

# VERMONT ENVIRONMENTAL REPORT

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## "BROOKFIELD MASSACRE"

Like lava from an active volcano, Highway Project 50196(1) cuts a swath into the outskirts of Brookfield, Vermont, a nineteenth century New England village included in Vermont's register of historic places. It is best known for its floating bridge which spans Brookfield Pond some 25 miles south of Montpelier. The bridge is entered in the National Historic Engineering Record.

Governor Salmon labeled the highway improvement project the "Brookfield Massacre" and expressed the opinion that it should never have been constructed. The Division of Historic Sites at the urging of concerned Brookfield residents asked the State Environmental Board for a declaratory ruling on the Highway Department's exemption from permit requirements under 10 VSA 6081 (b).

The Highway Department claimed that it was not subject to Act 250 because the initial hearing was held in 1965 well before the passage of the State Land Use Act. The Department did, however, hold another hearing in 1970 which it said was for informational purposes only. Historic Sites Director, William Pinney, claimed that the second hearing was a reopening or continuation of the first hearing and thus made the Highway Department subject to district permit requirements. The Environmental Board by a 4 to 1 margin ruled that the Highway Department project was a development under 10 VSA and was not exempt from the requirements of the law.

The Highway Department expresses the opinion that the road does not harm Brookfield and that opposition to it emanates from only a few new residents. Since the road is nearly completed it is difficult to speculate what results a CEASE and DESIST order from the Environmental Board will have on the end product. However, the order if upheld, could have ramifications beyond Brookfield which in the long run should make the Highway Department planners and engineers more sensitive to environmental and historic concerns.

A donation to the VNRC Publication Fund from a Life Member has supported the publication of this VER issue.

## CONSTITUTIONAL ISSUES

### IN LAND USE PLANNING

There is no such thing as an absolute legal right to use one's own land as one wishes, Joseph L. Sax told members of the legislature's agriculture and natural resources committees at a July meeting. He said the issue really is not governmental taking of private land but finding an accommodation between competing demands for the land.

The University of Michigan law professor was invited to Vermont by the State Planning Office to discuss constitutional issues in land use planning. A major question in preparing the Act 250 land use plan has been the degree to which the state can regulate private property without paying compensation.

Prof. Sax noted that laws controlling land use dated back at least to 1589 when a measure required four acres of land with each cottage. While other states are watching Vermont because it is among the first to plan statewide control, this is not so novel constitutionally. The right to zone was settled by the Supreme Court in 1926. More recently the state of Washington's law controlling the cutting of trees on private land was upheld. The court said it was the government's business to preserve the state's resources for a viable economic base.

Land policy should be made by the legislature, said Sax. Now it is made by real estate dealers. Their concern is what is salable. The business of government is to worry about its citizen's grandchildren. Lots of people are trying to sell and buy Vermont, but the ambience of Vermont is not salable. By reducing it to property -- by cutting it up like a pan of brownies, the essence of Vermont is destroyed.

He commented on several specific methods of controlling land use in answering questions.

- \* The state can reduce the value of property markedly without violating the Constitution. It can say that land may be used for farming but not for subdividing.
- \* The rate of growth may be regulated to keep it in phase with planning for capital improvements.
- \* The problem with trying to limit the number of people by the land's carrying capacity is that the capacity can be modified. There must be data justifying such limitations.
- \* Aesthetics as a basis for regulation is such an amorphous concept and a matter of personal taste that it always gives the courts trouble.
- \* The price of land probably can't be kept down by prohibiting specific uses such as second homes. Restricting use of a state's resources to its own citizens has been held unconstitutional.
- \* Land use taxation hasn't always worked well. In order to have incentive to keep the land, there needs to be almost a 100% recapture of profits when it is sold.
- \* The constitutionality of development rights needs to be explored. It is uncertain.

### THE FLOOD OF 1973

It is still too early to adequately measure the impact of the recent flood on the environment. Water collecting stations around the state indicate that rainfall measured on an average 2 inches less than in the great flood of 1927. Preliminary survey of damage indicates that 2 more inches would have been disastrous.

Some towns in the area where the rainfall was heaviest suffered extensive damage. For example, Cavendish lost 45 miles of highway, 20 bridges, and a sewage treatment plant. Environmental Secretary Martin L. Johnson, in a statement issued shortly after the flood, pointed to the fact that agricultural lands located in floodplains served their natural function as "safety valves", but he noted that had the Legislature passed the floodplain zoning bill every citizen would have been eligible to apply for National Flood Insurance. He also mentioned that the administration was considering the creation of a flood disaster fund to reimburse farmers for losses they will inevitably suffer as flood plains perform their natural function. He called the passage of the floodplain zoning bill a major priority for the State.

### NEW DIRECTIONS FOR VERMONT TOMORROW

Vermont Tomorrow has taken on new leadership. The statewide environmental group has chosen Peter Franchot of East Dover, Vermont as its new Executive Director. He is a graduate of Amherst College and has done work in botany and geology at the University of Vermont.

Franchot brings new energy and enthusiasm to the 1200 member organization which for two years has lobbied vigorously for good environmental legislation in the state legislature. He will lead the organization in support of a land use plan and the bottle bill and continue in efforts to crack the highway trust fund.

Vermont Tomorrow's Board of Trustees will continue its policy making role with Bob Babcock, Jr. as its President and Cathy Bothwell, formerly acting Director, as an active board member.

### FORMER VNRC DIRECTOR JOINS ENVIRONMENTAL AGENCY

The Rev. Brenden J. Whittaker, a former member of the VNRC Board, has been appointed chief of environmental information and education for the Agency of Environmental Conservation. Father Whittaker was a professional forester with the Vermont Department of Forest and Parks from 1959 to 1963. He recently served as chairman of the Rutland District Environmental Commission.

### CLEAN AIR TO STAY CLEAN

Vermont's air now has a better chance of staying at least as clean as it already is. The U.S. Supreme Court has decided that the 1970 Clean Air Act does not allow the U.S. Environmental Protection Agency to approve any state air quality plans which allow degradation. Vermont has joined the suit brought by the Sierra Club, as a friend-of-court, along with about 20 other states and citizen groups including the VNRC. (Con't on page 4)

CLEAN AIR (Con't)

Critics of the decision say it will prevent any new towns from being built and may worsen the energy shortage. Proponents don't want the few remaining areas with relatively pure air threatened. The Court was equally divided and issued no opinion in upholding the rulings in favor of the Sierra Club by lower federal courts.

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