

Permitting & Case Law: The Year in Review (2016)



Christopher D. Roy, Esq.
Mark G. Hall, Esq.

white + burke
VERMONT
DEVELOPMENT
CONFERENCE



Vermont Supreme Court 2016 Decisions of Note



- *Treetop Development* (Act 250/Post-Decision Conditions)
- *Waterfront Park* (Act 250/Changed Circumstances)
- *B&M Realty* (Act 250/Vested Rights and Regional Plans)
- *Costco* (Act 250/Traffic & Wetlands)
- *Northeast Materials* (Act 250/Grandfathering)
- *Wagner & Guay* (Zoning/Interpretation of Plat)
- *Willowell Foundation* (Zoning/Interpretation of Plat)
- *Burns* (Zoning/Change of Use)

In re Treetop Dev. Co. Act 250 Dev.

2016 VT 20 (Feb. 12, 2016)

- 2002: Act 250 permit issued
- 2009: Suit re stormwater, etc.
- 2012: Settlement by parties
- Permit amendment sought
- 2013: Amendment granted with Condition 14
- No appeal of condition reserving right of comm'n “to evaluate and impose additional conditions as needed”
- 2014: Ass'n appeals decision not to impose further
- Affirmed: Enforcement power vested solely w/ NRB & ANR – comm'n lacked auth'y to impose Condition 14



In re Waterfront Park Act 250 Amendment 2016 VT 39 (Apr. 15, 2016)

- Rule 34(E) Stowe Club
- Modification of Conditions
- De Novo Review?
- Evolution



In re B&M Realty, LLC

2016 VT 114 (Oct. 21, 2016)

- 2003: Regional plan enacted
- 2005: B&M sought zoning change
- 2007: Regional plan amended
- 2012: B&M seeks zoning permits
- VT follows “minority rule” regarding vested rights
- Only filing of a complete application vests rights
- Size and location means “substantial regional impact”
- Regional plan validly prohibits “principal retail establishments” outside growth centers



In re Costco Stormwater Disch. Permit

2016 VT 86 (Aug. 5, 2016)

- Standard of Review
- Deference To Agency
- Pilgrim Partnership
- Changes in Application
- Rule 403 – Exclusion of Evidence



In re Northeast Materials Group LLC

2016 VT 87 (Aug. 12, 2016)

- Rock-crushing operation at quarry
- 2nd appeal re grandfathering
- Act 250 date of July 1, 1970
- Applicant has burden to produce
- “Cognizable change to the existing development”
- “Potential for significant impact” under Act 250 criteria
- Burden applies regardless of lack of historic evidence
- Rejects mobility of rock-crushing as applying to whole
- Dissent: Burden of proof shifted to applicant



In re Wagner & Guay Permit

2016 VT 96 (Sept. 2, 2016)

- Standard of Review
- Interpretation of Permit Conditions
- Zoning v. Covenants
- Dissent



In re Willowell Found. Cond. Use.

2016 VT 12 (Jan. 29, 2016)

- 2000: Subdivision approval
- PC decision and minutes lost
- Plat outlines “building envelopes”
- 2005: conveyed w/ no restrictions
- Various notes on plat
- Mixed-use proposal w/ permitted and conditional uses
- Court rules that “terms appearing on the subdivision plat are not enforceable land-use restrictions”
- “Not sufficiently clear to constitute land-use restrictions”



In re Burns Two-Unit Resid. Bldg.

2016 VT 63 (May 27, 2016)

- Failure to Appeal
- “Decisions” of a ZA?
- Notice to Public At Large?



Discussion about *Lathrop*

- Notice of Changes in Projects
- Notice and Remand
- Noise Standards
- Traffic



Traffic Conditions in Previously Developed Areas

- *Hannaford and Killington Village* cases
- Two projects in developed areas
- Subject to pending S. Ct. appeals
- “Last one in” no longer practical
- Approach (like much of Act 250) encourages sprawl by making development in growth areas more difficult
- Act 145 recognizes concept of proportionality
- Can a district comm’n or court require non-agreeing gov’t entities to approve/design/build traffic mitigation?



Traffic Conditions in Previously Developed Areas



- Remember: Act 250 cannot be denied under Criterion 5, only conditioned
- Are post-permit traffic studies and potential future conditions valid any longer under *Treetop* (see *Champlain Parkway*, 2015 VT 105)?

QUESTIONS?

SPEAKERS



Christopher D. Roy, Esq.
Downs Rachlin Martin PLLC
croy@drm.com

Mark G. Hall, Esq.
Paul Frank + Collins, Inc.
mhall@pfclaw.com

