IN THE SUPREME COURT OF THE STATE OF VERMONT
DOCKET NO. 2020-197

In re Snowstone, LLC Act 250 Jurisdictional Opinion

Appeal from Superior Court
Environmental Division
Docket No. 151-11-17 Vtec
Durkin, J.

BRIEF IN SUPPORT OF APPELLANTS' MOTION TO REARGUE

Vermont Natural Resources Council

"VNRC"

I. THE PLAIN MEANING OF THE STATUTE SUPPORTS APPLYING ACT 250 TO CONSTRUCTION OF IMPROVEMENTS ON LAND THAT IS MORE THAN ONE ACRE IN TOWNS WITHOUT ZONING AND SUBDIVISION BYLAWS.

As the Vermont Supreme Court (Court) notes in its decision in this matter, in interpreting statutes, the task of the court is to effectuate the intent of the Legislature. Agency of Transp. v. Timberlake Assocs., 2020 VT 73, ¶ 11, ___ Vt. ___, 239 A.3d 253. "If the intent of the Legislature is apparent on the face of the statute because the plain language of the statute is clear and unambiguous, we implement the statute according to that plain language." Flint v. Dep't of Labor, 2017 VT 89, ¶ 5, 205 Vt. 558, 177 A.3d 1080.

VNRC respectfully submits that the Court has interpreted the plain meeting of the statute at issue in this matter incorrectly. Moreover, the Court's interpretation of this statute, which overturns decades of application of the statute, will have significant deleterious consequences for how land use is regulated and reviewed in Vermont.

The statute in question in this case is the definition of development in 10 V.S.A. § 6001 (3)(A)(i-ii). These statutory provisions provide that one of the instances where an Act 250 permit is required is when the following definitions of development is met:

> *(3)(A) "Development" means each of the following:*
>
> *(i) The construction of improvements on a tract or tracts of land, owned or controlled by a person, involving more than 10 acres of land within a radius of five miles of any point on any involved land, for commercial or industrial purposes in a municipality that has adopted permanent zoning and subdivision bylaws.*
> *(ii) The construction of improvements for commercial or industrial purposes on more than one acre of land within a municipality that has not adopted permanent zoning and subdivision bylaws.*

In its decision, the Court read into these statutory provisions a vital distinction between 10 V.S.A. § 6001(3)(A)(i), which addresses the definition of development in a municipality that has adopted permanent zoning and subdivision (ten-acre towns), and 10 V.S.A. § 6001(3)(A)(ii), which addresses the definition of development in a municipality that has not adopted permanent zoning and subdivision (one-acre towns). Specifically, the Court focused on the fact that the trigger for Act 250 jurisdiction in ten-acre towns is the construction of improvements on "a tract or tracts of land owned or controlled by a person, involving more than 10 acres of land," and the trigger for Act 250 jurisdiction in one-acre towns is the construction of improvements "on more than one acre of land."

Based on the difference in the wording of these statutes, the Court concluded that in ten-acre towns, Act 250 jurisdiction is triggered if development occurs on a piece of land that is 10 acres or more, and in one-acre towns Act 250 jurisdiction is triggered only if the actual development is one acre or more. The Court's interpretation does not reflect the plain meaning of these statutes. Nowhere in 10 V.S.A. § 6001(3)(A)(ii) does the statute indicate that in order to trigger Act 250 jurisdiction in a one-acre town, construction or improvements must actually use one acre of land. To the contrary, under the statute, jurisdiction is triggered by construction or improvements "on more than one acre of land."

There is no definition of "land" in Act 250. Black's Law Dictionary defines "land" as an "immovable and indestructible three-dimensional area consisting of

a portion of the earth's surface, the space above and below the surface, and everything growing on or permanently affixed to it." Black's Law Dictionary, 11th ed. (2019). Given this broad definition of "land," and the absence of any reference in 10 V.S.A. § 6001(3)(A)(ii) to jurisdiction attaching only to one acre of land that is actually used as part of a development, the plain meaning of this statutory provision is that Act 250 in one-acre towns applies to development on one acre of land.

As the Court further notes in its decision, when interpreting a statute, a court must read statutory language in context, especially one component of a broader statutory scheme, to ensure a harmonious whole. State v. Davis, 2020 VT 20, ¶ 47, 211 Vt. 624, 230 A.3d 620; see also Lyons v. Chittenden Cent. Supervisory Union, 2018 VT 26, ¶ 13, 207 Vt. 59, 185 A.3d 551 (explaining that legislative intent is discerned "by examining and considering fairly, not just isolated sentences or phrases, but the whole and every part of the statute, together with other statutes standing in pari materia with it, as parts of a unified statutory system." (quotation omitted) (alterations omitted)). Further, a court must also consider a statute's "purpose, effects and consequences" to aid in determining legislative intent. State v. Blake, 2017 VT 68, ¶ 9, 205 Vt. 265, 174 A.3d 126 (quotation omitted).

Reading 10 V.S.A. § 6001(3)(A)(ii) in context of the broader statutory scheme, it is important to look at other definitions of development in Act 250 where the Legislature clearly provided that the area of land that is actually part of a project must be used to trigger jurisdiction. 10 V.S.A. § 6001(3)(A)(v) provides that:

> *The construction of improvements on a tract of land involving more than 10 acres* ***that is to be used for*** *municipal, county, or State purposes. In computing the amount of land involved, land shall be included that is incident to the use, such as lawns, parking areas, roadways, leaching fields, and accessory buildings.* (emphasis added).

In crafting 10 V.S.A. § 6001(3)(A)(v), the Legislature clearly stated that for projects that have a municipal, county, or state purpose, when calculating acreage to determine if an Act 250 permit is required, only land "that is to be used" may be counted. The Legislature could have stated in 10 V.S.A. § 6001(3)(A)(ii) that in one-acre towns, when calculating land to determine jurisdiction, only *land that is*

to be used counts towards the acreage necessary to determine jurisdiction. However, the Legislature did not do this. Accordingly, there is a distinction between 10 V.S.A. § 6001(3)(A)(ii) and 10 V.S.A. § 6001(3)(A)(v). VNRC argues that reading the definitions of development in context, the Legislature only intended for jurisdiction based on the actual land used for construction and improvements to apply to municipal, county and state projects.

The Court's decision also focuses on whether the definition of "involved land" in the Vermont Natural Resources Board (NRB) Rules applies only to ten-acre towns. With regard to this issue, it is important to note that the question of the application of the definition of involved land is separate and distinct from whether jurisdiction in one-acre towns is triggered by the land actually developed. As noted herein, the plain meaning of the statutory provisions in question indicate that acreage of the land where a project is proposed must be calculated when determining jurisdiction in ten-acre and one-acre towns, regardless of the applicability of the definition of involved land.

The concept of involved land is used when there are lands related to a project that may be included in the acreage calculation to determine if Act 250 jurisdiction is triggered. In re Snowstone, LLC Act 250 Jurisdictional Opinion, 2021 VT 72, ¶ 7. The Court is correct that the terms "involving more" and "involved land" appear only in the statutory provision for ten-acre towns. However, VNRC believes that the Court failed to consider the context of these terms in the definition of development for ten-acre towns.

Breaking down the definition of development that applies to ten-acre towns, the term "involving more than 10 acres of land" qualifies the phrase which follows, "within a radius of five miles of any point on any involved land." VNRC submits that the plain meaning of the "involved land" provisions is that it was included in the definition of development for ten-acre towns in order to implement the requirement that quantifying acreage includes land owned or controlled by a person within a five-mile radius. Conversely, because the Legislature decided not to apply the five-mile radius provision to one-acre towns, there was no need to include the terms "involving more" and "involved land." Accordingly, the fact that these terms are not included in the definition of development in one-acre towns does not mean that the Legislature intended that acreage on adjoining land that is clearly related to construction of improvements may not be considered when determining whether Act 250 applies in one-acre towns.

As set forth in the following sections, the legislative history of Act 250 also supports VNRC's position that the statutory provisions at issue do not limit jurisdiction in one-acre towns to just the land that is used for construction of improvements.

II. LEGISLATIVE HISTORY SUPPORTS APPLYING ACT 250 TO THE CONSTRUCTION OF IMPROVEMENTS FOR COMMERCIAL PURPOSES ON PARCELS OF LAND GREATER THAN ONE ACRE IN MUNICIPALITIES WITHOUT ZONING AND SUBDIVISION REGULATION.

A. ACT 250 WAS MEANT TO APPLY TO DEVELOPMENT BROADLY.

Act 250 was written to limit the unplanned, uncoordinated, and uncontrolled use of lands to preserve natural resources in Vermont. H. 417, 50th Biennial Sess. (VT. 1970). At the time when the law was written, there was an influx of large developments that threatened the environment within the state. Richard O. Brooks, *Toward Community Sustainability: Vermont's Act 250* V-Legislative History of Act 250 2 (Serena Press, 1996 update ed. 1996). In 1969, Governor Davis appointed Representative Arthur Gibb to oversee a Governor's Commission on Environmental Control composed of leading political leaders, environmentalists, and business people in Vermont. Id. at 2. The Commission submitted the "Gibb Report" to the Governor, which provided the basis for the creation of Act 250. Id. at 2-3.

Serious concern for the health of the environment in Vermont from the threat of uncontrolled and unregulated development was documented in the Gibb Report. Id. at 2-3. The report took an ecological approach in its suggestions to regulate development that increases industrial pollution, the focus was not just landscape blight, but rather the serious effects that industrial development can have on the ecology of the state's ecosystems. Id. at 2. Particularly sensitive ecosystems like those at or above 2,500 feet above sea level were identified as places where ecological disturbances should be kept to "an absolute minimum." Id.

Act 250 was designed to serve as a minimum protection against problems that unregulated developments create. Id. at 3. Professor Richard Brooks of Vermont Law School wrote the seminal treatise on Act 250 *Toward Community Sustainability: Vermont's Act 250*, and in it, he explained that one of the most important parts of the bill was the definition of "development" which was defined broadly to cover commercial and industrial development on large tracts of land

and smaller tracts, where permanent zoning and subdivision regulations were not implemented. Id. at 4. The Legislature's broad definition of development did not shy away from bringing extensive areas under Act 250 jurisdiction to protect sensitive ecological areas, or lands not regulated where uncontrolled development could have problematic impacts.

B. ACT 250 INTENDED FOR JURISDICTION TO APPLY TO COMMERCIAL ACTIVITIES ON PARCELS GREATER THAN ONE ACRE.

When Act 250 was proposed and passed as a response to recommendations offered by the Gibb Commission, few towns had planning and zoning, and the general assembly was concerned about unregulated use of lands in towns that did not have zoning or subdivision bylaws. Id. at 3; see also 2007, No. 176 (Adj. Sess.), §1a. This concern was articulated in the findings and declaration of intent of Act 250 as passed:

> Whereas, the *unplanned, uncoordinated and uncontrolled use* of the lands and the environment of the state of Vermont has resulted in usages of the lands and the 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; and

1969, No. 250 (Adj. Sess.), §1 (emphasis added). One of the foundations of Act 250 is to provide stricter jurisdiction in one-acre towns where commercial and industrial development takes place on a parcel. Professor Brooks studied the legislative history of Act 250 and explained in his treatise that the difference in acreage requirements between ten-acre and one-acre towns "reflects a basic compromise in Act 250 limiting Environmental Board review to major projects in areas where competent local regulation is in effect" and "the 'one-acre rule', applicable to rural areas and towns without zoning and subdivision regulations, provides a safety net for protection of areas outside the scope of local land use control." Id. at 9.

Furthermore, the legislative history clearly shows that Act 250 intended to apply to development on ***parcels* of one acre or more** in towns without permanent zoning and subdivision regulations. Professor Brooks explained that one of the major principles of the Act as proposed was the permit mechanism which included if "a municipality had not adopted permanent zoning and

subdivision bylaws, Act 250 applied to activities for commercial or industrial purposes on ***parcels* of land greater than one acre**." Id. at 4 (emphasis added). When the Senate Natural Resources Committee reviewed H.417, the Committee effected this intent by amending the proposed bill to "extend Act 250 jurisdiction to development on tracts of land greater than 1 acre, for municipalities that did not have subdivision or health regulations" and in particular the Committee, according to Brooks, "included commercial and industrial development on ***parcels* of land greater than one acre**, if a town had not adopted permanent zoning and subdivision laws." Id. at 11 (emphasis added). The House concurred with this Senate amendment and the bill passed on April 4th, 1970. Id. at 12.

Mr. Jonathan Brownell, one of the authors of Act 250, underscored this intent in his testimony before the Senate Natural Resources Committee:

> "The ten acre minimum would be designed primarily, it seemed to me, to allowing residential building on small lots which would otherwise meet state requirements. Commercial development is something else again. Indeed a rendering plant could be put in on eight acres with no trouble. Many commercial developments could take place **on lots** of less than ten acres. I think this should be closed insofar as commercial and industrial development is concerned; that a ten acre exception be provided for residential housing also, but that commercial, money making developments perhaps should come within the purview of the act."

S. Nat. Res. Comm. Hearing on H. 417, 50th biennium, at 30 (Vt. 1970) (emphasis added). Mr. Brownell's testimony confirms that Act 250 intended to consider the size of the lot, and not the area of disturbance, in calculating a heightened jurisdiction for commercial development. The Supreme Court's decision to weaken jurisdiction to the actual area of disturbance for commercial development in one-acre towns is contrary to legislative intent, and will leave lasting policy and environmental consequences in Vermont.

C. THE COURT'S DECISION WILL HAVE BROAD POLICY RAMIFICATIONS BY RELAXING ACT 250 JURISDICTION IN A LARGE PERCENTAGE OF MUNICIPALITIES.

Since 1970, Vermont has made gains in the number of municipalities that have zoning and subdivision bylaws, but a large percentage, forty-five percent, are still treated as one-acre towns for Act 250 purposes. Municipal Planning Atlas, Vt. Dep't of Housing and Cmty. Dev., http://planningatlasdatabase.vermont.gov/Resources/Show-Resources-Table.aspx? (Select filter for all municipalities, sort by zoning and subdivision regulation). One-acre towns cover approximately over 2,000,000 acres representing a large percentage of land where Act 250 is supposed to be an important backstop in reviewing the impacts of commercial development. Natural Resources Atlas, Vt. Agency of Natural Resources, https://anr.vermont.gov/maps/gis-data (Select towns listed from Municipal Planning Atlas, use summarize land cover feature on Natural Resources Atlas, download summary table of acreage).

Furthermore, there are regions that are predominantly represented by towns that do not have zoning and subdivision regulations. For example, in the Northeast Kingdom territory of the Northeastern Vermont Development Association representing forty-six municipalities, seventy-eight percent of municipalities do not have zoning and subdivision regulations, which covers approximately over 870,000 acres. Id.; Municipal Planning Atlas (Select filter for NVDA on webpage and view results). Another example is the Windham Regional Commission, which includes twenty-seven municipalities. In this region, sixty-three seven percent do not have zoning and subdivision regulations. Id. (Select filter on webpage for WRC and view results).

If the Supreme Court's decision stands, Act 250 jurisdiction over commercial development will be further relaxed in these regions, where there is already very little land-use review. This means commercial development that was intended to be covered under Act 250 may receive no environmental review at all, and just as concerning, there will likely now be a flood of requests to release jurisdiction for commercial projects that are currently under Act 250. In addition, the heightened jurisdiction that was created for one-acre towns was designed to incentivize towns to enact zoning and subdivision regulations and the holding by the Supreme Court will now likely incentivize some towns to do the opposite and rescind regulations in order to reduce state environmental oversight.

Finally, as recognized in the decision, developers may now deliberately design commercial and industrial projects in one-acre towns to fall under the one-acre threshold of disturbance, creating a loophole in Act 250 that never

existed, which will exacerbate uncontrolled environmental impacts. This was not the intent of the Gibb Commission or the Legislature, and fifty years later, there is no less need to review the impacts of commercial and industrial development in towns that have no land use regulations.

By: _____
Jamey Fidel, Esq.

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Jon Groveman, Esq.

Dated: October 8, 2021
Montpelier, Vermont