

VERMONT SUPREME COURT REDEFINES STANDARD FOR ACT 250 INTERPRETATION OF TOWN PLANS

The Vermont Supreme Court has rendered a decision that makes it more difficult for provisions in town plans to apply to a proposed development under criterion 10 of Act 250, which requires that a project conform to any duly adopted local or regional plan. *In re Mark and Pauline Kiesel*, Vermont Supreme Court, No. 98-371 (December 29, 2000). Furthermore, the decision makes it extremely difficult for municipalities to have provisions of town plans apply in Act 250 if a town's zoning bylaws have not been updated to implement a specific goal of its plan.

The case involves a proposed five-lot subdivision in Waitsfield, Vermont. The project was proposed in Waitsfield's Forest Reserve District, off of a Class IV town road, and at elevations between 1500-1700 feet.

The project required a subdivision permit from the town. As required by law, the town reviewed the proposed subdivision under its regulations in effect at the time that the developer filed the application. However, the subdivision regulations in effect did not reflect provisions of Waitsfield's Town Plan that were relevant to the project.

After a lengthy permit process the town issued a subdivision permit with more than 20 conditions. The town also issued a permit to the developer for the improvement of the Class IV road. Subsequently, the developer applied for an Act 250 permit. As a statutory party by right to the Act 250 proceeding, the town challenged the project under several Act 250 criteria. In a decision favorable to the town, the Environmental Board (Board) denied the Act 250 permit under several criteria, including criterion 10. The developer appealed the Environmental Board's decision under criterion 10 to the Vermont Supreme Court (Court).

The Court has ruled in previous decisions that provisions of a town plan apply under criterion 10 if the provisions articulate a specific policy that is relevant to the area of town in which a project is proposed. See *In re Molgano*, 163 Vt. 25 (1994). Following this standard the Board found that the project violated two specific provisions in the Waitsfield Town Plan.

The first provision related to construction on steep slopes. The provision in question stated that it was the town's goal to "prevent the creation of parcels on steep slopes ..." The Town Plan goes on to define slopes as either slight, moderate, severe or extreme. The Board ruled that, because the project was proposed on severe slopes, it clearly violated the provision of the steep slope provisions of the Town Plan.

The second provision related to improving Class IV roads. The Town Plan states that the upgrade of Class IV roads should be discouraged. The Board found that this provision was sufficiently specific to apply under criterion 10 and that the developer's proposal to upgrade the Class IV road did not conform with this provision of the Town Plan.

The Court reversed the Board's decision that the project did not conform with these provisions of the Town Plan on two main grounds. First, the Court found that both the steep slope and Class IV road provisions of the Plan were not specific enough to apply under criterion 10.

The Court took issue with the fact that the steep slope provision did not specify whether the Town intended to prohibit development on severe or extreme slopes. The Court ruled that because this issue is not explicitly addressed in the Plan the steep slope provision of the Town Plan is too vague to apply under criterion 10.

The Court also found that the Class IV provision of the Plan is too vague to apply under criterion 10. In reaching its decision the Court noted that the Town Plan merely *discouraged* as opposed to *prohibiting* the upgrade of Class IV roads.

By concluding that these provisions of the Waitsfield Town Plan are vague, the Court raised the bar for towns in terms of the level of specificity town plans must have to be effective in Act 250. The difficulty with the Court's decision is that it seems to penalize municipalities for not writing town plans as if they were actual zoning bylaws. Town plans are planning documents that express the vision for growth in a municipality. Accordingly, town plans are not intended to be as specific as zoning bylaws. The Court seems to blur the distinction between adopting and applying zoning bylaws to a project through the local permitting process and ensuring that a project large enough to trigger Act 250 jurisdiction conforms to the vision for growth expressed by a municipality in a town plan.

The second reason that the Court cited for reversing the Board was that the *actions* of the town demonstrated that the project in fact complied with the Town Plan. This decision marks the first time that

the Court looked to the *actions* of a municipality in implementing existing zoning bylaws to interpret the meaning of a town plan in Act 250.

The Court previously held that, if a provision of a town plan is ambiguous, the Board must look to the *text* of the zoning bylaws that implement the town plan to construe the meaning of town plan provisions at issue. See *In re Molgano*, 163 Vt. 25 (1994). However, in this case the provisions at issue in the town plan had not been implemented through the town's zoning bylaws. For example, Waitsfield did not adopt a steep slope bylaw in its zoning ordinance based on the steep slope provisions of its Town Plan.

Rather than examining the *text* of the zoning bylaws themselves the Court looked to the *actions* that the town took to help it interpret the Waitsfield Town Plan. The Court found that because the town had issued a subdivision permit and a road permit to the developer these *actions* demonstrate that the town believed that the project conformed to the existing town plan.

The problem with the Court's reasoning is that the town's *actions* were based on bylaws and a road ordinance that did not fully reflect its Town Plan. Again, the Court appears to have confused the town's obligation to make local permit decisions based on its bylaws and the town's authority to argue that the typically more complex development projects that trigger Act 250 review do not conform with the vision for growth expressed in its Town Plan.

At the end of the day what does this decision mean for municipalities? First, it means that unless provisions in your town plan are extremely specific and regulatory in nature it is likely that your town plan will not be deemed relevant in the Act 250 process. Accordingly, if you want your town plan to apply in Act 250 be very specific in the language you choose. For example, use regulatory words such as prohibit and allow rather than planning words like discourage and encourage.

Second, the decision has a significant impact on municipalities that do not implement each and every substantive provision of their town plans through their zoning bylaws. For these municipalities, actions taken to apply bylaws as required by law, such as issuing local permits, may be used as evidence of a project's conformance with a town plan in the Act 250 process. To minimize this problem municipalities should amend their bylaws to reflect the substantive provisions of their town plans.

(Editor's Note: For more information about Act 250 and local plans and bylaws, see "Two Views on Making Local Plans Work for Towns in the Act 250 Process," in the February, 2000 VLCT News.)

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