

Permitting and Case Law: 2019 Year In Review

white + burke

VERMONT
DEVELOPMENT
CONFERENCE

2019 Vermont Supreme Court Decisions

- *State of Vermont Agency of Natural Resources v. Parkway Cleaners* (2019 VT 21; 03/29/19)
- *In re North East Materials Group, LLC/Rock of Ages Corporation Act 250 Permit* (2019 VT 55; 08/23/19)
- *In re 204 North Avenue NOV* (2019 VT 52; 08/30/19)
- *In re Diverging Diamond Interchange SW Permit* (2019 VT 57; 08/30/19)

Vermont Geography Trivia

- 1. In what town is the highest point in Vermont?

State of Vermont Agency of Natural Resources v.

Parkway Cleaners (2019 VT 21; 03/29/19)

Background/Overview:

- Dry cleaning biz in Hartford in 70's & 80's.
- State aware of contamination (including adjacent parcel) in late 80's
- Owner, an individual, purchases property in a 1995 tax sale.
- State contacts Owner about contamination in 2002.
- Owner conducts Phase II assessment in 2005 – lots of PERC.
- In 2006, Owner transfers property to a corporation (no consideration; Owner is president/director; no other assets or business records)
- State sues. Trial court grants summary judgment to State, finds Owner liable for release of hazardous waste, and orders Owner to remediate

State of Vermont Agency of Natural Resources v.

Parkway Cleaners (2019 VT 21; 03/29/19)

Party Arguments & Court Ruling:

- Owner claims that release or threatened release **during the ownership period** is required for current owner liability under 6615(a)(1) of VT's Waste Mgmt Act.
- Supreme Court (SC) calls claim "**meritless**" – 4 categories for liability for a release, including "the owner or operator of a facility, or both" and "any person who at the time of release...owned or operated any facility." Also, innocent landowner defense makes no sense with owner's interpretation.
- Owner argues lower court abused its discretion by ordering Owner to investigate and remediate (Owner argues can only be compelled to reimburse State or to refrain from conduct) and that order was vague.
- SC disagrees – statute gives court this power and order sufficiently specific.

Vermont Geography Trivia

2. What is the largest lake entirely within the borders of Vermont?

In re North East Materials Group, LLC/Rock of Ages

Corporation Act 250 Permit (2019 VT 55; 08/23/19)

Background/Overview:

- Graniteville, Barre - residences within 1325 ft. of rock crushing.
- 2009 - District Commission (DC) jurisdictional opinion determines no Act 250 permit required for rock crushing – operations begin.
- 2014 - ANR issues air permit, with condition for wet suppression controls.
- 2016 - SC rules that Act 250 permit is required.
- 2017 – DC denies Act 250 permit because of Criterion 1 (silica dust air pollution) and Criterion 8 (aesthetics - truck noise).
- E-Court reverse's DC's denial of permit.

In re North East Materials Group, LLC/Rock of Ages

Corporation Act 250 Permit (2019 VT 55; 08/23/19)

Party Arguments & Court Ruling:

- SC applies Quechee Test: Criterion 8 is violated if project will have an adverse aesthetic impact and that impact is undue. “Undue” if violates clear community standard, shocks average person, or if generally available mitigation steps not taken.
- Neighbors argue that SC precedent (*Lathrop*) requires that only Lmax noise data (sudden bursts of noise) be considered and not Leq(n) (max noise over period of time) to determine if adverse aesthetic impact is “undue”
- SC holds that although precedent requires review of Lmax data, consideration of Leq(n) not prohibited. E-court properly held that even though the increased frequency of noise would have adverse impact, the impact would not be undue.

In re North East Materials Group, LLC/Rock of Ages

Corporation Act 250 Permit (2019 VT 55; 08/23/19)

Party Arguments & Court Ruling:

- Neighbors argue that SC precedent (*Omya*) established a standard for increase in truck traffic and this project exceeds it.
- SC says no bright line rule for what amount of increase in frequency of truck traffic is “undue”. % increase is useful, but not dispositive. E-court properly considered context of this area.
- SC makes distinction between “historic” and “quintessentially Vermont” Brandon village in *Omya*, and the “far from pastoral” “industrial zone” in the present case where quarrying had occurred for 100+ years. It would take a greater increase in truck traffic in this area to “shock” the average person.

Vermont Geography Trivia

3. What three Vermont towns share a name with a Vermont county – but are **not** located in that county?

In re 204 North Avenue NOV

(2019 VT 52; 08/30/19)

Background/Overview:

- Building on North Ave in Burlington converted from duplex to triplex in 1992 (building permit obtained, but no C.O.)
- Building sold in 2002. Still rented/used as triplex.
- City issues notice of violation in 2017 for a change of use from duplex to triplex without zoning approval.

In re 204 North Avenue NOV

(2019 VT 52; 08/30/19)

Party Arguments & Court Ruling:

- Owner argues that 15 year statute of limitations (SOL) in 24 V.S.A. Section 4454(a) bars enforcement of an unpermitted use that has been ongoing for more than 15 years.
- E-court followed its own precedent and distinguished between “structural” violations (subject to the SOL) and “use” violations (not subject to the SOL) and determined that changing use from duplex to triplex was a use violation not subject to the SOL.
- SC reverses (!). Plain language of the statute does not make the “use” v. “structural” distinction. Notes also that the “first occurred” language in the statute makes no sense if the statute doesn’t apply to use violations.

Vermont Geography Trivia

4. What are the two largest towns in Vermont (by geographical area)?

In re Diverging Diamond Interchange SW Permit

(2019 VT 57; 08/30/19)

Background/Overview:

- Reconfiguration of Exit 16 in Colchester.
- Plaintiffs (nearby business owners) appealed various aspects of 3 lower decisions resulting in Act 250 and stormwater permits being issued to the Agency of Transportation.
- Water Quality Standards changed to include chloride and phosphorus weeks after SW permit application submitted.
- Criterion 5(B) added to Act 250 months after Act 250 application submitted, but days *before* final revised exhibit to application submitted.

In re Diverging Diamond Interchange SW Permit

(2019 VT 57; 08/30/19)

Plaintiff's Arguments:

- Vesting of Applications: Plaintiffs contend that neither stormwater permit application nor Act 250 permit application vested before the change to regs/law.
- Conflating Criteria: E-court improperly conflated Act 250 Criterion 1 (“Air and Water Pollution”) with Subcriterion 1(B) (“Waste Disposal”). Purpose of 1 is to assess water pollution issues apart from SW permitting process.

In re Diverging Diamond Interchange SW Permit

(2019 VT 57; 08/30/19)

Court's Ruling:

- Upholds E-court: permit application vests when administratively complete application is filed – nationwide, the minority rule. ANR emails, records and testimony establish SW permit was administratively complete before new regs (so they don't apply)
- Upholds E-court: changes to Act 250 application after Criteria 5(B) added not substantial enough to delay vesting. The application submitted prior to 5(B) effective date addressed all relevant criteria, the project wasn't significantly altered, and there was no bad faith (so 5(B) doesn't apply)
- Reverses E-court on Criterion 1. Court erred by dismissing Act 250 questions about possibility of project causing undue water pollution based solely on vested rights doctrine and that no chloride/phosphorus standards existed under applicable regs. Criterion 1 and Subcriterion 1(B) are independent of each other and involve distinct standards. Compliance with regs is only one factor under Criterion 1 (and so can't dismiss without considering other factors listed in the statute – soil, slope, etc.)

Vermont Geography Trivia

5. What is Vermont's smallest organized town (by geographical area)?

Environmental Court Decision

Coming Soon to the Supreme Court

In re Snyder Group Inc. PUD Final Plat

Background/Overview:

- Neighboring property owners appealing South Burlington DRB Decision approving 48 unit PUD.
- Maximum density for zoning district would be 31 units but for use of transferable development rights (TDRs) per 24 V.S.A. Section 4423.
- Neighbors challenging whether City's TDR bylaw complies with TDR statute and whether it is constitutional.
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Environmental Court Decision

Coming Soon to the Supreme Court

In re Snyder Group Inc. PUD Final Plat

E-Court Ruling:

- Although terms “sending areas,” “receiving areas” and “density increase” are not explicitly defined in the regs, they’re identified with enough specificity to comply with statute.
- No guidance in the zoning regs regarding the quantity of TDRs (land mass, parcel size, etc.) necessary to obtain a density increase and that “development rights” is not adequately defined, especially since does not include the minimum statutory definition (must “at a minimum...include a conservation easement”)
- Bylaw is unconstitutionally vague. Ordinary person not able to understand how the TDR program works (especially quantity of development rights that must be secured in order to utilize TDRs) and applicants or project challengers would be uncertain as to factors a DRB must consider when assessing TDR transfers.
- TDR bylaw is invalid. Project limited to 31 units.

Vermont Geography Trivia

6. What was the first town chartered in Vermont?

Draft Stormwater General Permit 3-9050

- Serves as the 3-Acre Permit as required by VT Clean Water Act. In March 2019, State releases new stormwater permitting rule.
- 3-Acre sites are those with 3+ acres of total impervious surface (includes adjacent properties that are part of a related operation or previously authorized under a common permit).
- Applies to pre-2002 developments not previously subject to stormwater rules and requires retrofitting (new infrastructure). 1st step - conduct Engineering Feasibility Analysis. If improvements impossible, impact fees can be paid. Possible grant funding and subsidized loans.
- Champlain and Memphramagog watershed owners already notified (700 projects; 8000 landowners, 5,700 acres, ~\$170M). Notices require owners to file notification of intent to bring properties into compliance.

Draft Stormwater General Permit 3-9050

- Current timeline: Champlain and Memphramagog watersheds need to be permitted by October 2023 (other watersheds by 2033).
- Draft rule also reduces permit threshold for operational permit from 1 acre to ½ acre of impervious surface starting 7/1/22 and tightens rules regarding phased developments.
- On public notice until **November 8th** (can submit comments through DEC Environmental Notice Bulletin)
- When permit is final, ANR will provide info on permit application process to the 3-Acre sites (and on how a site could request reconsideration of 3-Acre status)
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Transfer Tax and Land Gains Tax Changes

- Transfer Tax: As of July 1, 2019, property transfer tax now applies to not only a transfer by deed but also to a transfer by acquisition of a controlling interest of an entity owning real property. A “controlling interest” is defined as 50% or more of voting power of stock (for a corp.), capital, profits, or beneficial interest of an entity.
- Land Gains Tax: As of January 1, 2020, scope of land gains tax will be reduced. Sale of land held for less than 6 years is not subject to the tax (regardless of acreage) as long as seller did not subdivide the property.

Coming Soon – Changes to Act 250

- Changes are coming...but they're not here yet. The 50th anniversary of the Act may be marked by a modernization of the Act.
- Two bills currently alive in the legislature proposing changes to Act 250 jurisdiction and Act 250 criteria.
- Back to the Future?: Appeals potentially heard by an appointed board rather than by E-Court.

Coming Soon – Changes to Act 250

- Jurisdiction:
 - Creating alternative process for trails
 - Exempting jurisdiction over:
 - Areas in designated historic downtowns – allowing municipalities to apply for enhanced designations for downtown areas, village centers
 - “Accessory on-farm businesses”
 - Applying jurisdiction to:
 - all projects above 2,000 ft (down from 2,500)
 - “critical resource areas” or “unique resource value area (river corridor, wetland, ridgeline, steep slope, forest block)
 - interstate “interchange areas”

Coming Soon – Changes to Act 250

- New Criteria:
 - Climate change – include more green house gas analysis in Criterion 1 (air pollution)
 - Add forest block and connecting habitat criteria under Criterion 8 to avoid or minimize habitat fragmentation.
 - Include energy efficiency under Criterion 9(F)

Vermont Geography Trivia

7. The nation's first ski tow was located in what Vermont town?

Vermont Geography Trivia

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- 2. What is the largest lake entirely within the borders of Vermont?
- 3. What three Vermont towns share a name with a Vermont county – but are **not** located in that county?
- 4. What are the two largest towns in Vermont (by geographical area)?
- 5. What is Vermont's smallest organized town (by geographical area)?
- 6. What was the first town chartered in Vermont?
- 7. The nation's first ski tow was located in what Vermont town?



QUESTIONS?

SPEAKER

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