Landscape Policies: The Case of Vermont

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1.- Introduction

Picture taken from the Shire Riverview Motel of the winding Ottauquechee River as it meanders through the middle of Woodstock, VT: “A perfect town - if any town in any country can be.” (The American Architectural Society)

In October 20th 2000 representatives of 18 European nations gathered in Florence to sign an international convention: The European Landscape Convention (also called the Florence Convention). This international instrument, part of the Council of Europe's work on natural and cultural heritage, spatial planning and the environment, established as official chore of modern States, when it entered into force four years later (March 1st 2004), what since then has been called "landscape policy": *the expression by the competent public authorities of general principles, strategies and guidelines that permit the taking of specific measures aimed at the protection, management and planning of landscapes awareness of the need to frame and implement a policy on landscape* (article 1.b of the Convention)

The text originally shocked the legal community and much more the policy makers.

Until then landscape had been now and then considered an element (or even tool) accessory to other policies, such as, mainly, natural heritage and biodiversity preservation.

Protected landscapes became one of the classic categories of protected areas, managed mainly for landscape/seascape conservation and recreation, and defined as an area of land, with coast and sea as appropriate, where the interaction of people and nature over time has produced an area of distinct character with significant aesthetic, ecological and/or cultural value, and often with high biological diversity. Safeguarding the integrity of this traditional interaction is vital to the protection, maintenance and evolution of such an area.

The same approach, emphasizing the heritage conservation element was taken by the UNESCO 1972 World Heritage Convention although landscapes per se were not originally considered worth of protection (aesthetics, and landscape, were only one of the elements to be considered when defining "groups of buildings" or "sites")

Curiously enough, the Convention on Biological Diversity (CBD), signed in Rio in June 1992 did not considered at all landscape policy as part of any biodiversity conservation or sustainable use policy nor even an element of the different on site conservation actions that are to be implemented by the Parties. Many countries and world regions have thought otherwise, considering landscape not a concept of aesthetics so much as a system within which ecology and society operate and are inextricably entwined in order to develop "landscape ecology" (the study of reciprocal effects of spatial pattern on ecological processes, which emphasizes heterogeneity as an essential element of ecology) as an operative management tool for the conservation and sustainable use of biodiversity. It even has been formally linked to the CBD as one of the inevitable concepts that is involved in the CBD´s "ecosystem approach" principle (MAF Information Services, Wellington, New Zealand).

Regional instruments such as the Habitats Directive 92/43 of the European Union, which is the foundation on which Natura 2000 rests, the EU wide ecological biodiversity preservation network, go even into more specific role oriented nature of landscapes: they are considered a practical tool through which coherence and spatial connectivity can be brought to the otherwise isolated sites that conform the network:

But somehow, the 18 signatories of the European Landscape Convention had the hunch that landscape policies as afar as they could visualize them, went far beyond this ancillary role. They "knew" they were making history and sensed the feeling of a new beginning. They were aware that the Convention (hereinafter the ELC) while it clearly integrated the cultural heritage and biodiversity conservation elements also implied the deepening of participation of civil society in decision-making processes, the enhancement of traditional notions of the sense of place as an element of identity that could become operational and the introduction of a powerful tool of social cohesion in modern democracies.

The hunch triggered enthusiasm. Ultimately, as Vermonters know by experience, "*aesthetics has also become an important issue in Vermont and it has been incorporated in Act 250.. It is of primary importance because how a project looks, its design, and how it fits into its surroundings has more of an effect on people than many other aspects of a project*" (Robert Sanford and Hubert B. Stroud, at 248).

But the rationality on which modern democratic decision-making must be based immediately turned enthusiasm into scepticism. Landscape itself as a concept, since its very inception in Flemish Renaissance painting, had not been traditionally associated with territorial nor environmental policies but with art, although the first historical record of the word (*Landskap*, The Netherlands, 1462)…does not imply any reference to a picture representing the countryside, but to some extent something similar to "the country where it is possible to live" (Yves Luginbül, 2006) and there has always been some underground sense that there is something that connects the meaning of landscape with the quality of life if the territory as it is visualized by the citizens is well managed.

The famous allegorical frescoes from Ambrogio Lorenzetti, Good and Bad Government in the City and Country painted on the walls of the Room of the Nine (Sala dei Nove) or Room of Peace (Sala della Pace) in the Palazzo Pubblico of Siena, one of the masterworks of early renaissance secular painting, are the best reflection of this idea (see pictures in next page, by Margarita Ortega)

Nevertheless, these examples could be considered anecdotal if compared with the emphasis on the aesthetics of landscape as virtual artistic expression of symbolic beauty, not linked to virtues or vices of public policies. The almost industrial reproduction of landscapes in paintings to be deployed in public or private houses for the sake of decorating *per se*, which became almost an explosion of fashion after Joachim Patinir (c. 1480 – October 5, 1524), the first Flemish painter to regard himself primarily as a landscape painter established the painting of landscapes as an independent artistic genre, and as such it remained for the common person (Alejandro Vergara, 2007).

The fact that Nazi Germany was the first European nation to connect landscape and policy, since "the Nazis imagined a strange relationship between nation, landscape and nature" to the extent that they emphasized specific characteristics of landscape as living spaces for Germans even in the conquered territories since only Germans had special abilities and unique talents to commune with nature made landscape design a major piece of the official polices of the regime (Whyte, 181 and ff), did not help in the task either.

But what scared most the policy makers was the imprinted irresistible paradigm built upon the syllogism that landscape is a question o aesthetics and aesthetics are by definition subjective: the appraisal of a landscape, and therefore its attractiveness, are decisively influenced by emotional and aesthetic considerations that basically depend on individuals' selective perception, so it is impossible to build an objective policy.

Attempts had been made, at the theoretical level, to rely on the belief that certain qualified professionals (experts) are capable of analysing scenic beauty objectively and translating its components into formulas appropriate for use in design. But since this had led to the appropriation and monopolisation by the said experts of the power to decide at the local level (urban planning), the simple image of extrapolating this disempowerment of the people in polices with broader impact (at the national level) made the putting in place of landscape policy planning and implementation too risky.

Although landscape architecture as a science-skill had traditionally delivered some know-how on the potential efficiency and rationality introduced in economic and spatial planning, it was considered alien to the European tradition. Besides that, it had barely moved from science or technique to policy and much less to integral overarching policy dominating the use of the territory.

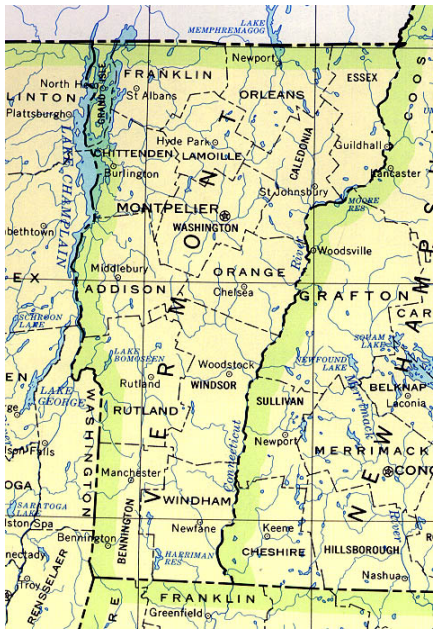
The ELC has been struggling since its entering into force in 2004 with the policy and legal structure needed at the national and regional levels to implement its broad mandates. The question stills remains whether such mandates can be translates into rules or principles that can be objectively applied. If the ELC is to become a real legal instrument policy makers, and judges need to use these objective criteria and standards. Otherwise, the ELC and the mandates it includes in its provisions will always remain as

non binding, non reliable, criteria with no real bite since nobody can enforce them. Judges and lawyers will always defer to the political process the content of the principles and landscape will not be protected or if it may be this protection will be based on pure arbitrariness, or in the sacred will of the majority always balanced (a loosing battleground) against more stringent economic uses of land.

There is though, at least one universally recognized different paradigm.

It is a relatively well known fact in the environmental law and policy community that there is at least one political entity with enough power based on self-government that has traditionally boasted since longer ago than the rest of the Western nations the full reliance on a rule of law based landscape policy as an essential or core element of its mainstream policies (although far from recognizing it as part of its constitutional structure). Actually, this policy seems to be in place since the same years in which the rest of the Western world started to slowly introduce environmental policies on the public agendas: the very early seventies of the past 20th Century.

This entity is the State of Vermont (hereinafter VT), the 14th State to become member of the United States in 1791, fourteen years later than the rest of the original colonies, after a long battle against New York, even before it became an independent Republic in 1777, and maddeningly annexing parts of New Hampshire (for the history of VT´s fight for independence from New Hampshire and New York see the Section on Guiding Students´ Discussion). It certainly enjoys a lot of personality and self reliance which probably can be traced to those years in which the US Congress backed the New York side of the struggle. "*Two centuries later, Vermonters still invoke the memory of this period of having been a sovereign nation. Whenever the state goes its own way –as it often does, in matters of politics and public policy- Vermont´s current citizens are reminded that they have a special right to do so*" (Don Mitchell, at 33). It even enjoys being a State with quite a large amount of atypical trivia-type characteristics (see Guiding Students´ Discussion) when compared to the rest of the members of the Union:



But, back to landscape policies:

- Is it a myth or a reality that VT has had in place efficient landscape policies since the early 70s?

-Are these policies really efficient?

- How did VT get around the almost unsurmountable challenge of the impossibility of objective decision-making? Is it based on special technologically driven criteria? Do normal citizens articulate valid claims against arbitrariness and how do judges then react to those claims?

- Is the system based on expert decision-making built upon a weak democracy? Is there corruption behind the scenes that might explain the firm grip with which VT politicians have maintained the system untouched?

- Have these policies being built at the cost of municipal home rule? Have they led to strong confrontation with the Federal Government when conflictive national policies have run counter to VT´s landscape policy requirements?

- What is the real cost? Are Vermonters poorer than the rest of the States? Does VT remain a primary economy without industry nor services?

- Have there being drastic changes in the land use pattern with the evolution of the economy in the past thirty years? How does VT deal with the main environmental problem of many States of the US: city sprawl and urban development?

In brief, if the myth is a reality and VT can still boast being an example of economic well being, what is “the secret formula” behind these policies?

or

If the contrary is the case? Are those policies challenged nowadays? Has the model become obsolete?

or,

Is it struggling to maintain its identity in a totally different global economy when compared to what was the state of affaires in the early seventies?

These are the questions to which the present case study tries to address.

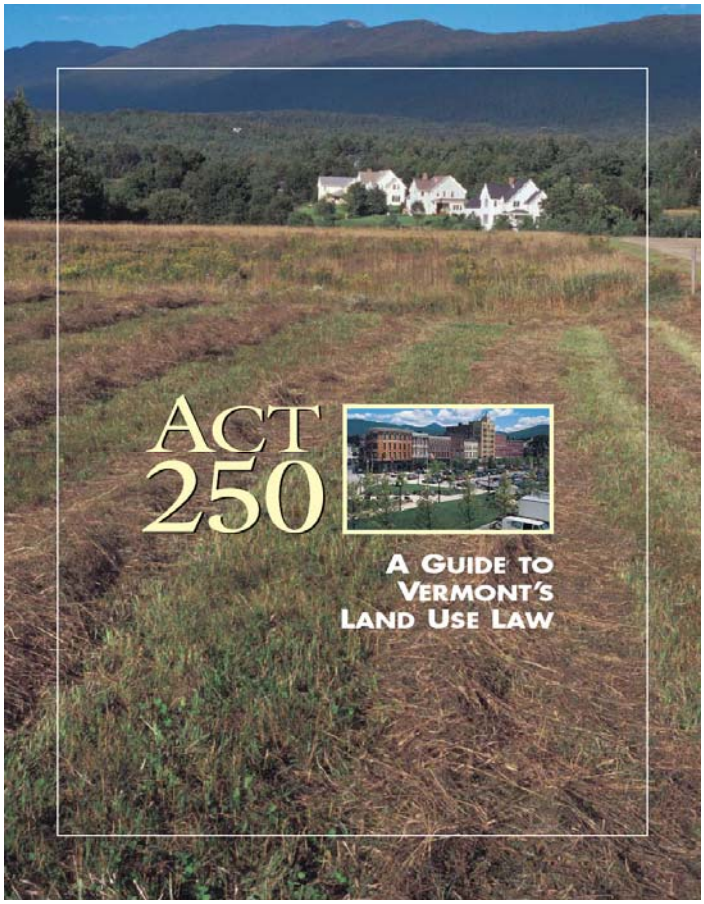
Many scholars have tried to pursue the quest for objectivity, fearing that if policies do not find a solution to this dilemma, the rule of law suffers so much that it is better to leave the policy outside the real of Law.

American scholars, for example have been dealing and continue to deal (struggle) with this issue notwithstanding the fact that this polices and legislation have almost forty years of enforcement tradition on its shoulders (see i.e. Mark Bobrowski, Richard O.

Brooks & Peter Lavigne, James P. Karp, Norman Williams, and others. See Section on Works Cited).

2.- The main instrument on which landscape policies are based: Act 250.

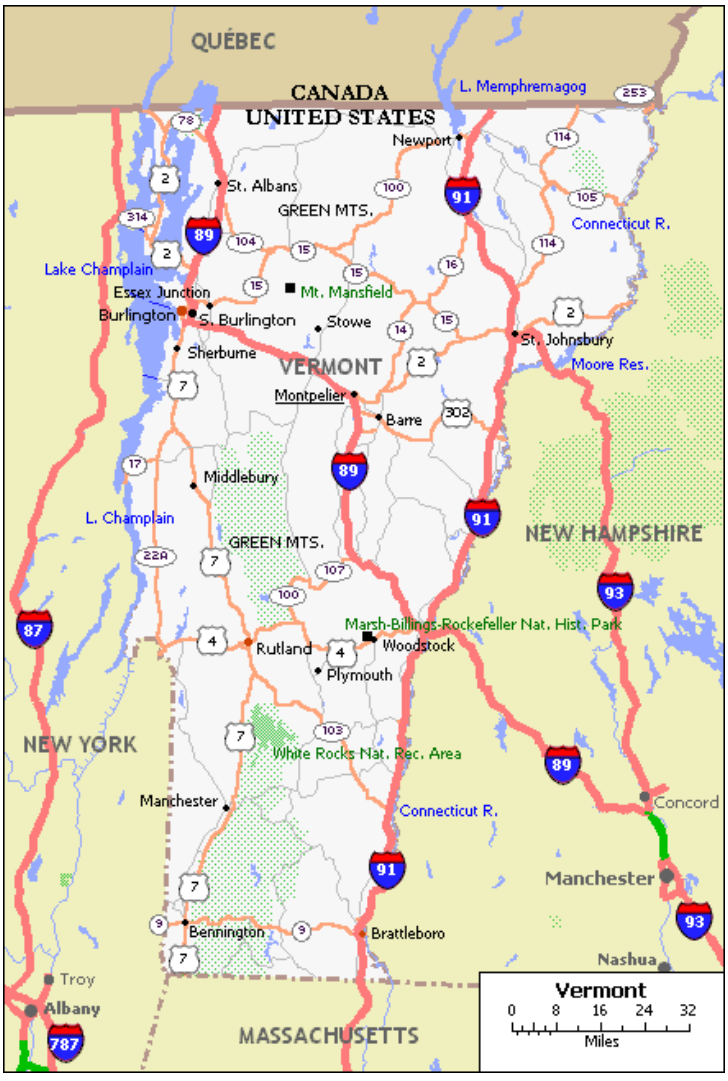
The VT legislature approved Act 250 on the spring of 1970 (it became effective in April 4, 1970). Known as the Land Use and Development Act, it responded to community concerns to the opening of two new interstate highways (I-89 and I-91) that made it much easier for out-of-staters to visit VT year round or even to settle, if they worked in other places in the flatlands of New England. Concerns were not limited to traffic congestion or the environmental impact of the new road.



What worried Vermonters were the additional environmental consequences of infrastructure that could be on demand by quick in-and-out visitors (typical of summer getaways and weekend skiers), the burden on local services that needed to be provided by them, which meant rising taxes, and the potential location of heavy industry that could ship their products quickly out of the State, all of which implied also higher real state prices.


CANADA
Burlington
Warren
Montpelier
NEW HAMPSHIRE
Rutland
White River Junction
Springfield
NEW YORK
Brattleboro
MASSACHUSETTS


Burlington
MONTPELIER
VERMONT
NEW HAMPSHIRE
AUGUSTA
Portland
CONCORD
NEW YORK
Manchester
Brattleboro
MASSACHUSETTS
Springfield
PROVIDENCE
HARTFORD
CONNECTICUT
RHODE ISLAND
NEW YORK CITY


QUÉBEC
CANADA
UNITED STATES
L. Memphremagog
Newport
St. Albans
GREEN MTS.
Connecticut R.
Lake Champlain
Essex Junction
Burlington
S. Burlington
Mt. Mansfield
Stowe
St. Johnsbury
Sherburne
VERMONT
Moore Res.
Montpelier
Barre
Middlebury
L. Champlain
GREEN MTS.
NEW HAMPSHIRE
Marsh-Billings-Rockefeller Nat. Hist. Park
Rutland
Woodstock
Plymouth
NEW YORK
White Rocks Nat. Rec. Area
Manchester
Connecticut R.
Concord
Manchester
Bennington
Brattleboro
Nashua
Troy
Albany
MASSACHUSETTS
Vermont
0 8 16 24 32
Miles

The Republican Governor Deane C. Davis had a study commission in 1969 to develop a statewide law to address these concerns. As in the rest of the country, no environmental regulations existed since the National Environmental Policy Act was only in the making and the Environmental protection agency was only a project. The "environmental decade" was yet to happen (Shades of Green, Ted Steinberg, 2590 ff; Carolyn Merchant, 2002, 181 ff; The Rise of Modern Environmentalism and Nationalizing Pollution Control, Richard Andrews, 201 ff & 227 ff; Michael Kraft & Norman Vig, 2003, at 11-14).

The law created nine District Environmental Commissions and charged them with the task of reviewing large-scale development projects. The Commissions have the power to issue or deny permits to real estate developers for any project that would extend to more than 10 acres (40,000 m²) [or more than 1 acre (4,000 m²) for towns that did not have urban or spatial planning regulation] Development projects with more than 10 housing units or housing lots need were also submitted to permitting, as well as any other construction above 2,500 feet of elevation. Act 250 also created the **Vermont Environmental Board** to review appeals to the decisions of the District Commissions. Decisions of the Board could later be submitted to judicial review since they could be appealed to **Vermont Supreme Court**.

Act 250 is today administered by the Land Use Panel of the Natural Resources Board (NRB) of the Agency of Natural Resources. The NRB was created by Act 115 of the Vermont General Assembly to succeed the Environmental and Water Resources Boards on February 1, 2005 but it has no longer the adjudicative nature that the Environmental Board used to have. The NRB is a nine member board which is divided into two panels, the Land Use Panel and the Water Resources Panel.

The **Division of Regulatory Management and Act 250 Review** of the Agency of Natural Resources reviews Act 250 permits. While the nine District Commissions make the final decisions, the Agency coordinates technical review of Act 250 permit applications by State agencies through its **District coordinators** (grouped in five regional offices based in Rutland, Springfield, Essex Junction, Barre and St. Johnsbury; see map below), which are also in charge of informing the public in general and interested parties about specific projects or general questions about Act 250. The Vermont Agency of Natural Resources is a statutory party to all Act 250 permit requests. As it will later explained, since January 2005 the former function of the Environmental Board as an administrative adjudication body disappeared. Appeals go directly to the judicial power, the Environmental Court being the trial court, and Vermont Supreme Court the court of last resort before which appeals to the Environmental Court decisions can be launched.

DISTRICT 6
Franklin & Grand Isle Counties

DISTRICT 7
Caledonia, Orleans, & Essex Counties

DISTRICT 4
Chittenden County

DISTRICT 9
Addison County (Except Granville and Hancock)

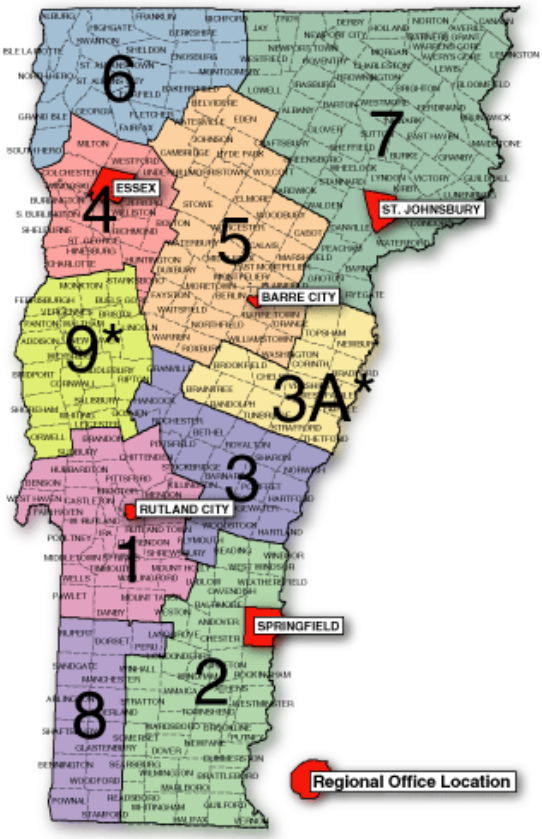
DISTRICT 5
Washington & Lamoille Counties & the towns of Williamstown, Washington, and Orange.

DISTRICT 1
Rutland County

DISTRICT 3
roughly Northern Windsor County & most of Orange County

DISTRICT 8
Bennington County

DISTRICT 2
roughly Windham County and the southern half of Windsor County

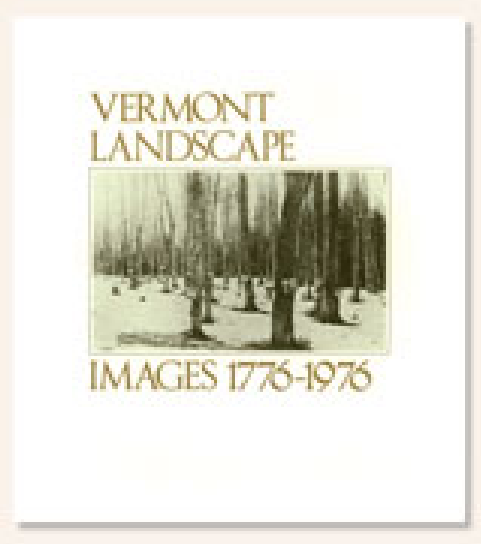


Of course, such harsh controls had never existed before. Why was it so could only be understood by the magnificent *statu quo* that VT had been able to maintain (or rather, to unconsciously develop, if historical land use changes are carefully analyzed, see Jan Albers, Hands on The Land: A History of the Vermont Landscape). Hundreds of literary, and of more or less technical, descriptions of VT try to reflect the beauty of its landscapes. Making a random choice: "*Its topography includes large expanses of open green space and lush forests, mountains and valleys, and sparkling streams and lakes. In addition, many Vermont towns include typical New England villages, along with winding roads, many of them unpaved. These villages , that were planned to accommodate a limited population, center on some form of central open space, such as the village green or common, and are bounded by a sharp break between village and countryside*"; or recalling a less lyrical description: "*[Vermont is] known for its green image, picturesque villages, rolling farmland, maple sugar, Fall foliage and Winter snow*." [The first description is by Richard Oliver Brooks, K. Leonard & Student Associates, 1997, at 1 of Vol 2 "Criterion 8; citing Reps, at 122-125; the second is by Robert M. Sanford & Mark B. Lapping, 2004.]

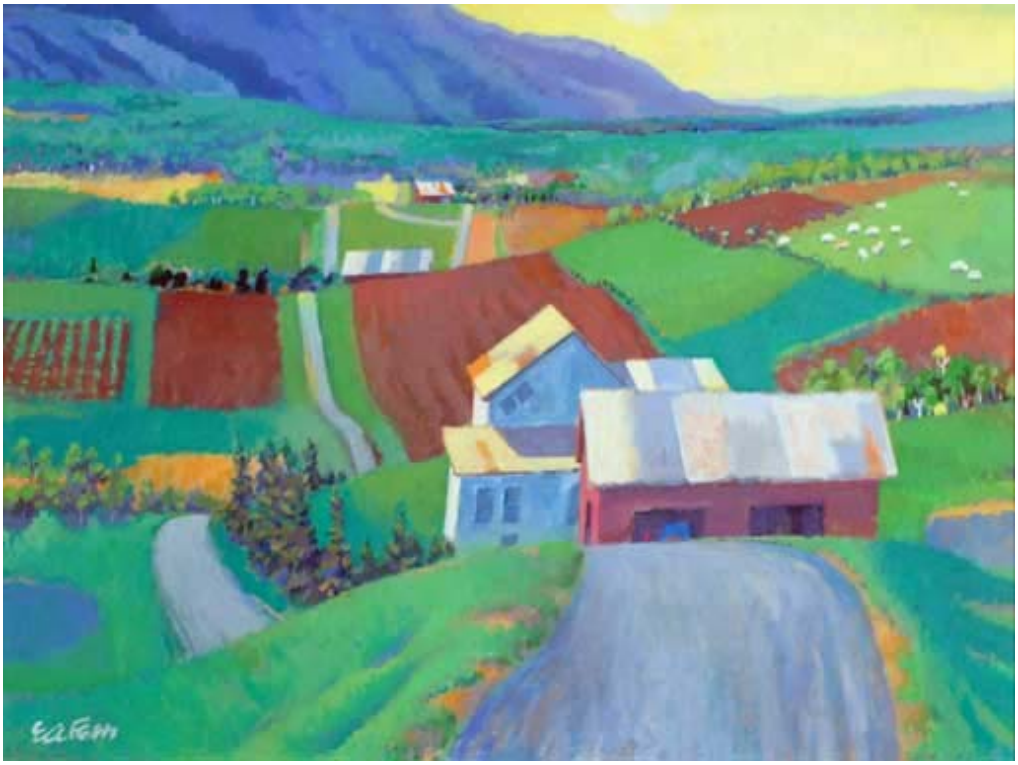
Lively downtowns, scenic vistas, family farms are all part of what made Vermont special. "*Rolls of hay dotting a field, a forested mountainside luminous with autumn color, a fisherman casting a line into a deep pool: these vignettes are all part of our state's rural countryside – a landscape and way of life under great pressure*." (Smart Growth Vermont)

Some evidence of the state of VT´s landscapes in the early 70s can be easily retrieved: In the Spring of 1976, The Robert Hull Fleming Museum located on the campus of the University of Vermont, celebrated the country's bicentennial with a presentation of five

exhibitions of Vermont landscape images. The event was catalogued in a publication that includes an assembly of maps, stereo views, photographs, postcards, drawings, prints, and paintings representing changes in the way the Vermont landscape had been represented from 1776 to 1976 [see Vermont Landscape Images, 1776-1976].



The painting of Rolling Hills in Vermont, by Eugene Fern (mid 70s), property of the State Art Collection, at the Capitol Complex in Montpelier, symbolizes very well the ideal of VT life:



"When creating my colorful paintings of the Vermont landscape, I use my memories and photos of places I have seen along with a healthy dose of imagination. My intention is always to capture how I feel about what I see – the actual arrangement of buildings, trees, hills and such is not as important. I especially like to play with the colors of the sky, mountains, and water on Lake Champlain." (Anna Vreman)

"Village in Winter". "*It uses the landscape around Fairfax, VT although the village itself is from my imagination*" (Anna Vreman).

"Autumn Colors" *is a variation of a farm near Dorset*, VT (Anna Vreman).

Nevertheless, the changes were getting noticed (see the 1970 Autumn issue of Vermont Life 25th birthday: *Twenty-five years of rapid change in the Green Mountains; Who owns Vermont today?*)

Legal and policy scholars acknowledge the relative value of Act 250. "I*t is not the only Vermont law intended to protect its scenic beauty. In seeking to preserve the beauty of the state, Vermont has established a scenery preservation council, passed a statewide bottle and can deposit law, undertaken a backroads restoration and preservation program, and established selected highway sign prohibitions. At a more site-specific level, Vermont passed laws to set aside land under a natural areas system, and to protect farmland and open space through tax stabilization contracts and other land use tax methods. Vermont also encourages local historic preservation programs, conservation commissions and local adoption of planning and zoning controls which promote the beauty of local communities and shorelands*." (Richard Brooks et al, 1997, Vol II, Criterion 8, at 1-2).

In any case, Act 250 (10 V.S.A. Chapter 151) became "the nationally known model for land use legislation" (Jan Albers, at 316).

Each Commission also has up to four alternate Commissioners. The Commissioners are appointed by the Governor of the State of Vermont. Their responsibility is to consider evidence presented by the parties concerned who are listed in the Act: the applicant; the municipal planning commission; the municipality (represented either by the selectmen, aldermen, or trustees); the regional planning commission; and affected State agencies. Adjoining property owners and other persons with a particularized interest that may be affected under any of the 10 Criteria may also be admitted as parties. The District Commission may also allow persons not accorded party status the opportunity to participate in the proceeding as a "friend of the commission," in which case the participation may be limited to the filing of memoranda, proposed findings of fact and conclusions of law, or argument on legal issues.

The District Environmental Commission will issue a decision in the form of Findings of Fact and Conclusions of Law, and, if appropriate, a Land Use Permit, within twenty days (the permits are additional to other permits required by law: they do not supersede or replace the requirements of other local or State land use laws). Decisions can be appealed to the Environmental Court (until January 31st 2005 they were appealed to the Environmental Board) by the applicant, the town, the regional planning commission, a state agency, or any "person aggrieved" by the decision. An appeal of a decision of the Environmental Court can later be filed before the Vermont Supreme Court.

The District Environmental Commissions´ main role is a hard one: it has to evaluate Act 250 applications and arguments in accordance with "the 10 Criteria".

These "**10 Criteria**" that must be met are the following:

The development or subdivision,

(1) Will not result in undue water or air pollution.
This criterion deals with water and air pollution generally and such specific matters relating to water pollution as: (A) Headwaters; (B) Waste disposal (including

wastewater and stormwater); (C) Water Conservation; (D) Floodways; (E) Streams; (F) Shorelines; and (G) Wetlands.

(2) Has sufficient water available for the needs of the subdivision or development.

(3) Will not unreasonably burden any existing water supply.

(4) Will not cause unreasonable soil erosion or affect the capacity of the land to hold water.

(5) Will not cause unreasonably dangerous or congested conditions with respect to highways or other means of transportation.

(6) Will not create an unreasonable burden on the educational facilities of the municipality.

(7) Will not create an unreasonable burden on the municipality in providing governmental services.

(8) Will not have an undue adverse effect on aesthetics, scenic beauty, historic sites or natural areas, and 8(A) will not imperil necessary wildlife habitat or endangered species in the immediate area.

(9) Conforms with the Capability and Development Plan which includes the following considerations:(A) The impact the project will have on the growth of the town or region: (B) Primary agricultural soils; (C) Productive forest soils; (D) Earth resources; (E) Extraction of earth resources; (F) Energy conservation; (G) Private utility services; (H) Costs of scattered developments; (J) Public utility services; (K) Development affecting public investments; and (L) Rural growth areas.

(10) Is in conformance with any local or regional plan or capital facilities program.

The burden of proof is on the applicant for Criteria 1, 2, 3, 4, 9, and 10. The burden of proof is on those opposing the application for Criteria 5, 6, 7, 8, and often 9(A). A permit can be conditioned but not denied under Criteria 5, 6, and 7. Regardless of the burden of proof, the Commission must have enough information to make findings under all of the criteria.

These “10 Criteria” could be considered a sort of list of sustainable development requirements. Actually, “sustainable communities” is what they try to ensure much before the Bruntland Commission coined the concept itself of sustainability in its famous 1987 report “Our Common Future” (see Richard O. Brooks, K. Leonard & Student Associates, TOWARD COMMUNITY SUSTAINABILITY: VERMONT´S ACT 250, 2 Vols., Vermont Law School, Environmental Law Center, 1997, hereinafter Richard O. Brooks et al, 1997).

Although this raises right away the question about whether any of them in isolation –or without serious enforcement of all of them simultaneously- can provide any serious and efficient guaranty of short or long term sustainability, an issue later discussed in the Scholars´ Debate Section of this Case Study, Criteria 8 immediately triggered the

attention of the general public: Could aesthetics become an objective parameter under the rule of law?.

This question has become one of the most intriguing issues for public policy makers and lawyers since it appeals to the fundamentals of landscape preservation per se and not as an ancillary condition to biodiversity preservation or other more easily science based decision-making processes. The ecological theory of beauty had established already an essential connection between the ecology of an area and its natural beauty. In this sense bueaty can be linked to science. Much of nature literature documents this fact. Theories linking ecology and beauty in different ways included Paul Shepard´s (1967); or Ian McHarg´s (1969); and, later, Kevin Lynch´s (l98l), Eugene Hargrove´s (l989), or J.B. Callicott´s (l987), and, of course, the founding fathers of environmentalism: Henry David Thoreau, John Muir and Aldo Leopold.

But still, for most people, ecologically healthy environments are not necessarily beautiful; nor the opposite, there can be beautiful landscapes in ecologically degraded ecosystems. Five years after Act 250 had been in place, public policy scholars U.S. wide were skeptic about the answer. As Norman Williams noted in his major 1975 treatise on American Planning Law: Land Use and the Police Power, "*while the subject matter [of aesthetics and landscape] is one of the important emerging fields of planning law, this is a field where the case law is as yet relatively unimportant, because there has been so little of it.*"

Nine years after Act 250 was passed, public policy and scholars were only scarcely optimistic about it. As Mark Lapping put it in 1979, "*landscape has rarely been seen as a central concern for planners. Even in land use planning processes, the problems associated with landscape value and quality are either unaddressed or are more frequently sacrificed in some trade-off equation. Evidence tends to confirm this as the body of land use case law suggests that landscape and scenic parameters are only now becoming controlling elements in litigation.*"

As time passed by, the issue has sporadically been discussed. Every five years the issue of whether aesthetics protection is a legitimate goal of public regulation, its evolving meaning in land-use regulation, its difficulties with objectivity as a problem for environmental protection policy, the implications of the many meanings of beauty for the policies that imply design, control, and protection of landscape, or its role in emerging models and paradigms of conservation at the landscape scale, … [the just listed ways of referring to the problem are simply titles of major books or review articles, published, curiously enough, in 1980, 1985, 1990, 1990, 2000 and 2005] are been thrown into the public arena as if the issue will haunt the scholars´ community forever.

What has been the practice in VT? What has been the reaction of VT´s population to decisions on aesthetics and to the permissive or restrictive economic effects of the decisions? Is this system unique in the U.S. or have there been other efforts in the U.S. similar to VT´s?

3.- Criterion 8 [01] Aesthetics & Scenic and Natural Beauty.

Criterion 8 requires that subdivisions and developments not have **an undue adverse effect on aesthetics, scenic beauty, historic sites or natural areas.** The 8(A) criterion, that it will **not imperil necessary wildlife habitat or endangered species in the immediate area** was added in1973.

As Richard O. Brooks said in 1997, the four categories "*clearly overlap, both in common sense and in accord with a deeper ecological theory of beauty*." (Richard Oliver Brooks, et al, 1997, Vol. I, Criterion 8, at 1, citing some of the main works that link ecology and beauty, beside Aldo Leopold´s Sand County Almanac, such as Shepard, 1967; Lynch, 1981; McHarg, 1989; and Callicott, 1987). The Commission and the Courts, though, treat the four categories separately, analyzing in each case in the project meets each one of them.

The problem of aesthetics and landscape protection *per se*, that is the main problem that landscape protection as a potentially self-standing public policy rises, is in Criterion 8 [01]: "Scenic and Natural Beauty, Aesthetics".

Substantial reviews of the decisions of the District Commissions and the Environmental Board, have been done since 1970. Until 1990 the most extensive one was done by Norman Williams & Tammara Van Ryn-Lincoln; Richard Brooks and Cindy Corlett Argentine in the *Vermont Act 250 Handboo*k updated the analysis up to 1997 and 1998.

Summarizing (in a list that should not be taken as comprehensive one; analyze, for details, the decisions in the Agency of Natural Resources Database and the E-Note), the Environmental Board has set clear-cut criteria [that are maintained as precedents after 2005, when the Environmental Court took over the role of the Board: pursuant to the provisions of Act 115 (2004), "*Prior decisions of the environmental board, water resources board, and waste facilities panel shall be given the same weight and consideration as prior decisions of the environmental court*."], such as the visibility of the development or structure from a wide area or by a large number of persons (in particular from roads since from them is where most people see scenery), which places special scrutiny on ridgelines and mountaintops, steep slopes, shorelines and riverbanks, wetlands such as floodplains, and open spaces in general, as well as historic and natural areas and attractive built-up areas. But, as Richard O. Brooks noticed, what makes VT´s Act 250 unique, are VT´s valleys, and it is no wonder that "the Board´s most frequent references to scenic beauty are to the typical valleys, predominantly rural residential and partly agricultural." (Norman Williams & Tammara Van Ryn-Lincoln, at 101).

VT Valleys have been beautifully described by Norman Williams & Tammara Van Ryn-Lincoln: "*It recurs all over the State in characteristic form, ridgeline to ridgeline. The valley bottom is usually an open meadow, interspersed with occasional farm buildings and stone wall; there is often a row of trees along the stream which meanders down near the middle. Occasionally some small-scale commercial use is apparent, frequently in converted buildings; and a white church spire in the distance may indicate the presence of a village. The hillsides often provide an interesting pattern of alternating field and forest, and open fields may be located quite high up on the ridge; the latter are the characteristic feature in Vermont as contrasted with New*

Hampshire…Occasionally all the above serves as foreground for distant views of mountains and/or water."

As Brooks sums it up: "this scenic beauty is a pastoral beauty" (Id at 3). "*Farmhouses, barns, lush pastures, fat Holsteins, dozing in the shade of leafy sugar maples, and assorted humble outbuildings nestled in an open palm of gently rolling hills, bordered by thick forests and within the sight of the Green Mountains (…) Does this picture have a stream? Then a cover bridge should cross it (…) A field of corn. A white-tailed dear…*" (Don Mitchell, at 15-16).

"Valley Views." "*It is based on the small river valleys near my home in northern Vermont. The valleys tend to be fairly narrow with villages tucked in the bottoms or along one side at the lower elevations. I chose to imagine the view from higher up the side of one of these valleys so that I could show the rolling hills at the edge of the valley, the village and farms on the flatter land at the bottom of the valley, the trees and houses on the rolling hills on the far side of the valley, and, finally, the mountains in the distance. Towns such as Cambridge, Jeffersonville, Jericho, Richmond, Underhill, and Johnson are all arranged in this fashion.*" (Anna Vreman).

This combination of valley-small village life is a nostalgic image for non-Vermonters but a reality to the natives: "*life is neither urban nor a sojourn in the wilderness; it is rural, based on managing small tracts of privately owned land –or, if not rural, then it is centered in the life of towns whose diminutive size would in most other place be the subject of jokes. Nothing is more characteristically Vermont than the white-steepled village in the middle of nowhere, home to just a couple hundred families –or fewer- living in an intimate and basically self-contained community*".

Luigi Lucioni, *Village of Stowe* or *Stowe Valley, Mount Mansfield*, 1931, oil on canvas, 24 x 34 inches. Minneapolis Museum of Art, Minneapolis, Minnesota. Gift of Mrs. G. P. Douglas. Shown at "Pastoral Vermont: The Paintings and Etchings of Luigi Lucioni", May 21-August 9, 2009. Middlebury College Museum of Art.

The focus of Criterion 8 [01] should then be the natural surroundings that ensure Vermonters all over the State a **sense of place.** The State's distinctive sense of place is largely the result of its cultural and economic heritage; a heritage created, and maintained, the state's historic landscape of compact cities and villages surrounded by working farms and forests.

This implies that it is community life –and not nature *per se*- what has been recognized as the creator the landscapes-, or rather, "a natural beauty created by the way of life of the Vermont people" (Richard Brooks, at 75, FN 35), which has very important policy implications for the design and implementation of policy. If "the kind of beauty of the landscape expresses and "objectifies" this way of life and its values" and "standards of preservation and conservation are directed at the preservation of this way of life, as well as the beauty of nature which reflects the way of life" (Id.), decision-making on "objectivity" should somehow appeal to the community itself and not to experts. But, is that possible? Does a community have the right to choose its way of life and change it (even radically change it) in any given moment or is it bound by the past?

What is the process?

Small town center – the common- of South Royalton

The village general store and gas station with its community intercommunication billboard, Norwich, VT

Formally, aesthetics under criterion 8 is a question of "fact", and as such, submitted to what in legal terms are considered the rules of evidence in a discursive or dialectic manner. The applicant has an initial burden to prove that the application for a permit meets the 10 Criteria, including Criterion 8. But as soon as a minimal prove is presented it is up to opponents or the District Commissions (even without any opposing party, as a question of fact that an administrative agency has to determine) to introduce a different finding. The Commission and the Board can make their own findings through site visits or other typical fact finding techniques. "The absence of opposition [from third interested parties] does not mean that the applicants automatically prevail on the aesthetic issue", said the VT Supreme Court in 1992 (*IN RE: Re Chester and Berha Denio*, 608 A 2d 1166), since the Boards role is to protect the public against aesthetic blights (Richard Brooks et al, at 5). Still the question remained both procedurally and substantively uncertain in the first years

It is worth of noting, though, that while some of the Criteria of Act 250 have specific guidelines to help the District commissions approach the issues at stake (typically, for example, Criterion 9.B), Criterion 8 was never addressed in such a way.

The Act 250 Rules traditionally enacted to make sure the Commissions acted within the legal requirements of the rule of law applicable to administrative procedures contained exclusively procedural rules as well as definitions to make sure that jurisdiction of the Commission is well entertained (new Rules of the State of Vermont, Agency of Natural Resources, Land Use Panel, Natural Resources Board, will be effective on July 10, 2009). The Commissions members Training Manual simply compiles the precedents that explore what is to be understood by each of the Criteria, including the three subcriteria under Criterion 8, but it does not add prospective guidance, neither for the Commissions nor for applicants or other interested parties.

So, the District Commissions and the Environmental Board were and continue to be totally free in the development of more detailed standards.

After two decades of exploring the standards the Board was ready to set a general rule; a rule that would embody a neutral principle that could ensure consistency in the process of decision making and objectivity, to its possible maximum extent, in the standards of aesthetics.

4.- The Economic and Land Use Development of Quechee

After several years of implementation of Act 250 VT´s Environmental Board (later maintained by VT´s Supreme Court who deferred to the technical judgement of the Board, see *In re Quechee Lakes Corporation* 154 Vt. 543, 580 A. 2d 957, 1990) was ready to put in place a doctrine that would allow for the objective enforcement of the Act.

[Prior to January 31, 2005, appeals of District Commission decisions were heard by the administrative State Environmental Board. The Act Relating to Consolidated Environmental Appeals and Revisions of Land Use Development Law, No. 115, 2004 (**Act 115**, passed on May 13th) abolished the State Environmental Board and granted appellate jurisdiction of Commission decisions to the State Environmental Court. After

January 31, 2005, any party with standing may appeal Commission decisions to the **State Environmental Court,** which is part of the State of VT Judicial Power. But, of course, the main body of current Act 250 jurisprudence results, though, from the *corpus* of precedential decisions issued by the Environmental Board until that date, and from the Environmental Court afterwards. The Environmental Court considers issues on appeal *de novo* and its decisions may be appealed directly to the Vermont Supreme Court for judicial review, but only by certain limited statutory parties.

The Supreme Court did not review Environmental Board decisions *de novo* and the facts established by the Board were deemed to be conclusive where supported by substantial evidence. See, e.g., *IN RE: Wal-Mart Stores, Inc.*, 702 A.2d. 397, 400-401 (1997) (noting that the Supreme Court gave "deference to the Environmental Board's interpretation of Act 250."). The question after January 31st 2005 was whether it could be expected that that the Supreme Court would afford similar deference to Environmental Court decisions. Certainly the Environmental Court has to take the previous decisions of the Environmental Board as precedent under a statutory mandate, as explained above. For a case in which the "new" State Environmental Court confirmed the full application of the Quechee Lakes Test, taking into account the cases in which VT´s Supreme Court had maintained its full application and deferred on its factual application to the Board, see *IN RE: Eastview at Middlebury, Inc.*. February 15, 2008, Appeal of Act 250 Permit #9A0314, later described. The JAM Golf case has cleared the first question of deference or not to the findings of the Commissions and the Environmental Court by the Supreme Court. It is analyzed in detail at the end of this Main Page]

State Environmental Court in Berlin, VT. It hears appeals from municipal boards and commissions and also appeals from Act 250 decisions. Additionally, the Court hears Agency of Natural Resources, Natural Resource Board and municipal enforcement cases.

Legal scholars had been worried since long ago about how neutral principles on aesthetics could be developed,… if they could at all !! (see some of them in pags 7-8.)

The Quechee Lakes development (or rather, developments) presented a perfect opportunity to sanctify a standard. The case (actually the two cases, since the Board unbundled the original three applications for permit into two different factual records, thus leading to two decisions) presented the Board with many of the issues involved in landscape preservation in urban development projects, in particular urban developments that would change the unique features a traditionally rural semi-industrial valley.

The old mill of Quechee, located at the entrance to Quechee Lakes from the town of Quechee

Map depicting the area. Number 25, at the bottom left, is where the Quechee Gorge is located. The Quechee Lakes development lays in the nort of Route 4, just after the pass of the Gorge when going west. Numbers 3 to 8 are the buildings of the Town of Quechee. The area to the left with Lake Pinneo at the center-south of the larger meander of the river is where most of the condominiums are located

Quechee, settled in the 1760's by homesteaders who obtained their deeds for the erection of mills along the Ottauquechee River thrived during the 19th Century, gaining celebrity for the rich economy they provided, from lumber to cider, and in particular for its fabric "shoddy", made of new wool and reworked soft rags, used for the finest white baby flannel in America, and the fabric for the making of baseball uniforms for the Boston Red Sox and the New York Yankees. More than 60 industrial buildings stood downstream from Quechee Village, although in Quechee´s Historic Mill District, the majority of the buildings are residential in nature, primarily 1 ½ and 2 ½ story, single-family residences with lesser numbers of multi-family residences, which historically housed millworkers. Assorted outbuildings, primarily barns, sheds and garages, accompany the residential structures.

Fabric mills brought prosperity to the area up to the mid-1900s, until the textile industry's economic focus shifted South. As the Hartford Area Chamber of Commerce web pages remind us: "*In the 1950's, due to the shortage of an affordable labor force and the enticement of the South and its labor force, the mills started closing. Quechee lost the economic base that had existed for almost 200 years. The once booming community became a village of abandoned buildings with broken windows, fallen roofs, brush and bramble covered walls, crumbling foundations -- a ghost town of what it had once been.*"

Quechee remained an area in decline for a number of years.

But in the late 1960's, a group of investors arrived in the area looking for land to build a four-season resort community. Known as the Quechee Lakes Corporation, the company purchased all available land for its planned community and amenities.

Nevertheless, even with this industrial past and with the decadent landscape that resulted in the mid-sixties, the valley still kept its traditional rural beauty. As the Environmental Board would assert in the Decision as a finding of fact, "*the Ottauquechee [river] lies on the floor of a broad valley and hills rising on all sides of the valley provide panoramic views of the surrounding area. Beyond the valley floor itself, much of the surrounding countryside is dominated by farmsteads and forest.*"

Quechee Lakes developments are almost side to side to the Quechee Gorge, the so-called "Little Grand Canyon" of New England"

It is very close to the historic villages of Woodstock, VT, and Hanover, N.H. (the home of Dartmouth College), and within an easy two-hour drive of Boston and a short flight from New York's LaGuardia International Airport, although it is also a short 15-minute drive from Lebanon, New Hampshire airport. Thus it is easily accessible from major metropolitan areas throughout the Northeast and Eastern Canada, also close enough to Montreal to consider Quechee´s charm not only to be “good living in the rural heart of New England· but also a close place to sophisticated metropolitan life: 120 miles northwest of Boston, 140 miles from Montreal, 145 miles from Hartford, Ct., 140 miles from Albany, N.Y., and 280 miles from New York City.

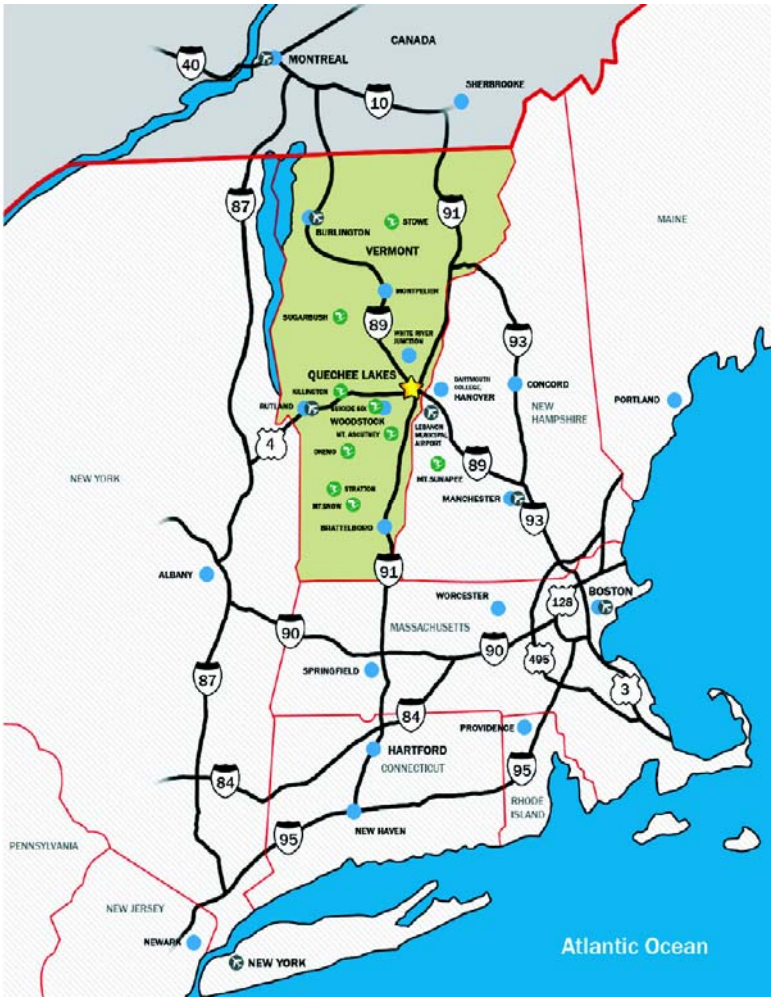
Quechee Lakes was to become VT's premier second home destination for people ready to embrace its famous lifestyle. Developed in the late 1960s, it opened in 1969 when the first townhomes and single family homes were sold Today the Quechee Lakes Resort was built with the idea of creating one of New England’s and even of the U.S. finest resorts for seasonal and year-round owners.

Several different developments would end up covering an area of 5,200 acres in the hills surrounding the Ottauquechee River Valley. For most of the 19th and early 20th century Quechee was a mill town, with a totally rural economy. The idea was to develop a luxury-style suburban environment that would look instead as a village with walking trails, polo field, covered bridges, neighborhood coffee shops, post office, public library, church, artisan studios and small businesses, and year round activities that

would allow not only for the use of the family and townhouses as second residence but also as an ideal retirement place (actually, it was listed in 2005 and 2007 as one of "America's Top 100 Master Planned Community" by Where to Retire Magazine.)

As this was the first development of its size to come under the jurisdiction of Vermont's Act 250: what would be the end result? a well resort, developed and maintained with great attention to its surrounding: the Ottauquechee River Valley, its hillsides, open meadows and woodland? Or, instead, a suburban standardized piece of America similar to thousands of developments impossible to identify with VT´s rural tradition?

The current owners of the development rights are not the original Quechee Lakes Corporation, from Boston, but the Quechee Lakes Company, from VT. It acquired the rights 12 years ago when the former went bankrupt




QUECHEE LAKES
Lake Pinneo
Murphy Farm
Condominiums
Fox Hollow
Dartmouth Place
Lakeland Village
Fairway Village
Windsor Village
Newton Village
Landmark
Greensway
Deere Run
Sales & Rental
INFORMATION


Quechee Lakes
1968

Nevertheless due to the fact that permits had initially been asked for the first developments of a smaller scale, "*the number of residential units and the ratio of developed land to "greenbelt" land has remained relatively unchanged since the inception of the QLC [the Quechee Lakes Corporation] project in 1970. This portion of the Quechee Valley ha[d] become a residential second home and vacation resort area and c[ould] no longer be characterized as a pastoral Vermont river valley*."

"In summary, the context into which QLC proposes to introduce the Murphy, Newton and Golf Course projects is dominated by man-made features placed within a natural, river valley setting. A visitor to the Quechee Valley is struck with the proliferation of housing structures and associated amenities. The development of the Valley since at least 1974 has been oriented toward establishing a recreational resort community with quite visible, newly constructed features which compete with natural scenery, eliminating all but a few traces of the pastoral character which dominated Quechee's past."

This issue of piecemeal initial permitting that contributes to trigger an initial change the "spirit of the land" or the "sense of place" is quite difficult to deal with since, as it is explained in the Scholars´ Debate Section, the "context" in which projects are located is an essential component of the decision, and this context might had been degraded through a process of one-by-one permit that may accumulate finally with an eventual minor change leading to a major variation of the integrated visual impact of a totally

different nature due to the synergic effects of all the accumulated permits. It also leads to strip development because connectivity to previous development does not change *prima facie* the context.

5.- The Quechee Lakes Case

The first Decision, issued November 4th, 1985, focused on two of the included developments: Murphy Farm and Newton Inn (land use Permits #3W0411-EB and #3W0439-EB). [The second decision, on Ridge Condominium, is relevant on an issue not related to the test. It is visited later in the text]

The first one, the **Murphy Farm project**, consisted of three components: improvements to and expansion of the Murphy farmstead, construction of four condominium clusters (the "upper tier" to the west of the farmstead) with related facilities, and construction of seven condominium clusters surrounding a reconstructed 12th hole at a golf course (the Lakeland Golf Course). The Commission approved the upper tier condominiums and the expanded 12th hole, and no party appealed the Commission's issuance of a Land Use Permit approving those 16 Murphy condominiums of the upper tier, nor anyone appealed the Commission's approval of a tennis court, a swimming pool, and the reconstruction of the Lakeland Golf Course's 12th hole. Therefore, these approvals were not at issue in the appeal to the Board, which limited itself to the analysis of the other two components of the project which had been denied approval by the Commission: the Murphy Farmstead and the golf course condominiums. [See Box below: Murphy Farm Project]

The second land use permit, the **Newton Inn** application, consisted of three components: the Inn building itself, "guest suites" operated by the Inn, and condominium units. the Commission rendered affirmative findings and issued a Land Use Permit approving Newton Condominium Buildings 4, 5, 6 and 7, a pitch and putt golf course, tennis courts, and the removal of existing farm structures. The Commission had rendered negative findings and denied a proposed access to Route 4 and approved an access to the project via an existing roadway, Lakeland Drive (under traffic congestion criterion); concerning Criterion 8, it had issued negative findings and denied approval of the Newton Inn, the guest suites, and Newton Condominium Buildings 1, 2 and 3. [See Box below: Newton Inn Project]

The Board, based on its findings of fact and conclusions of law, allowed the permits "*if completed and maintained in accordance with all the terms and conditions of those applications, the exhibits presented to the Board and the Commission by the Applicant, and the conditions set forth in Land Use Permits #3W0411-EB and #3W0439-EB, will not cause or result in a detriment to the public health, safety or general welfare under the Criteria set forth in 10 V.S.A.S 6086(a).*"

The Murphy Farm Project

The **Murphy Farmstead** renovation involved an expansion and conversion of an existing structure and the construction of two additional buildings, all to house residential condominiums. The Farmstead site lied on the shores of Lake Pineo, an artificial impoundment created by QLC through the temporary diversion of waters from the nearby Ottauquechee River. There were several improvements on the site: an attractive farmhouse constructed in the mid- to late 18OOs, a small barn probably constructed around 1950, a garagelike building near the shores of Lake Pineo, and a swimming pool which is in a state of disrepair. QLC had proposed to construct a 25' by 45', two-story addition to the existing farmhouse. The expanded building would be renovated to accommodate three condominium units. The farmhouse renovation involved the selection of architecture, colors and materials similar to the existing farmhouse design. The existing access drive to the farm complex would be re-routed to the rear of the house and six parking spaces would be added south of the house.

QLC had also proposed to remove the existing barn and swimming pool. In the approximate location of the razed barn, a two-story, barn-like structure would be erected, containing four condominium units (Building 5). A slightly shorter, L-shaped addition to Building 5 would contain a fifth unit and a shed-like extension of the L would house a five-car garage. The main structure of Building 5 would be 33' high at the peak (42' to the top of two cupolas mounted on the roof ridge), 33' wide and 96' long. The L addition would be 26' high with a 49' by 24' floor print. The garage would be 21' high with floor dimensions of 50' by 24'. A cylindrically-shaped 34' high silo-like structure with a diameter of 13' would be erected on the east side of Building 5 at its junction with the L addition. QLC would erect a third building, Building 6, between the farmhouse and Building 5, but offset slightly toward the Lake. The floor print and basic design of Building 6 would be similar to that of Building 5 (with some design detail changes), but Building 6 would be slightly shorter, being 31' at the ridge (and 39' to the top of two cupolas).

Building 6 would house four condominium units, and a four-car garage serving the building would be located across an entry drive courtyard from Building 6.

The farmhouse and Building 5 would lie 120' away from Lake Pineo at their closest points and Building 6 would lie within 100' of the Lake. The existing garage building would be renovated for use as an amenities building, and the Lake shore would be improved for use as a beach, with a gazebo extending 60' out into the Lake. The east or Lake side of Buildings 5 and 6 would include the installation of terraces. A swimming pool and tennis court would be constructed directly west of Building 5's garage.

Murphy Farm

The planting plan for the Murphy Farmstead provided for retaining an existing, dense tree buffer which was growing on the bank to the east and south of the site. Only minimal cutting would occur: the buffer would be cut to allow installation of the Building 6 garage and 18" and 24' maples would be removed to allow the re-routed driveway to pass behind the farmhouse. Very little new planting would occur around the farmhouse due to the existing spruce, maple and lilac around the building. Lilac and yews would be planted along the new driveway and three sugar maples would be planted north of the house. The driveway courtyard in front of Building 6 would be planted with birch, Washington thorn, and a variety of low, ornamental plants. Five weeping willows would be planted along the lakeshore in front of Building 6, and sugar maples and crab apples would be planted at the building's end. Washington thorns would be planted, two in the front and two in the rear, close to Building 6. Both ends of Building 5 would also be planted with sugar maples, and crab apples would be planted on the building's lake side. A 25 tree apple orchard would be planted in a concentrated area north of the tennis court.

Lake Pineo was the primary feature east of the project site, with the Lakeland Golf Course on the far shore. The golf course and the Ottauquechee River lied to the north of the project beyond an open field. Beyond the 16 new Murphy condominiums to be built west of the farmstead, lied the Lakeland Village project. To the south of the farmstead, lied the beach, beach house and proposed site of the golf course condominiums.

QLC had been careful in its proposals concerning the Murphy homestead to maintain existing architectural style, materials and colors. The planting plan was similarly adjusted to the historic style represented by the existing dwelling. The proposed addition is of a scale similar to the existing building. The QLC proposal for this building was compatible with historic patterns and existing use. The existing barn was not an aesthetically strong feature. Its design is not especially attractive, it was not similar to other barns in the area, it was not a typical Vermont barn and its scale was quite small in comparison to other barns in the Valley. Therefore, the removal of the existing barn would have little impact on the site's scenic features.

While the Murphy site was the most sensitive and most prominent of the three project sites before the Board, QLC's response to this challenge had been to use extreme caution in selecting design features properly adapted to the site. The barn-like condominium structures are of a design, scale and color similar to other barns in the area. Few people viewing these structures would believe that their use was for agricultural purposes, yet the flavour introduced by the design of buildings 5 and 6 would be of farming.

Buildings 5 and 6 are massive structures but their mass and scale were consistent with an attempt to induce a barn-like feeling. The project's low density is quite reasonable for the site: only three units will be placed in the house and an additional nine would be located in the barn buildings.

The Murphy site was significantly closer than the Newton site (later described) to several observation points in the Valley (River Road north and east of the project site, the Quechee Club, and the Dutton Hill/Ski Hill area), from which the Farmstead project would be visible. However, it was shielded from view somewhat by the tree-lined bank to the west of the site. Further, the design and density of the proposed project would cause them to adapt more readily in the viewer's eye to the natural landscape. The Murphy project only marginally infringed upon existing open space. Building 4 would be located on the site of the existing barn. Building 5 would consume a limited amount of open space. The project as a whole should appear similar to a collection of farm buildings with a central courtyard area and a field extending beyond an orchard to the north of the site.

The **conclusions of law** concerning this part of the project were the following:

"*We cannot conclude that the Murphy Farmstead project will have an adverse impact on area aesthetics, scenic beauty and natural beauty. The Murphy site is one of those peculiarly sensitive natural features which, because it lies at the focal point of the Quechee Valley, requires special scrutiny under Criterion 8. However, QLC has responded to the challenges of this site with a design carefully calculated to keep visual intrusion to a minimum.*

The Farmhouse renovations are, in a quite detailed manner, consistent with the historical style of the existing structure. The materials, colors, and designs chosen serve to perpetuate the architectural grace of the existing building. The placement of three units within this structure introduces an appropriate residential density.

The style chosen for the two barn-like buildings is also appropriate for the context. One's expectation for the existing site is to see structures which are agricultural in origin. The existing barn has little aesthetic value because it is not typical of area barns and its scale is not proportional to either the farmhouse or barns in the Quechee Valley. Most viewers will not mistake the new barn-like structures for cow barns; their function will be known to even the casual observer.

However, the design, location, colors, and architectural features of the new buildings will be strongly agricultural in origin. While no one will be fooled about the buildings' function, most observers should associate the finished project with a traditional farmstead with its collection of buildings around a courtyard, an apple orchard and a near-by field.

Because we do not conclude that the project's impact is adverse, we need not proceed to the second tier of our aesthetics analysis." [this conclusions advances one of the main "creature" of the Quechee Lakes Decision: the Quechee lakes Test, which is explored below],

Based upon the above findings and the analysis set forth in our Conclusions of Law, we further find that the Murphy project will not have an adverse impact on the aesthetics and the scenic and natural beauty of the area.

The **Golf Course Condominiums** (the "Fox Run" site) was dominated by a horseshoe-shaped, steep hillside surrounding the western end of the parcel. This bowl-like effect was apparently created when the area was used as a sand and gravel source during the construction of Interstate 89. The central and eastern portion of the tract was relatively flat, while at the western end the land rose gradually to a plateau before climbing the steep bank.

QLC proposed to construct seven condominium buildings tucked back against the base of the bank, conforming with the horseshoe shape of the parcel's topography. Twenty four condominium units would be constructed, four threeunit buildings and three four-unit buildings. The area at the base of the hill would be regraded to form a berm. Buildings would be situated with rear entrances at grade with the top of the berm at the base of the hill, giving the appearance of a one-story structure. Because the buildings will be built into the front slope of the berm, a lower level will be constructed at-grade with the base of the berm giving the appearance of a two-story structure from the front.

The units would be 22' high at the peak when viewed from the rear and 30' at the peak when viewed from the front.

Access to the project would be via a driveway entering onto Murphy Road which forms the site's northeasterly boundary. The driveway would be constructed at the base of the hillside to the rear of the units. Garages and entryways would be constructed at the rear of each unit.

The main portion of the site would be occupied by new 11th and 12th holes for the Lakeland Golf Course. Elevated tees for the 12th hole would be constructed part way up the hillside at the westerly property line. The site would be regraded for the installation of three ponds and undulations in the golf course.

A dense blanket of vegetation screens the westerly portion of the site and covered the steep hillside. Vegetation would be removed along the fringe (to an average depth of approximately 40') to permit the installation of the driveway at the rear of the buildings. Clumps of vegetation along the southern property line would also be removed.

Landscaped berms, planted with sugar maple, birch, pin oak, white pine, and hawthorn, would be established in the areas in front of Buildings 1, 2, 3, and 4. Similar berms would be created to the east and north of Buildings 1 and 2, protecting them from Murphy Road. A variety of ornamental plants would be located around building foundations and in courtyards to the rear of each unit.

Murphy Road, Lake Pineo, the beach, and Lakeland Golf Course lied to the northeast of the site. Windsor Village and Deere Run lied west and southwest of the project, separated from Fox Run by the vegetated hillside.

The proposed condominiums were of an architectural style well suited to their location: surrounding a golf hole.

The units were similar in design to other structures within the Quechee resort area. The project was neatly acclimated to the site in that units were tucked into the base of the horseshoe-shaped hill with a minimum disturbance of the existing vegetative backdrop. Building mass was appropriately distributed among several buildings whose scale was similar to surrounding condominium projects. The brown exterior tone chosen for the units would blend well with surrounding natural features. The buildings used a significant amount of glass, especially on the interior side of the horseshoe configuration. However, the impact of glass was minimized by the fact that most units face the interior of the horseshoe with minimal exposure to outside observation. Further, the use of landscaped berms and planting of trees would minimize the impact of glass.

The Golf Course project will likely be the least visible of the projects to outside observers. The units would be visible from the beach area; however, most beach users would be oriented toward the Lake, rather than toward the new condominiums. Units would also be visible from the River Road and portions of Quechee Village. However, the distance from these observation points was substantial (approximately 3,000') and implementation of landscaping would reduce the visibility of the project.

The project would consume additional open space in an area where open space was being rapidly depleted. However, this use had been minimized to some extent by locating structures at the extreme edge of the site while reserving the central and eastern portion of the site for an open space use.

Furthermore, the Applicant would preserve 3,000 acres in perpetuity as open space free of development. The finding of the Board that the loss of open space to this project would not have an undue adverse impact was contingent upon the Applicant's representations concerning open space preservation. The permit of the Board would be conditioned appropriately.

The **conclusions of law** concerning this part of the project were the following:

"*We also conclude that the **Golf Course Condominiums** will have an adverse impact on area aesthetics. Our principal concern is the project's consumption of limited open space. As is discussed more fully in section F, below, the Golf Course project, like the Newton project, will be located in a densely settled portion of the Quechee community, an area which has few remaining open spaces. This project contributes to the loss of open space.*

In other respects, the project is well suited to its context. The architectural style, density, color, materials, and scale of the Golf Course units is similar to others in the Valley and falls well within a reasonable person's expectations for a recreational resort community which focuses much of its attention on two golf courses. However, again, we conclude that the adverse impact of this project is not undue. We have previously concluded that no articulated community standard meeting the guidelines we established in section A [this is a reference to the Quechee test described below]*, above, has been introduced into evidence in these appeals. The sensibilities of the members of the Board are not offended by the project. We find the project consistent with its context and well adapted to its site. Finally, QLC has taken available mitigating steps including the selection of an appropriate number of dwelling units, the location of structures at the base of the hillside, making use of existing vegetation, the orientation of buildings toward the center of the site in an effort to minimize impacts on views from the Village area, and the development of an extensive landscaping plan geared toward softening the impact of the new structures."*

Fox Hollow golf course built in Murphy Farm

The Newton Inn Project

The Newton Inn project was to be constructed on a 19 acre portion of a 5,200 acre tract of land owned by QLC adjacent to U.S. Route 4 in the Town of Hartford, Vermont. The project had three components: the Newton Inn structure itself, 25 detached guest suites, and 35 condominium units.

The **Newton Inn building** would have a total length of 166', a width of 75', a front (south) elevation at the roof peak of 25' and a rear (north) elevation of 37' at the peak. The structure's main level would include an entryway, an office, a retail shop, storage areas, a 28 seat bar, a 92 seat dining room with dining deck, restrooms, lobby, and pool-hot tub area. The lower level (consisting of approximately one-half the floor space of the main level) would contain meeting rooms, storage areas, and utility rooms.

One cluster of six **rental suites** would be placed east of the Inn and three clusters would be located west of the Inn, containing nine, six and four units for a total of 25 suites. The suite clusters are detached from the Inn but would be operated as single rooms in association with a hotel-like operation from the Inn's main desk. Each suite consists of one bedroom, a living room and a bath. The suites would have a maximum height of 33' (peak – north elevation) and a minimum height of 24' (peak – south elevation). A circular driveway-parking area (with 67 parking spaces) would be shared by the Inn and suites.

Newton Village would consist of seven condominium clusters:
Building 1 with four units, Building 2 with four units,
Building 3 with seven units, Building 4 with six units,
Building 5 with six units, Building 6 with four units and
Building 7 with four units for a total of 35 units.

Amenities associated with the condominiums would include access driveways, parking areas, pathways, two tennis courts, a deck tennis court, and a two-hole pitch and putt golf course.

The Newton site slopes gradually from a high elevation of 738' in the southwest corner of the site, to a low point of 650' in the northeast corner of the site. Prior to QLC's execution of an option with the current property owner, a farmhouse and associated barns and outbuildings were located on the site. These buildings had been or would be removed in association with the Newton project. An apple orchard lied in the southwest corner of the site and several old stonewalls lie in the area adjacent to U.S. Route 4. This upper plateau has the general appearance of old pasture land with several rock outcroppings. The lower portion of the site was dominated by an unsightly gravel pit and dump area used over the years by QLC.

The Newton project's components were dispersed over the site resulting in the location of structures at a variety of levels on the gradually sloping hillside. The Inn and guest suites would be placed on a relatively flat terrace surrounding a knoll located at the highest point on the project site. The Inn and suites would generally face U.S. Route 4 which forms the southerly boundary of the site.

Structures would lie within 160' of Route 4 at the closest point and 520' at the farthest point. The highest floor elevation in the Inn area would be 732' *(seven* of the nine suites in the southwesterly-most cluster), the Inn base elevation would be 714' (the lower level), and the lowest floor elevation would be 707' (the easterly-most suites).

Condominium Building 3 would lie at approximately the same elevation as the Inn building and the two suite clusters adjacent to the Inn (elevation 710'-714'). However, Buildings 1 and 2 would lie a step lower (average floor elevation of 685'). Building 5 would lie at an elevation approximately five feet lower than Buildings 1 and 2 (680'); Building 4 would lie still one step below Building 5 (675'); finally, Building 6 would lie on the lowest terrace (elevation 665').

Most of the detached units and suites would be built into the sloping hillside with the up-hill floor elevation lying approximately nine feet higher than the down-hill base elevation. This would result in a significantly higher building elevation when the project is viewed from the north.

Twenty-three of the 35 condominium units, ten of the 25 suites, and the Inn building would be constructed into the hillside in this fashion.

QLC proposed to preserve most of the existing stonewall found on the southerly, upper portion of the site. Only 135' of the approximately 1,650' lineal feet of wall would be removed, 130' of the wall required rebuilding, and QLC would construct an additional 110' of wall. An old apple orchard measuring approximately 220' by 100' and enclosed by old stone walls would be retained by QLC.

The Newton Inn planting plan attempts to retain much of the existing vegetation which lied along the project's periphery. Some vegetation would be removed in a pocket near the northeast corner of the project to permit construction of Buildings 6 and 7, and trees would be removed in the southwest corner of the site to permit installation of the parking circle near the Inn. However, most existing vegetation south of the Inn site would be retained (including the orchard) and a margin of trees near Lakeland drive would remain.

Extensive planting was proposed by QLC. The area along Route 4 would be supplemented with a line of black locusts (8), Austrian pines (14) and lilacs. Eleven sugar maples would line both sides of the Inn access drive from Route 4. White ash and crab apples would also be planted in this area. The area enclosed by the drive/parking circle would be planted with white pine (11) and white birch (5), supplementing trees to be retained in that area. The westerly property line would be planted with an irregular line of 56 white pines, supplemented by sugar maples, and serviceberry. The easterly line is already covered with existing vegetation. The northerly line, along Lakeland Drive, would be planted primarily with white pine (21) and red oak (17) mixing with existing vegetation and a few crab apples, sugar maples and white birches to be planted by QLC. The interior of the project, building clusters and other amenities would be planted with a variety of species.

Sugar maples would line the main walkway from the Inn to the tennis courts, and white pine, white birch clusters, sugar maples, red oaks and crab apples would be planted throughout.

The planting plan calls for all pines to be in the 6' to 8' height range when planted; the maple, ash and oak to be in the 2.5" to 4" caliper range with some with a 5" caliper; the birch in the minimum height range of 12', and 6' for the crabs.

The project site was surrounded on three sides by existing condominium projects. The Landmark and Greensway projects lied to the west and southwest of the site, Windsor Village lied to the south, and, on the other side of an existing tree buffer, the Deere Run project lies on the east. The area across Route 4 on the south remained open field. South of the fields, in a hilly, wooded area, lied a residential subdivision not readily visible from Route 4.

The design of the Newton Inn and suites were compatible with their surroundings; the architecture is of a style typical of resort communities. While the Inn was a large structure, its scale was not disproportionate when compared to the physical surroundings or other existing structures such as the Quechee Club. The scale had been reduced by the use of detached suites, rather than a single, all-inclusive hotel structure. The Inn's mass has been successfully mitigated by the breaking up of roof lines, the use of multiple levels and through the use of stone and vegetation. Similarly, the suites had been broken into four clusters with each pair of suites being staggered from its neighbor, reducing the apparent mass of the buildings.

The Newton Condominiums had been treated in a similar manner. The units had been divided among seven clusters with between four and seven units in each cluster. Again, the units within each cluster hade been staggered reducing the appearance of mass, and the clusters have been dispersed throughout the site in a manner which establishes a scale appropriate to the area. The architectural style was similar to and compatible with units within the surrounding condominium projects.

The Newton project as a whole had made good use of the sloping, terraced nature of the site by locating different structures at different levels, maximizing the project's adaptation to the terrain. The density of land use was similar to the density of condominium projects in the immediate vicinity of the Newton site. QLC had selected medium brown as the predominant exterior color, a color which should have the least visual impact. Roofs would be a neutral grey color. The amount of glass used in the suites and condominiums is not atypical and, because of the manner in which structures are segmented and separated from each other, glass should not be an obtrusive feature.

The Inn used a large amount of glass on the southern facade but existing vegetation and trees to be planted by QLC will greatly reduce the visibility of this glass. The north facade of the Inn uses significantly less glass. QLC has represented that glare from the glass would not create an adverse aesthetic impact.

The Inn building and, to a lesser extent, the suites would be visible to travellers on Route 4. However, views of these structures would be quite brief in duration, the buildings would be partially obstructed by existing and new trees, and the visual impact had been reduced by using techniques which reduce mass.

The Inn, the suites, and the condominiums would be visible from various observation points in the Valley. However, the site was a substantial distance from these viewing points. Intermittent views of the site would exist from River Road north and east of the project site but the Road is a minimum of 3,000' away. Similarly, the Quechee Club lied 3,500' away, Dutton Hill was at least 4,750' away and the top of the ski hill is 6,750' away from the site. Residences in the Dutton Hill/Ski Hill area, from which the Newton project could be visible, were generally more than 5,000' from the site.

Therefore, while the project would be identifiable to the knowledgeable viewer seeking out the Newton project, it would be virtually indistinguishable from the nearby Landmark, Greensway, Lakeland and Windsor Village projects when viewed from these substantial distances. Views of the project would be in the far middleground of the observer's field and would not be a particularly distinct component of the general viewscape.

The Newton project would consume some existing open space. However, a portion of the existing open space (the gravel pit/dump) had poor aesthetic qualities (for which QLC was in part responsible) and the proposal sought to preserve green areas within the project boundaries: the "Pitch 'n' Putt" area and green spaces between building clusters.

Furthermore, the QLC Masterplan envisioned the preservation of 3,000 acres of "greenspace" to be preserved in perpetuity free of encroachment by buildings and other structures.

This greenspace would consist of a mix of open areas between housing clusters, golf course areas, field areas, and wildlife preserves. The preservation of this acreage implied that the project did not use existing open space in an inappropriate manner. Because of this reliance, the Board would later condition our approval of the Newton project upon the submission by QLC of a comprehensive open space preservation plan for its existing land holdings.

Quechee Lakeland Golf Course

The **conclusions of law** concerning this **Newton Inn** part of the project were the following:

"*Applying the standards identified above, we conclude that the Newton Inn would have an "adverse" impact on the aesthetics and the scenic and natural beauty of the area.*

The project is compatible with its surroundings. The architectural style is similar to other projects in the area. The buildings' scale and the materials chosen are appropriate to the project's setting. The building mass is diminished through the segmentation of structures and by the creation of building structures surrounded by open space. The density of the project is reduced by QLC's use of the natural slope and terracing at the site.

However, the project will have a significant impact on existing open space. While the dump/gravel pit portion of the site does not have positive aesthetic features, the project nonetheless will contribute to the depletion of open space in a portion of the QLC landholdings where open space is now at a premium. For this reason, we conclude that the project's impact is adverse with regard to scenic beauty and aesthetics.

However, we conclude that the adverse impact is not "undue."
The record in this case does not include any clear, written community standard intended to preserve area aesthetics. The "Quechee Concept" is amorphous at best. It apparently has not been adopted as an official community standard in Hartford.

Finally, the current viability of the "concept" is marginal in view of the repeated abrogations which have occurred regularly beginning in 1974 with the Saltbox project. No party has identified a community standard which comports with the requirements we discussed above.

The project does not offend the sensibilities of this Board. In fact, far from being offensive, shocking, out of character or significantly diminishing the scenic qualities of the area, the Newton project is compatible with the recreational resort context within which it is proposed.

Finally, we believe that QLC has made appropriate use of mitigating tools in an effort to reduce scenic intrusion. The extensive landscaping plan, preservation of existing trees and stonewalls, use of the natural terracing of the site, and the reduction of building mass through a design which segments the proposed structures all act to reduce the negative aesthetic impact."

Based upon the above findings, and the analysis set forth in our Conclusions of Law, the Board found that the project would not have an undue adverse impact on the aesthetics or the scenic and natural beauty of the area.

The Board then, in its Conclusions of Law, made a different issue of the **Glazing** and **Open Space** concerning both (Murphy Farm and Newton Inn) condominiums developments

Glazing and Open Space

All three projects cause us some concern in that significant amounts of glazing are employed in the design of all structures.

We inquired of QLC representatives concerning the glare characteristics of glass to be used and the impact of any such glare on area aesthetics. QLC representatives repeatedly assured the Board that little or no significant glare would be produced by the proposed designs. Our positive conclusions with regard to all three projects depend upon the accuracy of these representations. Therefore, we will reserve jurisdiction for a period of five years, beginning with the completion of all units within each project, to further evaluate the glare characteristics of glass after it is installed. We reserve the right to require retrofitting with glare-resistent glass should we determine that glare creates an undue aesthetic impact and that such retrofitting is a reasonable mitigating measure.

Our visit to the sites and surrounding areas, our review of aerial photographs, and our review of the testimony presented in these appeals supports a conclusion that QLC is rapidly depleting the limited open space remaining in the area bounded on the south by Route 4 and on all other sides by the Ottauquechee River. The Applicant has repeatedly confirmed its intention to preserve no less than 3,000 "open space" acres. It has stated that this open space is (and will continue to be) a mix of golf course areas, green spaces within and between building clusters, open fields, and wildlife preserves.

Our findings of fact and conclusions of law with regard to the Newton and Golf Course projects refer to the strongly negative impact of this rapid depletion of open space. We have found that this portion of the Quechee Valley is now devoted to recreational resort uses which to some extent conflict with the preservation of pastoral, scenic and natural vistas. However, the Valley retains substantial scenic beauty enjoyed by those who reside in and visit the Quechee resort. That scenic beauty will be destroyed should condominium clusters continue to march ad infinitum across the Valley landscape as they have marched since 1974. We make positive findings under Criterion 8 with regard to these projects only because we intend to hold QLC to its often-stated commitment to the preservation of open space.

The record of this case readily demonstrates the pitfall of segmented, "piecemeal" review of a phased development. Since 1970, QLC has planned a large residential and recreational resort community comprising 6,000 acres. Development of that community has progressed on a project-by-project basis resulting in incremental loss of open space. However, the consumption of open space by any one such project has not been of sufficient magnitude to conclude that a project's impact on scenic beauty is "undue." In contrast, the collective impact of the open space intrusions which have occurred since 1974, and which are likely to continue as QLC works toward its 2,500 housing unit goal (including the Newton and Golf Course projects), may be sufficient to "offend the sensibilities of the average person."

Unfortunately, we must in the context of these appeals focus on the pending proposals and cannot judge retroactively the impact of permitted projects on open space degradation.

Nonetheless, because we have jurisdiction over the entire 6,000 acre QLC holdings and because we are entitled to rely on the Applicant's representations with regard to open space preservation, it is reasonable to impose a condition geared prospectively to preserve the contributions of open space to the scenic beauty of the Quechee Valley.

We will, therefore, direct QLC to prepare a comprehensive open space preservation plan. The plan shall include all current QLC holdings in the Quechee Valley area. The plan shall depict with specificity all areas which in perpetuity as open space. Preserved mix of wildlife habitat, open field and amenity lands (golf courses, ski hill),

QLC intends to preserve lands shall include a meadow, recreational and green spaces within and between existing or proposed dwellings. A reasonable portion of the designated open space shall be located in the heavily-settled area north of Route 4 within the Ottauquechee River oxbow. The plan shall specify the techniques to be used by QLC to preserve designated lands as open space. Finally, the plan shall describe the manner in which designated lands will be maintained.

QLC shall not file and the District # 3 Commission shall not accept for filing any application for further development or subdivision of QLC lands until such time as the comprehensive open space plan has been filed with and accepted by the Commission.

The Commission shall hold one or more public hearings and shall issue findings consistent with this decision prior to accepting the plan. All subsequent applications filed by QLC shall be judged under Criterion 8 with specific reference to consistency with the approved open space plan."

Based upon the above findings and the analysis set forth in the Conclusions of Law, the Board found that the project would not have an undue adverse impact on aesthetics and scenic and natural beauty.
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6.- The Quechee Lakes Test

The Conclusions of Law concerning both Condominiums packages were preceded by an abstract standard which the Board took as the rule to make the objective judgements that allowed it to reach, in each of the cases, the conclusions of law based on the different set of fact findings:

This test, contained as paragraph A (Aesthetics and Scenic and Natural Beauty) of Part IV.(Conclusions of Law) of the Decision was formulated as an "*appropriate [mean] to first articulate our understanding of the phrase "undue adverse effect on the scenic or natural beauty of the area [or] aesthetics," the clause we must apply in judging these applications under 10 V.S.A. 5 6086(a)(8).*"

The Board acknowledged that previous cases (it cited Re: Brattleboro Chalet Motor Lodge, Inc., #4C0581-EB issued October 17, 1984) had already explored the meaning of the statutory terms: **"Scenic and natural beauty"** pertain to the pleasing qualities that emanate from nature and the Vermont landscape. The word **"adverse"** means unfavorable, opposed, hostile. **"Undue"** generally means that which is more than necessary—exceeding what is appropriate or normal.

But it also admitted that these explorations had not meant too much for the real operationality of the legal mandate: "*While this description helps in understanding the terminology of Criterion 8, it does not identify the process which we believe appropriate in applying this terminology to specific projects*." It could be "translated" into other words (such as : "In short, through Criterion 8 the Legislature has directed that no project within our jurisdiction be approved if it has an unnecessary or inappropriate negative impact on the enjoyment of surrounding natural and scenic qualities") but still needed clearer standards that would guide the Board itself in future decisions, the District Commissions, and, of course, applicants for permits and citizens in general.

This is the reason why the test was to become so radically innovative: it would be one of the first attempts in the Western World when a legal body would try to develop such abstract standards into operational legal rules more easily applicable, as neutral principles, to any future case at hand.

The test consists of two parts, the determination, first. of whether an aesthetic effect is adverse, and, second, if the effect is adverse, the determination of whether the adverse effect is "undue".

Under the Quechee Lakes test, "adverse" effects are assessed by considering the harmony and fit of a project with its surroundings. The cornerstone is the question: Will the proposed project be in harmony with its surroundings? will it fit the context within which it will be located? If a project fits in its **context**, it will not have an adverse effect.

The five elements that should be considered in the determination of whether an effect is adverse are: the context of the surrounding landscape, the project design, color and materials, project visibility and effects on open space.

1.- Surrounding landscape. What is the nature of the project's surroundings? Is the project to be located in an urban, suburban, village, rural or recreational resort area? What land uses presently exist? What is the topography like? What structures exist in the area? What vegetation is prevalent? Does the area have particular scenic values?

2.- Project design. Is the project's design compatible with its surroundings? Is the architectural style of the buildings compatible with other buildings in the area? Is the scale of the project appropriate to its surroundings? Is the mass of structures proposed for the site consistent with land use and density patterns in the vicinity?

3.- Color and materials. Are the colors and materials selected for the project suitable for the context within which the project will be located?

4.- Project visibility. Where can the project be seen from? Will the project be in the viewer's foreground, middleground or background? Is the viewer likely to be stationary so that the view is of long duration, or will the viewer be moving quickly by the site so that the length of view is short?

5.- Effects on open space. What is the project's impact on open space in the area? Will it maintain existing open areas, or will it contribute to a loss of open space?

All of these factors must be weighed collectively in deciding whether the proposed project is in harmony with -i.e. "fits"- its surroundings. The land uses which surround a project are crucial to the analysis. The same building which may add to the aesthetic qualities of an urban area may detract from those qualities in a rural setting, because the context I different. The visual impact of a single large building may be lessened if its mass is broken up into several smaller structures. A building which may project itself toward the viewer because it is painted white or red, may tend to recede into the background if it were painted in darker tones. Loss of open space areas tends to be "adverse" from a strictly aesthetic standpoint, because open space is an important feature in the scenic beauty of VT. Certain types of land forms are especially sensitive to change, because these land forms tend to be visible from a wide area or they are seen by large numbers of people. These sensitive areas include ridgelines, steep slopes, shorelines and floodplains. Other features are sensitive because they are aesthetically unique; examples may include historic structures, wetlands and natural areas. In evaluating a project proposed in a sensitive area, special attention should be given in assessing whether the scenic qualities of these sites will be maintained.

Once an effect has been defined as adverse, the following three questions must be answered affirmatively for the adverse effect to be considered **"undue"**, and an adverse impact is "undue", and therefore violates Criterion 8, if a positive conclusion is reached with regard to any one of the following:

1) Does the project violate a clear written community standard intended to preserve the aesthetics or scenic natural beauty of the area?

[Such standards may, for example, be set forth in the local or regional plan, or be adopted in the creation of an historic design district, or be incorporated into a municipal or State scenic road designation. If it is found that such standards do exist, and that the project as designed would violate those standards, the adverse impact would be undue.]

2) Does the project offend the sensibilities or the average person? … when viewed as a whole is (it) offensive or shocking, because it is out of character with its surroundings, or significantly diminishes the scenic qualities of the area?

[It is not enough that we might prefer to see a different design or style of building, or that people might prefer a different type of land use, but that the project, when viewed

as a whole, is offensive or shocking, because it is out of character with its surroundings, or significantly diminishes the scenic qualities of the area]

3) Has the applicant failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the proposed project with its surroundings?

[Such steps may include selection of less obtrusive colors and building materials, implementation of a landscaping plan, selection of a less obtrusive building site within the project area, or reduction of the mass or density of a project. If there are reasonable alternatives available to the applicant that would mitigate the adverse impact of the project, failure to take advantage of those alternatives may, in some circumstances, render undue .an otherwise acceptable aesthetic impact.]

The test, in summary, for the implementation of Criterion 8, consists in deciding, first, whether or not those a project is in harmony with its surroundings. In performing this analysis, special scrutiny must be given to sensitive natural features. If it is determined that a project's impact on its surroundings would be adverse in some manner, it must then be determined whether the impact is undue because the project would violate an express community standard pertaining to aesthetics, would be offensive or shocking to the sensibilities of the average person, or has failed to incorporate reasonable mitigating steps which would improve its harmony with its surroundings.

7.- The Progeny and Legacy of the Quechee Lakes Test

The effort made by the Board paid an enormous service. The test got immediate generalized acknowledgement and has continued to govern decisions on land use permits since then. [Decision of the Environmental Board can be tracked down in the E-Note Index managed by the Agency of Natural Resources; see Section on Links to Online Resources of this Case Study]

Of course, it has continued to be applied to developments (see e.g. the Box below)

Cases where the Quechee Lakes test has been applied to developments

- *RE: Otter Creek Development, LLC*. April 19, 2002. Land Use Permit Docket #803 Application #1R0535-3-EB: construction completion deadline on three previously approved but not constructed apartment buildings involving a total of 58 apartment units in the City of Rutland;

- *RE: The Van Sicklen Limited Partnership.* March 8, 2002. Land Use Permit Application #4C1013R-EB: construction completion deadline on three previously approved but not constructed apartment buildings in a residential development involving a total of 58 apartment units in the City of Rutland;

- *RE: John J. Flynn Estate and Keystone Development Corp*. May 4, 2004. Land Use Permit Amendment #4C0790-2-EB Docket #831: construction of a 148 unit multifamily residential condominium project on 40.8 acres in the City of Burlington, Vermont; or

- *RE: Peter S. Tsimortos.* April 13, 2004. Land Use Permit Application #2W1127-EB: construction of a residence, garage, stables, caretaker's quarters and barn, the clearing of 12.5 acres of land, the improvement of 1,800 feet of roadway, construction of a new wastewater disposal system and installation of underground electrical utility line on a 62.5 acre tract of land in the Town of Dover.

It has also been applied to different land uses such as:

- Self-standing buildings or group of buildings such as hotel resorts or retirement communities (see, e.g., Decision of April 21, 1988, Application #4C0288-14-EB: construction of a 100-bedroom hotel, 56 2-bedroom hotel suites, and a loo-seat restaurant on 6.06 acres located at Routes 2 and 7 and Mountain View Road near Exit 16 of Interstate 89 in Colchester, Vermont. Colchester Hotel Group 21st day of April,1988; or *IN RE: Eastview at Middlebury, Inc.*. February 15, 2008, Appeal of Act 250 Permit #9A0314, development of a multi-level residential retirement community adjacent to the Porter Hospital on South Street in Middlebury [the case cited above in which the State Environmental Court decides to fully maintain the Quechee test developed by the Board until 2005 and supported by the Supreme Court].

- Ski resort combining ski facilities and their accommodations and ancillary services (see, e.g., *IN RE: Okemo Limited Liability Company*. September 8, 2005. Land Use Permit Amendment #2S0351-34-EB. NO QL: expansion of the Okemo ski area in Ludlow, Vermont. The proposed expansion, Jackson Gore Phase II, consisted of three residential buildings with 104 units and underground parking, a 20,000-squarefoot conference center with underground parking; a 17,000-square foot recreation/health club facility; an 800-foot extension of a permitted beginner ski trail with snowmaking; relocation of a permitted but unconstructed quad chair lift; relocation of a permitted parking lot; an increase in total parking to 988 spaces; and expansion of utilities including water lines, sewer lines and pump station storage capacity, power lines and stormwater drainage pipes; or, [a decision of the Environmental Court, not of the Board, applying the Quechee test without any discussion] *RE: Free Heel, Inc., d/b/a Base Camp Outfitters*. March 2, 2007. Docket No. 217-9-06 Vtec, attachment of

a twofoot-by-fivefoot decorative banner to each of nine previously-approved light poles in a the parking lot in order to publicize a new warming hut facility cross-country ski touring operations at Mountain Meadows Ski Touring Center (Mountain Meadows) which encompasses approximately 26 miles of cross-country ski trails located both on and off the property of the applicant, and specifically in the vicinity of his retail store).

- Commercial retail centers, although the fight against the big retail corporations has made the headlines (for **Wal-Mart**, a conflict that got a lot of publicity and triggered a comprehensive public debate, see the Section on Guiding Students´ Discussion of this Case Study.)

- *IN RE: Susan Dollenmaier and Martha Dollenmaier Spoor.* February 7, 2005. Land Use Permit #3W0125-5-EB: construction of a two-story, 20,000 square foot commercial retail center with a 12,000 square foot "footprint" and associated parking and access drives located off West Gilson Avenue in Hartford;

or *IN RE: Hannaford Brothers Co. and Southland Enterprises, Inc*. November 27, 2002. Land Use Permit Amendment #4C0238-5-EB Docket #791: permit amendment for the construction of a Lowe's store in the previously (in 1995) permitted Southland development in South Burlington, approving a mixed use commercial development containing 260,046 square feet of commercial retail space in multiple buildings including a supermarket, other retail stores, restaurant(s) and a bank, plus a 95 room hotel, together with up to 1,401 new parking spaces, approximately 2110 feet of on-site roads, and other associated infrastructure, amenities, utilities and off-site road improvements. It involved both an issue of noise and of signage: exterior signs to be installed on the Lowe's building may not be internally illuminated; or *IN RE: The Home Depot USA, Inc., Ann Juster and Homer and Ruth Sweet, Aug. 20, 2001. Permit #1R0048-12-EB.* Demolition of 182,812 square feet of existing retail space, to construct a 133,298 square foot Home Depot retail store and garden center and to construct two additional retail buildings – a 13,120 square foot building attached to the old Osco Drug and 35,500 square foot stand-alone building ("the satellite building"), along with associated parking, lighting, landscaping, storm water discharge system and related improvements at the previously permitted and constructed Juster Mall, located on Woodstock Avenue/US Route 4 in the Town of Rutland.

- Industry, or industry supporting infrastructure. See, e.g.,

- *IN RE: Bethel Mills, Inc.* Land Use Permit. August 4, 2005. Permit #3W0898 (Altered)-EB [DOCKET #851]: removal of a sawmill and the construction of a 19,000-square-foot warehouse, wood storage racks and sheds, site paving, and related infrastructure, located on a 4.04-acre tract on North Main Street in Bethel

- *IN RE: Design Contempo, Inc., Dec. 20, 2001 Permit Amendment #3W0370-2-EB, Docket #775:* installation of a generator adjacent to the already-permitted sawmill building. The generator was housed within an insulated metal building or box. The box helps to absorb the noise from the generator. Fire safety precautions prevent the generator being located within the sawmill building. The

generator can be heard off site, at adjoining properties and properties in the valley, in Royalton.

- *IN RE: Pike Industries, Inc.*, October 23, 1997. Land Use Permit #400008-2-EB, Docket #674: 24-hour operation of Pike's hot mix asphalt plant located on Campground Road in New Haven.

- *IN RE: Pike Industries, Inc. and William E. Dailey, Inc.*, June 25, 1998. Permit #1R0807-EB, Docket #693: operations of a concrete plant for production of up to 25,000 cubic yards of concrete per year, and to extract up to 67,000 cubic yards of aggregate, sand, and gravel during a 200 day annual operating season from a preexisting gravel pit in the Town of Wallingford.

- *IN RE: John A. Russell Corporation and Crushed Rock, Inc.*, August 19, 1999. Permit Application #1R0489-6-EB, Docket #723: installation of an asphalt plant at the previously permitted dolomite rock quarry known as Crushed Rock under a different previous land use permit. The quarry site was located off the east side of Vermont Route 133 in Clarendon, Vermont. The Project included the addition of an asphalt plant, four fuel and asphalt cement tanks, a diesel generator, and various roadway, drainage, and other improvements.

- Industrial production or services provision related facilities (or even industrial operations per se, e.g. in and out truck traffic). See, e.g.,

- *IN RE: George and Diana Davis d/b/a Bates Mansion at Brook Farm*. December 15, 2004. Land Use Permit # 2S1129 –EB: construction of site improvements and the operation of the event facility permitted in Water Supply and Wastewater Disposal Permit #WW-2-1125; or

- *RE: EPE Realty Corporation and Fergessen Management, Ltd.*. November 24, 2004. Land Use Permit #3W0865-EB: construction of four buildings totalling 18,000 square feet with up to 100 self-storage units, located on a 16-acre tract on River Road in Sharon; or,

- *IN RE: North Country Dairy Supply, Inc.* November 16, 2004. Land Use Permit Application #1R0898-EB [#836]: approval of a preexisting facility used for mixing and storage of agricultural chemical solutions, with proposed improvements, at the intersection of Route 133 and Clarendon Springs Road in Clarendon).

- *IN RE: OMYA, Inc. and Foster Brothers Farm, Inc., May 25, 1999. #9A0107-2-EB, Docket #715:* authorization of an increase in the number of daily truck trips from the Permitted quarry from the current limit of 85 round trip truck trips per day to a maximum of 115 round trip truck trips per day through Middlebury.A total of 115 round trips per day is acceptable because it distributes the truck traffic in such a way that it will blend in with the existing truck traffic and with the existing nature of Brandon Village. The requested increase to 170 round trips, twice the current permitted amount, would unduly exacerbate the current situation by tipping the delicate balance in Brandon to favor use of U.S. Route 7 at the expense of the historic and aesthetic character of Brandon Village.

- Or quarries (remember VT´s marble tradition, specially near the city of Barre). See e.g. *IN RE: Barre Granite Quarries, LLC, and William and Margaret Dyott, December 8, 2000. Permit Application #7C1079(Revised)-EB, Docket #739:* Revision of a Permit issued to Barre Granite Quarries, LLC and William and Margaret Dyott authorizing to reactivate and expand abandoned granite quarries located on the Dyott, Padula and LeCours properties in the Town of Sheffield.

- Parking areas. See e.g. *IN RE: Old Vermonter Wood Products and Richard Atwood, Aug. 19, 1999. Permit #5W1305-EB, Docket #721:* authorization of the construction of a new 40' by 100' two story wooden building with a front porch and related driveways and parking areas; or *IN RE: State of Vermont - Buildings & General Services and Vermont State Colleges, Jun. 24, 1998. Permit Application #3R0581-5-EB, Docket #694***:** construction of a parking lot on the campus of the Vermont Technical College in Randolph.

- Also non profit services: *IN RE: Green Meadows Center, LLC, The Community Alliance, and Southeastern Vermont Community Action*, December 21, 2000. Permit #2W0694-1-EB, Docket #751: application by Green Meadows Center, LLC, the Community Alliance, and Southeastern Vermont Community Action for a Permit to convert the former Green Meadows School to a multi-use community center to be owned and operated by a consortium of non-profit interests. The Project involved the use of eight existing buildings on the tract, a community garden, senior housing, lodging facilities for visitors, classrooms, offices, meeting rooms, a gymnasium, commercial kitchen and other similar uses. The Project included upgraded water and sewer systems, improved parking, landscaping, and lighting. The Project is located on Stowe Hill Roadin the Town of Wilmington.

- Or exclusively rural land uses without construction, such as forestry projects or hunting or shooting clubs. See, e.g., *IN RE: Bull's Eye Sporting Center, David and Nancy Brooks, and Wendell and Janice Brooks*. April 4, 2003. Land Use Permit Amendment Application #5W0743-3-EB: changes to a shooting range known as the Bull's Eye Sporting Center on a 35-acre tract of land in Orange.

- or sport facilities: *IN RE: Roger Loomis d/b/a Green Mountain Archery Range and Richard H. Sheldon*, 18 December, 1997. Permit application # 1 R0426-2-EB: authorization of the conversion of a previously permitted gymnastics facility to an indoor/outdoor commercial archery facility with increased parking capacity in North Clarendon

- and public infrastructures such as roads (See, e.g., *IN RE: Dr. Anthony Lapinsky and Dr. Colleen Smith.* October 3, 2003. Land Use Permit Applications #5L1018-4/#5L0426-9-EB 3rd day of October 2003. construction and use of a connecting road between parcels of land which they own in two adjacent subdivisions in Stowe) or water supply systems (See e.g. *IN RE: Town of Hinesburg and Stuart and Martha Martin, September 23, 1998. Permit Application #4C0681-8-EB, Docket #704*: Subdivision of a 16.42-acre lot into two parcels and the construction of a 500,000 gallon concrete reservoir and a

pump station to serve the Town's water system on Piette Road in the Town of Hinesburg.)

- or public services. See, e.g., *IN RE: Burlington Broadcasters, Inc., d/b/a WIZN; Charlotte Volunteer Fire & Rescue; & John Lane.* October 29, 2004. Application Land Use Permit #4C1004R-EB: radio broadcast tower on the northwest side of Pease Mountain in Charlotte; or *IN RE: Hector LeClair d/b/a Forestdale Heights,* February 25, 1999. Permit Application #4C0329-17-EB, Docket #711: authorization to construct, operate, and maintain a 2,300 foot road and associated utilities, including municipal sewer, water, and gas mains, telephone service, electricity, and storm water drainage structures off Allen Martin Drive in the Town of Essex; or *IN RE: Lawrence White, Apr. 16, 1998. Permit Amendment #1R0391-8-EB, Docket #689:* authorization to operate an office, a maintenance building, a firewood processing area, and a radio tower on a 58-acre tract of land on U.S. Route 7 and Town Highway 19 in the Town of Danby.

- *IN RE: Pittsford Enterprises, LLP, and Joan Kelley. December 31, 2002.* Land Use Permit Application #1R0877-EB: construction of a post office building, and related construction and subdivision).

It is still supposed to set criteria to facilities that are expression of unthought-of (in 1985) ways of life:

- On the construction of an equipment shelter/building and cellular panel antennas and personal communication services (PCS) antennas [which are unavoidable elements for the deployment of cell phone services] on land and in the towers of St. Mary's Star of the Sea Church in Newport, see *IN RE: Vermont RSA Limited Partnership d/b/a Verizon Wireless.*October 20, 2005. Declaratory Ruling #441; [See, also, Connecticut River Watershed Council: Planning for Telecommunication Facilities in New Hampshire and Vermont, October 2000]

- *IN RE: Vermont RSA Limited Partnership d/b/a Bell Atlantic Mobile, August 21, 1998. Revocation of Permit #3W0738-4-EB, Docket #698:* Revocation of a Permot that authorized Vermont RSA Limited Partnership d/h/a Bell Atlantic Mobile ("BAM") to construct a 190-foot unlit telecommunications tower, equipment shed, access road, and related improvements, on Baxter Mountain off of Fay Brook Road in the Town of Sharon.

- On the proposal of March 10, 2006, for decision on Petition of EMDC, LLC d/b/a/ East Haven Wind Farm for Certificate of Public Good pursuant to 30 V.S.A. section 231 and 248, authorizing it to construct a 6 MW wind electric generation facility, and associated transmission and interconnection facilities, in East Docket No. 6911 Haven, see the Conservation law Foundation participatory declaration. [Wind parks, one of the essential elements of renewable energy policies, always present almost exclusively, in terms of the environmental problems to be discussed, that of visual impact, although many other issues are raised when these projects become public. See the Draft Guidelines for the Review and Evaluation of Potential Natural Resources Impacts from Utility-

Scale Wind Energy Facilities in Vermont, April 2006, by the Agency of Natural Resources. On the most famous one, Cape Cod´s, see the previous Friends of Thoreau´s Case study: Cape Cod Off-shore Wind Park: The Multivariate Nature of Energy Policy Issues, by Enrique Alonso & Ana Recarte Vicente-Arche, May 2007]

And, of course, it has been used to decide issues of identity concerning ubiquitous (not only in the US but everywhere in the planet) corporate imaginery: the case of **McDonalds** is as symbolic as the Wal-Mart case. See *IN RE: McDonald's Corporation, December 7, 2000. Permit #1R0477-5-EB, Docket #747:* This proceeding concerned the application of McDonald's Corporation for a permit amendment retroactively authorizing modification of the exterior of its previously permitted restaurant from a brown color scheme to a red, white and yellow scheme with a red roof. The Project was located at the intersection of Woodstock Avenue and Stratton Road in the City of Rutland, It included whether the restaurant's colors would be so out of character with its surroundings or so significantly diminish the scenic qualities of the area as to be offensive or shocking to the average person. The Board concluded that, if the repainting and other mitigation measures noted above are taken, the restaurant's new color scheme will not be shocking or offensive. It is worth of analysis because of the various dissenting opinions.

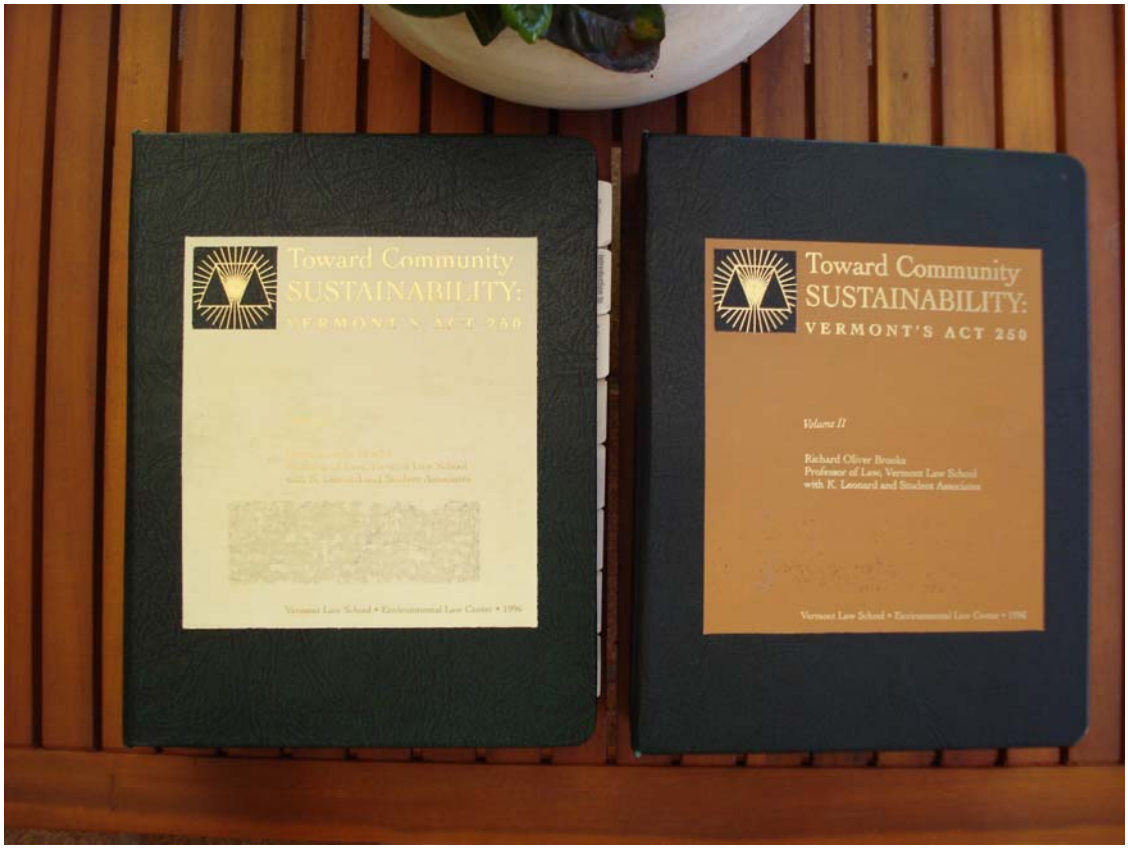
8.- The hidden issues behind the test: the weaknesses (or strengths?) of the process

Many voices have made noise either to celebrate or to sharply criticize Act 250 and its outcomes on the long term. On the whole, the first ones recognize that it could be much better in many aspects, and the second ones that it ain´t that bad. Moderates of both sides usually keep on welcoming it and celebrating it happened when it happened but emphasize (most times under- or overemphasize) particular aspects of the details of the small letter of the Act and the more or less non-expected or intentional side-effects that in particular settings or issues it has produced. We will visit only those questions that try to focus on "the big picture"

As JAN ALBERS has summarized it: "*While Act 250 has not acted as a brake on development, it has helped to ensure that the environmental and societal aspects of larger building projects have been thoroughly addressed. Some argue that it has not slowed growth enough (…) [and that] landscapes all around the state have been ruined by the accumulation of badly planned and poorly sited small projects. (…) [On the other side], the act is periodically critizied by developers and property rights activists who argue that its strict land use provisions act as a harmful barrier to the State´s economic growth*".

Similar balanced opinions are strongly held by prominent scholars or institutions, such as, for example, the Land Use Institute at the Environmental Law Center of **Vermont Law School**, the proud private institution that happens to be one of the leaders of the U.S. academy on issues concerning land use and development, energy law & policy and other related areas of law, and not only on environmental law (an area were it is, at least in July 11, 2009, the #1 Law School, if the classic America´s 2010 Best Graduate Schools as assessed by the classic U.S. News & World Report).

The Institute, established in 2005 at the Environmental law Center, and directed by Prof KINVIN WROTH, has been built on the solid tradition of the works of RICHARD O. BROOKS. Having dedicated great part of its effort on thorough and in-depth short and long term analysis and research on VT´s land use policies and their interrelation with the legal processes generated around Act 250, its conclusions have special authority. The final sentence of the already cited *opus magna* **Toward Community Sustainability:Vermont´s Act 250,** are clear-cut describing Act 250 as a model for the Nation, …but one that has still much to improve: "*In short, Act 250 offers a model community land use and sustainable environmental law for the nation, but there is much room for improvement*".



"*When economic conditions are good, you hear less moaning about Act 250 and the Environmental Board,*" said, in 1998, Vermont Natural Resources Council´s STEPHEN HOLMES. "*During a time of economic downturn, a lot of people in the business community say Act 250 is to blame for the troubles*" (see J. Kevin, 1998).

BRIAN SHUPE, also from VNRC (Sustainable Communities Program Director) has a very similar opinion (personal conversation held in August 2009, although the Vermont Supreme Court´s decision in *JAM Golf LLC. vs. City Of South Burlington,* analyzed later in the next item –on planning- brought new challenges to the arena immediately afterwards).

That general understanding cannot be used though as an excuse not to explore some of the identifiable problems that can stand an analysis for themselves as self-standing issues.

The list can be infinite. Focusing on the most relevant ones, the authors suggest the following:

1.- Scenic beauty as a result of holistic approaches: Criterion 8 cannot be understood as the main factor if isolated from many other criteria.

2.- In particular, VT´s legacy of landscape management is in great part due to the strict policy on "compact towns", which cannot be implemented only through the enforcement of Criterion 8, but rather as an issue of planning and of implementation of Criterion 10 or even as a question of implementation of a different statute: Act 2000.

3.- Unfortunately, the social and economic costs, as in other areas related to environmental law (such as Superfund, the federal mechanism to help clean-up toxic contaminated sites –on the comparison on how it works when compared with European an Spanish and European legal and economic clean-up mechanisms, see a published work by Friends of Thoreau Scholars in the Section on Works Cited) are in many instances linked to the legalistic technicalities-without-sense quagmires that Act 250 has generated for property owners as buyers-sellers of any piece of real estate in VT. They have to do with the exact timing of the entry into force of Act 250 itself and its amendments and to which property status are legal provisions applied.

4.- Related to the previous one, but different from it, in terms of legal policy the issue of timing, and in particular when the permit is asked for (previous to the construction or to legalize it) has also been one of the most difficult issues that the Environmental Board had to deal with in the Second Quechee Lakes Case (The Ridge Condominium) a decision that highlighted the unavoidable value-charged nature of supposedly neutral principles in landscape related decision making. A broader issue is how to assess community standards that have ceased to be traditional because of small incremental changes through time, whether in the spatial pattern of development (strip development) or in the nature itself (mainly agricultural, mainly second-hand residential, mainly recreational resorts etc) of towns.

5.- The nature itself of democracy: Act 250 has been hailed as one of the most clear examples of "a citizen-based response to rapid growth and development" (See Richard O. Brooks, et al, 1997; or Robert Sanford & Hubert B. Stroud, 1997).. But, who decides ultimately? What are the powers of representative local governments? Is it unavoidable to recognize that landscape as a public policy needs to be on the hands of supramunicipal bodies? That closeness to citizens does not protect landscape? Does this imply a technocratic approach to power (who makes the findings of facts: experts, interested parties, lawyers, judges…?) or is it only a political compact question: state versus local home-rule allocation of power? Does Act 250 really allocate power in supramunicipal hands in VT? Is there any connection between the allocation of power and the prevention of corruption as one of the unavoidable burdens of democracy?

6.- What about "real" biodiversity: wildlife in VT, is it really possible to restore wildlife or will VT have to acknowledge the ultimate "artificial" (man-made) character of its landscapes?

7.- The ultimate issue: Is VT´s economy thriving? Are Vermonters prosperous in the most classic economic sense? Is the mix of primary (agriculture), secondary (industry) and tertiary (commerce, e-economy, tourism…) sectors a balanced one? Can VT be singled out as a first world economy notwithstanding its clear rural landscape image?

8.- The maintenance of agricultural soil available for farming, since it would be impossible to maintain and "manage" VT landscapes without dedicating a large acreage of surface to agricultural uses.

These questions and issues (and many others) could justify long term in depth analysis and study. The section on Scholars´ Debates will introduce the reader to ecah of them. We remand the reader to that Section. There are, though, two additional items that this

introductory Main Page of the Case Study needs to wrap up before directing the readers to the next Sections: 1.- What is the role of planning (*versus* adjudication)? 2.- What has been the life of Act 250 in VT´s legislature: the amendments and the current *status quo*.

9.- The role of planning: what is missing in Vermont´s landscape policy? The initial failure and the subsequent amendments of Act 250.

The effort made by the Environmental Board paid an enormous service. But it is not the only body in charge. As Richard O Brooks has said, "*to promote sustainability and hence to promote [its] ideals, the legislators of Vermont (in passing and amending Act 250) and the citizens´ boards (reviewing developers´ applications) must face difficult problems of justice in which some persons are harmed and others benefited no matter what decision is made. The Environmental Board and Commissions resolve these kinds of conflicts on a careful case-by-case basis…*". But, what about local communities themselves? Do the have instruments to envision the same ideals that these other listed bodies try to protect? Are sustainability and landscape protection planned?

We have seen that, under the Quechee test, community standards as expressed in plans have some role But, which role? In comparative terms planning, land use planning, in Europe tads to be binding and totally determining of the legal outcome of the permit: construction is either allowed or not allowed by the plan. So landscape policies have a niche role only to the extent that they either 1) introduce an additional layer of public power control, additional to the land use plan/permit and autonomous (in terms of what they ask for: scenic beauty and integration into the social and visual context, reflecting the cultural identity expressed in terms of sense of place for the community that self-identifies with its surroundings) from the land use plans and permits which simply reflect the consequences of development planning that takes into account most other things –including socio-economic development and cultural issues- but that historically has simply forgotten about landscape; or 2) force the existing planning mechanisms to integrate landscape policies within the making of the land use plans (landscape studies, catalogues, plans… become then a necessary element in terms of process and results that conditions the legality itself of the land use plan if these fail to follow that parallel planning process that looks –only, and exclusively- to landscape; it re-examines the land use plan, before its final stages of approval, form the point of view of landscape, and introduces conditions on the land use plan itself). What is the process in VT?

First of all Act 250 created three layers of plans: at the State level; at the regional and local level; and at the private level (the developer had to base the permits applications on masterplans or other types of planning). The State Plans envisioned by Act 250 (in particular after its 1973 and 1988 amendments) was the following. The State had to approve 3 plans: 1) the interim land capability plan; 2) the capability and development plan; and 3) the land use plan.

The first one, the **State interim land capability plan**, was quickly approved (in 1972) and showed for the first time the trends that VT was suffering and where the concentration of residential and institutional land was happening and identified VT´s best preserved unique ad critical natural areas, and the best agricultural and forest soils. The Plan itself stated that its maps were to be only supplementary and subject to

modification by spot information in terms of what they contained and its legal force was limited by Act 250 to help guide the environmental commissions and to serve as a basis for the capability and development plan. This "guiding" value applied also to the more detailed "strong environmental policies" adopted as part of the plan (see Richard O Brooks, et al, 1997, at Vol I, Ch XI, pg 2, and FN 12, pgs 30-31).

The second one, **the State capability and development plan,** that should govern the development of the State, was adopted in 1973 as an explicit amendment to Act 250, and included 19 policies on planning for land use and economic development, resource use and conservation, and government facilities and public utilities. Act 250 (as amended) is explicit in denying the plan (and its policies) binding force for the District Commissions: "the legislative findings [and policies] (…) shall not be used as criteria in the consideration of applications by a District Commission or the Environmental Board".

But "criteria" does not mean guidance. The Environmental Board has been eager to link its setting of community standards and its interpretation of the 10 Criteria "taking into account" the plan and its content, "an indirect way through which the plan enters into decision-making under Act 250" (Richard O, Brooks, et al, 1997, Ch XI, pg 4.)

The third one, **the State land use plan**, to be developed taking as its basis the capability and development plan, would zone VT (determining the forestry, recreation, agriculture or urban purposes" of the land, would coordinate regional and local plans and land use ordinances and by-laws, which, once the State plan was approved, should farther implement it through those instruments as well as through other usual land control mechanisms such as subdivision regulations, zoning, non-regulatory incentive based instruments (public acquisition of land, conservation easements, tax relief or other incentives for private land owners who allowed public use of their lands and other taxation instruments).

The "mapped plan to guide VT´s development" was never born. The vagueness of its maps, the loss of control by municipalities, and even the change of philosophy of how planning should accommodate democracy (bottom-up planning *versus* top-bottom planning)… triggered a political debate that forced the legislature to reject it in 1975 and 1976 which led to the 1983 amendment of Act 250 deleting the statutory requirement of the plan.

This failure to implement State planning unbalanced Act 250. For some Vermonters that is not a special problem. As Cindy Corlett Argentine put it, in 1998, "*Act 250 initially called for a state land use plan to be drafted. Statewide planning was to accompany the permitting system created by the Act. The state plan would provide a larger, Statewide perspective, and the permitting system would allow specific, local impacts to be considered. (…) [The] state land use plan has not been adopted to guide the permitting system. However, state interests are incorporated into the review process by the participation of state agencies*."

Others were, at the same time of "celebration" of Act 250´s 25th birthday, more reluctant to admit that the lack of State-wide planning was a good thing. As Richard O. Brooks put it, in 1997, "*the abandonment of the state land use plan was a watershed event in the history of Act 250. As a consequence, for the past twenty-five years, the law*

has been administered on a permit-by-permit basis, with no statewide comprehensive planning controls, with no comprehensive ecological vision of the state. Supporters of a comprehensive state land use plan argue that current land use developments are not coordinated on a statewide basis and that the cumulative and collective impacts of development upon different natural areas of the state-developments which are allowed on a permit-by-permit basis, are not assessed. Opponents to a Statewide plan argue that the detailed information for such a plan is not available, and that such a plan would be an undesirable "top down" exercise of state power." (Richard O. Brooks et al, Vol.II, Ch.XI, at 7).

In general, though, the most extended opinion was that the system ended up "*lack[ing] a planning component which would allow municipalities the foresight to assess impacts of all potential and proposed developments [rather than] . . . address[ing] only . . . individual developments and their impacts as they arise*." (Jessica E. Jay, at 950). "*Because permit review under ct 250 is project triggered, its focus is, figuratively, on the trees rather than the forest. Similarly, in the absence of the Statewide development plan for which the Act originally called, reviewing boards and courts have created a common-law patchwork of decisions interpreting and applying the Act's permitting criteria*" (Jack Kraichnan, at 589).

This new *status quo* generated by the lack of regional planning was compensated in part, at least with a new Act (**Act 200,** Vermont Growth Management Act or "Act Relating to Encourage Consistent Local, Regional and State Agency Planning", No. 200, **enacted in 1988**) which, amending Act 250, reinforced both State guidance via the revisiting of several polices and criteria, and, in particular –which had a very significant impact on the implementation of landscape policies- of Criterion 10.

Most critics coincide in the immense value that Act 200 provided as a partial solution towards the integration of State views in local and regional planning decision-making processes and in the guidance that it provided to the District Commissions and the Environmental Board.

For example, also in those years of the post mid-nineties, Cindy Corlett Argentine acknowledged that value of Act 200: *"[Notwithstanding the lack of State-wide land use plan,] regional interests are incorporated through a requirement that development comply with regional plans. (A related law, Act 200, has subsequently provided tools for strengthening local, regional, and state planning.) Nonetheless, municipalities still have considerable authority to shape their own futures through the Act 250 process. Criterion 10 requires that proposals comply with municipal plans, and Criteria 6 and 7 require that projects not place undue burdens on municipal services. In addition municipal officials have a right to participate in all criteria as automatic parties to permit applications."*

The same can be said of Richard O. Brooks´ comments on the "watershed" impact of the abandonment of the State land use plan by the legislature: "*With the abandonment of "top-down-planning" based upon state comprehensive plans, Act 250 has turned to reliance upon more decentralized regional and local plans and developers´ master plans. For the past two decades, the capacity of Vermont´s towns and cities to plans has been limited by lack of monies and staff. Unlike other New England states, most Vermont municipalities did not receive federal funds for planning in the 1960´s. As a*

consequence, both regional and municipal plans have been sketchy at best, offering limited guidance for Act 250 permitting under the Criterion 10 requirement for conformity with regional and municipal development plans. With the advent of Act 200 along with the gradual strengthening of local and regional staffs, and the advent of G.I.S systems, land use planning is slowly improving, and ironically, large-scale developers are often more careful planners than local towns.

Although such a decentralized planning regime may be sensitive to local environmental conditions and values, id does not permit for comprehensive statewide strategies, and consequently, there is no systematic and coordinated control of large-scale development. As a consequence, local planning, developers´ master site plans and sector plans of statewide agencies dominate Vermont´s planning arena. In short, free enterprise, weak localism, and bureaucratic planning remain the order of the day." (Richard O. Brooks et al, Vol.II, Ch. XI, at 7).

Act 200, and its contribution to VT landscape policies with it "compact town" requirement will be revisited in the Scholars´ Debate Section of this Case Study. The issue of the power allocated via regional or town planning to local communities in VT (and how it integrates Criterion 8) is worth, though, of a brief analysis.

Regional and local planning was regulated in VT before Act 250 (**Vermont Planning and Development Act**, Nº 334, 1967) but adoption of land use plans and land use controls remained an option. Act 250 simply added an additional layer of control but did not change this principle, although it was perceived by many municipalities as an encroachment upon their police power, specially because it submitted municipal projects to the same controls as those of private promoters of developments. The Vermont Planning and Development Act was also amended by Act 200 precisely to reinforce local planning power (other specific activities, such as waste facilities in 1990, or incentives for downtown developments in 1998, were also enacted through other acts or amendments over time.). Act established a coordinated, comprehensive planning process and policy framework to guide decisions by municipalities, regional planning commissions, and state agencies. Municipalities are encouraged to establish planning commissions and manage land use in accordance with a town plan; town plans are coordinated by regional planning commissions; and regional planning commissions are ostensibly overseen by a council, all under a voluntary review system. Implementation dragged its feet. For example, in 1998 Act´s 200 Council of Regional Commissions remained unfunded (Kraichman, at 589).

Whenever a municipality adopts a plan it is enabled to adopt bylaws which include zoning regulations, maps with legal force, and subdivision regulations which might conflict with the 10 Criteria or that, to the contrary, might add or simply run parallel to them (thus implying the need of two permits, the local –in accordance to plan- and the Act 250 permit- what is referred to in VT as "the double veto") [This also applies to the Criterion 10 compliance on "compact towns" so the District Commissions and the Environmental Board / Court can deny a permit even if it complies with local plans and zoning and subdivisions.]
The complexities of the interaction of municipal, regional and State authorities gave birth to a subarea within VT´s land use law that requires good expert knowledge on the intricacies of the process (see Richard O. Brooks et al, 1997, Vol II, Ch XII.).

As a concluding general assertion it could be said, that

- land use regulation in VT really falls under two different systems: a) State-wide permits based on Act 250; and b) local regulation enabled by the VT Planning and Development Act;

- although Act 250 compliance is mandatory, adoption of local land use plans and controls, such as zoning, is voluntary;

- so, the fact that Act 250 might not be applicable to a project (for example to small developments –see the Scholars´ Debate Section of this Case Study-) does not mean that it is has no control It might fall within the scope of a local plan and regulation;

- at the same time, in some cases, the existence itself of State jurisdiction –the submission to Commissions and Board / Court controls of Act 250- depends on whether there is or nor local planning: in a municipality with bylaws only projects of more than 10 acres triggers Act 250 jurisdiction; and a municipality with zoning and subdivision bylaws can elect to have Act 250 jurisdiction extended only to projects of more than 1 acre –these are the so-called "The One and Ten Acre Rules";

- and, also, at the same time, although local and regional planning is taken into account by the enforcers of Act 250 if the project is submitted to Act 250 District Commission approval, then local and regional planning is taken into account as an community standard but does not mandate necessarily the content of the decision neither of the Commission nor of the Environmental Board (neither, of course, nowadays, of the Environmental Court) unless planning governs the issue under the previous rules.

But still, the political will to try to rationalize decisions on development, and ultimately to provide investors and citizens –as well as to rationalize State investment- with a clear picture on which areas in VT are appropriate for growth, and the attempt to provide VT towns with an operational scheme to make compatible growth with the preservation of its rural character, which were the main two visionary goals of underlying Act 250, persisted.

In 2006 a new attempt to accomplish that function was tried. In May, the Act Relating to Creation of Designated Growth Centers and Downtown Tax Credit Program, No. 183, 2006, known as **Act 183**, was enacted. It was an attempt to go back to the origins and recapture integrated decision making: "*It was recognition of the need to encourage and facilitate coordinated, centralized growth at the municipal level that led to Act 183.*"(Jack Kraichnan, at 590). Triggered by a sort of *anti natura* coalition of business and environmentalism (the Vermont Business Roundtable and Vermont Forum on Sprawl -now called Smart Growth Vermont-) and a strategic policy document made public after several years of working together (known as "the New Models Project"), Act 183 attempted to institutionalize **smart growth principles** that would overcome the piecemeal common law case-by-case approach and build farther on the potentiality of municipal democratic planning.

New Models Project´s smart growth principles

1. Uses land efficiently.

2. Through planning and design, meets the needs of the people it will serve, and is economically viable.

3. Uses existing infrastructure to the fullest extent.

4. Is connected with other development, and/or integrated into existing and planned growth centers.

5. Reuses existing structures to the fullest extent, and does so creatively.

6. Promotes mixed uses, including existing or new workforce housing in or near the proposed development.

7. Represents good design that integrates into the community, respecting community desires and fitting in terms of scale, aesthetic qualities, and character of surroundings.

8. Recognizes the importance to Vermont of environmental quality.

9. Enables alternative forms of transportation, minimizes vehicle trips, shares parking with other businesses and uses, and minimizes curb cuts

Act 183 statutory smart growth principles

(A) Maintains the historic development pattern of compact village and urban centers separated by rural countryside.

(B) Develops compact mixed-use centers at a scale appropriate for the community and the region.

(C) Enables choice in modes of transportation.

(D) Protects the state's important environmental, natural and historic features, including natural areas, water quality, scenic resources, and historic sites and districts.

(E) Serves to strengthen agricultural and forest industries and minimizes conflicts of development with these industries.

(F) Balances growth with the availability of economic and efficient public utilities and services.

(G) Supports a diversity of viable businesses in downtowns and villages.

(H) Provides for housing that meets the needs of a diversity of social and income groups in each community.

(I) Reflects a settlement pattern that, at full build-out, is not characterized by: ….

[see next Box below]

Act 183 also describes what smart growth is not (see Box below).

“Negative” statutory definition of smart growth

"Smart growth principles" means growth that:

(I) Reflects a settlement pattern that, at full build-out, is not characterized by:

(i) scattered development located outside of compact urban and village centers that is excessively land consumptive;

(ii) development that limits transportation options, especially for pedestrians;

(iii) the fragmentation of farm and forest land;

(iv) development that is not serviced by municipal infrastructure or that requires the extension of municipal infrastructure across undeveloped lands in a manner that would extend service to lands located outside compact village and urban centers; and

(v) linear development along well-travelled roads and highways that lacks depth, as measured from the highway

Planning remains voluntary but incentives imply the designation of **Growth Centers** in areas within the municipality, which streamlines development approval since they are

submitted not to the 10 Act 250 Criteria (and the Quechee lakes test under Criterion 8 as well as the rest of such tests developed for the rest of 9 Criteria) but to the standards and requirements designed by the approved plan, since it entitles developer to apply for a more general master plan permit covering an entire development and allows for a declaratory pre-permit that lasts for five years if granted. Incentives for the municipalities to apply include tax credits for renovation of pre-1983 buildings in town centers and technical assistance for the municipality to do the planning. It also gives them priority in many State grants programs (for infrastructure, transportation, affordable housing construction assistances, brownfields…).

Municipalities can apply for the status of Growth Center if they approve plans in accordance with the statutory smart growth principles (see Box above) and have other characteristics such as balanced mixed uses, public spaces to gather, and others, within a densely developed, compact area (see Box Below).

A Growth Center contains substantially the following characteristics:

(i) It incorporates a mix of uses that typically include or have the potential to include the following: retail, office, services, and other commercial, civic, recreational, industrial, and residential uses, including affordable housing and new residential neighborhoods, within a densely developed, compact area;

(ii) It incorporates existing or planned public spaces that promote social interaction, such as public parks, civic buildings (e.g., post office, municipal offices), community gardens, and other formal and informal places to gather.

(iii) It is organized around one or more central places or focal points, such as prominent buildings of civic, cultural, or spiritual significance or a village green, common, or square.

(iv) It promotes densities of land development that are significantly greater than existing and allowable densities in parts of the municipality that are outside a designated downtown, village center, growth center, or new town center, or, in the case of municipalities characterized predominately by areas of existing dense urban settlement, it encourages in-fill development and redevelopment of historically developed land.

(v) It is supported by existing or planned investments in infrastructure and encompasses a circulation system that is conducive to pedestrian and other nonvehicular traffic and that incorporates, accommodates, and supports the use of public transit systems.

(vi) It results in compact concentrated areas of land development that are served by existing or planned infrastructure and are separated by rural countryside or working landscape.

(vii) It is planned in accordance with the planning and development goals under section 4302 of this title, and to conform to smart growth principles.

(viii) It is planned to reinforce the purposes of 10 V.S.A. chapter 151.

But besides committing to those principles and mixed uses under the compact village principle, the land to be designated as Growth Center must be located within (i) a designated downtown, village center, or new town center; or (ii) an area of land that is

in or adjacent to a designated downtown, village center, or new town center, with clearly defined boundaries that have been approved by one or more municipalities in their municipal plans to accommodate a majority of growth anticipated by the municipality or municipalities over a 20-year period.

It is clear that Act 183 keeps on building on Act 200: the municipalities are offered incentives to determine their own growth patterns as soon as they adjust to principles of sustainability through planning. But is it enough to overcome the lack of state-level land use planning that Act 250 originally promised?

As Jack Kraichnan has put it, "*Act 183's apparent comprehensiveness does not, however, mean that Vermont's current land use regime is sufficiently proactive to guide, rather than merely respond to, the state's growth. In fact, by relying on municipalities to initiate all of the planning, Vermont's entire land use planning mechanism remains, by definition, reactive. Absent a proactive, state-level plan to inform their application, the tools and incentives Act 183 provides-comprehensive though they may be-cannot be used to their full potential. (…) Although Act 183's detailed codification of smart growth principles is a step forward, articulation and facilitation of a proactive, Statewide land use plan remains an unfulfilled promise of Act 250. Absent this big-picture perspective, the land use planning regime that Act 183 augments still "leave[s] Vermont without a Statewide comprehensive ecological vision and without control of cumulative statewide impacts of growth*." Jack Kraichnan, at 600.

But VT is a peculiar State. It may well be that its communities will never accept top-down land use regulation by the State, and is that is the case, … Does VT´s future lie in a the "*pluralistic approach accept[ing] the multiplicity of planning efforts, seeking to coordinate such plans through strategic plans and through ad hoc coordination between specific plans*" that Richard O Brooks described in 1997 (See Richard O. Brooks et al, Vol. II, Chapter 11, pgs 28-29; also cited by Jack Kraichnan, at 601.)

"Winter's Glow". "*It is an imaginary place reminiscent of the hills in northern Vermont where glimpses of Lake Champlain can be seen in the distance.*"(Anna Vreman)

10.- To the Future and Back: Landscape Policy Still in the Making?

Act 183 is probably not the end of a long journey but one more milestone toward a balanced system that takes its time to mature. Are 40 years enough for a policy to consolidate? The fact that Act 250 will enter into the forties on April 4, 2010, still as a subadult should not be scary as soon as the final goal, maturity, is still on sight and the adolescent does not go wild forever.

Three important events happened since 2006, though. The first two are related to VT´s perennial attempts to find a balance. The first is a new intent by the legislature; the second one introduces a new actor which has decided to enter the scene: the Supreme Court of Vermont, that used to pay deference to the findings and conclusions of law of the Board and the Environmental Court, but that in August 22, 2008 surprised everybody by making local planning much more difficult than expected by introducing a new test (what could be called "the JAM Golf planning test"). The third one implies the local or internal "unique" way of internalizing into VT´s political arena an external factor: the 2008-09 global economic crisis, and what it will mean for VT when combined with what is seen by many, at least by the Governor, as unreasonable restrictions to investments.

1.- In 2007 the legislature rejected Governor Douglas's "new neighborhoods" program, which would have exempted most residential development from Act 250 review. Meanwhile two other critical events happened: in the process of rejection of the 2007 (actually of an amendment backed by several environmental organizations such as VNRC, Champlain Housing Trust, Conservation Law Foundation, Housing Vermont, Smart Growth Vermont and the Vermont Land Trust, as well as some business groups, that was introduced by the House but rejected by the Senate) the legislature struck a deal: the so-called "housing bill" (H.863) that went into effect in 2009 and that mandates to form a study committee to explore how Act 250 can better address these important land use issues: "*Study Act 250 criterion 5, relating to traffic, criterion 9(H), relating to scattered development, criterion 9(L), relating to rural development, and other criteria identified by the committee, to determine the effectiveness of those criteria to promote compact settlement patterns, prevent sprawl, and protect important natural resources, and to make recommendations to improve the effectiveness of those criteria in preserving the economic vitality of Vermont's existing settlements and preventing sprawl development*."

The study is being done and the environmental groups are collaborating, although they assert that there are two non-negotiable basic principles: (1) that any exemptions from State review (Act 250) of housing developments would be limited to smart growth locations in communities that have demonstrated an ability to plan for and manage development in a responsible manner; and (2) that eliminating regulatory oversight in smart growth locations should be balanced with corrections to those Act 250 criteria that have been ineffective in preventing rampant strip development along the state's highways and poorly designed residential subdivisions that devour farmland.

2.- In August 22, 2009, the Vermont Supreme Court issued a decision (***IN RE Appeal of JAM Golf, LLC,*** 2008 VT 110) which will certainly have far-reaching implications for VT communities engaged in land use planning. The Supreme Court struck down a South Burlington zoning bylaw protecting an array of natural resource features,

including wildlife habitat, on the basis that the bylaw did not specify sufficient conditions and safeguards to guide applicants and decision makers.

The project was a planned residential development (PRD), an 18-hole golf course, involving over 400 acres of land on two side of Dorset Street in South Burlington. The project had been under development since 1996. The particular case involved a proposed amendment to the PRD application to incorporate a new 10 lot subdivision, in what was the last remaining knoll of trees, a prominent knoll of trees which had originally been planned to be preserved as important to the pre-existing natural landscape of the project. In the case before the environmental court, a good portion of the City's presentation focused on the mandate of the bylaws to "protect natural resources." There were two aspects. The first is that the plan provided a wildlife corridor link between the forest to the north of the project and other open lands and wildlife habitat to the south. The other aspect focused on the scenic views from public places.

The Environmental Court decision fully supported the analysis presented by the City agreed with it and denied the request for the 10 proposed house sites. The City of South Burlington Zoning Ordinance Section 26.151 mandated that "A Planned Unit Development and Planned Residential Development shall comply with the following standards and conditions: g) Will protect important natural resources including streams, wetlands, scenic views, wildlife habitats and special features such as mature maple groves or unique geologic features."

Then the matter went to the Vermont Supreme Court, which focused on the meaning of the word "protect" [without looking elsewhere in the bylaws to give meaning to that term and aid in the application to the particular project, see Steve Stitzel, 2009], and declared [without having any constitutional issue been raised previously at the Environmental Court, see Id.] that under constitutional due process, the standards set on the bylaws were too vague, and considering that lack of standards and guidance led to "unbridled discrimination" in their application (citing previous cases) amounting to a due process violation declared them unconstitutional "on their face", not as applied (which means that the Zoning Ordinance was void itself, which is the major change of the rules set in its own precedents): landowners must be given fair notice of what it can and cannot do with their land.

The Supreme Court had addressed three critical issues: (1) Whether expert testimony on wildlife corridors was admissible; (2) whether the provisions of the ordinance concerning protection of scenic views and wildlife habitats were valid; and (3) whether the provisions of the city plan were appropriately incorporated in the zoning ordinance and were sufficiently specific to be enforceable. The Supreme Court held that the expert testimony was admissible but that the ordinance provision protecting scenic views and wildlife habitats lacked sufficient standards to be enforceable consistent with due process and that the provisions of the city plan, though properly incorporated in the ordinance, were similarly lacking in standards and too ambiguous to be enforceable.

Vermont Precedents Cited by the Supreme Court of Vermont in JAM Golf

Town of Westford v. Kilburn (1973):Zoning ordinance provision authorizing Board to allow commercial uses upon determination that they "promote the public health, safety, convenience and welfare" was an unlawful delegation of discretion in violation of the State enabling act.

State v. Chambers (1984): Statute authorizing state's attorney or chief medical examiner to order an autopsy when in the interest of the public health, safety and welfare was not an unconstitutional delegation of discretion.

In re Miserocchi (2000): Court narrowly construed bylaw provision concerning nonconforming uses to avoid an issue presented by a "standardless approval procedure".

In re Handy (2000): Court invalidates statutory provision containing no standards to the granting of consent by selectboards for development impacted by interim zoning bylaws.

The applicant had challenged the Environmental Court's interpretation and application of the provision of the City's zoning ordinance protecting scenic views and wildlife. It had concluded that the project as proposed at this density and surrounding a roadway therefore does not meet the requirements of the said Section 26.151(g) of the Zoning Regulations. The project woodland is an important wildlife habitat in a pivotal location connecting habitat to the north with habitat and open land to the south. It is also an important special feature as a mature grove of mixed species on a knoll in the landscape. Despite the fact that the golf course fairways and former agricultural fields are also "open land," this feature provides a very different kind of important visual or scenic interest in the landscape, worthy of protection under this section.

The Supreme Court, however, did not reach those issues, because it held that the ordinance provided no standards to guide a determination of the degree of protection required. Since the ordinance permitted some development in the affected area, protection could not be absolute. Accordingly, there should have been some guidance to landowners that would have allowed them to know how to strike the balance between protection of "important natural resources" and development: "Unfortunately, the ordinance as written is essentially standardless. Although applicant challenges the court's interpretation of the ordinance, rather than attacking the ordinance itself, Section 26.151 is flawed, since it provides no standards for the court to apply in determining that would constitute a failure to "Project" the listed resources".

For the City of South Burlington and for JAM Golf, LLC it meant that only compliance with other subsections [(h) and (i)] of Section 26.151 remained an issue. Subsection

"The question for drafters" says Professor KINVIN WROTH, Director of the Land Use Institute of Vermont Law School, "*is how to attain the requisite degree of specificity, a question to which the cases cited by the Court [and the Case itself] give little guidance*." (Kinvin Wroth, 2009, "In Re JAM Golf: Good News…"). "*The bottom line,*

seems to be, in your plans, you can say what you like about visions and goals or what you believe to be necessary and important, but if the plan is to have regulatory force under Act 250 or because there is no regulation in the town or because as in JAM Golf the plan is incorporated in the bylaws, then the plan as well as the bylaws should lay out specific requirements those who are subject to the regulatory impact can understand and follow." (Kinvin Wroth, 2009)

The new major challenge, under Kinvin Wroth´s view, is the following:

"*What is specific, how specific does one have to be in the drafting and what are the sources for that specificity; the statutory guidance [in Chapter 117 of Act 250]? Model ordinances that various organizations have produced? That is the challenge. The challenge is a critical one for every one in this room at three different levels at least:*

1) *In reviewing existing plans and bylaws, to see whether they meet those standards,*
2) *The drafting and amending of new bylaws pursuant to those standards, and*
3) *Finally under the review of a local panel, the Environmental Court or the Vermont Supreme Court whether the language viewed in hindsight as applied in a particular situation satisfies those standards."*

The area to be developed in South Burlington

The Environmental Court had to revisit the JAM application since the Supreme Court remanded it for this Court to address the proposed project's compliance with the other subsections of § 26.151 that remained at issue.

Subsection (h) required that the proposed project "[w]ill not have an undue adverse effect on the scenic or natural beauty of the area, [and] is aesthetically compatible with surrounding developed properties…". Subsection (i) required that the proposed project "[w]ill provide convenient allocation and distribution of common open space in relation to proposed development and will conform with the City's recreation plan."

JAM Golf, LLC, continued to argue that both of these subsections, and it should be noticed that Subsection (h) simply incorporates Criterion 8 (and, thus, the Quechee Lakes test?) into he language of the Zoning Ordinance, are vague and standardless, and cannot support a denial of the application, for the same reasons as discussed by the Supreme Court regarding subsection (g).

What did the Environmental Court do concerning this new claim?

The decision (Docket No. 69-3-02 Vtec) was issued on June 12, 2009, and applying the JAM Golf Test, the Environmental Court declared that Subsection (i) contained also too vague a language concerning part of its language, that could not be filled in through interpretation by looking a other sections of the Ordinance, other plans of South Burlington, or local or State regulations or statutes:

"The parties have not identified any statute, in Vermont or elsewhere, in which the phrase "convenient allocation and distribution" is defined or even used, nor have the parties identified any judicial or administrative interpretation of the phrase. Because the phrase "convenient allocation and distribution of common open space" is standardless and vague, that portion of § 26.151(i) cannot be enforced as to the application at issue in the present appeal."

But concerning Subsection (h) the Court almost "sanctified" the value that tradition and history had given to the Quechee Lakes Test (it qualified it as a "historical usage", "upheld as recently as 2008") and concluded exactly the opposite: "Because § 26.151(h) uses identical language to the corresponding criterion in Act 250, and the Quechee test provides standards which can be applied to determine whether a proposed project will have an "undue adverse effect on the scenic or natural beauty of the area" and whether it is "aesthetically compatible with surrounding developed properties," § 26.151(h) is not too vague to be enforceable."

The circle is closed: The Quechee Lakes test is not only the criterion to be used if there is no local planning, … but also the test to be used whenever the local plans, bylaws, or zoning ordinances, use similar language. But, going back to Prof Kinvin Wroth´s challenge: is it possible at all to imagine or draft a different standard (see for example, Sharon Murray, 2009), or should planners rather rely instead in the test as the abstract not unconstitutionally vague, but, just the opposite, precise enough, neutrally principled, rule of law that allows for objective decision-making.

The fact that community standards (typically democratic) ultimately have almost by necessity to remand to the test, that has been and will continue to be administered by Commissions and Courts, makes it even more necessary to analyze in depth who ultimately makes the fact finding and reaches the conclusions under the Quechee Lakes Test, which is left for discussion in the Scholars´ Debate Section of this Case Study.

3.- In January 9, 2009, journalist Peter Hirschfeld, from Vermont Press Bureau, reported that Governor James Douglas had once more brought Act 250 to the center of public debates (see Box below). What it may mean to the process set up in 2007 to reflect via the "study" is to be seen.

Peter Hirschfeld, from Vermont Press Bureau, January 9, 2009
http://www.timesargus.com/article/20090109/NEWS01/901090360/1002/NEWS01

Governor James Douglas ensured yet another session-long debate over permit reform Thursday when he blamed Act 250 for impeding economic growth in the State. Job creation and economic development were keystones last summer and fall in Douglas' re-election campaign. Delivering on promises to reduce unemployment, increase stagnant wages and bolster corporate revenues, Douglas said Thursday, will require wholesale changes to the state's sweeping land-use and development law.

"The current system remains a labyrinth, fraught with unpredictability, which threatens job creation for years ahead – unless we are prepared to make substantive changes that will modernize the system," Douglas said of Act 250 in his inaugural address.

Douglas' proposal seeks not only to expedite Act 250 proceedings but to fundamentally alter the criteria on which applications are judged. Rather than considering development proposals on their environmental impacts alone, Douglas wants the system to take into account their potential economic and social benefits as well. "It's easy to characterize applications in the negative…" Douglas said. "But to me, a permit application actually says something very positive. It says**,** 'I'm hiring.'"

Vermont Governor James Douglas

Douglas additionally said he wants to eliminate the "chilling and costly effect" of the appeals process by implementing an "on the record review" in which appeals are conducted in one formal hearing. The plan also calls for more "self-certification" and general permits, a process whereby some permits are issued with virtually no up-front vetting.

The trust-but-verify approach, Douglas said, would impose severe financial sanctions on businesses or individuals later found not to have complied with Act 250 standards. "Instead of complex front-end regulation, we can provide clear guidance to businesses and trust them to design appropriate systems … and move towards better and faster construction," he said.

The concept is already being assailed by Democratic lawmakers and environmental advocates, who called the proposal a misguided effort that scapegoats Act 250 for broader economic problems. "I am both troubled by his proposals and perplexed by his proposals," said Rep. Tony Klein, an East Montpelier Democrat and chairman of the House Committee on Natural Resources. "Because Act 250 is not the cause of our recession or economic slowdown, nor is getting rid of Act 250, which is what it sounded like to me he was saying, going to get us out of this recession."

Klein said Vermont's natural assets – the very resources Act 250 seeks to protect – offer the most compelling solution for the state's economic woes. Watering down a landmark statute designed to protect natural beauty, Klein said, is antithetical to sound economic planning.

"This is all about the underlying fundamental belief that making it easier for businesses to do what they want to do will always be the right thing to do, because the right thing is always to be profitable," Klein said. "And we have seen in this global meltdown that this belief is absolutely not true. It is a lack of regulatory oversight that has put the world into a deep recession."

Kevin Dorn, secretary of the agency of commerce and Community Development, said it's impossible to quantify the downward pressure Act 250 imposes on new development. He said though that a "mountain of anecdotal evidence" suggests would-be entrepreneurs are forgoing business plans for fear of getting entangled in Act 250 red tape.

"The labyrinth is there, and it's daunting to get through," Dorn said. "… We have story after story of businesses or individuals saying it's just not worth it."

Joe Sinagra, head of the Homebuilders and Remodelers Association of Northern Vermont, said many developers would move ahead immediately with major projects if they had more confidence in the Act 250 process.

"We're very optimistic that he's making permit reform the centerpiece of a new term," Sinagra said.

Environmental advocates, including Jake Brown with the Vermont Natural Resources Council, called Douglas' permit reform proposal a "solution looking for a problem." Brown pointed to state data indicating that less than 1 percent of Act 250 applications are denied, less than 2 percent are appealed, and the vast majority of applications are approved within 120 days of the initial filing.

Sinagra, though, said that the statistics do not take into account the number of home builders who opt not to build for fear of costly appeals, or the builders who scale back projects in order to improve their prospects with regional environmental commissions that review projects around the state

Laura Pelosi, commissioner of Environmental Conservation, said the governor's proposal could enhance resource protection in the state. By streamlining the permit process, Pelosi said, her staff would be freed up to focus on compliance.

"From a general perspective, the proposals set forth in no way undermine the very stringent standards the state of Vermont has in place," Pelosi said. "We're simply looking at ways we can shift the focus for how we're administering programs to make sure more staff are in the field to look at projects."

Klein said it's difficult to believe that catering to business interests would benefit the natural landscape. And he said the proposed reforms rob Vermonters of the only mechanism by which they can express their concerns over proposed developments.

"This process is the only avenue individual Vermonters have to get seat at the table to get their voice heard," Klein said.

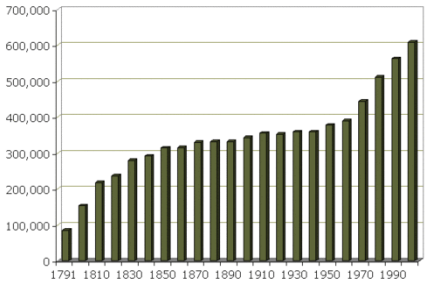
So, … the saga continues. Meanwhile is the future of VT´s landscapes doomed (or at least ominous, as Richard O Brooks characterized the situation in 1997)?

"*In the final analysis, the most pertinent question is how has Act 250 handled Vermont's growth problem? Those most familiar with the workings of Act 25(I have no doubt that it has failed to adequately manage growth. Problems associated with commercial development, residential subdivision, and traffic are spiraling out of control and have been detrimental to the quality of life in Vermont*" (Robert Sanford & Hubert B. Stroud, at 254)

Or, to the contrary, ultimately the back and forth cycles, are a question of seriously analyzing the best alternatives to a policy that protects landscapes as soon as the essence of Act 250 is maintained?

This is really the question that should be explored by outsiders who are still in the initial stages of implementation of a mandate to put in place, for the first time, a landscape policy, which is the situation were most European States and regions are right now.

Whatever gaps, imperfections, loopholes,… VT´s landscape policy had since 1970 and may continue to have, at least in was in place when the major increase in the settlement of population took place since it became a State of the Union started (courtesy of Smart Growth Vermont):



Of course, how Criterion 8 of Act 250 by itself, or combined with other Criteria and through guidelines and with planning, really is a landscape policy (?) might also be

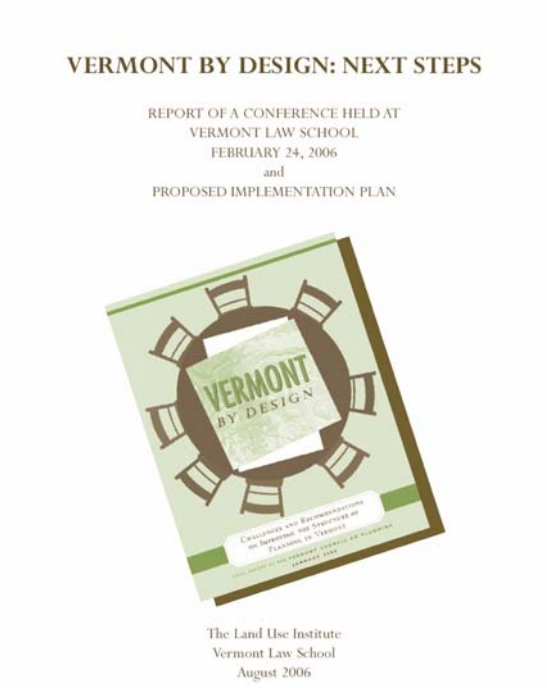
submitted to questioning, since at least from the technical side, landscape architects might dispute that fact. Landscape policy, as many other policies, such as, for example, policies on biodiversity conservation and sustainable use, imply the use of modern technologies, but this should only be considered tools that should retrofit the system and not the other way round. As Richard O Brooks said (after having "spent a thoroughly enjoyable afternoon yesterday [together with my colleagues planners] on the net going through the regional and local plans and maps in Vermont, and [after experiencing that] it was delightful to see them there, laid out and accessible [and after thinking that] as the sophistication of the populace grows in the years coming ahead, more and more people will become aware of the availability of these plans and, more importantly, the content of the plans themselves"), "it is not possible to be fully rational at all times, and this has been pointed out the multiple theories of planning (…)", and concluded much later in the same presentation: "*The alternative I suggest is to limit of the planning scope within land use by focusing upon the planning of settlements, housing, and physical aspects of the planning process. Thus, I suggest land use planners leave to others the tasks of economic planning, environmental planning, social planning. In short, land use planners would leave other kinds of planning to be conducted within other rubrics, not bringing them within the comprehensive land use planning matrix, which we're discussing at this conference. In short, I suggest giving up the dream of comprehensive land use planning and recognizing the "uses of disorder" [i.e. the uses of the fragmentation of planning phases and processes] in American society*."

Of course the advances of technology and in particular GIS (Geographic Information Systems) technology has revolutionized the methodology of landscape architecture as a science. The VT Agency of Natural Resources administers its own GIS Internet Mapping. It also has other units in charge of mapping, such as the Vermont Center for Geographic Information (VCGI) (a site with a variety of data layers including Floodplains, Land Cover/Land Use, Wetlands, Deer Wintering Areas, Vermont Biodiversity Project, and others) or the Vermont Geological Survey (VGS) (which produces geologic maps -available to the public on paper and CD- topographic maps, Vermont Bedrock Geology, Vermont Surficial Geology, Mineral Resources Geology, Geology for Environmental Planning, and others) and other units that produce many other maps., some real time maps (air quality).

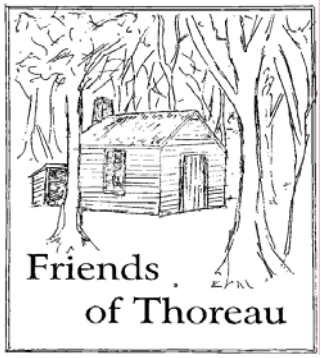
On the available maps of VT see the Section on Links to Online Resources.

The Vermont Association of Planning & Development Agencies (VAPDA) dedicates its time to foster sound planning principles that try to enhance the quality of planning as an essential element in the life for VT residents through a combination of environmental and economic planning strategies.

But, on the other side, ain´t it true that that integration of all aspects in a complex methodology what landscape planning (more an exercise of social participatory democracy than a technical design) is all about? [See i.e. the works of Christine Negra at the Snelling Center of the University of Vermont, on the interrelation of science and environmental policy in general, and on landscape policy in particular.]



Some of these issues are addressed in the Sections on Scholars´ Debate and Guiding Students´ Discussion (depending on their degree of complexity) of this case study. The rest, and many others, are left for younger students and scholars to explore.



Landscape Policies: The Case of Vermont

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SCHOLARS´ DEBATE

As the Main Page analysis of Act 250 concluded [# 8.- The hidden issues behind the test: the weaknesses (or strengths?) of the process], the list of issues raised by the application of Criterion 8 [01], in the broader context of Act 250 and other statutes, regulations and polices of Vermont, can be almost infinite. This Section revisits all of them.

1.- Holistic approaches to landscape policy making and management.

Vermont Agency of Natural Resources has a clear understanding of the mandate contained in Act 250 which it has to administer (see Box below). This mandate is a clear reflection of the "listing" approach that was at the origin of VT´s environmental policies and that has survived since then: the 10 Criteria.

Act 250, VT's land use and development control law, considers a development's effect on:

- town & regional plans
- necessary wildlife habitat
- town & regional growth
- primary agricultural soils
- municipalities & governmental services
- historic & archeological sites
- energy & water conservation
- air & water quality
- streams & shorelines
- educational facilities
- public investments
- endangered species
- soil erosion
- utilities
- waste disposal
- water supplies
- wetlands
- floodways
- forest soils
- transportation
- aesthetics
- natural areas
- earth resources

Can the effect of VT´s landscape policy be attributed to Criterion 8 [01] (aesthetics) or is it rather the combined and integrated synergistic effect of all of them?

The answer to this question seems obvious at a first glance. It is clear, for example, that VT owns the preservation of its landscapes to many statutes that have even nothing to do with Act 250. And it is normal: societies try to have their visions embedded into almost any product of their legal products. It is no wonder that VT was the fist State that got serious about billboards and the impact that they unconsciously create in the general perception of landscapes at the regional (bioregional) level.

The Main Page emphasized that legal and policy scholars acknowledge the relative value of Act 250 since it not the only Vermont law intended to protect its scenic beauty: bottle and can deposit law, backroads restoration and preservation programs, selected highway sign prohibitions, conservation easements, farmland and open space protection by statutes that regulate tax stabilization contracts and other land use tax methods etc.

But the real question is to which extent landscape policy should be the all-embracing one, or simply an additional piece of the puzzle. Why this question? Why could

anybody claim that landscape policies should dictate to some extent the rest of the planning policies?

Some would argue that it is the main value that communities have, and that if the landscape falls apart the whole economy is at risk. "*How individual communities plan for and manage land use and development will determine Vermont's economic, social and environmental well-being. The State's distinctive sense of place is largely the result of its cultural and economic heritage. This heritage created, and maintained, the state's historic landscape of compact cities and villages surrounded by working farms and forests. Unfortunately, this landscape is being incrementally lost to a pattern of unplanned, inefficient development. The result is that our farms, forests and opens spaces are being replaced by strip malls and residential subdivisions scattered far outside of our traditional centers. At Smart Growth Vermont, we believe that for Vermont to grow and thrive we need to carefully integrate growth, environmental protection and economic opportunities into our local planning framework.*"

SMART GROWTH VERMONT

Is that really true? Analyze the concept of landscape ecology, and if there is some real science behind it. It is true that biodiversity policy, as a new paradigm of sustainability economics, has been has been exploring different strategies at (what looked as in the 1990s) all levels: genetic, population, species, ecosystem…, but the reality is that ecosystem protection needs a broader operative concept to work: landscapes combine ecosystems at a larger level, and that level is precisely the one that people have in their minds as an identity indicator. People identify with the landscapes the live in and visit recurrently and regularly, for no special reason, at least once or twice per year ("new bioregionalism"). If landscape reflects community and individual choice of life style, that impacts the rest of the policies.

Should this be the approach for a Statewide planning effort? Is that what VT has not been able to articulate?

Even a the micro level, when the JAM project is analyzed, the question of whether 10 lots (or maybe less) fit into the tract of land set aside by South Burlington for wildlife protection can be addressed under appropriate landscape studies that take the ecology of the forest and the wildlife that either lives in it or use it as corridor. The fact that the Zoning Ordinance clause addressing the objective of nature protection is illegal should not lead not to have that parameter analyzed under the only clause of the Ordinance ["undue adverse effect on the scenic or natural beauty of the area" and whether it is "aesthetically compatible with surrounding developed properties," § 26.151(h) (the one that leads to the Quechee Lakes Test)] that remains in place.

The problem might be that **§ 26.151(h) of the Zoning Ordinance of South Burlington and Criterion 8 [01] of Act 250 are not really "the landscape Criterion"** but exclusively the **visual impact** one. Landscape means much more than scenic views, although if one forgets the scenic component the ecology and biodiversity ends up also suffering. But certainly the Quechee Lakes Test could have included more elements of ecology than what it finally did. Is it then that the problem could be in the excessive "cutting" of the phrases and words of the statutory language of clauses that the legal interpretative process uses? If wildlife or biodiversity is "taken care of" by a different sentence in the same clause or by a different clause, should it be addressed exclusively in those other clauses, subcriteria or concepts?

2.- The compact towns policy. **Is it an economic issue or is it environmental? or social?**

Although VT valleys (a combination of small town, agricultural lands with some facilities, mountain slopes encircling both, and forest dominating the scene) are supposed to be what Criterion 8 [01] is all about [remember the assertion in the Main Page: But, as Norman Williams & Tammara Van Ryn -Lincoln noticed, what makes VT´s Act 250 unique, are VT´s valleys, and it is no wonder that "*the Board´s most frequent references to scenic beauty are to the typical valleys, predominantly rural residential and partly agricultural.*"], ultimately this type of landscape, the one inextricably linked to VT´s sense of place, might have little to do with Criterion 8 itself.

The maintenance of compact towns, with lively downtowns in the larger ones, which is what allows for the control of city sprawl and the persistence of dominant rural landscapes, is ultimately achieved through the implementation of other provisions of Act 250 and of other statutes.

None of the celebrated 10 Criteria refer to this image of VT. Actually, the only way to incorporate any such thing (what could be called "the principle of compact towns") is through Criteria 9 and 10, and to the extent that the Capability and Development Plan or the local or regional plan adopts that strategy:

"(9) Conforms with the Capability and Development Plan which includes the following considerations:(A) The impact the project will have on the growth of the town or region: (B) Primary agricultural soils; (C) Productive forest soils; (D) Earth resources; (E) Extraction of earth resources; (F) Energy conservation; (G) Private utility services; (H) Costs of scattered developments; (J) Public utility services; (K) Development affecting public investments; and (L) Rural growth areas.

(10) Is in conformance with any local or regional plan or capital facilities program."

Norman Williams & Tammara Van Ryn –Lincoln´s assertion (to which Richard O. Brooks agrees, see Id et al 1997, Vol II, Criterion 8, at 3) is nevertheless right. It is under the Quechee Lakes Test that the Board ultimately introduces the "ideal" of New England (or rather of VT) compact towns, and it is done in the first part of the test the one that determines if the effect of the project is "adverse"[Remember the test: *The cornerstone is the question: Will the proposed project be in harmony with its*

surroundings? will it fit the ***context*** *within which it will be located? If a project fits in its context, it will not have an adverse effect*.]

In any case, the paintings of VT´s artists placed in the main page abound on the description of that statutory ideal. Anna Vreman´s paintings of is also a perfect example.

"Hilltop Village." "*It is based on the village of Orwell, VT."* (Anna Vreman).

Criterion 10 Cases certainly reinforce the ideal:

IN RE: Swain Development Corp., and Philip Mans, August 10, 1990, #3W0445-2-EB: The Board applied provisions in a regional plan which stated that commercial activities "should"" be in village centers to deny a proposed development under Criterion 10.

IN RE: Accord, Waterbury Shopping Village, Inc., July 19, 1991, #5W10678-EB: The Board denied a project based on regional plan provisions that stated "*It is recommended* that future high intensity development *be guided* towards the service areas of [wastewater] systems…." and "New development outside existing settlements *should* be planned so as to respect the historic settlement pattern of compact villages and urban centers separated by rural countryside".

So, … the democratic process (see # 5 below) has nothing to do with the decision to maintain that "ideal"? Aren´t the decisions of the Environmental Board (today the

Environmental Court) really hiding that the elites (the members of the Board, the judges…) are imposing their "ideals" against what the democratic process might decide through planning?

The question ultimately has to be answered with the same arguments of what the essence of judicial power in a democracy. And in this case, the answer is similar: members of the District Commissions, Boards, and Courts are not isolated persons. They are permeable to the values that society has en the short, medium and long term.

If the Board has decided to refer to the compact town, rural valley landscape as the ideal "context" it is very probable that it is because the legislature has been constantly pushing for that ideal.

One of the statutes that has not been mentioned in the Main Page is the is the 1998 Downtown Development Act 1998 Act (Act Relating to Downtown Community Development, No. 120, 1998 Vt. Acts & Resolves 321, codified as amended in scattered sections of Vt. Stat. Ann. tits. 10, 24, 32). This Act´s objective and purpose is "to preserve and encourage the development of downtown areas of municipalities of the State", "to reflect VT´s traditional settlement patterns" and "to minimize or avoid strip development or other unplanned development throughout the countryside on quality farmland or important natural and cultural landscapes". Following other statutory precedents this Act wanted to put more bite on the promotion of designations by municipalities of "downtown development districts."

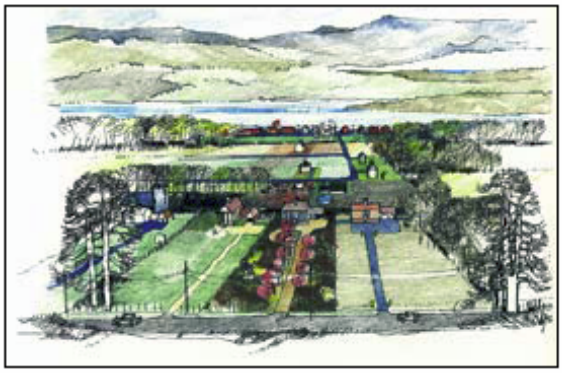
Act 200 and Act 183 cannot be understood but as additional attempts to maintain that ideal.

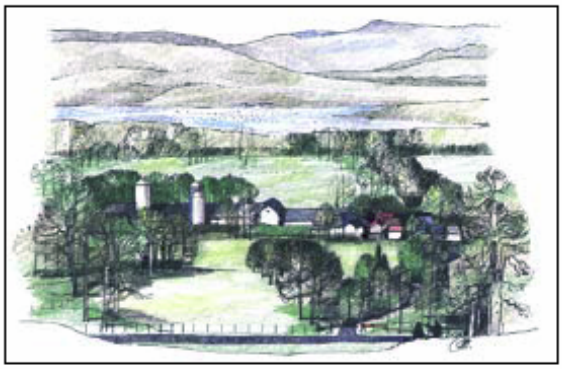
The famous 1991 State brochure "Vermont Agency of Natural Resources - Elizabeth Courtney, ***Vermont's Scenic Landscapes*: *A. Guide For Growth and Protection***, April, 1991" (amazingly, the most cited document on the modern literature n smart growth not only everywhere in the US but even beyond its borders, unfortunately not in the web since nobody seems to have noticed its keystone value) is simply a recollection of some drawings, pictures and landscape architecture techniques that allow the reader to visualize what exactly is meant by the VT compact town when compared with the typical American suburban development, whether strip or conventional developments. [See for example, the reproduction of one of the sample drawings of the pamphlet in Jan Albers, at 321, in the Box "Good Development Means Good Choices.]

A less descriptive but more employed one, reproduced in most of the literature on Act 183 manuals and brochures on Growth Centers, is the following one (see picture below).

The "official" Growth Center Planning Manual of Vermont Agency of Natural Resources has several pages dedicated to describe what it is meant by it (see pages reproduced below).

Figure 66. Conventional vs. Cluster Development





Vermont's Scenic Landscapes, 1991

[As a study that traces the origins of the Vermont village, identifies its unique features, and details the benefits of its preservation as well as the increasingly popular Neo-traditional movement, which seeks to abolish sprawl and embrace features of the traditional village. see Jessica E. Jay]

[The issue of small commerce, the Wal-Mart case, is analyzed in the Guiding Students Discussion Section]

Village of Willinston

Comparison of Program Purposes and Benefits

The new designated growth center program is integrated with existing programs for the designation of downtowns, village centers and new town centers. Designated downtowns, village centers or new town centers can serve as the core of future designated growth centers. The area of the growth center outside the designated downtown, village center or new town center will serve residential growth, as well as other uses not suitable for or able to be accommodated in the core. The outlying lands beyond the growth center boundary will be primarily rural countryside in most Vermont municipalities, and will have distinctly different development patterns and lower overall densities.

The Downtown Board is now responsible for administering the designation process for four distinct, but interrelated programs. Each was created for specific reasons as follows:

Designated Downtowns: A downtown is the traditional central business district of a community, that has served as the center for socio-economic interaction in the community, characterized by a cohesive core of commercial and mixed-use buildings, often interspersed with civic, religious, and residential buildings and public spaces, typically arranged along a main street and intersecting side streets and served by public infrastructure.

The designated downtown program was created in 1998 and focuses on traditional downtowns. It requires that the designated area have a National Register Historic District. Traditional downtowns are often characterized by multi-story, zero lot line, masonry and high-density areas. Residential neighborhoods and industrially-zoned areas are typically not included in a designated downtown. Following the model established by the National Main Street Center, downtown designation requires, among other things, a dedicated downtown organization along with municipal commitments for planning, capital budgeting and infrastructure.

A designated downtown typically plans for and is able to accommodate some growth – mainly through a combination of historic building rehabilitation and infill development on vacant or underutilized property – but it is not likely to absorb most of the development in a municipality that is growing rapidly. The primary goals are historic preservation and economic revitalization.

Designated Village Centers: A village center is a traditional center of the community, typically comprised of a cohesive core of residential, civic, religious, and commercial buildings, arranged along a main street and intersecting streets. Industrial uses may be found within or immediately adjacent to these centers.

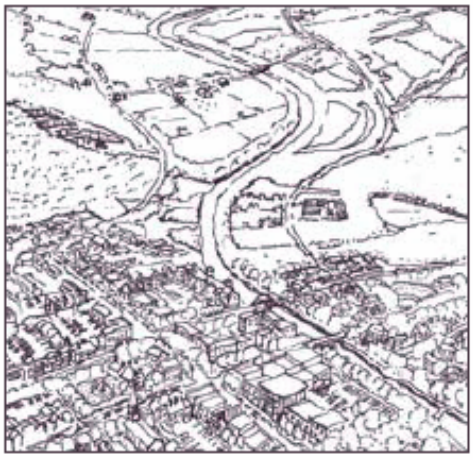
The legislature saw the successes of the designated downtown program, but recognized that the program really was not appropriate for the numerous smaller villages around the state. So, a much simpler process was created for designated village centers in 2002.

The size of these centers range from small hamlets – places with just a handful of commercial and civic uses along with a few homes – to larger villages with a variety of uses and residential neighborhoods. The Board has encouraged larger communities to seek downtown designation, but there is no clear statutory threshold separating downtowns from villages.

As with the designated downtown program, the policy goal is to support the preservation of historic buildings and the economic revitalization of the existing traditional mixed-use core area. The Board has typically decided not to include undeveloped areas within a village center boundary that might be targeted for future growth.

Designated New Town Centers: A new town center is an area planned for or developed as a community's central business district, composed of compact, pedestrian-friendly, multi-story, and mixed-use development that is characteristic of a traditional downtown, supported by planned or existing urban infrastructure, including curbed streets with sidewalks and on-street parking, stormwater treatment, sanitary sewers and public water supply.

The designated new town centers program was passed by the legislature in 2002 along with the village centers program, in support of community plans for new centers in municipalities that do not have a traditional downtown. Conceptually, this program is intended to support the development of new downtowns that are similar in form and function to traditional downtowns. This concept does overlap with growth centers in that both are intended to support substantial new development within a limited area. However, a new town center implies a smaller geographic area built like a downtown, while growth centers suggest a broader geographic area, only part of which may resemble a downtown.

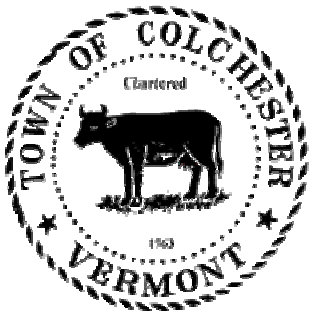


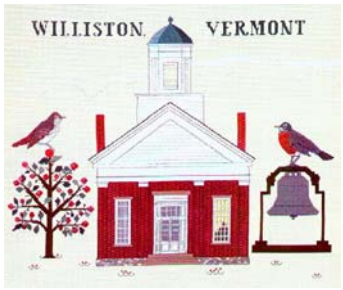
Designated Growth Centers: This most recent designation was created by the legislature in 2006, implementing one of the key planning goals in Act 200, which called for compact settlements separated by rural lands. The purpose of this program is to promote compact development over sprawl in municipalities that are facing development pressure. Conceptually, growth centers are intended for dense and mixed-use development. While they include an existing designated downtown, village center or new town center, they would likely cover a broader geographic area and feature a greater diversity of development patterns than typically found in a traditional downtown. A growth center would include a new or traditional downtown, but also may include areas planned for new largely residential neighborhoods, or commercial or industrial uses that are not appropriate for or cannot be located in an existing downtown area. Some communities may plan growth centers that will be built largely on open land. Others may plan for the redevelopment of a developed area that could accommodate more density.

State legislation establishes a hierarchy among the four programs administered by the Downtown Board. The state's highest priority is facilitating development and growth in downtowns and village centers. As such, designated downtowns and village centers will be given priority in state funding and programs over new town centers and growth centers as indicated on the following chart.

Paradoxically, very few towns have made use of Act 183. As of July 2009, there are only three Designated Growth Centers**:** Williston, October 2007; Bennington, October 2008; and Colchester, April 2009

So, what is the real desire of VT citizens expressed through their celebrated town meetings democratic governance system? (see also # 5 below.)





3.- Legalistic quagmires (or nightmares?).

The celebration of Act 250 as "the nationally known model for land use legislation" (Jan Albers, at 316), gets blurry when reading or hearing some accounts of how it operates in reality.

Act 250 is certainly well known for its "sluggishness" (Jack Kraichnan, at 588, citing Doug Costle, Forward to Argentine, at vi.). But legal technicalities seem to deserve been categorized not as sluggishness but as a real nightmare for anybody wanting to move to VT buying its home or anyone wanting to move to another home in VT or… to retire as a wine maker.

Jon T. Anderson´s [a former Legislator from Montpelier, recently named one of America's leading environmental lawyers] comments on "ACT 250: A SUGGESTION FOR REFORM, in 35 Vermont Bar Journal 34 (2009)" are full with "funny" (if one is not the "retired wine-maker dreamer") examples such as the following, which is one of the most simple ones compared to other examples dramatically decsribed:

"Let us suppose a project does not have an Act 250 permit. The project is a winery on less than ten acres of land in a town that now has zoning and subdivision bylaws. (In the jargon of Act 250, the town is now a ten-acre town.) The winery has grown so that more than half of the grapes are grown off-site. For this reason, the winery is a commercial operation that would be subject to Act 250 review if located on more than ten acres. Because the winery is located on more than one acre, it will be subject to Act 250, if Act 250 jurisdiction was triggered before the town transformed itself from a one-acre town to a ten-acre town by adopting both zoning and subdivision bylaws. In investigating jurisdiction, then, a lawyer must first determine when the town became a

ten-acre town by adopting both zoning and subdivision bylaws. The lawyer must then determine whether a commercial operation was developed on the land between April 4, 1970 and the date the town became a ten-acre town. If more than half the grapes used for winemaking were grown on site until after the town at issue became a ten-acre town, the winery is exempt from Act 250. Similarly, if the winemaking operation predated Act 250 and did not change substantially until after the town became a ten-acre town, there is no Act 250 jurisdiction."

Is it true that Act 250 is so technically complicated?

Is it unavoidable that, when landscape policies are put in place, as it happens in most areas on Environmental Law, efforts are moneys are wasted not in landscape planning or mitigation of impacts but in "lawyerish" work?

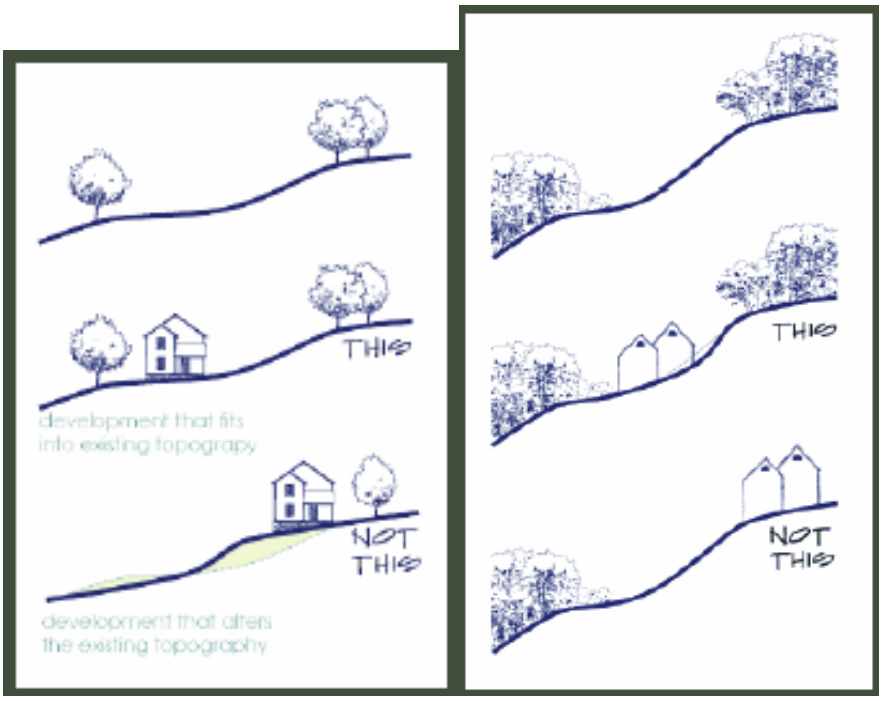
4.- The Quechee Lakes Ridge Condominium decision: Is it better to proceed and do it than to ask for a permit? When are traditional VT landscapes changed forever? Are small uncontrolled developments damaging forever VT´s landscapes?

Ridgelines are, for landscape architects, one of the main sacrosanct uses one does not play with.

As Richard O. Brooks explains when describing the "context" factor of the Quechee Lakes Test, "*another feature that has special significance are ridgelines. These receive*

close scrutiny because their high visibility and uniqueness. The Board is especially sensitive to developments which result in the first intrusion of the natural beauty of a ridgeline" (Richard O. Brooks et al, Vol I, Criterion 8, at 9).

Many of the brochures on scenic VT planning insist with particular eagerness on this idea.



The second Quechee Lakes Case is because of this worth of exploring (*IN RE: Quechee Lakes Corporation*, February 3, 1987, Application #3W0364-lA-EB ("Ridge Condominiums")

Application #3W0364-lA, which is the subject of this appeal, seeks approval for the following modifications to some or all of the six Ridge Condominium buildings which were originally approved in February 1981: elimination of lofts, addition of four-foot overhangs, addition of entry-level bedrooms, reduction of roof pitches, addition of skylights, addition of "clerestory windows," elimination of split-entry design, addition of wrap-around decks, extension of living room areas, elimination of full-height crawl spaces and access doors, enlargement of sliding glass doors, addition of side doors on decks, addition of windows and sliding doors, alterations to the locations of some buildings, and construction of a rear access road for Building 6.

The District Environmental Commission approved most of the changes requested by the Applicant in Permit #3W0364-1A.

However, by permit condition, the Commission required the implementation of additional landscaping (Conditions #4, 5, 6, and 7 of Permit #3W0364-lA), the

installation of non-glare glass in “downslope” windows (Condition #9), removal of skylights (Condition #lo), and the installation of a barrier on the access road behind Building 6 (Condition #ll).

In its Notice of Appeal dated October 25, 1984, Quechee Lakes Corporation (QLC) objected only to Condition # 10 requiring the elimination of the skylights. In their cross-appeal filed on November 9, the Fosters argued that Building 6 should be torn down. In its cross-appeal filed on April 23, 1985, Ridge Condominiums, Inc. (RCI) objected to the inclusion of Conditions #4-11 as issues in the appeal. The parties agreed that Criterion 8 (aesthetics) was the sole criterion of Act 250 at issue in this appeal.

The Environmental Board´s decision (See Box below) imposed additional conditions on one of the buildings and the access road that had been built without a permit. But the relevance of the case, besides the admission of such an impact on a ridgeline, becomes apparent when it is examined under the light of the dissenting opinion of one of the members of the Board:

Findings of fact:

(…)

2.- Land Use Permit #3WO364 authorizing the construction of the Ridge project was issued to QLC on February 4, 1981.
The Ridge project is located on a ridgeline which overlooks the Quechee valley from the east. The project consists of twenty-eight condominium units in six buildings, plus an access road, utilities and swimming pool. The buildings are located approximately 280 feet above the floor of the Quechee valley, and approximately 50 feet above the top of the ski hill. The project area is approximately 8.6 acres.

4. The Ridge project is generally visible from throughout the Quechee valley. Among the viewpoints where the project may be seen by the greatest number of people are the Quechee Lakes Landowners Association clubhouse, golf course, Lake Pineo and beach, and the ski area. It is also visible at various points to persons travelling easterly on River Road and, to a lesser degree, on Route 4. While the colors of the buildings (brown with light trim) were selected to make the buildings less noticeable, the scale, mass and location of the building on the ridgeline tend to make them one of the most visually prominent features in the valley.

5. The visual impact of the buildings varies somewhat with the time of day and the season. During the summer months, when the hardwood trees are in leaf, the buildings tend to be less prominent. At night, lights from the windows, sliding glass doors and skylights are visible from many points throughout the valley. During the day, and especially in the late afternoon, light is reflected off the glass on the western facade of the buildings. While the testimony of architect XX and Exhibits 842-46 tended to show that direct reflection of the sun's rays to a particular viewing point occurs only a minimal number of times per year, and then only for a period of 3-33 minutes (assuming that all windows and sliding doors had been constructed in a perfectly plumb and true position), reflection of sunlight occurs far more frequently because the glass will reflect diffuse light as well as spectural (direct) light. As the photographs in Exhibits #39, 40, 51, 53, 68, 77 and 78 show, reflective glare from the Ridge Condominiums results in a significant visual impact, even on cloudy days.

The Findings of Fact continue with the full description of the Ridge Condominiums

8. Views of the Ridge project from the Quechee valley tend to be long, putting the project in the middleground or even the back of the middleground. The beach on Pineo Lake is 2,800 feet away, the clubhouse 4,000 feet, Route 4 one mile, ski hill 5,500 feet, Dutton Hill 7,000 feet, and the golf course 1,500 - 7,000 feet. Because of these distances, some of these changes are not perceptible. The modification in the footprints of Buildings 3 and 5, for example, have no perceptible visual impact. Some of the other changes discussed above, however, are clearly perceptible, and, when viewed cumulatively, contribute significantly to the visual impact of the Ridge project on the Quechee valley.

9. QLC's own expert witnesses agreed that the Ridge Condominiums have a significant impact on the Quechee valley. OO, a landscape architect appearing on behalf of QLC, admitted that the Ridge project has a profound visual impact, that it is located in a sensitive area, and that it is not in context with its surroundings. PP, QLC President and himself a landscape architect, admitted that by and large he agreed with OO that the Ridge is in a visually sensitive area and may be out of context.

10. QLC filed Land Use Permit Application #3W0364-lA-EB on August 1, 1984, after the changes discussed above had already been constructed.

Conclusions of Law

After recalling the Quechee Lakes Test of the first Case (Murphy Farm & Newton Inn), the Board continued:

The question to be decided in the Ridge appeal is whether the changes QLC made after the District Commission had issued the original land use permit for the Ridge project result in an "undue adverse effect." Although the original permit is not now on appeal, and QLC has a vested right to build the project described in Land Use Permit #3WO364, it is not possible for the Board to judge these changes without first considering the context within which they occur, which is the Ridge project itself.

There is little doubt that the visual impact of the Ridge Condominiums is "adverse," as that term has been defined above. Due to its location at the top of a steep valley wall near the crest of the ridge, the virtually unrelieved mass of Buildings l-5 when viewed from the west, and its general lack of vegetative screening, the Ridge project tends visually to dominate the Quechee valley. Far from blending harmoniously into its surroundings, the Ridge tugs at the eyes of visitors, including the members of this Board. In summer or winter, on clear days or cloudy, during daylight or at night, the Ridge project makes its presence known. No other development in the valley has as much of an intrusive effect. Nor is there much disagreement that the project is located in a visually sensitive area. QLC's own experts agreed that the site is aesthetically sensitive. As the Board pointed out in the Quechee Lakes decision quoted above, the Board and Commissions must give special attention in evaluating projects proposed in a sensitive area to determine whether the scenic qualities of these areas will be maintained.

If the Board were evaluating the Ridge project today, it would find that the project's impact on the scenic and natural beauty of the Quechee valley is "adverse." The Board members shared a strong negative reaction to the visual impact of the project which extended far beyond a matter of personal taste. The question to be decided in this appeal is not whether the Ridge project itself should be denied an Act 250 permit because it causes an "undue adverse effect," but whether the changes constructed by QLC, when coupled with the original project, have such an effect.

The position that QLC and RCI urge upon this Board is that the impact of the changes is virtually indistinguishable from the impact of the original project, and therefore should be approved. For example, they argue that because the District Commission gave its blessing to the reflective glare from 109.3 square feet of glazing in each building when it issued Land Use Permit #3WO364 in 1981, the additional glare reflected from 155.2 square feet should not be much worse.

This argument misses the point. The Board need not engage in a speculation over whether a 5% or 10% change would have been a "material change" under Board Rule 2(P) and would thus have triggered the need for a permit amendment. The fact remains that a 42-46% increase in glass area, plus the other changes made after the original permit was issued, do have a significant visual impact, especially when the project is located in a sensitive area.

Some of the changes installed by QLC have de minimus impact and do not result in a "material change" that would require a permit amendment. The changes which fall into this category include the slight rotation of Buildings 3 and 5, the elimination of lofts in units 1A through SD, the addition of side doors on units lE, 2E, 3A, and 5E, and the construction of a "drop-off" road at the rear of Building 6. These changes are not visible from the Quechee valley, and do not affect, negatively or positively, the visual impact of the Ridge project.

The other changes, either singly or cumulatively, do contribute to the overall negative visual impact of the Ridge project, and therefore result, within the context of this amendment application, in an undue adverse effect on the scenic and natural beauty and aesthetics of the Quechee valley. The Board will therefore require in its Order that the Applicant QLC and Co-applicant RCI take certain remedial steps to either eliminate or substantially mitigate the adverse effect of the changes.

Based on the foregoing Findings of Fact, it is the conclusion of the Environmental Board that unless the remedial steps set forth in the Order below are implemented, the project amendments described in the application #3W0364-1A will create an undue adverse effect on the scenic and natural beauty of the area, and aesthetics, and therefore it will result in a detriment to public health, safety or general welfare under Criterion 8 described in 10 V.S.A. S 6086(a).

The Decision continues analyzing a) the rights of RCI since tit had acquired the rights fon QLC, but these had gone beyond the rights allowed by the original permit, and the mitigation requirements (Amendments to Correct Permit Violations) for the buildings and access road.

IV. DECISION

The Board concludes, on the basis of the testimony presented, that the elimination of the lofts, the rotation of Buildings, 3 and 4, the addition of the side doors and the installation of the rear access to Building 6 have no measurable impact on any of the values sought to be protected by the Act 250 criteria. #3W0364-lA-EB

The Board further concludes that the other changes listed in the amendment application, either singly or when considered together, have an undue adverse impact on the scenic, natural beauty and aesthetics of the area and that there were no unanticipated circumstances or other mitigating factors justifying the changes. Since the Board is persuaded that the impacts resulting from the unauthorized changes can be substantially mitigated, the Board will require QLC and RCI to undertake a series of mitigative actions, as set forth in the Order below. In the event such actions are implemented in a timely and effective fashion, the Board will issue an amended permit approving the balance of the changes.

v. ORDER

1. The changes which were approved by the District #3 Environmental Commission in Permit Amendment #3W0364-1A which were not challenged in the appeal to the Board are hereby approved. In addition, the Board hereby approves the elimination of the lofts, the rotation of Buildings 3 and 5, the addition of the side doors on Units lE, 2E, 3A and 5E, and the addition of the rear entrance to Building 6. A revised permit will be issued confirming these approvals when the other conditions of this Order have been fulfilled.

2. The skylights which have been installed on the western roof slope of Buildings l-5 shall be removed. Removal shall occur as soon as possible, but in any event by no later than June 1, 1987.

3. QLC and RCI shall prepare plans for review and approval by the Board to limit the total projected glass area on the western facades of each of the Buildings l-6 to not more than 109.3 square feet. This modification may be accomplished by constructing solid balcony railings, replacing windows or sliding doors with smaller units, eliminating the clerestory windows in Building 6, or such similar construction device that will achieve the intended result. Vegetative screening alone shall not be sufficient to satisfy this condition. The plans shall be submitted to the Board and the other parties by no later than April 1, 1987. Upon approval by the Board, the plans shall be implemented as soon as possible, but in any event no later than September 1, 1987.

4. QLC and RCI shall prepare planting plans for review and approval by the Board to break up the mass of Buildings l-6 when viewed from the Quechee valley and restore the screening required in the original permit. In general, the plans shall follow the recommendations of QQ as set forth in Exhibit #66. The plans shall be submitted to the Board and the other parties by no later than April 1, 1987. Upon approval by the Board, the plans shall be implemented as soon as possible, but in any event no later than September 1, 1987.

5. QLC and RCI shall fund the hiring of an independent architectural and/or landscape architectural consultant, to be approved by the Board, to review the plans submitted by QLC and RCI, and to submit his or her evaluation of the adequacy of the plans to accomplish the objectives set forth in this Order.

Dated in Montpelier, Vermont, this 3rd day of February, 1987.

View from the Ridge Condominiums

Dissenting Opinion of one of the Members of the Board:

.

It is not sufficient to consider only the effects of the changes made by the permittee in a case such as this. While the applicant has the right to construct the project in conformance with the original permit, it has no right to deviate from the permit terms and conditions. Perhaps minor variations could be overlooked, but the Board's findings contain numerous examples of QLC's ignoring permit conditions and do not show justification for such deviations. Any one of these variances (even taken alone) might have tipped the scale and resulted in a denial to the original permit. The Applicant could have built the approved project, or it could have applied for an amendment, prior to construction. It did neither. It built a different project.

I would find that the project as built, under our prior Quechee Analysis, creates "an undue adverse effect on the scenic or natural beauty of the area . . .,'and I would deny the amendment and require the Applicant to complete the project in conformance with the terms and condition of the original permit.

The Vermont Supreme Court maintained the decision: In re Quechee Lakes Corp., 154 Vt. 543, 580 A.2d 957 (1990). Applying the classic deferential standard of review the Supreme Court deferred to the Board's judgment.

The Quechee Lakes II Decision raises the same issue at the micro and macro time-level.

At the micro level the narrow issue is whether the fact that a project is already constructed contributes to legitimize what otherwise would have been illegal and not allowed to be built because of a lack of permit. It is an issue of equitable treatment for all citizens. But it also reflects the general approach that District Commissions and the Board may have, and in this case, it became clear that the Board ultimately was becoming too permissive. But, the importance of the case relies on the broader issue indirectly decided by the Board:

Views from the Ridge Condominiums

The Ridge Condominiums as seen today from Lake Pinneo

As Robert C. Granger put it in 1992, "*despite its ultimate decision, the Board indicated discomfort with the approval of Quechee Lakes´ amended permit application. The Board expressed concern over the level of fairness given to interested parties, and its effect on public policy. The Board's opinion noted that such a decision might encourage developers to circumvent purposefully the land use permit process, thereby rendering pre-construction review essentially `meaningless´. (…) Allowing unbridled changes in a project without advance review undermines the basic purpose of Act 250, which provides for orderly planning and growth in Vermont. Instead, it encourages developers to circumvent the procedural safeguards incorporated into Act 250's land use provisions when it is in their economic interest to do so."*

The effect that small but gradual degradation of landscape produces in the overall context is a delicate issue. Most critics of Act 250 argue that the problem of Act 250 is not in what the law requires but in what the law leaves without any type of control since it disregards excessively the "small developments", the adding of one house after another all of which are under the one acre-ten acres rule. Or the permissive initial permit that added to a next one might change the character of the valley or town, so that the next new comer asking for a permit can argue that the rural compact town character was lost long time ago (as the Board admitted in the first Quechee Lakes Case).

Act 250 applies to most large commercial and industrial projects. Permits are generally required for residential construction of ten or more units and subdivisions of ten or more lots. This allows for speculation when combined with extreme legal technicalities converge in many projects (see previous # 3 and the Section on Guiding Students´ Discussion)

It is true that the Commissions and Board fight against it with what could be called the "overkilling effect" (see Richard O. Brooks et al, Vol I, Criterion 8, at 7). A simple addition of another project in an already developed area might be rejected because it is the last drop on a glass of water that might cause the water to spill. The famous gigantic illuminated advertising sign case (IN *RE: Town and Country Honda*, October 5, 1990, Permit application # 7R0639-EB) commented by Brooks (at id) is self explanatory: "*Although a large , internally lit Mobil Gas sign already existed nearby, the Board concluded that the surrounding area primarily consisted of a mixture of open spaces,*

forested areas, and small commercial and professional buildings. The fact that one sign was already in place did not necessarily mean that another would be permitted , and the Board concluded that the proposed illuminated sign would contribute to the visual impression of a commercial strip, which it found [under the Quechee Lakes Test] offended its collective sensibilities".

Certainly the "first come, first served" rule is objective enough to be used as an equitable non-discriminatory rule of law. Or isn´t it?

[A lively account, and discourse, on how the Growth Center designation mechanism ultimately "sanctifies" previous degradation of city centers and downtowns instead of restoring them, studying in some detail the cases of Willinston and Middlebury, see Jessica E. Jay]

Pictures above and in next page: typical minimum impact commercial buildings in a small VT town (Waitsfield)


FIDDLERS GREEN
DENTIST
Car Wash
LAUNDRAMAT
DRY CLEANING
AUTO PARTS

5.- The essence of democracy: Who defines one´s own sense of place, citizens, their representatives democratically elected, or bureaucrats?

I f there is one thing tat VT boasts about is that Act 250 builds directly upon its tradition democratic decision-making.

One of the most well known evaluations of the role of the Act done on its 25th Anniversary Celebrations was Robert Sanford & Hubert B. Stroud´s. The following descriptions scattered all along the text reflect that idea:

"*The bill provided for regional administration of the state law and included local participation. Local participation was. and continues to be, a critical factor in assuring public acceptance of the process. The decision to locate primary review responsibility in regional citizen commissions gives the process a grassroots responsiveness and safeguards the system from charges of bureaucratic insensitivity to local issues*" (Robert Sanford & Hubert B. Stroud, at 242).

"*The administration of Act 250 is centered around nine district environmental commissions that receive and consider applications for development and subdivision permits. Each commission has a defined district based loosely on county and other political boundaries (see map in Main Page), and the three Commission members must reside in that area. The members, appointed by the Governor, are on call to serve as needed to fulfill their responsibilities. They are chosen for their general familiarity with local conditions, and their civic-mindedness. Although appointees may represent a diversity of occupations, most do not have special training or expertise in environmental or land use planning, thus it is a true citizen board rather than a 'science court' or other specialized body*" (Robert Sanford & Hubert B. Stroud, at 243, emphasis added).

"One of the most significant aspects of Act 250 is that it utilizes citizen participation in the decision making process. Though not without its critics, it has gained widespread support among the general population and among government officials as well. An important part of this acceptance is the role that citizens play in the decision-making process. Local residents (non-professionals) are selected as district commission members to review permit applications and actually make decisions on approval or denial of projects. Such participation has been crucial in helping Act 250 gain widespread, grassroots support" (Bourdon, D. (1995) Director, Two Rivers Regional Planning Council, Woodstock, Vermont, personal interview, July, 1995, cited by Robert Sanford & Hubert B. Stroud, at 243, emphasis added)

"*One individual (or corporations, towns, and other parties--all have similar rights) can stop a project only if they convince the review board that there is some legitimate or compelling reason why it should not proceed. A large part of the popularity and attractiveness of the Act 250 process is based on grassroots support and citizen participation. The power of an individual (or family) should be no less important than that of a developer or large corporation, according to former commission chairman Dick McCormack*" (McCormack, R. J., 1994: Senators Discuss Act 250 Process, Environmental Board: Primer. The Sunday Rutland Herald and the Sunday Time Argus, February 6. Section C, pg 3, cited by Robert Sanford & Hubert B. Stroud, at 250, emphasis added)

Of course, Robert Sanford & Hubert B. Stroud are not the only ones reaching this conclusion, and the more time passes the more reality seems to confirm these findings.

Traditional town meeting, courtesy of the Billings Farm Museum

This idea gets particular emphasis when decisions on aesthetics under Criterion 8 [01] are described. Actually, the Quechee Lakes Test is built in great part upon this assumption. The response to the question of whether the adverse effect is "undue" is based on three questions the answer to any of which compels a finding that the impact is "undue". The 3d one concerns the evaluation of the mitigation efforts made by the applicant. The 1st and 2d one are the following (see Main Page):

1.- Will the project violate any clear, written community standard?

2.- Would the average person find the project shocking or offensive?

The first one, al it has repeatedly been seen, remands to planning (which is supposed to be a democratic process). The second one, … to what does it remand?

One of the most complex issues on landscape policy is whether landscape beauty (or the sense of place of an individual and a community) is an objective finding or if it should be referred to democratic processes to determine. The first end of the spectrum reinforces "objectivity" (there is a clear answer to the determination of scenic beauty and sense of place even if a majority of members of the community differ about it, or would rather have a different scenery or sense of place where they might economically do better); the other end "subjectivity" (there are no "gurus" of landscape, it cannot be appropriated by "experts, the opinion of which should be as valid as that of anyone else).

Landscape architecture science (and methodology –knowledge and skills-) abound on the learning of participatory techniques (direct democracy, proactive participatory processes, enlightened hearings, interactive internet use, Delphi or benchmarking consultation methodologies…etc), although at the same time it emphasizes that there are general rules or principles that are the core elements of the science in a way that is looks more as enlightened despotism of the elites instead of real democratic-based science. On the other side, which other science is so humble to admit that it is based on these principles? Civil engineers would certainly not concede even to the slightest suggestion that their science is wrong because democratic decision making proves it to be wrong.

The fact that if there has ever been in the history of humankind a regime that fostered and advanced landscape as a public policy it was the Nazi Germany regime chills the impetus of many of the advancers of this public policy, at least in Europe.

Is there a special secret formula in VT?

If the Main Page has proven anything, it is that the members of the House and Senate are at odds with each other on the issue of VT´s economic model of growth and on how VT landscapes (and the growth model it implies) should look like. The continuous failure to strike a balance and the yearly review of the content of Act 250 could be evaluated as a continuous learning process, the representatives putting all kinds of efforts in improving it, or just the opposite, a balance that is always questioned because it is unstable and never got a clear majority.

Now and then there continue to be "occasional efforts within the legislature to disembowel the Act (notably, the 1994-95 legislative year, in which several long-serving board members were ousted)" (Robert Sanford & Hubert B. Stroud, at 243.).

What about local planning? The JAM case shows that the fact that planning is more democratic than decisions of the Commissions or of the Environmental Court does not impress the justices of Vermont Supreme Court.

The District Commissions are certainly special. The organizational principle in which they are based: "ordinary citizens" appointed by the Governor for a four year term, with very limited staff. But that this "sanctify" *per se* the process as being "radically democratic"? or, does it simply concentrate too much power in the hands of a few people?

The repetitive emphasis by most scholars in the sense that the right answer is the "yes" to the first previous alternative questions is not so well founded. Repetition by itself does not make good arguments out lack of real reasons.

The emphasis on this very same aspect (the "laymen decide" principle) placed in the critical analysis of the core elements of the procedural rules implied in the decision making process, and in the Quechee Lakes Test, is somehow worrying. It looks more as a confession that transcends a "guilt" psychological complex than as a clearly articulated rule of law. The Vermont Supreme Court has tried to make clear that Act 250 permitting is ultimately about administrative procedural rules related to findings of

fact and shifting of the burden of the proof concerning those fact findings. As Richard O. Brooks has recalled, in the leading case (*IN RE: Robert B. and Deborah J McShinsky*, 153 Vt. 586, 572 A.2d 916, 1990) the Supreme Court stated: " The Board has the right to believe all the testimony of any witness, or to believe it in part and disbelieve it in part, or to reject it altogether", and it is the Board, not he average person, nor the citizens, who decide: "In making such a decision [if the impact would be undue: the answers to Qs 1 and 2 of the Quechee Lakes Test] the Board does not need to poll the populace or require vociferous local opposition in order to conclude that an average person would consider the project to be offensive". Actually site visits by the members of Commissions and the Board were totally relevant, but they are a very limited group of people. The Environmental Court had to intervene vigorously claims of arbitrariness when decisions are taken exclusively in that evidence. See e.g. *IN RE: Appeal of Tepper, et al.*, February 8, 2006. Docket No. 225-12-04 Vtec. Questioning, rejected by the Court, of due process minimum requirements when decisions of the Board are exclusively based on site visits (arguing on the difficulty to contest testimony)

As a part of the application review process, the District Commission or its staff conduct a site visit to review the plans for the proposed development and to assess the potential for environmental impacts.

Picture courtesy of the Vermont Natural Resources Board (taken from pg 6 of its official brochure "Act 250: A Guide to Vermont´s Land Use Law"; see Section on Links to On Line Resources)

But those very same words of the Vermont Supreme Court are carefully drafted and could be interpreted as reinforcing the core democratic element of the decisions-making process. I is not asserting that citizens opinions are not valuable; it is channelling democratic participation to its very essence: democracy and not demagogy. It is the enlightened and non-passionate open dialogue mature of the fact finding process what makes of the decision-making process a radically democratic experience.

The rules on participation and standing before the Commissions are drafted with special zeal and care. It would take too long to describe them. But they ensure proactive participation

But, ultimately, isn´t it simply a typical (not at all exceptional) example of participatory administrative decision-making?

The “secret” of VT might be on its political culture, on its traditions of active real practising of democracy, and not in any particularity of the rules or of the essence of landscape policy.

At the same time, it is true that this participatory principle is something that only the last part of the Century has been systematically imposed as a strict rule of law in the Western world, including the US. Both per se in all sorts of pubic policy decision making, and in the project-concerning decisions through environmental impact assessments. So it could well be that VT´s secret resides in the fact that 1) its citizens take seriously those general and ubiquitous rules; and 2) that started experimenting with them, with extreme success, sooner than the rest of the world and of their fellow citizens of the rest of the US as they related to land use and environmental and landscape administrative controls.

In Europe the Landscape Convention can simply not be understood at all if it is not legally linked to another Convention that is literally implying a silent but widespread revolution: the 1998 **Aarhus Convention on *Access* to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters**.

But this is a different story? Or is it not?

6.- What about “real” biodiversity: wildlife reintroduction in VT

“*Vermont’s traditional landscape – compact villages surrounded by a working landscape of farms and forests – was largely established in the early 19th century. During our early settlement years, we saw the evolution of agriculture from subsistence farming, to intensive grazing for sheep production, to dairy, to the emerging diversification shaping agriculture today. Forests were initially cleared for homesteading and potash production, and then pasture land (including areas not suited for pasture, as documented by George Perkins Marsh in his seminal book* Man and Nature*). With the demise of large-scale sheep production, Vermont’s forests returned and today provide the state with many ecological and economic benefits.*” (Smart Growth Vermont´s web page –see the Section Online Resources of this Case Study-. Emphasis added)

So, conservation of landscape and sense of place runs against biodiversity? Aren´t these landscapes, so clearly man-made [artificial?], that they block all potential of reintroduction (or extension, if not yet vanished) of native biodiversity?

Vermonters continuously say that VT is no ecosystem for wolves. New Hampshire´s and Maine´s are (BRIAN SHUPE, personal conversation) And. that is a scientific fact. Compared to the ecological landscapes of other parts of New England the pastoral scenery and ecology of VT is much less prone to success of an imaginary timber wolf reintroduction plan.

So, when other Criteria (such as e.g., Criterion 8A: [a project] will not imperil necessary wildlife habitat or endangered species in the immediate area, see Main page) introduce the biodiversity conservation and sustainable use parameter, are they really serious?

If something is nowadays clear in biodiversity conservation policy (and in the law, at least in international law, see article 8.f) of the Convention of Biological Diversity has made of it a leading principle: "*Each Contracting Party shall, as far as possible and as appropriate: (f) Rehabilitate and restore degraded ecosystems and promote the recovery of threatened species, inter alia, through the development and implementation of plans or other management strategies*") it is that there is no such law and policy in place if on site conservation regulation does not include reinstatement, restoration… of biodiversity. This includes formerly existing wild species, even if they are carnivores.

So, do VT landscape policies ultimately run counter to biodiversity policies? Is it a cultural landscape (not a natural landscape) what VT´s scenery is all about? Is it the Johnny Appleseed, or the Poccahontas Disney culture what VT policies favor?

Some decision of the Board had to touch upon some serious issues at least with already existing carnivore (or rather, omnivore) species.

Certainly Act 250 is praised for its protection of wildlife habitat. But "*black bear habitat is a case in point where small parcel development has disrupted normal feeding and migratory patterns even though there is ten times more land designated as black bear habitat than is needed*" (Robert Sanford & Hubert B. Stroud, at 253.) [Bear population was estimated to be 2000 in 1997; the target of VT´s Fish & Wildlife Service was then 2,500 (Richard O. Brooks et al, Vol I, Criterion 8, [8A] at 55, citing the official Vermont Agency of Natural Resources 1994 Assessment).]

But the problem concerning "the return of the natives", as JAN ALBERS has "labelled" it is open to question. And he refers not to the reintroduction of conflictive wild species but to the reaction against the "natural" reoccupation by former locals of naturally reforested areas: "*The reemergence of the forest has led to the return or proliferation of a number of species of wildlife that had become scarce since the time of the great clearing*" (Jan Albers, Box in pg 306, describing the problems caused by the white-tail deer, moose and catamounts.)



It is a well known fact the in the U.S. most States fear (and struggle against) attempts of the U.S Fish & Wildlife Service to reintroduce endangered species under the federal Endangered Species Act (see, the Case Study of this series: Ana Recarte Vicente-

Arche, The Sea Otter Recovery Plan, Friends of Thoreau / IUIEN, University of Alcalá 2003).

Is Vermont a special case? Or is it, concerning this issue, unfortunately, business as usual?

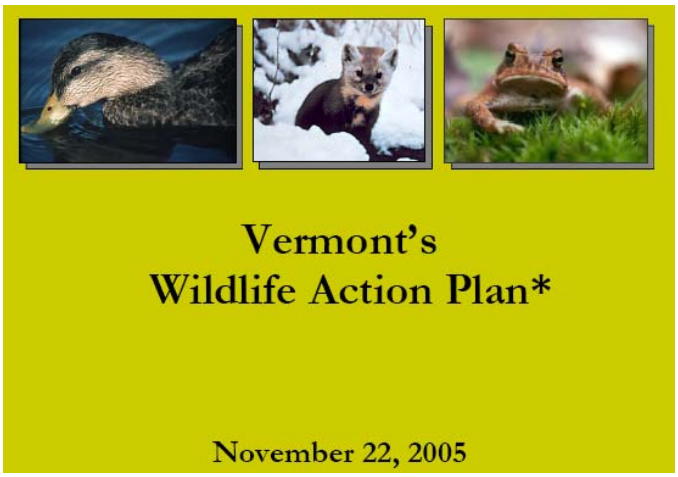
Stories reflect a contradictory approach to serious and really committed biodiversity conservation policy.

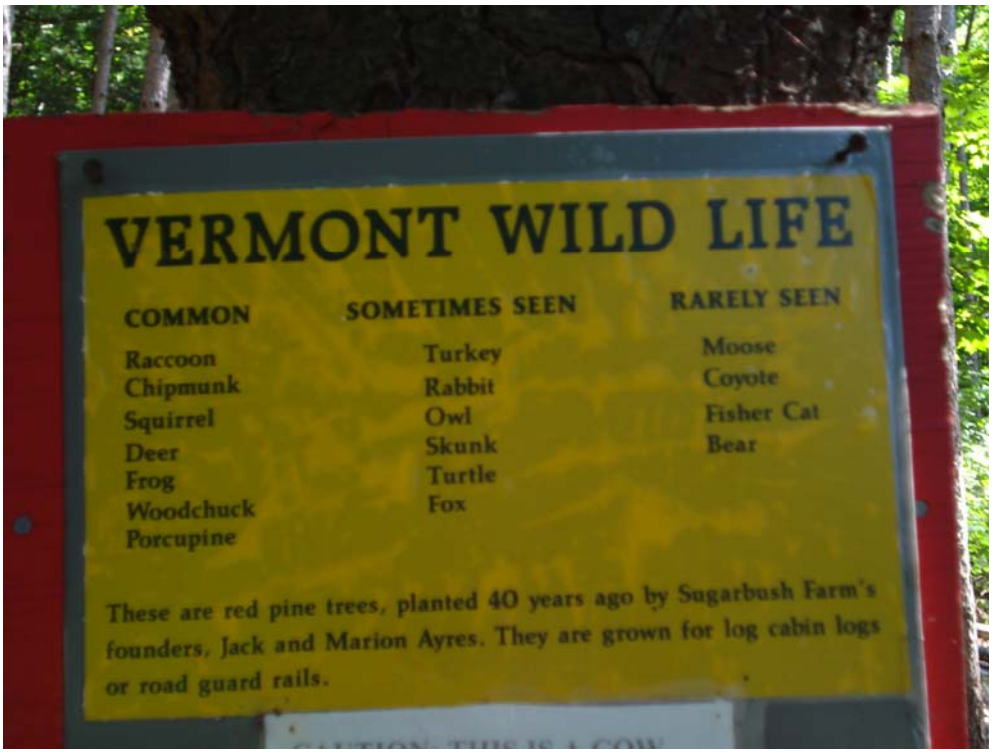
"*It may seem radical to propose creating a system of connected wilderness reserves in the North East and embedding such a system in a landscape of sustainably managed farmland and forestland at the beginning of the twenty-first century. Yet, paradoxically, in many ways the proposal is conservative*" (Christopher McGrory Klyza, at 23). Attitudes of Vermonters support such an idea (64% support the establishment of more wilderness, Id at 24). Buy such initiatives exist and are catching up momentum. The rewilding of the North East is more than an ideal (see "Wilderness Comes Home", Christopher McGrory Klyza ed)

The idea of "middle landscape" and how it can be made operational through land stewardship is well known too in VT (see Nora Mitchell & Rolf Diamant).

Although the State animal, the Morgan Horse, is not precisely wild, the return of wolves might also be closer than ever (Rick Bass). The current VT Wildlife Action Plan admits it, and it does so precisely in the Chapter (4) that deals with forests management through landscape: "**Desired Condition (SGCN Needs):** The habitat needs of wide ranging wildlife species is best met by maintaining large blocks of contiguous forest connected by linkages. Species such as black bear, marten, river otter, lynx, **wolf,** and others cross forest boundaries. **Successful conservation and management of these wide ranging species therefore requires a landscape level approach**, compounding the complexity of development and implementation of successful strategies." (Wildlife Actyion Plan , at 4:43.)

The farther exploration of on-going initiatives that might make possible the combination of traditional man-settled landscapes with the restoration of VT´s biodiversity will still take time but everything points toward the compatibility in the long run? Or not?





7.- The ultimate issue: Is VT´s economy thriving?

"*In the final analysis, the most pertinent question is how has Act 250 handled Vermont's growth problem"*, concluded one of the opinions (Robert Sanford´s & Hubert B. Stroud´s) on the role of the Act (See Main Page).

But is this really the most pertinent question?

It is so if what is being assessed is the growth of urban development.

But what worries many Vermonters is also prosperity. So, the pertinent question could really be: *In the final analysis, the most pertinent question is how has Act 250 affected Vermont's economic development.* If this question is bypassed and its answer is not explored, then the tensions and unstable dynamism that Act 250 cannot be understood.

To which extent this model favours added-value postmodern economic development in which prosperity is based among other things but essentially on landscape maintenance is a very legitimate question.

The rural economy in which VT historically based its wealth is changing rapidly.

The primary sector: is it thriving?

It seems that VT ´s agriculture is submitted to the same global pressures that impact farmers everywhere else.

Nevertheless, maybe because of its will to maintain sense of place, exploration of new ways of doing things locally in a global market of food are experience everyday.

The **"localvore" movement**, community supported agriculture schemes [Vermont Agency of Agriculture supports a **"Buy local, buy Vermont" Program**, see Section on Links to On Line Resources)], the "grow organic" trends, and the diversification of income through a combination of primary-tertiary product-service dichotomy, show lots of examples.

"If we each made a concerted effort to reallocate just 10% of what we spend on food annually to buying local products, it would mean an additional $132 million annually to Vermont's agricultural economy."

—Leon Graves, Former VT Commissioner of Agriculture

Courtesy of Vermont Smart Growth

Current agricultural practices imply getting involved in many economic sectors

Farmer

Agricultural Coop

Food Producer

Distributors

Food Coop

Chef

Educational Institutions

It is true that global economy gets its bites every now and then.

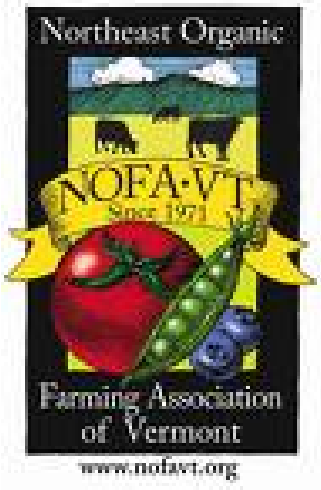
The famous VT brand recently acquired by Unilever. Constance L. Hays asked herself in the New York Times ("Ben & Jerry's To Unilever, With Attitude") on Sunday, July 26, 2000, commenting on the sale that had taken place in April 13, 2000: *"Did Ben & Jerry's sell out, or is the Ben & Jerry's culture invading the corporate world?"*
Her answer: *"A scoop of each, perhaps."*

The problem facing VT´s agriculture, besides competition of the global economy, is the loss of agricultural soil due also to loss of tradition, and of course, to competition of land prices if potential development enters the scene.


Market
on the
Green
Farm Fresh
Goodies
Wednesday's
3-6pm From 4/11-8/


VERMONT
CERTIFIED
ORGANIC
PROCESSOR
Vermont Organic Farmers, Certifier
PO Box 697 • Richmond, VT 05477 • 802-434-4122


FABLE
farm to table
FARM
BARNARD, VT


Northeast Organic
NOFA-VT
Since 1971
Farming Association
of Vermont
www.nofavt.org

The preservation of forests, which is around 80% of VT 6 million acres –and increasing, of which a) 77% are privately owned, b) 75% are timberland, and c) 96% susceptible of commercial exploitation including other products and services, and which are also the base of an industry that in 2004 provided USD 1.2 billion and employed 17% of its workforce (David Brynn, at 235-236), is as much of essence for VT´s landscapes, as agriculture. [See i.e., on "Family Forests", David Brynn, 235-262. He estimates income per acre of maple sugar to be USD 30, 210 or 430 –all minus costs-/acre/year, depending on whether the forest owner rents the trees, sells the sap, or produces the syrup]. Both forestry surface and agricultural soil need especial preservation techniques. And they seem to be in place in VT [For the forest preservation techniques, see David Brynn and Norma Mitchell & Rolf Diamant, in the Works Cited Section; for agricultural soil conservation techniques and State programs and see next #].

If the maintenance of agriculture and forestry are of essence for the preservation of VT landscape, tourism is the other side of the coin, although many times they are totally interrelated: see below the picture of a curiosity: a brochure (Guide; it includes quite an extensive map of VT) simultaneously advertising (and locating in the map, with additional literature) Vermont Ski Resorts & Maple Syrup.

VT certainly knows how to invite tourism (see pictures below):

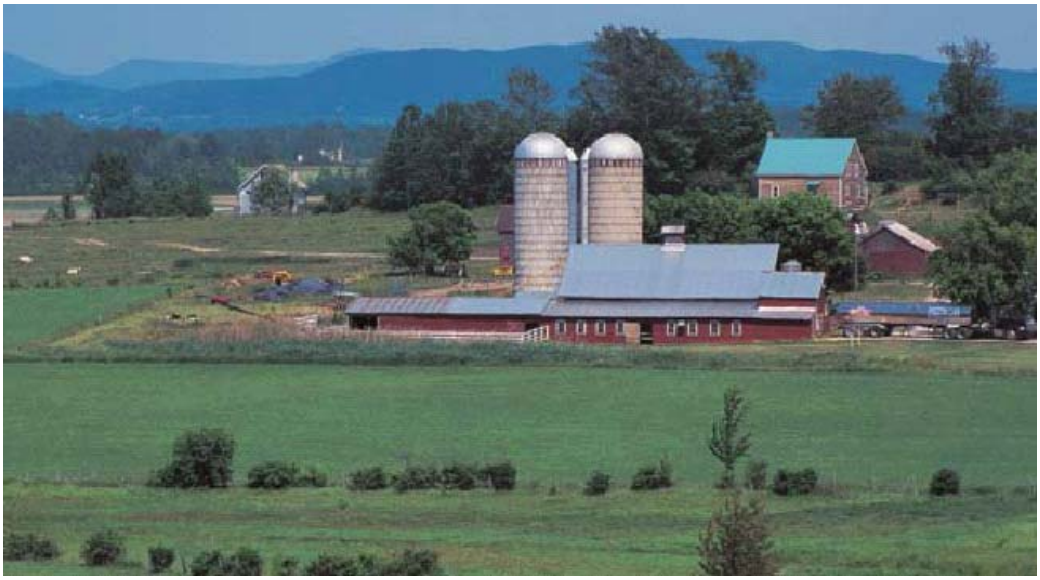
Recreational summer activities and exceptional winter sport related infrastructure are main drivers of the economy.

They actually were even from the 30s to the 70s (Blake Harrison) and that is what triggered the fear of loss of identity and overkilling land use when the interstates were built But what is their relation to landscape?

SKI VERMONT

Winter in its Original State.

To start with, even the environmental community is conscious that traditional rural landscapes can cohabitate with reasonable skiing infrastructure. And landscaping and mitigation are at least official policy of most resorts.



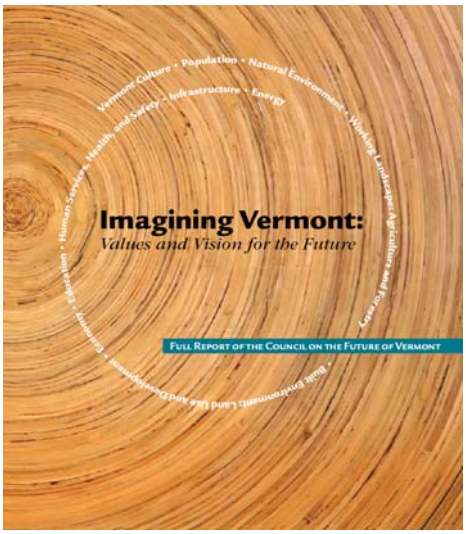
Farm buildings (3 pictures above). Compare their design features with those of the headquarters of Sugarbush ski Resort (first picture on top of them).

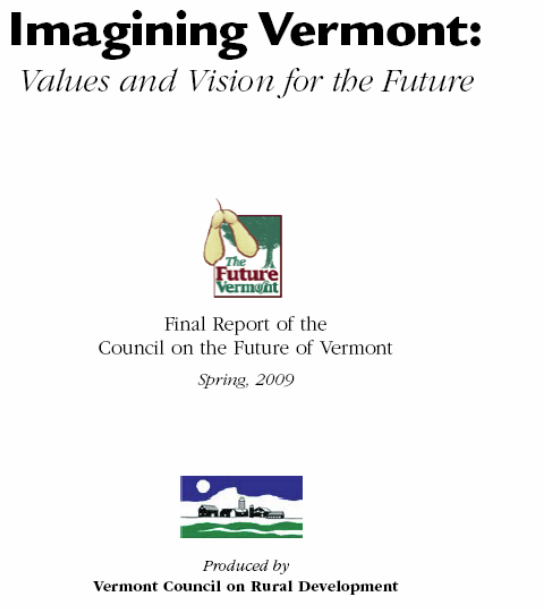
The use of skiing infrastructure to foster all-seasons use is quite usual in VT

Still "the final" question remains unanswered. Some maintain that the spin-offs of landscape policies are the main driver of VT´s economy (in classic economic theory, leaving aside environmental economics cost-benefit and environmental valuation methodologies).

Many others maintain just the opposite, that at the aggregate level, VT´s policies will ultimately have to be sacrificed, at least to some extent, to attract the investment needed to maintain the same levels of prosperity. The fact that for the first time, the unfortunately omnipresent episodes of semi-slave immigrant labor force conditions are making the headlines could be an indicator of how not only capital, but labor might still be on demand. And certainly it is population growth what might unbalance Act 250 delicate equilibrium.

The good news: VT society takes these things seriously. Civil society is highly involved about the economic model pretty much as it is involved in the land use growth model.





Most Vermonters, though, think that there is only one pertinent final question since lack of controls does not lead to economic growth but to economic mismanagement and reduction of economic opportunity

These are the reasons spelled out by Smart Growth Vermont:

Impacts of Sprawl: Reduced Economic Opportunity:

Poorly-planned, scattered development costs taxpayers hundreds of thousands of dollars to support inefficient and over-built infrastructure.

Excessive public costs for roads and utility line extensions and service delivery to dispersed development

Decline in economic opportunity in traditional centers

Premature disinvestment in existing buildings, facilities and services in urban and village centers

Relocation of jobs to peripheral areas far from population centers

Decline in the number of jobs in some sectors, such as retail

Isolation of employees from activity centers, homes, daycare and schools

Reduced ability to finance public services in urban centers

Loss of farmland – so key to State's history and rural economy

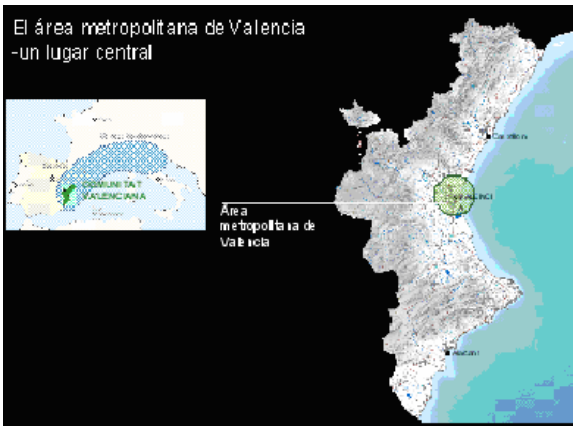
But, on the other side, does it attract investments?

8.- Agricultural soil conservation

One of the main problems affecting landscapes that, as VT´s, have been framed by historical agricultural use is the out-competing multiplied value that land gets when urban development gets closer. It is also a sociological problem: city life attracts youngsters much more than the harsh conditions of agricultural labor.

For example, of the five high quality periurban orchards of big European cities (cities that culturally connect their identity with that type of agriculture) all of them are threatened. The farmers simply dream for their last crop, their children and grandchildren having abandoned farming forever when they were in their teens: the so-called “brick crop” (collecting from developers).

The City of Valencia Orchard Conservation Draft Plan. The draft diagnoses the situation just described as one of the main problems to tackle with



How can agricultural soil be maintained without farmers? Is farming a profession, a life style?... Can public policy offset or counterbalance the overwhelming sprawl related economic trends? What has VT to show about it?

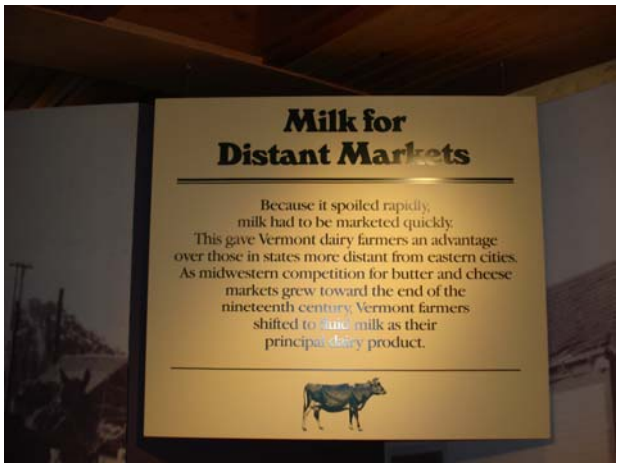
As Jack Kraichnan (at 598-599) has made clear, "*States are increasing their efforts to preserve farmland, open space, and areas of special interest through acquisition of fee title, conservation easements, and transfer of development rights. Although Act 183 does not provide for acquisition of title or rights by the state, it satisfies this element indirectly by providing that "[a]ll primary agricultural soils preserved for commercial or economic agricultural use [in mitigation of development] . . . shall be protected by permanent conservation easements . . . conveyed to a qualified holder . . . with the ability to monitor and enforce easements in perpetuity.*"

Act 183 reduces regulatory burdens in designated growth areas by limiting developers´ duties to compensate "*for the conversion of primary agricultural soils" in designated growth centers. Rather than requiring mitigation on site to "preserve primary agricultural soils for present and future agricultural use*," the Act provides that an applicant within a designated growth center shall instead "*deposit an offsite mitigation fee into the Vermont housing and conservation trust fund . . . for the purpose of preserving primary agricultural soils of equal or greater value*" elsewhere. It follows logically that by allowing developers to pay fees in lieu of setting aside developable land, off-site mitigation will both promote more complete infill and encourage developers to undertake projects in growth centers.

The question, though, is where Hill that farmland be located?

The Region of Valencia, for example has a similar provision on its Land Use statute. Every developer has to provide 1m2 of "natural area land" per 1m2 of the land to be developed. It is also thinking in monetizing it. But, that concentrates landscape or biodiversity rich habitat away where it is more needed, in inslets distributed all through the region. Those benefiting form the landscape created by farmland (or natural areas in the case of the Region of Valencia) should pay for it: and they are those who live closer to the developed land.

Is this argument right or wrong?



Cows and the dairy industry have always been at the center of VT´s economy

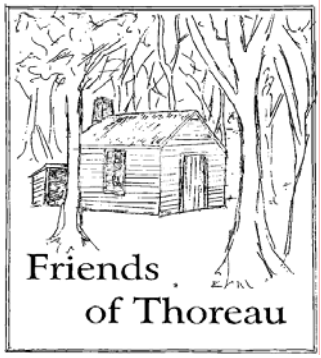
Farmland far from towns; in the middle of Route 100

Farmland, just outside Woodstock (Billings Farm)

Of course other techniques and policies not directly related to land use regulation are usually more helpful, but the establishment of linkages between both policies cannot be simply set aside. For example, in compliance with the requirements of 6 V.S.A. §8, the Vermont Secretary of Agriculture, Food and Markets shall establish guidelines to assist the municipal and regional planning commissions of the State in identifying agricultural lands for VT´s 256 towns. And those guidelines are in place and administered by the Department of Housing & Community Affaires (see the Section on Links to On Line Resources).

Still, the cultural factor: the enhancement of rural life and farming as a professional activity is of essence for the maintenance of landscapes. Vermont, as many other States in the world has agriculture enhacement programs too (see Section on Links to On Line Resources)

The manual is not based on VT´s experience. It was done by the New Hampshire Coalition for Sustaining Agriculture, but its principles and techniques are perfectly usable in the VT environment (see Section on Links to On Line Resources)



Landscape Policies: The Case of Vermont

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GUIDING STUDENTS´ DISCUSSION

1.- VT trivia

VT has its own personality. Its very origin, with the grants war, and the secret negotiations to join Canada until Congress recognized its State status in 1791 were Students should be introduced to the differences that soil occupation implies in creating the character of States.

Eight questions that students should be able to answer after a good exploration of this Case Study could help (answers, at the very end, in the Section on Links to On Line Resources):

TRUE or FALSE?
1.- In ratio of cows to people, Vermont has the greatest number of dairy cows in the country.

2.- Vermont's largest employer is the ice cream giant, Ben & Jerry's.

3.- The first ski lift in the U.S. was started in Vermont.

4.- .Vermont Wildlife biologists estimate that four out of five fawns starve to death each winter in Vermont.

Conditions are harsh for farmers during VT winters. This parafernalia sits outside almost every farm even in summer. Prepared for the next fall.

5.- Farmland covers more than 3/4 of the Vermont landscape.

6.- Vermont is the largest producer of maple syrup in the US.

7.- Vermont is the only state in the U.S. that doesn't allow billboards.

8.- Vermont has more covered bridges than any other State.

Covered bridge in Woodstock, VT

2.- A brief approach to history and how institutions and legal techniques frame societies. Grants, speculation, and homesteading

The history of VT is inextricably linked to its original occupation by settlers from New Hampshire (which became a colony on its won when separated form the Massachusetts Bay Colony in 1741) and New York. Both colonies with the intervention (not at all clear-cut decisive interventions) of the British Crown (George III) patent towns in the disputed respective western-eastern territories (129 patents issued by NH in 1749-1764; 107 by NY in 1765-1776). But each State, of course did not recognize each other´s. The "fight over the grants" (see Jan Albers, at 90-91) lasted even through the Revolutionary war of independence, with VT becoming an independent State in 1778 and not joining the Union until the conflict was settled.

Guiding students through this long-lasting fight will better help understand the historical roots of Vermonters´ claim of "uniqueness".

But ultimately settlement was in a large part based on those town patents and private property grants, and speculation was also a big underlying component of the strife. Surveying (remember that Pt George Washington himself was a surveyor, so this profession is very much linked to the origin itself of the U.S. as a nation) in VT went hand to hand with the marketing of the land surveyed (see Jan Albers, at 92-100).

Is it unavoidable that the origin of private property in VT still has a bearing on the speculative processes to which VT is still submitted (see next #)?

What is the difference between acquiring land via grants and homesteading?

Do these different territory occupation techniques transcend its simple origin as title awarding legal institutions to forge a different type of society?

Are those historical facts what make VT different from many other U.S States whose settlement was based on President Lincoln´s Homesteading policy and Act of 1862 (see Enrique Alonso García, Introduction… 2007)?

3.- Regulatory control and property rights in the US. The question of whether VT land use controls amount to unconstitutional takings.

Local land use planning, almost by definition, implies sometimes (almost always) the condemning of private property whenever new (different from those currently existing) uses of land are included in the plan. Ultimately the new owner, after the expropriation and the payment of the compensation, will be a private user (of a different use, i.e., commercial or industrial instead of residential) will be the owner.

The constitutional requirement of condemnation of property to be dedicated to "public use" comes always to question whenever such things happen (Fifth Amendment to the US Constitution: "*nor shall be (…) deprived of (…) property, without due process of law; nor shall private property be taken for* ***public use****, without just compensation*";

Article 2d of VT Constitution: "*That private property ought to be subservient to public uses when necessity requires it, nevertheless, whenever any person's property is taken for the use of the public, the owner ought to receive an equivalent in money*.")

In most, if not all European countries, this type of condemnation of property is without any doubt constitutional, and in the US it is clear that "public use" is not entirely equivalent to "**public purpose**" or "**public interest**" (the European Constitutions and the European Convention of Human Rights use the term "public interest": "*No one shall be deprived of his possessions except in the **public interest** and subject to the conditions provided for by law and by the general principles of international law*." –article 1 of Protocol 1).

But in the US this questioning seems repetitive as if the notion of private property as an essential human right should have more bite than anywhere else. Americans had to wait until 2005 to have the US Supreme Court settle some of the issues around urban planning and property condemnation in cities such as New London (Connecticut), *Kelo v. City of New London*, 125 S. Ct. 2655, 545 U.S. 469 (2005), the historical whaling town [for what this means in American history see Ana Recarte Vicente-Arche, Historical Whaling in New England, Case Study, Institute of North American Studies of the University of Alcalá, see Links to On Line Resources and Works Cited Sections of this case study].

The European Parliament and the European Commission, in the recent years, have also started to worry about the impacts in terms of urban sprawl and landscape degradation of some regions in the coast of Spain and other places. They attribute those impacts to excessively permissive laws than overemphasize the rights of developers *vis a vis* those of property owners, and those of property owners *vis a vis* those of the general public.

Students should compare the consequences of the *Kelo* decision (see Richard O. Brooks, Kelo and the "Whaling City"…, 2005, on the Section on Works Cited) with the arguments used by the European Parliament and Commission "charging" against coastal landscapes degradation in the Mediterranean (see both texts in the web: Links to On Line Resources).

Students should also look at the picture in next page and explore why almost every private forest in VT has such posted warnings.

Under Vermont's Constitution, fishing and hunting rights are protected on all lands not legally posted according to the Vermont statutes. Some landowners do not want their property to be used by the public for recreation. Concerns about privacy, property damage are among reasons cited for posting lands, as well as potential liability.

Motorized vehicle users, though, need the expressed written consent of the landowner to legally use their vehicles on private land.

4.- And what about Native Americans? Why does VT not recognize the Abenaki?

One of the surprising not so trivial "Trivia" of VT is the status of its Native American population: the Abenaki.

Under federal law Native American tribes have the possibility (or right?) to be recognized as a tribe.

"*The Abenaki have regained* [as many other Native American tribes, see Winona LaDuke] *their sense of identity and common purpose in the late twentieth century (…) But despite overwhelming evidence that the Abenaki traditionally inhabited the land that would become Vermont, the State has remained steadfast in its refusal to grant them legal recognition, for fear of lawsuits and casinos*" (Jan Albers, at 301, the text in brackets is added by the authors)

Historically they were and have continued to be one of the "Hands on the Land" of Vermont (paraphrasing Jan Albers splendid work –see the voice Abenaki in the Index of the Book, listed in the Works Cited Section of this Case Study-.

It is unavoidable that VT will eventually have to recognize them? Does federal law allow the States to control de decision on recognized federal tribes?

An Abenaki Headlining Dancer
Picture Taken at Dartmouth Pow Wow (courtesy of Koasek Traditional Band)

If what Jan Albers asserts as the main reasons to refuse recognition is right, then it may be that VT landscape policy might suffer some loss. But are there cases where Native American management of natural resources in reservations has caused landscape problems? (See e.g. Case Study of the Friends of Thoreau Program by Jane Ziegler, "Native Americans and Natural Resources: Black Mesa", December 2005).

5.- The ecological role of dirt roads, byways, scenic roads, and … road ecology en general.

"*A town is most often viewed from its public places, and the most visited public places in a community are its roads. As such, public highways are extremely important to a town's overall scenic character.*

(…)

Roadways also can be scenic features in and of themselves. A winding country lane lined by a stone wall and a village street passing under a canopy of mature trees are distinctive scenic resources. Roadways also provide visual access to scenic view; indeed, most of the photographs displayed in this report [referring to the rest of the

Town of Bennington, Vermont, -remember the second town to obtain a designated Growth Center, see Main Page- Scenic Resource Inventory, December 2004, See Section on Links to On Line Resources] *are taken from the side of a* public *road.*

It can be argued that most roads and streets in Bennington have significant scenic qualities.

Instead of attempting to list all of the scenic roads or road segments, however, this section will provide examples of elements that contribute to a road's scenic qualities.

In general, narrow local roads that blend harmoniously with the surrounding countryside are more scenic than wide roads that don't follow natural or historic elements of the landscape.

Landscape features that are adjacent to a roadway become a part of the road corridor: without stone walls, fencelines, trees, and similar elements the overall scenic value of a roadway can be significantly diminished. Some scenic roads also draw the traveller's eye along the centerline of the road to a unique view or distinctive landscape feature in the distance.

Of course, the views from roadsides are often just as important as the scenic character of the road itself. Some local roads offer delightful forays into deep forests while others bring motorists, bicyclists, and other travellers to views of fields, farms, mountains, or historic buildings. In these instances, scenic viewpoints are open to the principal view and are not blocked or disrupted by incompatible structures or other objects in the foreground. At the same time, attractive foreground objects can greatly enhance roadside views." …etc.

Paragraphs taken from the Scenic Resource Inventory, pgs 26 ff, December 2004, of the Town of Bennington, Vermont, -remember the second town to obtain, in October 2008, a designated Growth Center under Act 183. [See Main Page; see also for the Inventory, the Section on Links to On Line Resources]

Independently of the impact that the interstate system had on the very origin of Act 250 and VT´s landscape policy (see main page) VT roads have received special attention within and outside of the application of the Quechee Lakes Test.

"*The view from I-89 is an important scenic resource of the State*" said the Environmental Board in *IN RE: Palazzi Corp.*, September 13, 1985, #6F0322-EB, in a case concerning Criterion 8 [01] application. But the same thing van be said of other roads and of how the roads themselves are seen form other places.

Under Governor Howard Dean the State of Vermont put in place an Interagency Group (Vermont Agency of Transportation, the leader agency, the Department of Housing and Community Affairs, Division for Historic Preservation, and the Department of Travel and Tourism) which convened a larger group composed of citizens, officials and public sector employees, who participated in the development of the Vermont Byways Program / The Scenic Byways Planning Project.

"Flowers along the Lane" is based on the farms in the Champlain Valley, one of the few areas in Vermont with significant amounts of flat land (Anna Vreman).

The Byways Program was designed to help the State's residents and officials promote community and economic development and conserve community character based on locally defined goals and strategies built upon two basic aspects: 1) it provided a flexible tool that communities could use to organize a local or regional tourism effort based on the special resources along a highway corridor; and 2) **it continued a long tradition of concern for conserving Vermont's scenic landscapes by allowing communities to designate and manage local scenic roads**.

Component Reports for the Vermont Byways Program were the following:
• Program Manual
• Designating Vermont Byways: A Fieldguide
• Scenic Evaluation Method
• An Analysis of the Economic Impacts of Scenic Byway Treatments to Vermont: A Pilot Study
• A Workbook & Guide for Valuing Vermont Byway Changes: Pilot Study Application
• Bicycle Touring in Vermont & Vermont's Scenic Byways Program
• Phase I Report
• What's Scenic?

Manuals and guidelines, official and unofficial, insist on this every specific point over and over again.

Elizabeth Courtney, ***Vermont's Scenic Landscapes***: A. Guide for Growth and Protection,

But roads *per se* unavoidably imply an exchange of its impacts with its surroundings, to the extent that there is a whole science behind the notion of "road ecology". As the forementors and "discoverers" of this science as: *"A road is an open way for the passage of vehicles, and ecology is the study of interactions between organisms and the environment. Therefore, the combination describes the essence of* ***road ecology****, namely, the interaction of organisms and the environment linked to roads and vehicles. More broadly, traffic flows on an infrastructure of roads and related facilities form a road system. Thus road ecology explores and addresses the relationship between the natural environment and the road system*" (Richard T.T Forman & Daniel Sperling, at 7.) But the birth of the scenic values as the driver for road building precedes these ideas. It was in the 1920s when the US Government built a number of scenic highways to provide attractive access to the emerging National Park System and to forestlands. These included Going-to-the-Sun Road in Montana and the Blue Ridge Parkway and Skyline Drive in the mountains of Virginia and North Carolina. States followed, but after the II World War this idea was never reestablished on a significant scale (id at 30.)

What was the rationale for those scenic roads, pure out-of- depression investments? If such is the case, do scenic roads at a smaller scale make sense or should the principles of road ecology be the exclusive factor deciding about the soundness of such type of investments?

Roadside vegetation— wildflowers and a canopy of trees— can greatly enhance a road's scenic character.

Mature trees lining a rural roadway create an attractive and colorful canopy.

Some narrow unpaved local roads, such as Mount Anthony Road, that wind through quiet woodlands, are especially scenic.

Main Street, lined by street trees and historic buildings, and offering occasional views of the nearby mountains, is a scenic in-town road.

Page 27 of the Scenic Resource Inventory, December 2004, of the Town of Bennington, Vermont. See above.

6.- City sprawl and politics. Speculation? Corruption in the making?

The US smart growth movement is based on the widespread though that the uncontrolled growth of American suburbs is the #1 environmental problem that the US faces. The US is not alone in this one. It clearly is the most important environmental problem in Spain and in many other regions of the world.

According to a University of California Public Law Research Institute survey, most States´ smart growth approaches contain the following elements:

(1) eliminating State subsidies that promote sprawl;
(2) promoting infill development;
(3) preserving farmland, open space, and areas of environmental and recreational value; and
(4) supporting local planning by providing incentives and technical assistance to local governments and encouraging them to enter into regional planning agreements."

[For a recent -2007- study on the developments of States´ legislation on smart growth, see Gabor Zovanyi]

Is Act 183 sufficiently comprehensive to satisfy all of these elements? Is the main Act passed in VT trying to control smart growth smart enough?

Uncontrolled growth might be a simple consequence of Adam Smith´s invisible hand directing investment where market forces seem to be more profitable (see # 8 below). But, in many cases, it is the consequence of plain speculation.

The origin of VT itself as an independent State is connected to it since grants were the original titles of much of the private property (see # 2 above).

Act 250, as many other statutes try to control it, but as there are many ways by which speculators can circumvent it:

Land speculation is related in most cases with subdivisions designed to avoid Act 250 review:

"(1) Lot shapes are distorted to allow developers to maximize road frontage or shore frontage and still be over ten acres, thereby escaping regulatory inscription review of water supply and septic systems by the other state agency that approves subdivisions, the Department of Environmental Conservation. Many parcels are carved up into what is often referred to as "spaghetti" or "bowling alley" lots because of the long, narrow design that avoids shared roads. Without a regulatory or planning incentive, subdividers may have little motivation to pay attention to the natural lay of the land.

(2) Unregulated subdivisions may engender the piecemeal removal of productive forest and agricultural land from use. Widely-dispersed ownership makes commercial timber management and harvesting impractical.

(3) Extensive land subdivision also removes and reduces the amount of land available for recreation such as cross-country skiing and hunting.

(4) Wildlife habitats such as "deeryards" arc made increasingly vulnerable as more and more land is subdivided into small parcels that may someday become house sites.

(5) Most towns in Vermont lack the ability to adequately review septic systems and water supplies, let alone other potential sources of impact reviewed under Act 250 or other regulations. Parcels divided into nine or fewer lots all over ten acres in size may receive no substantive review at all.

(6) A mixed message is being sent to the public. The potential for environmental impact is not necessarily related to the size of a lot. Further, an insensitive live lot subdivision may have man more adverse effects than a professionally designed and developed subdivision of ten or more lots."

(S. Hamilton & S. Clark, S.)

"*Other problems are created by the "road rule." This is part of one of the exclusions from Act 251} that reads as follows: "the subdivision of less than10 lots if there is no construction of a road serving more than 5 lots and if there is no road construction over 811(I feet in length.." Developers often lay out their lots to provide road frontage along existing roadways. The best layout and design may be ignored in their attempts to avoid the Act 250 review process*." (A. Hensel, District Coordinator, Environmental Board, North Springfield, Vermont, personal interview. September 1996, cited by Robert Sanford and Hubert B. Stroud, at 253.)

But that is part of the game. The relevant question is to which extent, notwithstanding the strict rules on conflict of interests rules (see Kristina L. Bielenberg & Melanie Kehne), is VT immune to what the systems based on a strong control of city sprawl generate almost inevitably everywhere as if it were a plague: corruption.

This is not at all the case in VT !! It is free from corruption (Peg Elmer, Vermont Law School, personal conversation). Vermonters hold strongly to that opinion and there is no evidence, nor even indicia showing the minimum cloud of doubt.

Is it due to the fact while decision-making by citizens themselves is not so exceptional in VT (see # 5 of the Scholars´ Debate Section), the system guarantees total and full transparency?

7.- Home rule

Some think that speculation, at least in the 60s, was possible because of the relative weakness of most towns and local governments, which on its own, is based on a peculiar structure of local power in VT:

"Unlike most states, every square inch of land in Vermont has been divided into so-called towns that serve as important administrative units (a few "gores" still exist as unintended exceptions; these small, irregular parcels resulted from eighteenth-century surveying errors and present an ongoing management concern). Towns function in a

way that is similar to counties in many states. County government is still almost non-existent in Vermont. Local government resources were minimal; towns did not generally have civil engineers, sanitarians, planners, or other land use professionals. Consequently, much of Vermont's rural landscape remained vulnerable to the whims of the developer even during the decade of the 1960s when Vermont first began to experience tremendous development pressure from the recreation and tourism industry" (W. Schmidt, former Regional Planning Director, Windham Regional Planning Commission, Dummerston, Vermont, personal interview, cited by Robert Sanford and Hubert B. Stroud, at 241)

How is local government organized in general in the US?

Students should get familiarized with the so-called Dillon´s Rule. The famous rule, created by John Forrest Dillon (1831 – 1914, an American jurist who served on both federal and Iowa state courts, and who authored a highly influential treatise on the power of states over municipal governments, asserts uncontestable State preeminence over local governments:

"Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so may it destroy. If it may destroy, it may abridge and control." (*Clinton v Cedar Rapids and the Missouri River Railroad*, 24 Iowa 455; 1868).

The US Supreme Court fully adopted the rule in *Merrill v. Monticello,* 138 U.S. 673 (1891), reaff'd. *Hunter v. Pittsburgh*, 207 U.S. 161 (1907), which upheld the power of Pennsylvania to consolidate two cities against the wishes of the majority of the residents in one of them. The Supreme Court ruled that States could alter or abolish at will the charters of municipal corporations without infringing upon any contract rights: municipal corporations are not private ones.

But, of course, State constitutions can impose the opposite rule as a matter of State law. Local government becomes then a matter of absolute right of the municipality itself and of all the citizens of that State, who cannot take it away.

What is the rule in VT? Is VT a Dillon´s Rule State? Are Vermonters and their towns entitled to autonomy? Would the disempowerment of the municipalities, amounting to their loss of land use planning power, imply a breach of Vermont Constitution?

LOCAL GOVERNMENT AUTONOMY

"The Senate and the House of Representatives…may…grant charters of incorporation, subject to the provisions of Section 69, constitute towns, boroughs, cities and counties…"
(Vermont Constitution, Section 6)

"No charter of incorporation shall be granted, extended, changed or amended by special law, except for such municipal, charitable, educational, penal or reformatory corporations as are to be and remain under the patronage or control of the State; but the General Assembly shall provide by general laws for the organization of all corporations hereafter to be created. All general laws passed pursuant to this action may be altered from time to time or repealed."
(Vermont Constitution, Section 69)

Official State logo and State House in Monpelier, the capital of the State; a city of 8,035 at the 2000 census (the US smallest State capital).

8.- Planning versus the invisible hand

"*While planning is an operation of technical reason to resolve present and future community land-use problems in particular, it primarily seeks to improve the social and ecological working values in our towns, cities and rural areas. My contention is that land use planning is only one form of human reasoning and human order in our society, whether at the federal, state local areas. Economic markets, social customs and class, environmental conditions and legal and political processes are also important exercises of reason, and they are somewhat different than those of technical planning. And I would suggest to you that one of the reasons, perhaps, we planners have some difficulties communicating with other people is not that they are unreasonable opponents of our technical plans, but rather that we planners adopt one kind of reasoning, primarily, through technical methods and that most citizens look to other forms of reasoning through markets, customs, politics,- kinds of reasoning which they usually employ and which may indeed be appropriate or more appropriate depending on what the subject matter is that they're dealing with-*."

(Richard O. Brooks remarks on "Vermont by Design")

Many plans fail because of their bad estimates on the economic and social costs of the ideals that end up drawn in the maps and rules of the plan.

Is it easy to draw the delicate line between uncontrolled economic investment and planned frameworks for those investments to thrive without causing loss of identity and other not easily quantifiable damages to community life?

9.- Merino Lambs

VT´s economy and landscapes have a direct connection with Spain. And that connection is also sort of omnipresent in VT.

For example, the Windham Foundation is a not-for-profit organization located in Grafton, VT, established in 1963, to carry the mission to promote the vitality of Grafton and Vermont's rural communities through its philanthropic and educational programs such as, for example, the University of Vermont and Windham Foundation Speaker Series

Students should look closer into the details of its logo (below) and see if it captures VT´s rural communities´ essence. On any case, nobody would dispute the fact that certainly the sheep fit in

Where do these sheep come from?

It is a well known and documented historical fact that William Jarvis brought merino sheep to America.. While serving as US consul to Portugal, and taking advantage of the fact that Spain was in turmoil fighting both for its first Constitution (signed in Cadiz in 1812) and against Napoleon´s invasion, he acquired –getting a special permit of some Spanish noblemen- 400 merinos that were highly valued for the quality of their wool, and shipped them to America. He moved to Weathersfield, Vermont in 1812, purchasing 2,000 acres of land on the Connecticut River. Only several years before, had some of them arrived to the US (Jan Albers, at 145; Carroll W. Pursell, Jr.) The breed had been literally "created" at El Escorial, near Madrid, out of the Royal Flocks.

From a curiosity in some farms to whom Jarvis had distributed them merinos became the most important economic resource for VT just when the soils of many farms were loosing fertility. Due to the high tariffs put by Congress on imported wool in 1824, VT became the place of "**the great merino craze**" (Jan Albers, at 145-150.) The textile

wool industry (remember that Quechee´s industrial past was also connected to textiles) made its day.

Students should investigate: why where merino sheep so valuable? What influence did they have on VT history? Which other countries in the world had, for some periods of their history, the same reliance on merino sheep wool?

Young Vermonters learning about merinos in Billings Farm Museum.

10.- Big malls v. small commerce. The Wal-Mart Case.

One of the most extended debates all over Europe is about the impact that the big chains have in the fabric of downtowns of large cities and the historic cores and central districts of smaller towns. Small commerce is usually the glue element that keeps community life together brings cash to traditional residents.

Their economies of scale make it impossible to compete with corporate-based commerce both because of labor costs, since a small business cannot afford 24 hours and/or seven days a week openings, and because of car access to the shops themselves, which is easier in out of town parking lots of the big “boxes” or malls.

In fact the fight for the control of timing and location by regions and towns is one of the bitterest ones between the European Union and its member States.

Most of them invoke the police power clause over land use zoning and planning, as well as the cultural exception (preservation of heritage maintained both by the craftsmanship itself of manufacturing processes and the location in the historic cores of city or town centers –environmental clause exception-). Actually much of the strife and difficulties that the European Union is having in reaching a new statu quo after the European Constitution was rejected by referenda in France and the Netherlands had to do with the impact that the so-called Bolkestein Directive (that liberalizes access to, and provision of, all sorts of services) will have in the daily lives of many small businesses and in the

cohesion of the social fabric they produce. The Directive, though, is supposed to start to be applied on January 1st 2010.

I seems clear that the revitalization of historic cores of landmark heritage towns can only be based in the preservation of small commerce as part of the fabric of the town otherwise condemned to become ghost administrative centers (if only the municipality, the State or big corporation –under social responsibility policies- engage in the renovation and use of buildings whose economics have ceased to make sense). Tourism might be an alternative but tourists flee from "tourist districts" that do not mix with the real daily life of the neighbors. (Enrique Alonso García, Jose Antonio Gomez-Ibañez & Gerald McCue).

Traditional quilts from VT, from an exhibit at the Billings Farm Museum
(Courtesy of the Billings Farm Museum).

It seems that America in general and VT in particular has been able to deal with the problem through the reaffirmation of such police power after much political debate and litigation.

As in Europe, "`*box retailers´[are] large discount retailers characterized by their economies of scale, warehouse-type stores, and low prices" (e.g., Wal-Mart). These stores generally locate themselves outside of the traditional downtown, near highway access, and are typical precursors of suburban sprawl*." (Jonathan Moore Peterson, at 335.) *"These structures, and their inhabitant businesses, seem to be patiently lying in wait, anticipating the inevitable growth which will eventually bring a flood of customers to their doors. The empty lots between the present structures sprout signs promising: "'Wal-Mart': coming soon," and "'Shop 'n Save' Spring 1996." What is so fundamentally disturbing about this present and impending development is not that it exists, or will exist (for economic vitality and good ratables are sought by every municipality)"* (Jessica E. Jay, at 959, citing Norman Williams, Jr., The Three Systems..)

Thus it was no wonder that the Wal-Mart Case became the symbol of this fight. *IN RE: Wal-Mart Stores, Inc.*, December 23, 1994, #6F0471-EB. The issue in legal terms was clear-cut and straightforward: was the law that, "*lest the growth center tool be construed as exclusionary, let it be understood that box retailers such as Wal-Mart may be permitted to develop, so long as they do so on the town's terms*" (Jessica E. Jay, Alan Ehrenhalt, Up Against The Wal-Mart, GOVERNING, Sept. 1992, at 7).

The arena was the town of St. Albans, VT, which is a different political entity from the city of St. Albans. Both the town and the city are located in Franklin County, near the northeast arm of Lake Champlain. The proposed site is located about two miles from the city's downtown. The permit applicants included the St. Albans Group, which owns the land upon which the store was to be constructed, and Wal-Mart Stores, Inc. Opposing the applicants before the Commission, and again on appeal before the Board, were the Franklin/Grand Isle County Citizens for Downtown Preservation ("Citizens") and the Vermont Natural Resources Council (VNRC). this opposition, the applicants initially succeeded in obtaining a permit. [For a detailed account of the Case until the appeal to Vermont Supreme Court, see Michael A. Schneider] .

The students should read the Environmental and Supreme Court decisions, and discuss to which extent there is at all any connection between economics and scenics: how do downtowns and historical districts end up looking? are ghost "beautiful" downtowns really beautiful? Or, to the contrary, without lively and varied dynamism, the lack of authenticity of town or village life is only a Disney or Hollywood decorative display? Why is it that none of the bodies in charge (District Commission, Environmental Board, Vermont Supreme Court) mention Criterion 8 [01]? [For the location of both decisions see Section on Links to On Line Resources]

Main Street, St. Albans, Vermont

Will traditional general stores such as this one in the middle of Woodstock survive?

Lively pedestrian friendly downtowns are also a major target of VT´s policy

11.- Finally, some economics. Non-timber forest products: the economy of maple sugar .

Students should never forget that even landscapes imply good and even hard science. The Section on Scholars´ Debate ultimately referred to the status of VT economy as an indicator of the success or failure of VT landscape policies.

One of the factors that help mountain forests, in particular privately owned forests, is the direct relationship between forest preservation and and the possibility of obtaining revenues. There are numerous studies on whether the income coming from wood is more or less than that produced by the exploitation of non timber products (see e.g. Kameron Decker Harris & Claire McKown; Frank H. Armstrong)

Many tracts of VT forests produce maple sugar.

Typical forest tract dedicated to maple for maple sugar production, side by side to dairy farming and cheese manufacturing facility

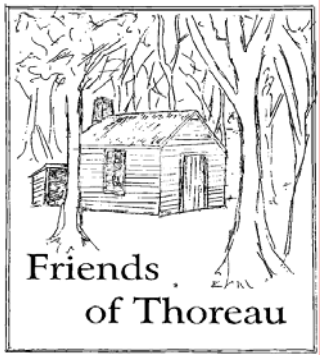

Modern and traditional sap collection techniques

Maple sugar from VT, a real “delicatessen”, is as well known and celebrated outside VT as its cheese.

A typical VT sugarbush has about 60 taps per acre (valued USD 50/tap). Each tap will typically produce a gallon of sap that will boil down to 1 quart of syrup on a typical year. What would be the difference in income if a forest owner [do not consider costs to simplify the case] a) decides to rent his/her trees (average rent: USD 0.50/tap); b) elect to sell the sap (price in the market: USD 0.35 /gallon of sap; knowing also that the dilution of 60 taps into sap allows for the production of 10 gallons); or c) choose to produce syrup (price in the market USD 30/gallon of syrup; knowing that 60 taps, dilute into 0.25 gallons of syrup)?

[The data, and of course the idea, have been taken from David Brynn at 247]

The answer is in the section on Scholars´ Debate # 8.



Landscape Policies: The Case of Vermont

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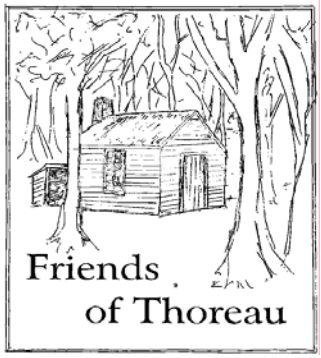

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LINKS TO ON LINE RESOURCES

The web of VT´s **Agency of Natural Resources** on act 250 is the following: http://www.anr.state.vt.us/site/cfm/act250/index.cfm

The E-Note Index VT´S Agency of Natural Resources provides brief annotations of key legal conclusions contained in Environmental Board decisions from 1970 to the present (through 12/31/07). The Index is arranged in major categories covering topics such as Jurisdiction, Party Status, Permits, and the 10 Criteria. The Index, a 400-page document, is available to download:
http://www.nrb.state.vt.us/lup/publications/enotes123107.pdf

The Agency has also a Database search tool:
http://www.anr.state.vt.us/site/cfm/act250/index.cfm

On the available maps of VT see http://www.anr.state.vt.us/site/html/sitemap.htm#maps

The **Vermont Department of Housing and Community Affaires**, whose mission is to promote community revitalization and development policies that maintain Vermont's

compact settlements separated by rural landscapes, includes in its web page infromation on the designations of Downtowns, Village Centers and Growth Centers as well as on planning resources and grants programs:

http://www.dhca.state.vt.us/index.htm

Web page of the **Vermont Department of Fish & Wildlife**
http://www.vtfishandwildlife.com/

VT **wildlife action plan** of the Department:
http://www.wildlifeactionplans.org/vermont.html

On **maple tree** as a genus and its explitation in VT:
http://www.mapleinfo.org/htm/forests_management.cfm

The web page of the Vermont **Association of Planning & Development Agencies** (VAPDA) is the following:
http://www.access-vermont.com/vapda/bylaw/bylaw1.htm

Web page of the "official" Growth **Centers Planning Manual** of VT Agency of Natural Resources:
http://www.dhca.state.vt.us/Planning/GCManualPart1.pdf
http://www.dhca.state.vt.us/Planning/GCManualPart3.pdf
http://www.dhca.state.vt.us/Planning/GCManualPart2.pdf

Vermont Natural Resources Board brochure "**Act 250: A Guide to Vermont´s Land Use Law**", November 2000, Revised August 2006 edition can be downloaded from:
www.nrb.state.vt.us/lup/publications.htm

The **Fieldguide of the Vermont Byways Program** / The **Scenic Byways Planning Project** can be downloaded from:
www.vermont-byways.us/sites/byways/files/pdf/.../FieldGuide.pdf

On the **Farm Viability Enhancement Program**
http://www.vhcb.org/pdfs/agviabilityar04.pdf

The web page of the **"Buy local, buy Vermont" Program** of the Vermont Agency of Agriculture is the following:
http://www.vermontagriculture.com/buylocal/links/environment.html

Decisions of the **Environmental Board** can be found in
http://www.nrb.state.vt.us/lup/decisions.htm

Environmental Court Decisions can be found at:
http://www.vermontjudiciary.org/GTC/Environmental/Opinions.aspx

Web page of **Vermont Business Roundtable**
http://www.vtroundtable.org/

Web page of **Vermont Forum on Sprawl** (now called **Smart Growth Vermont**)
http://www.smartgrowthvermont.org/
Smart Growth: community character inventory
http://www.smartgrowthvermont.org/fileadmin/files/Partner_Communities/Report_PDFs/Burke_Community_Character_Inventory_-final_01.pdf

Web page of **Vermont Natural Resources Council**:
http://www.vnrc.org/

Save VT Ridgelines:
http://www.clearskyvt.org/letters.html

The web page of the **Windham Foundation** is the following:
www.windham-foundation.org/

The **Vermont Journal of Environmental Law** (VJEL) is the student-edited periodical published. The Journal includes articles, essays, editorials, case comments, book reviews, and student notes.

See its web page: http:// www.vjel.org/.*org/jour*nal.

The web page of **Vermont Law School** is: http://www.vermontlaw.edu

About the **Land Use Institute (LUI)** of Vermont´s law School:
http://www.vermontlaw.edu/x3704.xml

On the Vermont Law School conference on the follow-up of the JAM Golf VT Supreme Court 2009 decision: http://vermontlaw.edu/x4045.xml

About the debate triggered by the VT SC decision on JAM Golf: JAM GOLF LLC. VS. CITY OF SOUTH BURLINGTON: LESSONS FOR VERMONT COMMUNITIES
March 20, 2009 Vermont Law School's Land Use Institute, Vermont Natural Resources Council and Vermont Planners Association hosted a workshop for Vermont planners, land use attorneys & natural resource professionals
http://vermontlaw.edu/x4045.xml

The work of Professor Richard O. Brooks on the US Supreme Court 2005 Kelo-New London Decision included in the LUI´s Volume on "The Supreme Court and Takings: Four Essays", listed in the Works Cited Section, can also be downloaded from the following internet acces:
www.vjel.org/takings/Brooks_Article.pdf

Hartford Area Chamber of Commerce web page is very useful to visualize **Quechee** and its surroundings:
http://www.hartfordvtchamber.com/quecheehistory.asp

The **Council on the Future of Vermont**´s ***Imagining Vermont: Values and Vision for the Future*** is the final report of the Council on the Future of Vermont.

The report can be downloaded from:

The report ***Dissapearing VT?*** Can be downloaded from:
http://www.vspop.org/DisappearingVermontFINAL08.pdf

On VT **changing landscape**
http://www.anr.state.vt.us/Env98/DOCS/webpgs/vtchglds.htm

The **Town of Bennington** Scenic Resource Inventory December 2004 can be downloaded from:
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http://www.rochestervtpubliclibrary.com/VermontBibliography.pdf

On the **Vermont State Art Collection**:
http://www.vermontartscouncil.org/ProgramsInitiatives/ArtofVTTheStateCollection/tabid/87/Default.aspx

About the exhibition "**Pastoral Vermont: The Paintings and Etchings of Luigi Lucioni**", May 21-August 9, 2009. at Middlebury College Museum of Art: http://museum.middlebury.edu/exhibitions/current/lucioni.htm

On the paintings of **Anna Vreman**:
www.annavreman.com/AboutAVreman.html

On the **merino** sheep and their Spanish origin (and how they were at the base of the economic system that sustained the Spanish empire) there is a lot of information in te web pages of the Vermont Historical Society:
www.vermonthistory.org/
Also in:
http://en.wikipedia.org/wiki/Merino
http://www.livestocktrail.uiuc.edu/sheepnet/paperDisplay.cfm?ContentID=6701
http://www.cyberspaceag.com/farmanimals/sheep/sheephistory.htm
http://wool.com/about.php?id=9
http://www.uvm.edu/~vhnet/hertour/hthome06.html
http://www.flowofhistory.org/themes/movement_settlement/vtmigration.php

The Resource Kit materials of the **NH Coalition for Sustaining Agriculture** are being made available online at the UNH Cooperative Extension Web site:
http://coopext1.unh.edu/sustainable/farmfrnd.cfm

On the **European Landscape Convention**.
http://www.coe.int/t/dg4/cultureheritage/Conventions/Landscape/

Text of the Convention: http://conventions.coe.int/Treaty/EN/Treaties/Html/176.htm

On the **Draft Report of the European parliament on the impact of extensive urbanization in Spain**
http://www.europarl.europa.eu/meetdocs/2004_2009/documents/pr/755/755463/755463en.pdf
http://www.europarl.europa.eu/sides/getDoc.do?language=EN&reference=A6-0082/2009#title2

On the **IUCN categories of protected areas**:
http://www.unep-wcmc.org/protected_areas/categories/index.html

UNESCO´s World Heritage Center Official Site: http://whc.unesco.org/
Text of the UNESCO World Heritage Convention: http://whc.unesco.org/en/182/

On the **roots of landscape ecology and ecosystem approach**:
http://www.maf.govt.nz/mafnet/rural-nz/sustainable-resource-use/biodiversity/convention-on-biological-diversity/convention-on-biological-diversity-report-02.htm#P198_29407

EU website on the Habitats Natura 200 Directive:
http://ec.europa.eu/environment/nature/legislation/habitatsdirective/index_en.htm

Text of the EU habitats Directive:
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1992L0043:20070101:EN:PDF

On **Patinir** and the invention of Landscape:
http://www.virtual-history.com/book.php?id=8720

Answwrs to **Vermont Trivia** can be found in:
http://www.virtualvermonter.com/trivia/index.ht

A newborn Vermonter waiting relaxed for the future to come

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Anna Vreman generously allowed for the reproduction of part of her beautiful paintings of VT´s landscapes as well as her insights about them (see Links to On Line Resources for her Gallery web page).

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