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STATE SUPREME COURT RULING EFFECTIVELY KILLS MILNE'S EXIT 1 DEVELOPMENT

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VALLEY NEWS — SHAWN BRALEY

Editor's note: This article by Matt Hongoltz-Hetling was first published in the [Valley News](#) on Oct. 22, 2016.

QUECHEE — The Vermont Supreme Court on Friday issued a major setback, and potential death blow, to the proposed Quechee Highlands mixed-use development near Interstate 89 exit and Route 4.

The high court overturned a lower-court ruling and found that the mixed-use business park, with some residential units, on a 168-acre parcel in Quechee does not comply with the regional plan, a key criterion in the state's Act 250 environmental permitting process.

The ruling, which concluded that the project on old farmland was in conflict with a 2007 regional plan created by the Two Rivers-Ottawaquechee Regional Commission, significantly strengthens the ability of regional commissions across the state to regulate the

development of Vermont's green spaces and curb sprawl.

"The Exit 1 interchange is not an 'existing or planned settlement center' under the regional plan, and therefore, it is not an appropriate location for major development," the Supreme Court wrote in its decision.

Within hours of the court's ruling, Two Rivers Executive Director Peter Gregory issued a written statement hailing the decision as "important for planning all over the state."

"(The decision) signals to Vermonters who take the time to articulate a vision for their regions, that it is valuable, it is legitimate and it does make a difference," Gregory wrote.

For Scott Milne, the Pomfret travel business executive and U.S. Senate candidate seeking permission to build Quechee Highlands, the Supreme Court's decision is an unwelcome exclamation point on a decade of debates and appeals in a variety of settings.

"As a small businessperson who is trying to grow our local economy, the court's decision is disappointing and frustrating because it will cost the region 300 good jobs that it desperately needs," Milne wrote in an email Friday afternoon in response to a request for comment by the Valley News.

The regional plan seeks to direct commercial development away from interstate interchanges and toward designated growth areas, including village downtowns.

An environmental group that had filed a friend-of-the-court brief in support of Two Rivers applauded the ruling and its broader effects.

"The Court also affirmed the ability of planning commissions to restrict development at interstate interchanges, areas that we know, from our recent work on Exit 4 (in Randolph), are especially vulnerable to sprawl and strip development," Brian Shupe, executive director of the Vermont Natural Resources Council, wrote in a news release on Friday.

The ruling overturns a February decision by Vermont Environmental Court Judge Thomas Walsh, who ordered that B&M Realty, a company owned by Milne and lawyer David Boies III, be given a state permit under Act 250, which governs large development in the state.

Milne estimated earlier this year that he's invested more than \$4 million in the effort to make the project a reality.

"This is not just a setback for B&M Realty, but a real loss for the hundreds of Vermonters and their families who might have found paychecks through our project," he wrote on Friday.

Abutter Charles Rataj has opposed the project for years based on concerns about the impact on his neighborhood, including increased traffic.

"We felt it wasn't in keeping with the tradition of Vermont to have shopping plazas right off the interstate," Rataj said.

Still, Rataj said the way Milne conducted his efforts was commendable.

"Scott Milne was very gracious throughout the entire process," he said. "I have a tremendous amount of respect for him. If the project was anywhere else, I would have supported it."

Two key components of the lower court's February decision had the potential to undermine the ability of regional planners to stop developments like the one proposed by Milne.

The first centered on the definition of a “principal retail establishment,” a category of development that is tightly regulated under the regional plan. The Quechee Highlands project would have seen 115,000 square feet of new construction, about 35,000 of which would have been for retail use. Ruling for the lower court, Walsh found that, because retail didn’t comprise a majority of the project, it could not be considered a principal retail establishment.

The second key component was concerned with whether the language contained in the 2007 regional plan was concrete enough to be considered a “prescriptive” mandate, or whether it was loosely worded enough to be considered merely “aspirational.” In February, Walsh found that the language in the regional plan gives too much power to regional commissions to decide what is appropriate.

“This provision is unenforceable as it fails to provide adequate guidance and allows the unbridled discretion of the regional planning commission,” Walsh wrote.

In particular, Milne’s team argued that the regional plan didn’t define what constituted a “substantial regional impact,” and that it was therefore unclear whether the project was governed by the plan at all.

The implications of Walsh’s rulings were part of what had state planners lining up to sign onto the appeal before the Vermont Supreme Court — the appeal drew support from five regional commissions, the Vermont Natural Resources Council, the Preservation Trust of Vermont and the Natural Resources Board.

David Mears, a Vermont Law School professor who represented the environmental groups in the proceedings, said Walsh’s rulings sent shockwaves across the state.

“There was definitely a sense of unease among planners across the state who have invested time trying to develop plans,” said Mears, who spent four years as commissioner of the Vermont Department of Environmental Conservation. “There was concern that those investments weren’t going to be respected.”

The Supreme Court ruling overturned Walsh’s decision, thereby upholding an initial decision of the District 3 Environmental Commission to reject Milne’s application.

The Supreme Court’s unanimous decision found that Walsh had erred by defining a principal retail establishment according to the total square footage of the Quechee Highlands, which would have included 10 separate buildings. Were Walsh’s decision allowed to stand, “unlimited retail development could occur outside of growth areas consistent with the regional plan as long as such development was folded into even larger square footage development of other sorts,” according to the decision.

The Supreme Court also found that the language in the 2007 regional plan was not aspirational, but clearly prescriptive.

“Because the court retains ultimate discretion to determine a substantial regional impact ... the Legislature has not made the kind of wholesale delegation of legislative authority to the regional commissions that (Milne) suggests,” the Supreme Court wrote, adding that the language in the regional plan is “sufficiently clear to prevent discriminatory application.”

Mears said the ruling was important because it provides an incentive for communities that want to shape development.

“This kind of sprawl is not good for Vermont,” he said. “It’s not good for Vermont’s economy. It’s not good for Vermont’s environment. Our economic future depends on being careful and thoughtful about development patterns.”

Gregory said during a phone interview Friday afternoon that the regional plan represents the area’s best efforts to guide development responsibly.

“It was very clear, and it had specific criteria,” he said.

Gregory said that the ruling reaffirms the way the Two Rivers does business.

“I don’t think that it empowers us any more than the statute has from the day Act 250 was passed,” he said. “Some will read it differently, but we’re supposed to participate in the process and use that plan. We’ll continue to do that.”

Mears and Gregory both said the ruling effectively kills the project in its current form.

Milne did not find fault with the timing of the decision, which comes just weeks before Vermont voters turn out to decide between him and Democratic Sen. Patrick Leahy.

“This decision would be disappointing at any time, but I do not question the court’s timing,” Milne wrote.

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