

ENVIRONMENTAL COURT HOLDS THREE SECTIONS OF 2003 SOUTH BURLINGTON ZONING REGULATIONS UNCONSTITUTIONALLY VAGUE

In the continuing litigation arising out of development of the Vermont National Country Club (VNCC) in South Burlington, the Environmental Court ruled that three provisions of the 2003 South Burlington Land Development Regulations were unconstitutionally vague. *In re Highlands Development Co., LLC and JAM Golf, LLC Master Plan Application*, No. 194-10-03 Vtec. This follows the controversial 2008 decision in which the Vermont Supreme Court held that two provisions of the earlier 2002 version of the South Burlington regulations were so vague and delegated such standardless discretion to the City's Development Review Board that they violated property owners' due process rights and could not be applied to other portions of VNCC development project. *In re Appeal of JAM Golf, LLC*, 2008 VT 110.

The objectionable provisions of the 2003 South Burlington ordinance – §§ 15.18(B)(1) and (B)(3) and § 15.18(A)(4) – addressed aesthetic values, natural resources, and unique natural features, respectively. The Environmental Court held that § 15.18(B)(3) and § 15.18(A)(4) lacked adequate standards by which the Court could determine what would actually constitute a failure to protect natural resources and unique natural features under these provisions. The Court also held that § 15.18(B)(1) failed to adequately define “aesthetic values,” and was therefore not specific enough allow the Court to identify the resources or features to be protected. Fortunately, the Court upheld several other provisions of the 2003 Regulations relating to the protection of wetlands and stream buffers (§ 15.18(A)(4)), contiguity of open space (§§ 15.18(A)(6) and (B)(4)), visual compatibility (§ 15.18(A)(5)), and lot layout (§ 15.18(A)(10)). It found each of these sections adequately identified the resource to be protected and provided sufficient standards for the Court to apply as to the required degree or level of protection. Other provisions contested by the applicant were not ruled upon because there were inadequate facts presented for the Court to reach a decision.

Though not entirely favorable for South Burlington, the *Highlands Development* decision may in the end prove to be a resource for municipal planning and zoning officials who seek to craft land use regulations in the wake of *JAM Golf*. The Environmental Court has provided a detailed review of the legal standards applicable to municipal zoning regulations. It has further provided guidance on how land use regulations must be specific enough to allow the decision-maker to clearly identify the resources or features to be protected and provide standards by which the decision-maker can discern the degree or level of protection that must be achieved for each identified resource or feature. The decision also indicates that the Court will endeavor to avoid finding unconstitutionality in municipal bylaws by considering other provisions of a challenged ordinance, the historical usage of the challenged provision, relevant precedents, and prior legislation. A copy of the decision can be obtained at www.vermontjudiciary.org/GTC/Environmental/ENVCRT%20Opinions/03-194z.HighlandsMasterPlan.sjo.pdf

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