NOTES AND COMMENTS

VAGUENESS AND OVERBREADTH: THE CONSTITUTIONAL CHALLENGES TO VERMONT'S LAND USE AND DEVELOPMENT LAW (ACT 250)

INTRODUCTION

Vermont's Land Use and Development Act[1] (Act 250), enacted in 1970, was among the first state acts to attempt to balance industrial and commercial growth against environmental considerations.[2] Act 250 prohibits sale of a subdivision[3] and commencement of construction or development without a permit issued by the state.[4] Before a permit may be granted, the appropriate district environmental commission must make a determination, based on ten specified criteria,[5] that subdivision or development will not un-

---

1. VT. STAT. ANN. tit. 10, §§ 6001-6092 (1973 & Supp. 1980).

2. 5 N. WILLIAMS, AMERICAN LAND PLANNING § 160.01, at 389-90 (1975). The author provides a list of state environmental acts.

3. "Subdivision" means a tract or tracts of land, owned or controlled by a person, which have been partitioned or divided for the purpose of resale into 10 or more lots within a radius of five miles of any point on any lot and within any continuous period of 10 years after the effective date of this chapter.

VT. STAT. ANN. tit. 10, § 6001(19) (Supp. 1980).

4. Applications for an Act 250 permit must be filed with one of nine district commissions. The district commission responsible for the development area conducts hearings and evaluates the proposed development or subdivision and then grants or denies the permit. VT. STAT. ANN. tit. 10, § 6083 (1973).

5. *Id.* § 6086 (Supp. 1980). The criteria, generally, are that the subdivision or development:

1) will not result in undue water or air pollution;
2) has sufficient water available;
3) will not cause an unreasonable burden on the existing water supply;
4) will not cause unreasonable soil erosion or reduction in capacity of the land to hold water;
5) will not cause unreasonable congestion or unsafe conditions in the various transportation modes;
6) will not cause an unreasonable burden on a municipality's ability to provide educational services;
7) will not place an unreasonable burden on local governments' ability to provide governmental services;

duly affect the environment or public services[6] of the area. Upon denial by a district commission, an appeal may be heard by the Environmental Board or by the superior court, either of which must then conduct a *de novo* hearing.[7]

The Pyramid Company of Burlington (Pyramid) applied to District Environmental Commission IV for an Act 250 permit on July 20, 1977.[8] The company proposed to build a regional, enclosed shopping mall in the town of Williston, six miles from Vermont's largest city of Burlington.[9] The mall would include two department stores, approximately eighty smaller shops and twenty food facilities.[10] The building, parking for 2000 cars, driveways, facilities, and landscaping would cover more than ninety acres.[11] Pyramid was denied a permit to develop the mall by the commission which found the proposed mall to be "detrimental to the public health, safety and general welfare."[12]

Pyramid appealed the commission's decision to the superior court, contending that "the legal positions . . . adopted by the commission, are unsupportable as a matter of constitutional, statutory and administrative law."[13] The Chittenden Superior Court denied Pyramid's motion for a summary judgment[14] but granted Pyr-

---

8) will not have an undue adverse effect on the scenic or natural beauty of an area, or historic sites or on irreplaceable natural areas;
9) is in conformance with a valid capability and development plan and land use plan, when adopted;
10) is in conformance with a local or regional plan as provided in chapter 117 of Title 24.

6. Of particular concern are services such as education, transportation, and public utilities. *Id.*

7. *Id.* § 6089(a) (Supp. 1980).

8. *In re* Pyramid Co. of Burlington, District Environmental Commission #4, Application #4C0281, Findings of Fact and Conclusions of Law at 1 (Oct. 12, 1978).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 67. Such a finding is required before an application may be denied. VT. STAT. ANN. tit. 10, § 6087(a) (1973).

13. Memorandum of Law in Support of Pyramid's Motion for Summary Judgment on Legal Issues Presented, *In re* Pyramid Co. of Burlington, at 4 [hereinafter cited as Memorandum].

14. *In re* Pyramid Co. of Burlington, No. S59-78 CnM (Vt. Super. Ct. Oct. 14, 1980).

amid's motion for permission to appeal that decision to the Vermont Supreme Court.[15] Pyramid's objections to Act 250 constitute a major challenge to the statute—one which may determine the future effectiveness or even the existence of the statute itself.

The purpose of this note is to analyze Pyramid's specific complaints that Act 250 is constitutionally void for vagueness and overbreadth. This note will first capsulize Pyramid's specific challenges to Act 250. The note will then analyze the definition of vagueness and examine the manner in which the courts have generally applied this doctrine. Based upon this analysis, a suggested application of the vagueness doctrine to Pyramid's assertions will be presented. The third section of the note will present a similar analysis of the doctrine of overbreadth.

I. The Statutory Challenge

In its appeal to the Vermont Superior Court, the Pyramid Company challenged Act 250 on both vagueness and overbreadth grounds.[16] Generally, terms of a statute must not be so vague that persons of common intelligence must guess at their meaning.[17] Pyramid's assertion that Act 250 is void for vagueness is divided into two parts.

Initially Pyramid contends that, standing alone, Act 250 is constitutionally infirm.[18] Pyramid's first vagueness challenge apparently encompasses the entire statute since it states that "the scope and nature of Act 250 itself is difficult to determine."[19] Specific discussion in Pyramid's challenge is limited, however, to only one of the ten criteria,[20] as an example.[21] Pyramid asserts that the

---

15. *In re* Pyramid Co. of Burlington, No. S59-78 CnM (Vt. Super. Ct. Nov. 19, 1980). Only questions of statutory construction are being argued at this stage. The court denied permission to appeal the constitutional questions themselves until the statutory provisions have been finally interpreted.

16. Memorandum, *supra* note 13, at 15.

17. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

18. Memorandum, *supra* note 13, at 19.

19. *Id.* at 15.

20. The criterion at issue states:

> The district commission or board will grant a permit for a development or subdivision which is not physically contiguous to an existing settlement

"terms [of Act 250] are open to many distinct interpretations which are not variants of shading or degree, but are crucial differences which go to the heart of the Act itself."[22]

Secondly, Pyramid contends that if the court considers several separate issues urged upon it by the city of Burlington and the Chittenden County Regional Planning Commission, two of the parties to the permit application proceedings, the resulting strained construction of Act 250 would "unquestionably [render] the statute infirm."[23] The three postulates to be considered are:

1. That the court must consider the economic impact upon Burlington from the proposed mall;
2. That the proposed mall be held responsible for all increased traffic up to the year 2000 at remote traffic intersections;
3. That the court review final land use decisions made by Williston pursuant to title 24, sections 4301-4493 of Vermont Statutes Annotated.[24]

Pyramid argues that because Act 250 lacks precision and clarity it offers no notice that items such as these three are to be evaluated. Pyramid contends, therefore, that if the court accepts the plaintiffs' arguments the statute is void for vagueness.[25]

Pyramid's second major constitutional challenge to Act 250 is that it is unconstitutional due to its overbreadth.[26] The doctrine of overbreadth seeks to promote the narrow, specific drafting of statutes to prevent the likelihood that constitutionally protected free-

---

whenever it is demonstrated that, in addition to all other applicable criteria, the additional costs of public services and facilities caused directly or indirectly by the proposed development or subdivision do not outweigh the tax revenue and other public benefits of the development or subdivision such as increased employment opportunities or the provision of needed and balanced housing accessible to existing or planned employment centers.

VT. STAT. ANN. tit. 10, § 6086(a)(9)(H) (Supp. 1980).

21. Memorandum, *supra* note 13, at 15.

22. *Id.*

23. *Id.* at 19.

24. VT. STAT. ANN. tit. 24, §§ 4301-4493 (1975 & Supp. 1980). Memorandum, *supra* note 13, at 16.

25. Memorandum, *supra* note 13, at 17.

26. *Id.* at 19.

doms will be infringed by an overbroad sweep of statutory language.[27] Pyramid states that "[a]ssuming a legitimate state need to enact legislation to protect the environment, that need cannot be met through a statute which precludes economic competition."[28] The Act is overbroad, Pyramid contends, if its effect is to protect established shopping areas such as Burlington from major new development and to curtail the market entry rights of new business.[29]

II. Vagueness

A. *Background*

The Supreme Court has recognized that a determination of vagueness is as difficult for the courts as is the drafting of sufficiently specific statutes by the legislature. Nonetheless, each governmental body must fulfill its responsibilities to the legal system and society in general. "The legislative bodies in draftmanship obviously have the same difficulty as do the judicial in interpretation. Nevertheless, despite the difficulties, courts must do their best to determine whether or not the vagueness is of such a character 'that men of common intelligence must necessarily guess at its meaning.' "[30]

The judiciary is entrusted with the responsibility of deciding the constitutionality of statutes.[31] Lawfully enacted statutes have been struck down by courts on various constitutional grounds—one of which is vagueness.[32] Specific applications of vagueness vary throughout the cases, but most courts agree that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning

---

27. Shelton v. Tucker, 364 U.S. 479, 488 (1960).

28. Memorandum, *supra* note 13, at 21.

29. *Id.*

30. Winters v. New York, 333 U.S. 507, 518 (1948) (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)).

31. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

32. *E.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968); Lanzetta v. New Jersey, 306 U.S. 451 (1939); Champlain Refining Co. v. Corporation Comm'n, 286 U.S. 210 (1932); Cline v. Frink Dairy Co., 274 U.S. 445 (1927).

and differ as to its application, violates the first essential of due process of law."[33] It is important to remember that the requirement of statutory specificity stems from the doctrine of due process.[34] Effective due process of law can not be achieved unless the citizenry is able to understand the requirements of the law, which is impossible under vague guidelines.

Of course, it is highly unlikely that the legislature, in passing a regulatory statute to be administered by an executive agency, is able to anticipate all possible applications and ramifications of the statute. For such a statute to have its intended effect, therefore, the statutory standards should provide guidance to the agency but not be overly restrictive. One administrative law scholar has stated that "[a] regulatory agency would probably be an impossibility if power could not be delegated with vague standards."[35] Once a valid delegation has been made, it is the responsibility of the administrative agency to protect due process through procedural safeguards of rulemaking and adjudicatory hearings.[36] The genesis of the agency's responsibility is, however, in the statute itself.

The Supreme Court provided the parameters of sufficiently specific statutory language in *Connally v. General Construction Co.*:[37]

> [T]he decisions of the court upholding statutes as sufficiently certain, rested upon the conclusion that [the statutes] employed words or phrases having a technical or other special meaning, well enough known to enable those within [the statutes'] reach to correctly apply [*sic*] them . . . or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ . . . or

---

33. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

34. "No person shall be . . . deprived of life, liberty or property without due process of law." U.S. CONST. amend. V.

35. K. DAVIS, ADMINISTRATIVE LAW TEXT § 2.09, at 51 (1972).

36. *Id.* at 47. The fairness of procedural safeguards is of paramount concern in determining the validity of a delegation—at times as important as the legislative standards. *Id.* § 2.08, at 44. Pyramid makes no claim, however, against the administrative procedures used under Act 250. The focus of this note, therefore, is on the requirement of legislative standards.

37. 269 U.S. 385 (1926).

> . . . "for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded."[38]

Although "[t]he essential purpose of the 'void for vagueness' doctrine is to warn individuals of the criminal consequences of their conduct,"[39] both criminal and civil statutes challenged as vague have been evaluated in light of this definition and the criteria therein since 1926.[40]

The Supreme Court has delineated several reasons for requiring precision in statutory terminology: (1) to provide notice to the affected public of proscribed behavior, (2) to provide guidance to those responsible for enforcement of the statute, and (3) to provide protection for first amendment freedoms.[41]

First, under the notice requirement, a statute must be comprehensible to an average individual before he may be held accountable under it.[42] This requirement of notice of proscribed acts or behavior is settled law with respect to penal statutes.[43] Since the defendant in a criminal case is faced with possible deprivation of liberty, a potential defendant must be given reasonable opportunity to discern the requirements of the statute before the state may exact such a payment.[44]

---

38. *Id.* at 391 (citations omitted).

39. Jordan v. DeGeorge, 341 U.S. 223, 230 (1951).

40. *E.g.*, Colten v. Kentucky, 407 U.S. 104, 110 (1972); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) (both criminal); Cramp v. Board of Pub. Instruction, 368 U.S. 278, 287 (1961); Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183, 196 (1936) (both civil).

41. See Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972), for a concise discussion.

42. Grayned v. City of Rockford, 408 U.S. 104 (1972); United States v. Petrillo, 332 U.S. 1 (1947); Lanzetta v. New Jersey, 306 U.S. 451 (1939); Champlain Refining Co. v. Corporation Comm'n, 286 U.S. 210 (1932).

43. Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972).

44. A seemingly anomalous case, which has never been overruled, is Nash v. United States, 229 U.S. 373 (1913). There the defendant raised a vagueness defense to an indictment for restraint of trade. In upholding the statute the Court placed much of the responsibility to estimate properly the limits of the law on the individual, stating:

> the law is full of instances where a man's fate depends on his estimating rightly, that is as the jury subsequently estimates it, some matter of degree. . . . "The criterion in such cases is to examine whether common social

The second reason for requiring statutory precision is to help assure standard administration and enforcement of the statutes.[45] Unless the administrator, jury, or court is able to ascertain the intent of the legislature, administration and enforcement of any given statute can depend on the whim or disposition of the enforcer. A properly drawn statute must give notice to those responsible for enforcement as to the types of behavior the legislature has sought to enjoin.[46] Only on this basis can the administrator or court begin to dispense equal justice.[47]

The third and perhaps most compelling reason for requiring statutory definiteness is to provide a layer of protection for first amendment freedoms.[48] The courts have expressed concern that an individual might curtail his legitimate first amendment activities to avoid violating a particular statute.[49] Although an individual may have adequate notice that a particular activity is forbidden, unless the statute is specific, that individual may believe that protected activities are proscribed by the statute as well. The Supreme Court has found this result unacceptable because of "[t]he danger of [the] chilling effect upon the exercise of vital First Amendment rights."[50]

---

duty would, under the circumstances, have suggested a more circumspect conduct."

Id. at 377 (citation omitted). *But see* Note, *Reconciliation of Conflicting Void-for-Vagueness Theories Applied by the Supreme Court*, 9 HOUS. L. REV. 82, 83 (1971), in which the author states that the Court has used *Nash* as one of three theoretical guidelines to vagueness.

45. Grayned v. City of Rockford, 408 U.S. 104 (1972); Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968); Cline v. Frink Dairy Co., 274 U.S. 445 (1927).

46. Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 685 (1968); Cline v. Frink Dairy Co., 274 U.S. 445, 465 (1927).

47. See *Reconciliation, supra* note 44, at 93, which postulates that after Connally v. General Constr. Co., 269 U.S. 385 (1926), the requirement for standard enforcement was secondary to notice.

48. Grayned v. City of Rockford, 408 U.S. 104 (1972); NAACP v. Button, 371 U.S. 415 (1963); United States v. Harriss, 347 U.S. 612 (1954); Winters v. New York, 333 U.S. 507 (1948).

49. Grayned v. City of Rockford, 408 U.S. 104, 109 (1972).

50. *Id.* *See* Amsterdam, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 75 (1960), in which "[t]he primary thesis advanced . . . is that the doctrine of unconstitutional indefiniteness has been used by the Supreme Court almost invariably for the creation of an insulating buffer zone of added protection of the peripheries of

Although standards for statutory specificity do exist, courts will attempt to uphold statutes against vagueness claims, especially when the statutes do not limit first amendment rights.[51] The judiciary recognizes that the art of drafting is inherently imprecise; to give a statute effect is to accept some degree of vagueness.[52] The Court has stated that "[t]he root of the vagueness doctrine is a rough idea of fairness."[53] Notwithstanding the limitations inherent in legislative language, the state retains the responsibility to define rights and regulate behavior. The "inability to define regulated materials with ultimate, godlike precision . . . [does not remove] . . . the power of the states or Congress to regulate."[54]

In the event the legislature does draft legislation that is unconstitutionally vague, the state supreme court may still save a statute by endorsing a limiting interpretation of the statute made, through application, by the administrative agency responsible for its enforcement. The Vermont Supreme Court has adopted the doctrine that construction of a statute made by the agency responsible for its administration should be adhered to unless compelling reasons show that it is wrong.[55] Thus, decisions of Vermont administrative agencies are given substantial deference.

---

several of the Bill of Rights freedoms."

51. United States Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 571 (1973); Winters v. New York, 333 U.S. 507, 517 (1948). There is a presumption of validity of duly enacted statutes. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976); *Re* Montpelier & B.R.R., 135 Vt. 102, 103-04, 369 A.2d 1379, 1380 (1977). If it is difficult to determine on which side of the vagueness line an offense falls the statute will not necessarily be found deficient. Jordan v. DeGeorge, 341 U.S. 223, 231 (1951); United States v. Petrillo, 332 U.S. 1, 7 (1947). Further, "[t]he unconstitutionality of a part of an act does not necessarily defeat or affect the validity of its remaining provisions." Champlain Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932). *See also*, United States v. Jackson, 390 U.S. 570, 585 n.27 (1968).

52. Colten v. Kentucky, 407 U.S. 104 (1972). The vagueness doctrine "is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited." *Id.* at 110.

53. *Id.*

54. Miller v. California, 413 U.S. 15, 28 (1973).

55. Committee to Save the Bishop's House, Inc. v. Medical Center Hosp. of Vt., Inc., 137 Vt. 142, 150-51, 400 A.2d 1015, 1020 (1979).

Of even greater binding force are decisions of a state supreme court on the United States Supreme Court. In fact, the United States Supreme Court will accept a construction of the highest court of the state which determines the meaning of a state statute.[56] Thus, if the Vermont Supreme Court accepts a limiting interpretation of statutory language challenged as vague, the United States Supreme Court will also accept such interpretation in determining the constitutional specificity of the challenged statute.

The Court has not been averse to referring to other extra-statutory sources in defining terms and making its determinations.[57] As a starting point, statutory words are given their ordinary meaning absent reasons to the contrary.[58] As indicated in *Connally*, however, when the statutory terms themselves provide little guidance as to the precise meaning of the statute, the Court may look to a well-known technical or other special meaning, a well-settled common law meaning, or to the subjects with which a statute deals for a more precise meaning.[59] In cases where the three requirements of statutory precision[60] must be satisfied by sources outside the statute, the Court has given few standards and has placed no limitations—outside of the guidance in *Connally*—on the use of extra-statutory definitions.[61] Regardless of the source(s) of statutory precision, the Court appears to have developed a tri-level

---

56. Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684, 688 (1959); American Mfg. Co. v. City of St. Louis, 250 U.S. 459, 461-62 (1919).

57. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104, 111 n.6 (1972), in which the Supreme Court looked to Webster's Third International Dictionary to define the statutory term "diversion." The Court in Lanzetta v. New Jersey, 306 U.S. 451, 454 n.3 (1939), used five different dictionaries to define the statutory term "gang."

58. Burns v. Alcala, 420 U.S. 575, 580-81 (1975).

59. See text accompanying notes 31-40 *supra*. Lanzetta v. New Jersey, 306 U.S. 451, 455 (1939); Champlain Refining Co. v. Corporation Comm'n, 286 U.S. 210, 242-43 (1932). Some lower courts have resorted to comparing the statutory language at bar to other acceptable language in making their decisions. *See, e.g.*, United States v. Maude, 481 F.2d 1062, 1068 n.45 (D.C. Cir. 1973); United States v. Article of Drug, 484 F.2d 748, 751 (7th Cir. 1973).

60. 1) Notice of proscribed conduct, 2) guidance to administrators, and 3) protection of first amendment freedoms. See text accompanying notes 41-50 *supra*.

61. Amsterdam, *supra* note 50, at 70-74. Given this lack of judicial guidance, it may be difficult to reconcile the various reasons for requiring statutory precision with the fact that these three reasons may be satisfied by sources outside the statute.

analysis in evaluating statutory vagueness which depends on the rights involved or severity of the sanction.

The Supreme Court exercises close scrutiny in all cases—civil or criminal—involving statutes that affect first amendment freedoms, such as speech, press, and religion.[62] Since such freedoms are guaranteed by the Constitution,[63] the Court allows limitation of them only with narrow statutory specificity.[64] The Court invokes a lesser standard, however, in evaluating criminal statutes which do not involve first amendment rights[65] and, apparently, an even lesser standard for nonfirst amendment civil cases.[66] The closer a statute comes to affecting fundamental rights the more demanding the Court will be in requiring statutory precision. The less severe the consequences of violating a statute are, the lower the standard of scrutiny applied by the Court.[67]

The highest standard of vagueness review is of cases which involve the first amendment. In such cases the legislature must draft a statute narrowly and precisely to prevent an unnecessary infringement of first amendment freedoms. Examples of cases involving the first amendment are *Smith v. California*,[68] a criminal case, and *NAACP v. Button*,[69] a civil case. In *Smith* the defendant was convicted under a Los Angeles ordinance which made it illegal for a bookstore to have obscene books on the store premises. The ordinance imposed criminal liability without reference to any

---

62. *See, e.g.*, Keyishian v. Board of Regents of the Univ. of N.Y., 385 U.S. 589, 604 (1967); NAACP v. Button, 371 U.S. 415, 433 (1963); Winters v. New York, 333 U.S. 507, 509 (1948).

63. U.S. CONST. amend. I.

64. Keyishian v. Board of Regents of the Univ. of N.Y., 385 U.S. 589, 603-04 (1967); NAACP v. Button, 371 U.S. 415, 433 (1963); Smith v. California, 361 U.S. 147, 155 (1959).

65. United States v. National Dairy Products Corp., 372 U.S. 29, 36 (1963).

66. Neblett v. Carpenter, 305 U.S. 297 (1938); Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922).

67. Although the test presented is similar to and parallels the three-tier test of equal protection (strict scrutiny, "middle tier," rational relation), it is not identical. For example, the legislature may have had a reasonable purpose in enacting Act 250 which the statute furthers, thus satisfying an equal protection challenge. If actual terms of the statute are, in fact, vague under the test presented, however, the statute will be struck down.

68. 361 U.S. 147 (1959).

69. 371 U.S. 415 (1963).

knowledge on the part of the store owner of the contents of a book. The Court labelled the ordinance vague and invalidated it, stating "that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech."[70]

In *NAACP*, a Virginia statute which empowered the state to regulate the legal profession was challenged. The Court felt that the statute was vague in defining what was and was not proper solicitation of legal business and, therefore, violated plaintiff's freedom of speech. In striking down the statute, the Court stated that "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."[71]

The language used in striking down the statute in the classic vagueness case of *Papachristou v. City of Jacksonville*[72] is more moderate than in the cases previously cited. Such moderation indicates a second level of statutory vagueness analysis used in criminal, nonfirst amendment cases.[73] *Papachristou* involved eight de-

---

70. 361 U.S. at 151.

71. 371 U.S. at 433. *See also* Keyishian v. Board of Regents of the Univ. of N.Y., 385 U.S. 589, 604 (1967) and Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961). In *Cramp* the Court invalidated a statute requiring that each state employee swear that he had never given "aid, support, advice, counsel or influence [to] the Communist Party." *Id.* at 279. The Court felt that these phrases were too indefinite and stated that "[t]he vice of unconstitutional vagueness is further aggravated where . . . the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution." *Id.* at 287.

72. 405 U.S. 156 (1972).

73. Although there is a difference in standards between classes (i.e. first amendment, criminal, civil), the rationale in striking or upholding statutes within a class is often nebulous. Within the nonfirst amendment criminal class, *compare* Lanzetta v. New Jersey, 306 U.S. 451 (1939) (crime to be a "gangster"—struck down); Champlain Refining Co. v. Corporation Comm'n, 286 U.S. 210 (1932) (prohibited production of petroleum so as to constitute "waste"—struck down); Cline v. Frink Dairy Co., 274 U.S. 445 (1927) (exempted from criminal anti-trust act combinations to obtain "reasonable profits"—struck down); Connally v. General Constr. Co., 269 U.S. 385 (1926) ("current rate of per diem wages in the locality"—struck down); United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921) (crime to charge an "unjust or unreasonable rate" for "necessaries"—struck down) *with* United States v. National Dairy Products Corp., 372 U.S. 29 (1963) (crime to sell goods at "unreasonably low prices" to "[destroy] competition"—upheld); United States v. Petrillo, 332 U.S. 1 (1947) (crime to coerce a radio licensee to employ any person "in excess of the number of employees needed"—upheld).

fendants convicted under a municipal vagrancy statute. The statute defined vagrants in part as "[r]ogues and vagabonds . . . common drunkards, . . . lewd, wanton and lascivious persons . . . common railers . . . persons wandering or strolling around from place to place without any lawful purpose."[74] The Supreme Court did not use language such as "narrow specificity" in deciding the standard of scrutiny. It merely struck down the statute as vague, stating that the accused had no fair notice and that it encouraged arbitrary arrests and convictions.[75] The Court went on additionally to state in dictum that "[i]n the field of regulatory statutes governing business activities, where the acts limited are in a narrow category, greater leeway is allowed."[76]

The Court appears most likely to uphold statutory language in civil statutes which are unrelated to the first amendment, evidencing a third level of statutory vagueness analysis. These civil statutes constitute an area in which the courts have encountered difficulty in establishing a standard of required specificity.[77] For example, *Neblett v. Carpenter*[78] was a civil case in which the Insurance Commissioner was entitled, by statute, to rehabilitate any insurance company that had become insolvent.[79] The petitioners (stockholders and policyholders) objected when the Commissioner exercised his option, claiming their rights and property had been altered. They asserted that the statutory language was so vague that no one could determine the extent of the Commissioner's

---

74. 405 U.S. at 156 n.1 (1972).

75. *Id.* at 162.

76. *Id.*

77. *But see* Amsterdam, *supra* note 50, at 115 where the author states:

> [t]he concept of indefiniteness and its appurtenant doctrines have been developed and used by the Court precisely to obviate . . . the need for . . . narrowly drawn decisions of ultimate power . . . . Indefiniteness is, after all, a creature of due process; and it is the essence . . . of due process to minimize the frequency and gravity of those occasions, in a society, when it is necessary to reach the issue of ultimate power.

78. 305 U.S. 297 (1938). *See also* Old Dearborn Distrib. Co. v. Seagram-Distillers Corp., 299 U.S. 183, 196 (1936) (civil case—language upheld).

79. The language was: " 'the commissioner . . . may . . . mutualize or reinsure the business of' an insurance company 'or enter into rehabilitation agreements.' " 305 U.S. at 302-03.

power. The Court overruled that contention on the basis of the criteria approved in *Connally*.[80] The Court did not comment on the standard of scrutiny being applied.

A second civil case, *Edgar A. Levy Leasing Co. v. Siegel*,[81] involved the validity of an emergency housing statute which permitted tenants to remain in their homes or apartments upon payment of a "reasonable" rental. In upholding the statute, the Supreme Court stated that "[t]he standard of the statute is as definite as the 'just compensation' standard adopted in the Fifth Amendment . . . and therefore ought to be sufficiently definite to satisfy the Constitution."[82] By comparing the statutory language to that of the fifth amendment to justify its decision, the Court seemed to apply its own standard of reasonableness, although it did not explicitly state the standard actually applied.

Although the actual vagueness standard applied in civil cases remains unstated, in *Winters v. New York*[83] the Court explicitly recognized that a lower vagueness standard as applied to civil cases exists: "The standards of certainty in statutes punishing for [criminal] offenses is higher than in those depending primarily upon civil sanction for enforcement."[84] Therefore, given the type of reasoning

---

80. *Id.* at 303 n.6. Those criteria are that the words had 1) a technical or other special meaning to apply them correctly, 2) a well-settled common law meaning or, 3) a meaning established from the text of the statute or subjects with which the statute dealt. 269 U.S. at 391-92.

81. 258 U.S. 242 (1922).

82. *Id.* at 250.

83. 333 U.S. 507 (1948).

84. *Id.* at 515. In a few older cases the Supreme Court minimized the differences between criminal and civil cases with respect to vagueness. For example, in Champlain Refining Co. v. Corporation Comm'n, 286 U.S. 210 (1932), a criminal case, "[i]t [was] not the [criminal] penalty that [was] invalid but the exaction of obedience to a rule or standard that [was] so vague and indefinite as to be really no rule or standard at all." 286 U.S. at 243. A.B. Small Co. v. American Sugar Refining Co., 267 U.S. 233 (1925), also minimized the difference between standards in civil and criminal cases. In *Small* the plaintiff was attempting to recover for breach of contract in the sale of raw sugar to the defendant refiner who had refused delivery. One of the refiner's defenses was that the price in the contract violated the Federal Lever Act which made it illegal for any person to charge unjust or unreasonable prices for any necessaries. That particular section of the Lever Act had already been held void for vagueness in the context of criminal prosecutions, United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921), but defendant tried to distinguish the application of the statute

as well as the subtle language in the nonfirst amendment civil cases and the explicit recognition in *Winters*, the Court appears to apply a lower standard in civil cases.

It is important to remember that the actual criteria used to evaluate any statute challenged as vague are identical under the guidance of *Connally*.[85] Different applications of the test result from the standards of statutory specificity expected to be met depending on the rights involved or the severity of the sanction involved in the statute.

B. *Pyramid's Challenge: Vagueness*

Act 250 was challenged as vague on its face[86] by the Pyramid

---

for his civil defense. The Supreme Court held that this distinction was inadequate. 267 U.S. at 239. The Court used the same reasoning as it later did in *Champlain*—that the issue of concern was not the criminal penalty but rather the requirement of obedience to a vague standard. *Id.* at 239.

Had the Court considered *Small* before *Cohen* and upheld the Lever Act in the civil context first, it might, nonetheless, have scrutinized the Act more closely in the criminal context and provided different dicta.

The concepts in *Winters* and in *Small* may be reconciled under the theory that although a vague rule or standard which exacts obedience is unacceptable in either a criminal or a civil context the Supreme Court will invoke a higher standard of review in determining vagueness in criminal statutes. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972).

85. Although research disclosed no land use statutes challenged as vague in either the Vermont courts or the United States Supreme Court, other jurisdictions have applied the standard vagueness reasoning used in other contexts to land use statutes. *See, e.g.*, CREED v. California Coastal Zone Conservation Comm'n, 43 Cal. App. 3d 306, 330-33, 118 Cal. Rptr. 315, 332-34 (1974); *In re* Spring Valley Dev. by Lakesites, Inc., 300 A.2d 736, 749-52 (Me. 1973).

86. If a statute is challenged as vague on its face, the court may expand its traditional standing rules. Generally the Supreme Court will not entertain challenges to a statute "on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." United States v. Raines, 362 U.S. 17, 21 (1960). The Court in *Raines* went on to list several exceptions to this basic doctrine in which the Court allows a third-party defense:

1) in cases in which, as a result of the litigation at bar, the constitutional rights of one not a party to the suit would be impaired;
2) where application of the statute would inhibit free speech;
3) where criminal statute gave an inadequate warning of proscribed conduct;
4) where the statute has already been declared unconstitutional in most of its intended applications;

Company in its appeal to the Vermont Superior Court.[87] The Supreme Court has held, however, that a statute which does not involve first amendment freedoms must be examined as it applies to the facts of the instant case.[88] The action in this case is based on the fourteenth amendment; no first amendment rights are at issue. It is unlikely, therefore, that the court will grant Pyramid's request to examine Act 250 as it universally applies.[89]

Pyramid's initial vagueness challenge is a general objection that the exact scope and nature of Act 250 cannot be discerned.[90] Pyramid cites section 6086(a)(9)(H) of the Act as an example of the problem and poses seven questions designed to show which terms of the section are impermissibly vague.[91]

The superior court disagreed with Pyramid's contention that

---

5) where lower courts have declared a state statute as having a valid application tied to an invalid one;
6) where the Court holds that Congress wants the statute to stand only if it is valid in every application.

362 U.S. at 22-24. In any of these instances the Court will allow the complainant to litigate the vagueness challenge on behalf of the public even if his own activity was clearly within the range of regulation. NAACP v. Button, 371 U.S. 415, 432 (1963). Such a process permits the Court to evaluate the total effect of a statute at one time rather than piecemeal contraction of the statute over the years.

However, "vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." United States v. Mazurie, 419 U.S. 544, 550 (1975). When the Court evaluates the constitutionality of a statute as exclusively applied to the conduct in question the analysis is much narrower. The Court must simply determine if the statute in question provided adequate notice that the particular behavior was prohibited, that guidance was provided for consistent enforcement, that no chilling effect on first amendment rights resulted, and finally that the behavior itself was validly proscribed. See text accompanying notes 41-50 *supra*. The Court need not look beyond the facts of the case at bar.

87. Memorandum, *supra* note 13, at 19.

88. See note 86 *supra*. United States v. Mazurie, 419 U.S. 544, 550 (1975).

89. See note 86 *supra*. Therefore, the fact that Act 250 contains criminal penalties is irrelevant on the facts of this civil case. It could be argued that the existence of criminal penalties in a statute such as Act 250 is irrelevant in light of the vagueness analysis as presented in this note anyway, but that is beyond the scope of this note.

90. Memorandum, *supra* note 13, at 15.

91. *E.g.*, "(1) what is 'physically contiguous', [*sic*] and how does it differ from 'adjoining' or 'adjacent', [*sic*] which terms are used in other sections of Act 250, . . . (3) How are 'additional costs of public service and facilities' measured, and whose additional costs are considered, and what are public facilities." Memorandum, *supra* note 13, at 16.

criterion (a)(9)(H) was unconstitutionally vague. The court held that section "(a)(9)(H) provides sufficient standards so as to not leave [sic] the Court with constitutionally proscribed unlimited discretion."[92] The court stated that the (a)(9)(H) standards were more specific than those in other valid statutes or delegations, and that the section provided adequate guidance on the items the court was to consider.[93] When this issue is presented to the Vermont Supreme Court the decision of the lower court should be upheld.

In the context of section (a)(9)(H), Pyramid contends that since Act 250 derogates Pyramid's common law property rights, the statute must be strictly construed.[94] The Supreme Court has held that a statute is not to be construed so that it alters the common law more than the language of the statute indicates.[95] The Vermont Supreme Court has held likewise,[96] so that the terms of a statute will be interpreted narrowly. Such strict construction of statutory language would appear, however, to aid a court in upholding a statute against a vagueness challenge.[97] More narrow interpretations of actual statutory language result in greater notice to those affected and increased guidance for those who must administer the intended application of a statute.[98]

In evaluating the specificity of the terms in Act 250, it should be noted that, generally, the ordinary meaning of words will be applied.[99] If further guidance is necessary, extra-statutory sources may be used as well.[100] Therefore, in determining whether the language in Act 250 is vague, the Court would first look to the ordi-

---

92. *In re* Pyramid Co. of Burlington, No. S59-78 CnM at 10-11 (Vt. Super. Ct. Oct. 14, 1980).

93. *Id.* at 11.

94. Memorandum, *supra* note 13, at 14.

95. Robert C. Herd & Co. v. Krawill Machinery Corp., 359 U.S. 297, 304 (1959); Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603, 623 (1812).

96. Committee to Save the Bishop's House, Inc. v. Medical Center Hospital of Vt., Inc., 137 Vt. 142, 152, 400 A.2d 1015, 1020 (1979).

97. "[A] close construction will often save an act from vagueness that is fatal." Williams v. United States, 341 U.S. 97, 101 (1951).

98. Since no first amendment freedoms are here involved, the analysis of Act 250 will be limited to the notice and guidance functions of statutory specificity.

99. See text accompanying note 58 *supra*.

100. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

nary meaning of words such as public benefits[101] or indirect costs.[102] Thereafter, the Court would be permitted, under *Connally,* to look to well-settled common law or some well-known technical or other special meaning to establish a definition with sufficient certainty.[103] The *Connally* criteria leave some leeway for acceptance of a definition even though estimates of the degree of the definition might differ.[104] Thus, the Court is not limited to definitions "which may be gleaned from recourse to the statute itself,"[105] as Pyramid asserts it should be.

One noted scholar has stated that the Act 250 criteria "are so vague as to provide practically no serious guidance for an administrative agency making decisions thereunder."[106] Act 250 does, however, delineate the general criteria used to evaluate an application,[107] which appear to provide at least the minimum of notice and standard enforcement required to save it from general constitutional invalidity. Although discretion is granted to the administrators in applying the criteria provided by the legislature, such a delegation by itself is usually not enough to invalidate a statute on vagueness grounds.[108] One eminent scholar in administrative law has stated that "[w]hen a delegation is challenged, a court should not hold it unconstitutional even if the court finds that the legislative body has failed to provide either sufficient safeguards or sufficient standards; instead the court should require the agency to provide the required safeguards and the required standards."[109] The Environmental Board has promulgated regulations[110] and published decisions in annotated form.[111] It has also adopted, with

---

101. Vt. Stat. Ann. tit. 10, § 6086(a)(9)(H) (Supp. 1980).

102. *Id.*

103. 269 U.S. at 391.

104. *Id.*

105. Memorandum, *supra* note 13, at 16. *See* text accompanying notes 57-61 *supra.*

106. 5 N. Williams, American Land Planning Law § 160.11, at 398 (1975).

107. Vt. Stat. Ann. tit. 10, § 6086 (Supp. 1980), entitled "Issuance of permits; conditions and criteria." See note 5 *supra.*

108. West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22, 30 (1951); Gonyaw v. Gray, 361 F. Supp. 366, 370 (D.C. Vt. 1973).

109. K. Davis, Administrative Law Text § 2.08, at 45 (1972).

110. Vermont Environmental Board Rules Annotated, March 1, 1980.

111. Declaratory Rulings have been annotated in Vermont Environmental Board Rules

legislative approval, a Vermont Capability and Development Plan[112] as required by Act 250[113] for "the general purpose of guiding and accomplishing a coordinated, efficient and economic development of the state."[114] Further, reasonable and consistent applications over the years by administrators provide direction to statutory language, and decisions by administrative agencies are given great deference by the courts.[115] The Supreme Court has stated that "if the question were one of doubtful construction, such long acquiescence in it, such contemporaneous expositions of it, and such extensive and uniform recognition of its validity, would in our judgment entitle the question to be considered at rest . . . ."[116] The ten year history of the Vermont court's acceptance of Act 250 indicates its belief that the statute does give adequate guidance to those responsible for administration. Of the twenty-one times that decisions of the administrators have been appealed to the Vermont Supreme Court, only one has been reversed on substantive grounds.[117] In that reversal the court itself found the statutory guidelines sufficient to make an independent determination as to the proper application of the statute.

In addition to the anticipated narrow construction of the language in Act 250, it is important to remember the judicial inclination to uphold a statute against a vagueness challenge, even if it is difficult to determine on which side of the vagueness line the statute falls.[118] In this regard, the purpose of the legislature, as evidenced in the statute, tends to affect the judicial decision.[119] The

---

Annotated, March 1, 1980. Decisions will be published, annotated, and indexed in the near future.

112. 1973 Vt. Act 85, §§ 6-7, *reprinted in* VT. STAT. ANN. tit. 10, § 6042 (Supp. 1980).

113. VT. STAT. ANN. tit. 10, § 6042 (1973).

114. *Id.*

115. Quern v. Mandley, 436 U.S. 725, 738 (1978); Committee to Save the Bishop's House, Inc. v. Medical Center Hospital of Vt., Inc., 137 Vt. 142, 150-51, 400 A.2d 1015, 1019-20 (1979).

116. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 621 (1842).

117. Committee to Save the Bishop's House, Inc. v. Medical Center Hospital of Vt., Inc., 137 Vt. 142, 400 A.2d 1015 (1979).

118. See text accompanying note 51 *supra*.

119. Jamison v. Encarnacion, 281 U.S. 635, 640 (1930); Standard Register Co. v. Commissioner of Taxes, 135 Vt. 271, 272, 376 A.2d 41, 42 (1977).

Vermont Supreme Court has held that "the fundamental rule is that the real meaning and purpose of the Legislature is to be ascertained, and if a fair and reasonable construction discloses it, the statute is to be given effect."[120] The Supreme Court of Vermont recognized the purpose of Act 250 in *In re Juster Associates*:[121]

> The purpose of Act 250 is to protect and conserve the environment of the state and to insure that lands slated for development are devoted to uses which are not detrimental to the public welfare and interest. . . . These ends are served by a system of land use permits established by the Legislature. Where the Act applies, property may not be developed without a permit.[122]

Since the court has recognized and articulated the underlying purpose of the legislature, it should be sympathetic to carrying out that purpose.[123] The broad enabling legislation should be interpreted narrowly in specific applications to provide reasonable administration in light of the legislative purpose. Thereafter, if the legislature disapproves of any particular application, the discrepancy can be remedied when it next sits.[124]

In determining the general adequacy of statutory precision in Act 250, the criterion to be used is that in *Connally*: language is void for vagueness if persons of common intelligence must guess at its meaning.[125] As was previously noted, however, the Supreme Court has been elusive in structuring scrutiny standards for civil cases not involving first amendment rights, but the standard seems to be minimal.[126] The statutory language of Act 250 is likely to be upheld initially by the Vermont Supreme Court and ultimately by

---

120. State v. Bartlett, 128 Vt. 618, 621, 270 A.2d 168, 170 (1970).

121. 136 Vt. 577, 396 A.2d 1382 (1978).

122. *Id.* at 580, 396 A.2d at 1384 (citations omitted).

123. *See, e.g.*, Standard Register Co. v. Commissioner of Taxes, 135 Vt. 271, 272, 376 A.2d 41, 42 (1977).

124. 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 45.12, at 38 (1972). The legislature, in fact, amended VT. STAT. ANN. tit. 10, § 6085(c) (1973) in response to the Vermont Supreme Court's holding regarding party status in *In re* Preseault, 130 Vt. 343, 292 A.2d 832 (1972). *In re* Wildlife Wonderland, 133 Vt. 507, 518, 346 A.2d 645, 652 (1975).

125. 269 U.S. at 391. *See* State v. Bartlett, 128 Vt. 618, 270 A.2d 168 (1970).

126. See text accompanying notes 62-84 *supra*.

the United States Supreme Court if the courts follow the civil cases of *Neblett* and *Siegel* and apply a minimal standard of scrutiny.[127] The Court appears to have a greater tolerance for statutory imprecision in statutes, like Act 250, which exercise a valid state interest[128] in a civil context and which limit purely economic expectations of an individual.[129] In addition, environmental and land use planning laws, such as Act 250, have evolved and are generally accepted as broad, regulatory statutes, greatly affected by social policy.[130] "In American planning law many of the rules are *broad* and *vague*; and in many situations sensitive issues of social policy are involved."[131] Therefore, even if the courts determine that the statute might have been drafted with greater clarity—a not unlikely determination—the statute should still be upheld,[132] especially since no first amendment rights are implicated directly.

Pyramid's second vagueness challenge claims that three specific postulates, if accepted by the court, would render the statute unconstitutionally vague.[133] The first claim is that the court may

---

127. See text accompanying notes 77-82 *supra*. Only two Vermont statutes have been challenged in the Vermont Supreme Court as vague to date—hardly enough to anticipate a trend. Both the statutes were nonfirst amendment cases and both were upheld. Boone v. Boone, 133 Vt. 170, 333 A.2d 98 (1975) (civil) ("the resumption of marital relations is not reasonably probable"); State v. Giant of St. Albans, Inc., 128 Vt. 539, 268 A.2d 739 (1970) (criminal) (sale of sports equipment "within ten airline miles of areas devoted to [various listed] sports," "works of necessity and charity").

128. *See* 1 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 7.05, at 182-84 (1975) for a concise discussion of Supreme Court cases.

129. *E.g.*, Neblett v. Carpenter, 305 U.S. 297 (1938); Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922).

130. *See* WILLIAMS, *supra* note 128, § 4.01 at 85-90. *See also* note 85 *supra*.

131. WILLIAMS, *supra* note 128, § 4.01 at 87 (emphasis added). *See also* 1A SANDS, *supra* note 124, § 21.16 at 95, in which the author states:

> Although attractive, an absolute standard often results in an unworkable statute for without discretionary powers the administrator must stand by and watch the statute be emasculated through acts which escape the letter of the law though they violate its spirit. As a consequence the establishment of broad general standards which direct, but do not sharply limit, administrative action is desirable.

132. "[T]his prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision." Rose v. Locke, 423 U.S. 48, 49 (1975).

133. Memorandum, *supra* note 13, at 16. The superior court refused to rule on this issue since "we do not know what specific evidence will be presented by the parties and thus

not consider the economic impact on Burlington from the proposed mall. Pyramid asserts that the statutory language of Act 250 gives no indication that economic impact on towns as far away from a proposed development as Burlington is from Williston will be considered in evaluating permit applications.[134] The superior court's interpretation of Act 250 was that large-scale development creates impacts beyond the locality and affects concerns of the state as well. The court stated that "[i]f the very purpose of the Act is to consider the impact of large-scale developments on State as opposed to local concerns, a narrow reading of the statutory criterion to prevent consideration of impact beyond the limits of Williston is not justified."[135]

A resolution of this issue is closely related to the eventual definition of the terms in Act 250. The section at issue is section 6086(a)(7)[136] and the uncertain terms appear to be "unreasonable

---

what criteria and factors will be considered by the Court as necessary to its final decision." *In re* Pyramid Co. of Burlington, No. S59-78 CnM at 12 (Vt. Super. Ct. Oct. 14, 1980). A preceding section of the opinion, however, discusses all the criteria on which the permit denial was based. There the court gives strong indications of its thinking on the vagueness of these three criteria. *Id.* at 1-10.

134. Burlington apparently believes that the proposed mall will reduce the number of shoppers and sales in Burlington, thereby causing rental and assessed values of property to drop which will adversely affect Burlington's financial ability to provide municipal services. Memorandum, *supra* note 13, at 7.

135. *In re* Pyramid Co. of Burlington, No. S59-78 CnM at 3 (Vt. Super. Ct. Oct. 14, 1980). Although the result on this criterion is correct, the analysis is somewhat unclear. The conclusion that the *state* is interested in the impacts of major scale development because of the Act 250 jurisdiction granted by the legislature may be valid. From that inference, however, a logical leap is required to assume that a state interest in "values of state concern," Committee to Save the Bishop's House, Inc. v. Medical Center Hospital of Vt., Inc., 137 Vt. 142, 151, 400 A.2d 1015, 1020 (1979), automatically permits an expansive interpretation of the actual words and criteria of Act 250. Furthermore, the impact of the mall on Williston is no less of a *state* concern than the impact of such a large development on Burlington or even on Brattleboro. The fact of state concern itself provides no ready answer to the geographic limitations of the Act's criteria. The lower court provides no guidance, and the question remains as to where a reasonable geographic line should be drawn for purposes of substantive statutory interpretation and impact analysis. If it is reasonable to consider the scope of the impacts of a major development as a whole under Act 250 and to look at a development's real impacts on Vermont wherever they may occur, the court should so state.

136. "Before granting a permit, the board or district commission shall find that the subdivision or development: . . . (7) Will not place an unreasonable burden on the ability of the local governments to provide municipal or governmental services." VT. STAT. ANN. tit.

burden," "local governments," and "municipal or governmental services." The court could determine that these terms are not in themselves overly ambiguous and that a reasonable interpretation of "local governments," for example, could include towns six miles from Williston. If so, there would be little justification for Pyramid to claim that they had no notice that an Act 250 review would include an evaluation of the economic impact as it relates to municipal services in Burlington.

The court may hold, however, that the statutory language or extra-statutory sources provide little guidance as to the local/regional scope of section 6086(a)(7). If so, it is questionable whether Pyramid could have had sufficient prior notice or that the District Commission had proper guidance. A limited attempt to analyze prior applications of this section in the Environmental Board files did not reveal the historical geographic scope of this section. The files are set up such that a comprehensive effort to determine the geographic scope of section 6086(a)(7) would take days, if not weeks. By reviewing prior applications, Pyramid could be deemed to have had adequate notice, but if a reasonable attempt at research cannot reveal such a scope, then the notice requirement cannot be deemed to have been met. Therefore, if it is not reasonable to interpret section 6086(a)(7)—either by itself or by the extra-statutory sources outlined in *Connally*—as including the indirect economic impact on a city as remote as Burlington, then Pyramid should not be held to such a construction.

On the other hand, if the court does uphold the District Commission on this point but acknowledges that no reasonable prior notice was offered and that the administrators' discretion was open-ended, Pyramid's assertion that Act 250 is void for vagueness is considerably stronger. This possibility, however, is remote, since the Vermont Supreme Court would be likely, in that situation, simply to limit the application of that section by providing more precise definitions, as it did in *Committee to Save the Bishop's House, Inc. v. Medical Center Hospital of Vermont, Inc.*[137]

10, § 6086(a)(7) (Supp. 1980).

137. 137 Vt. 142, 400 A.2d 1015 (1979). It is not unheard of, however, for a court to

Pyramid's second claim is that the requirement of sufficient notice would be violated if the court considers the claim by Burlington and the Chittenden County Regional Planning Commission that the source of the entire increase in traffic at remote intersections in the area be allocated to the development up to the year 2000.[138] The applicable statutory section is section 6086(a)(5).[139] Based on this section it is apparent that there is ample notice that traffic congestion in general is a part of an Act 250 review. The challenge apparently is to the remoteness of the intersections and is, therefore, similar to Pyramid's challenge of the remoteness of Burlington under section 6086(a)(7). The superior court correctly held that as long as the traffic conditions "are causally related to the proposed development" the court will properly consider even remote traffic impacts.[140]

---

make a limiting statutory interpretation which applies retroactively. As discussed, a court may narrow a broad meaning of a statutory term to save the particular statute from a declaration of unconstitutional vagueness. See text accompanying notes 94-98 *supra*. The court may even impose that new interpretation on the case at bar thus saving the statute and at the same time neutralizing the claim against it. For example, in Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270 (1940), the Supreme Court evaluated a statute which provided for commitment of individuals with psychopathic personalities. The appellant's vagueness challenge was based on his own interpretation of the statute, but the state court had imposed a more precise definition of "psychopathic personality" in its review of the case. The Court upheld the statute and held appellant responsible under the new state court interpretation.

Theoretically, this situation could occur in Pyramid's challenge to the geographical scope of section 6086(a)(7) whereby a restricting interpretation would be adopted by the court and imposed on Pyramid. Such ex post facto judicial legislation is, however, of questionable justice. *See* SANDS, *supra* note 124, § 42.04 at 319.

138. Memorandum, *supra* note 13, at 16. This assertion is somewhat misleading. The four studies done on traffic increases and flows resulting from the mall also took into consideration natural growth and growth resulting from the proposed Digital Equipment Corporation facility. One did assign to Pyramid the entire increase in traffic at some remote intersections as a result only of traffic pattern changes because of the existence of the mall—not a direct increase in the amount of traffic. T. Adler, An Analysis of the Impacts of the Proposed Pyramid Mall on Greater Burlington Traffic Patterns 7-9 (January 1978).

139. "Before granting a permit, the board or district commission shall find that the subdivision or development; . . . (5) Will not cause unreasonable congestion or unsafe conditions with respect to the use of highways." VT. STAT. ANN. tit. 10, § 6086(a)(5) (Supp. 1980).

140. *In re* Pyramid Co. of Burlington, No. S59-78 CnM at 2 (Vt. Super. Ct. Oct. 14, 1980).

It is reasonable to include the impacts of traffic generation or pattern changes at any intersection if they can be traced to the particular development. The challenge in this issue should be to the quality of the modeling study which makes the specific traffic projection, not to the validity of the statute which does provide notice that traffic congestion will be considered. The court will be forced to rely on one or several environmental and economic studies on the impact of the mall in making its decision. Those studies should be used by the court based solely on their methodological and statistical quality. If the court determines that the traffic projection model is sound, that model and conclusions will form part of the foundation on which the court will base its decision. The court may determine, however, that the study is not valid. If so, the traffic projection would be rejected entirely or in part.

Pyramid's third claim questions the courts' jurisdiction to review a final land use decision made by the Planning Commission of the town of Williston.[141] It is the opinion of Pyramid that, under title 24, sections 4301-4493 of Vermont Statutes Annotated,[142] these decisions were final and not reviewable.[143] The issue is: Does jurisdiction to make a final decision on Pyramid's land use application reside in the local Planning Commission or in the state under Act 250? The superior court held that local approval does not preclude Act 250 review and does not preempt jurisdiction of the court.[144]

Act 250 is not invoked in every land use decision in the state. For development within a municipality which has enacted permanent subdivision and zoning bylaws—such as Williston—an Act 250 permit is required only if the tract of land involved in the project is larger than ten acres.[145] If, in such a municipality, the land

---

141. The Planning Commission granted subdivision approval on July 14, 1977, site plan approval on August 9, 1977 and a building permit on October 2, 1978. Memorandum, *supra* note 13, at 2-3.

142. VT. STAT. ANN. tit. 24, §§ 4301-4493 (1975 & Supp. 1980).

143. Memorandum, *supra* note 13, at 16-17.

144. *In re* Pyramid Co. of Burlington, No. S59-78 CnM at 9 (Vt. Super. Ct. Oct. 14, 1980).

145. VT. STAT. ANN. tit. 10, § 6001(3) (Supp. 1980).

involved is less than ten acres, then the project does not trigger Act 250 review. In such a situation the land use decision made by the local government controls and will not be replaced by a contrary decision of the state under Act 250.[146]

The Vermont Supreme Court addressed the legislative intent regarding the scope of involvement by the state in land use decisions in *Bishop's House*. In the hearing below, the superior court held that an Act 250 permit was required for the defendant to raze an historic building on a parcel of 1.44 acres of land and replace it with a parking lot. In interpreting the statutory term "involved land," the supreme court rejected involvement by the state and stated that "it was the Legislature's intent to involve the state in land use decisions in cases where a permanent mechanism exists for their review at the municipal level only where activity on a very major scale is planned."[147] By the terms of the statute, such major scale activity is defined as development involving land larger than ten acres.

The area of land on which the mall would be built consists of 94.46 acres[148] on a 200 acre tract.[149] By the sheer size of the land area of the project—almost ten times the statutory minimum for state involvement—it is extremely unlikely that the court will not allow Act 250 jurisdiction in this case. If so, the third vagueness challenge of Pyramid will fail.

C. *Conclusion*

In conclusion, in determining the entire issue of vagueness under Pyramid's initial claim—that Act 250 in its entirety is vague—the standards which the court will follow in making a decision will be a decisive factor. There are no first amendment freedoms involved, so it is unlikely that a standard of "narrow specificity"[150] will be required. If the court follows the lead of *Neblett*,

146. *Id.* § 6082.

147. 137 Vt. at 151, 400 A.2d at 1020.

148. Memorandum, *supra* note 13, at 2.

149. *In re* Pyramid Co. of Burlington, District Environmental Comm'n #4, Application #4C0281, Findings of Fact and Conclusions of Law at 1 (Oct. 12, 1978).

150. NAACP v. Button, 371 U.S. 415, 433 (1963).

Siegel, and *Winters* and recognizes that the standard for certainty is less strict in civil cases, the possibility of striking down Act 250 as unconstitutionally vague is slim.

One would expect that the court would balance the history and interest in planning and environmental regulation by the state against the constitutional claims of the developer.[151] Given the lack of guidance available to the court and the fact that the Supreme Court attempts to uphold state statutes—especially those not associated with the first amendment—that regulate behavior or subjects not easily defined,[152] it is likely that the vagueness challenge of Pyramid will fail.

III. OVERBREADTH

A. *Background*

Claims that a statute is constitutionally overbroad, and thus void, have been relatively frequent.[153] Historically this doctrine has been used to prevent a chilling effect on first amendment freedoms.[154] Overbreadth is somewhat easier to define than vagueness although its proper application tends to be as elusive. The doctrine of overbreadth recognizes that a state may have a legitimate and substantial interest in regulating a particular behavior, but "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[155]

---

151. *See* WILLIAMS, *supra* note 128, § 4.03 at 91-94.

152. Winters v. New York, 333 U.S. 507, 517 (1948).

153. *E.g.*, Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968); Shelton v. Tucker, 364 U.S. 479 (1960); Schneider v. New Jersey, 308 U.S. 147 (1939).

154. *See, e.g.*, Hobbs v. Thompson, 448 F.2d 456, 459 (5th Cir. 1971). *Accord*, Note, *Narrowing the Overbreadth Doctrine?*, 45 U. COL. L. REV. 361, 364 (1974); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 852 (1970).

155. Shelton v. Tucker, 364 U.S. 479, 488 (1960). *See also* Cantwell v. Connecticut, 310 U.S. 296 (1940); Lovell v. City of Griffin, 303 U.S. 444 (1938). As a result of this emphasis on first amendment freedoms, the Supreme Court has historically been willing to declare a statute facially overbroad even if the legitimate rights of the defendant at bar had not been violated. Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973). Historically, if the defendant could show that the statute had such a broad sweep that it would or could interfere with some other person's first amendment rights, the Court would declare the statute facially overbroad, and the defendant would avoid liability. *Id.*

Before 1973 application of the theory of overbreadth was relatively simple, and many statutes were nullified.[156] In 1973, however, the Supreme Court added new criteria to the application of the overbreadth doctrine in *Broadrick v. Oklahoma*[157] which eliminated this simplicity. In *Broadrick* three state employees challenged as vague and overbroad a state statute which prohibited them from receiving or soliciting assessments or contributions for political purposes and which prohibited their membership on a political party committee or participation in management of a political party or campaign. The Court declared that "the over breadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[158] By using such language the Court clearly indicated that it had reevaluated its prior stance on overbreadth as a seemingly automatic protection for first amendment rights. Henceforth it would look to the legitimate sweep of the statute and would strike down the statute only if its overbreadth were real and substantial in comparison.[159]

The more traditional attack has been that the statute is overbroad as applied to the defendant alone rather than a facial attack. Ohralick v. Ohio State Bar Ass'n, 436 U.S. 447, 462 (1978). This type of challenge is more restrictive than a facial attack: the court is only required to view the statute in relation to the defendant's behavior and not examine the universal ramifications of the statute. *Id.* at 463.

156. *E.g.*, Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968); Cantwell v. Connecticut, 310 U.S. 296 (1940); Lovell v. City of Griffin, 303 U.S. 444 (1938). In *Cantwell*, for example, a state statute requiring a person to obtain a permit before soliciting money or services for a religious or charitable purpose was challenged by three Jehovah's Witnesses. The Court conceded that a state may constitutionally regulate the time, place, and manner of soliciting on the streets for the good order of the community. The statute was, however, struck down as overbroad because, in obtaining a permissible end, the sweep of the statute was too broad and infringed on the first amendment freedom of religion. 310 U.S. at 311.

In Shelton v. Tucker, 364 U.S. 479 (1960), a statute required public teachers to list, as a condition of employment, the organizations to which they had belonged for the preceding five years. The Court recognized a legitimate right of the state to determine the fitness of those who teach its youngsters. The Court struck down the statute, however, because its broad sweep impaired the teachers' first amendment rights to freedom of association. *Id.* at 486-87. See also Keyishian v. Board of Regents of the Univ. of N.Y., 385 U.S. 589 (1967); Dombrowski v. Pfister, 380 U.S. 479 (1965); Lovell v. City of Griffin, 303 U.S. 444 (1938).

157. 413 U.S. 601 (1973).

158. *Id.* at 615.

159. *But see* 413 U.S. at 630 (Brennan, J., dissenting) in which the Justice states that the majority offers no definition of "substantial overbreadth" and that "a requirement of substantial overbreadth is already implicit in the doctrine." There are, of course, practical

The Court also established a sliding scale of analysis between conduct and speech, stating that as statutorily prohibited behavior moved from pure speech to conduct—even if that conduct were expressive—application of the doctrine of facial overbreadth would be less likely.[160] Although statutes regulating conduct may deter constitutionally protected speech, the Court felt that there came a point where such a deterrence could not justify invalidating a statute which legitimately regulated conduct.[161]

A year later in *Arnett v. Kennedy*[162] the Court upheld a challenged statute in which freedom of speech was affected. In *Arnett* a federal employee was dismissed on the basis of five charges. The most serious charge was that he had claimed that his employer had accepted a bribe. The statute allowed dismissal only for "cause" that affected the efficiency of the agency. Arnett challenged the statute on several grounds, one of which was overbreadth since the statute "unwarrantedly interfere[d] with . . . employees' freedom of expression."[163] The Court declared that the purpose of the statute was only to regulate employee behavior, including speech, which affected the efficiency of the agency and, therefore, it was not overbroad.[164]

In the past, statutes were often declared facially overbroad because they conceivably could be applied to restrict first amendment freedoms. Under *Arnett* and *Broadrick*, however, the Court appears to be stepping back from the days when overbreadth was in high fashion. By stipulating that the overbreadth must be real and substantial and by instituting a sliding scale analysis in regard to speech and conduct, the Court restricted the application of the doctrine of facial overbreadth.

---

judicial problems with such a relative test imposed by the majority. *See* Note, *First Amendment Vagueness and Overbreadth: Theoretical Revisions by the Burger Court*, 31 VAND. L. REV. 609, 616-17 (1978).

160. 413 U.S. at 615.

161. *Id.*

162. 416 U.S. 134 (1974).

163. *Id.* at 139.

164. *Id.* at 162. *See also* United States Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973).

B. *Pyramid's Claim: Overbreadth*

Pyramid has not claimed that Act 250 is facially overbroad, and thus the courts will examine the statute only as it applies to Pyramid and not as it applies universally.[165] It is important to remember, when analyzing an overbreadth argument, that the doctrine has been invoked essentially to protect first amendment freedoms.[166] Although economic competition is the basis of a free enterprise system, it is not a protected right under the first amendment.[167] The Supreme Court has stated:

> [F]reedom of speech and that of the press [are] fundamental personal rights and liberties . . . .
>
> In every case, therefore, when legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.[168]

In fact, the Court has stated that "the justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context."[169] The effect of Act 250 may well be to restrict economic competition, but unless the courts are willing to expand the traditional application of unconstitutional overbreadth, this challenge will fail.

Conclusion

Applying the current law to the constitutional challenge of Pyramid against Act 250, it appears unlikely that the Act will be struck down due to vagueness. The key weakness in the Pyramid case is that it is a property challenge against a legitimate state interest of environmental regulation, and not a first amendment

---

165. 413 U.S. at 612.
166. Note, *Narrowing the Overbreadth Doctrine?*, 45 U. Col. L. Rev. 361, 364 (1974).
167. See U.S. Const. amend I.
168. Schneider v. New Jersey, 308 U.S. 147, 161 (1939).
169. Bates v. State Bar of Arizona, 433 U.S. 350, 380 (1977).

challenge. Although the Court has not clarified the standards applicable to civil cases not involving the first amendment, lower courts will probably follow a balancing test. The court will impose a minimal requirement of statutory definiteness if it finds: 1) the conduct being regulated is not constitutionally protected, 2) the interest of the state in regulating the behavior is great, 3) the conceivable applications of the statute are not susceptible to precise prestatement, 4) the administrative procedural safeguards are fair, and 5) there are sufficient opportunities for the one affected to discover the consequences of acting before he incurs liability. Given the long history of active environmental protection in Vermont,[170] it appears that the court will view the state's interest in maintaining and enforcing Act 250 as substantial, thus outweighing Pyramid's economic interests.

Pyramid's claim that Act 250 is unconstitutionally overbroad will not succeed. The overbreadth doctrine was actively developed for the purpose of protecting and insulating first amendment freedoms; Pyramid's "right" to economic competition is not in that category. It is doubtful that the doctrine of overbreadth will help Pyramid's challenge to Act 250, especially since the Court has begun to retund the edge of overbreadth.

At its inception the purpose of Act 250 was to ensure quality development to protect the people and environment of the state of Vermont. Its language was drafted broadly to achieve that purpose and, after ten years of interpretation and application, it appears that the statute is succeeding. Act 250, although a broad delegation, is not vague and should withstand this constitutional challenge.

Shelley A. Hill

---

170. Vermont led the country in the 1940's in roadside sign control. VT. STAT. ANN. tit. 10, §§ 481-505 (1974); WILLIAMS, *supra* note 128, § 6.40 at 171. Vermont is one of the few jurisdictions to have enacted a state-wide anti-littering bottle bill. VT. STAT. ANN. tit. 10, §§ 1521-1527 (Supp. 1980); see W. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW 686-88 (1977).