueness. The bare language of "aesthetics" and "scenic or natural beauty" affords a rather nebulous standard for review of a lower decision because there is no precise common law understanding of those terms to which a reviewing court may refer.¹²⁶ The inconsistent application of criterion eight reflects the absence of a clear definition of its language.¹²⁷ Finally, where there are methods of more precise articulation,¹²⁸ there is no need for the use of vague terms. An analysis in this manner more strongly suggests a finding of vagueness. But if the Vermont Supreme Court continues to regard "fair notice" as the primary test, as in *Bartlett*, an opposite result is likely.

The disparities in interpretation and application of criterion eight can be minimized and constitutional infirmities remedied through the promulgation of standards by the Environmental Board or the General Assembly.¹²⁹ The proposals drafted in 1974¹³⁰ provide an excellent starting point. They consist mostly of general policy statements establishing expectations and values to be implemented and attempt to define the scope of the statutory language.¹³¹ These drafts can be improved by imposing more specific limitations where possible.¹³²

125. Interview with Ken Senecal, Executive Officer, Environmental Board, in Montpelier, Vt. (Feb. 1977). "Applications we are getting now are much higher in quality because applicants are aware that we impose aesthetic conditions in our approval. Either they come in with a better plan or they don't try."

126. *But see* interview with Ken Senecal, *supra* note 125. The Executive Officer believes that the eight years of experience with criterion eight has built up a "common law understanding of what is required under the statute."

127. See text accompanying notes 14-40 *supra*.

128. See text accompanying notes 129-137 *infra*.

129. The Environmental Board can establish rules pursuant to VT. STAT. ANN. tit. 10, § 6025 (Cum. Supp. 1978), and *id.* tit. 3, §§ 801-808. The likelihood of legislative remedy seems dim, in light of the General Assembly's failure to pass a state land use plan as provided for by *id.* tit. 10, § 6046(b). An amendment of criterion eight was introduced in the General Assembly by Representative Urie of Hardwick, Vt., in 1977. H. 229, Vt. Gen. Assembly, 54th Biennial Sess. (1977). This amendment would have broken criterion eight into two parts, one dealing with scenic and natural beauty, the other with historic sites, and would have eliminated the other two concerns, aesthetics and rare and irreplaceable natural areas, presently in criterion eight.

130. See text accompanying note 94 *supra*.

131. See note 94 *supra*.

132. For example, an ordinance requiring a forty foot set back avoids the subjectivity problem of an ordinance requiring an "aesthetically pleasing" setback. The Vieux Carre

Another method that could inject consistency into the decision making process is to establish models for common developments. The models would be used to exemplify the manner in which a development could be integrated with the aesthetics of the area.¹³³ Another model could represent natural or scenic areas; it might include a checklist of attributes that are commonly associated with beautiful scenes.¹³⁴ A development site that has an established number of these characteristics would then be a scenic area for purposes of the act.¹³⁵

Finally, the *ad hoc* nature of district commission determinations necessarily invites inconsistent application of the statute, and such determinations should be limited where possible. Two land development acts similar to Act 250¹³⁶ use a method to predetermine all areas of scenic significance. Briefly, what these acts do is implement scenic area zoning, precluding development in the appropriate zones.¹³⁷

Adoption of these methods would help to cure the possible constitutional weaknesses of criterion eight, but effecting these changes in Vermont may be difficult. Act 250 was passed in 1970 as a stop-gap measure to delay what seemed to be uncontrollable develop-

ordinance avoided such subjectivity where possible. See note 88 *supra*. Signs and lighting are perhaps the most adaptable to strict numerical limitations.

133. It is not suggested that a model would stand as a replica of all future development, for certainly this would be undesirable. I emphasize that these models would embody the principles of design and construction that do not create unduly adverse visual impacts.

134. A checklist approach has been suggested in a report prepared for the Vermont Scenery Preservation Council. M. Ashcroft, *Criteria and Methods for the Designation of Scenic Roads in Vermont* (1978) (unpublished report). Similar to this is the checklist approach established by the National Trust for Historic Preservation which has been adopted by Congress for use by the Internal Revenue Service which administers certain tax advantages for historic site improvements. See I.R.C. § 191(d).

135. In Petaluma, California, the annual awards of 500 development unit permits are given by means of an allocation procedure. At the heart of the procedure is a point system, whereby a builder accumulates points for conformity with the city's general plan and environmental design plans, for good architectural design and for providing low and moderate income dwelling units, and various recreational facilities. *Construction Indus. Ass'n of Sonoma County v. City of Petaluma*, 522 F.2d 897, 901 (1975).

136. *Adirondack Park Agency Act*, N.Y. EXEC. LAW § 800 (McKinney Cum. Supp. 1972-1978); *USE REGULATION*, ME. REV. STAT. tit. 12, §§ 681-689 (1964 & West Cum. Supp. 1978-1979).

137. A similar scheme might eliminate the *ad hoc* nature of such determinations in Vermont.

ment,¹³⁸ and to a large degree it has been successful.¹³⁹ The promulgation of regulations for criterion eight might be dimly regarded as additional controls on land use, obnoxious and unnecessary in light of the general success of the act.¹⁴⁰ To a certain extent this may be valid criticism. Regulations might establish a much more substantial basis for district commission action and eliminate much of the bargaining process that presently characterizes the application of criterion eight.¹⁴¹ The argument may be just as strong, however, that new regulations might establish lower standards and require less burdensome conditions than those now imposed by the various district commissions.

Regardless of the obstacles to effecting these changes in Vermont, criterion eight will remain vulnerable to constitutional attack for its uncertain language until some guiding standards are established by the General Assembly or the Environmental Board.

CONCLUSION

The General Assembly has recognized the importance of protecting the scenic and natural beauty of Vermont. Criterion eight of the state land use and development law, Act 250, has been of primary importance in this effort. Although aesthetic regulation has long been upheld as a valid police power regulation, it is still apt to be applied differently from case to case. Criterion eight has been drawn in uncertain language, which has led to arbitrary and inconsistent application. Checks on the discretion of the administrative agency need to be established to cure possible constitutional infirmity in the arguably vague and standardless terminology of criterion eight.

Andrew MacLeod Jackson

138. Interview with Peter Zilliaccus, *supra* note 21.

139. *Id.* One of the clearest examples is the recent denial of a permit for Pyramid Mall, a proposed 81 acre shopping center near Interstate Highway 89, in Williston, Vt., Application No. 4C0281 (1978).

140. The 1974 proposals were regarded as just this. See note 95 *supra*.

141. See text accompanying note 41 *supra*.

