IN THE SUPREME COURT FOR THE STATE OF VERMONT

No. 2015-454

IN RE: B&M REALTY, LLP	Appeal from Environmental Division Docket No. 130-8-13 Vtec

BRIEF OF THE APPELLANT TWO RIVERS-OTTAUQUECHEE REGIONAL COMMISSION

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INTRODUCTION

This appeal raises fundamental issues about the role of regional planning in shaping Vermont land-use decisions.

The Two Rivers-Ottauquechee Regional Plan (the Regional Plan) states clearly where major commercial growth must be sited, and where such development must *not* be sited. The Regional Plan specifies that major development must be located in or adjacent to existing or planned growth centers, and in areas where adequate public facilities and services are available. The Regional Plan specifies that such development must *not* occur at Interstate 89 Exit 1.

In this case, the developer proposed to create a new 120,000 square-foot development outside designated growth centers, and at Exit 1. The development proposal violates specific and unambiguous policies in the Regional Plan—policies that have been enforced in Act 250 since the Environmental Board blocked a comparable development 25 years ago relying on an earlier version of the Regional Plan. The trial court nonetheless held that multiple provisions of the Regional Plan – all of which are specific in wording and clear in context—were "merely aspirational."

In this Brief the Two Rivers-Ottauquechee Regional Commission (the Regional Commission) argues that the plain language of the Regional Plan is sufficiently clear to be enforced under Act 250's Criterion 1o – and must be enforced if Criterion 10 is to fulfill its statutory purpose.

The trial court effectively demanded that the text of the Regional Plan be written with the specificity of a building code. If this interpretative approach

were upheld, the statutory role of regional planning in guiding land-use decisions under Act 250 would be nullified. The trial court's approach is inconsistent with the purposes of Act 250, and would undermine the important role given by the Legislature to regional planning in other statutes.

STATEMENT OF THE CASE

In May 2012, B & M Realty, LLC (B & M, or the Applicant) filed an application for an Act 250 permit.[1] The Applicant sought Master Plan and Phase I construction approval for development of 168 acres located on U.S. Route 4, in the Town of Hartford, next to Interstate 89 Exit 1 (the Project). The site is currently developed with a single residence and a 2,500-square-foot office building. Printed Case (PC) at 131

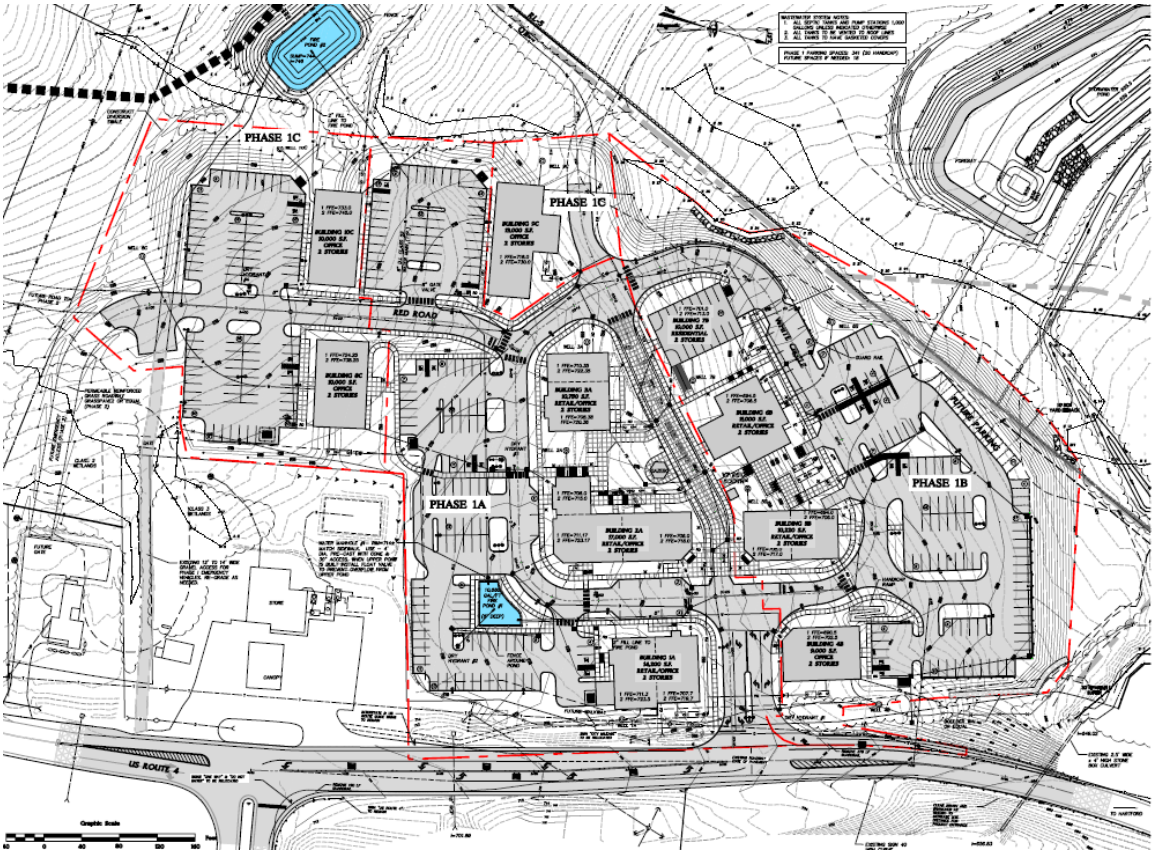
In Phases IA-IC of the Project, ten buildings would be constructed, each of two or more stories. These buildings would contain 120,000 square feet of leasable commercial space and nine multi-residential units. Phase I would also include construction of new east and westbound turning lanes on Route 4 into the Project, and a westbound left-turn lane onto the I-89 southbound ramp. Later phases would add additional residential and commercial units. PC at 36-38; 122.

The area surrounding the Project site is predominantly rural, containing only scattered single-family residential units, one small office building, and a gas station/convenience store. There is no mixed-use, two-story commercial or retail

[1] A land-use permit granted to developments that satisfy the criteria specified in 10 V.S.A. § 6086(a)1-10.

building of the scale proposed in Phase IA, nor any mixed-use commercial and multi-family housing. No municipal water or sewer currently serve the site. PC at 131-133.

At trial, the Project's engineer described Phase I as "a smaller version of Church Street [in Burlington]." PC at 121. The plan for Phase I appears below:



The scale of the Project is also depicted in a short video presented by the Applicant at trial. PC at 38-39, 42 (CD copy in sleeve.)[2]

The permit application did not specifically define how much of the commercial space would be designated for retail uses. At trial, the Project

[2] In the pdf version of this brief, the video can be viewed by clicking the link below: https://www.dropbox.com/s/yzegauqszprocqp/Video%20of%20project.m4v?dl=0.

engineer estimated that there would be 43,000 square feet of retail, plus a restaurant. PC at 120.

By order dated July 3, 2013, District #3 Environmental Commission unanimously denied the application. In pertinent part, the District Commission found that the Project would create a substantial regional impact and would not conform to the Regional Plan. *In re B & M Realty, LLC*, Application 3W1074, Findings of Fact and Conclusions of Law and Order, (Dist. 3 Envtl. Comm'n July 3, 2013.). PC at 41.

B & M then appealed to the Vermont Superior Court, Environmental Division, and sought *de novo* review of whether the Project would conform to the Regional Plan. The Statement of Questions filed by the Applicant also challenged various other parts of the District Commission's findings.

The Regional Commission, which participated actively in the proceedings before the District Commission, entered its appearance in the Environmental Division as a statutory party pursuant to 10 V.S.A. § 6085(c)(1)(C). The Regional Commission, a political subdivision created pursuant to 24 V.S.A. § 4341, is a compact of 30 municipalities in east-central Vermont founded in 1970. PC at 43.

The Vermont Natural Resources Board (NRB) also entered its appearance pursuant to 10 V.S.A. § 6027(j). PC at 32.

B & M moved for summary judgment on its claim that the version of the Regional Plan applicable to the Project was the plan adopted in 2003 rather than the 2007 version in effect when the Act 250 application was filed. The Applicant asserted certain vested rights under the 2003 Regional Plan. This claim was rejected by the court in an order dated October 7, 2014. PC at 148-154.

In its trial memorandum, the Regional Commission specifically identified the sections of the Regional Plan at issue in the appeal. There are the eight specific criteria, adopted pursuant to 24 V.S.A. § 4345a(17), which define the types of development that would cause "substantial regional impact, as the term may be used with respect to [the] region." PC at 48-50, 61, 75-77. The Regional Plan[3] requires that "[i]f a proposal under review affects more than the immediate area or municipality where the project is to be located (through application of **any or all** of these criter[ia]) it should be concluded that a development of substantial regional impact exists" (emphasis supplied). PC at 61.

The Regional Commission argued that the Project would have substantial regional impacts because of (a) its location outside Regional Growth Areas (a defined term in the Regional Plan); (b) the scale of Phase I; and (c) the Project's impact on highways in the vicinity. PC at 48-50.

The Regional Commission also identified the specific provisions in the Regional Plan to which the Project would not conform. These are the requirements that major growth must be located in Regional Growth Areas; that major growth must *not* occur at Exit 1; and that principal retail establishments must be located in Town Centers, Designated Downtowns or Designated Grown Centers. PC at 50-53; 62-73.

Trial was held on March 17, 2015, with the Hon. Thomas Walsh presiding. B & M did not present any evidence regarding Project conformance with the

[3] In its Order dated October 7, 2014, the trial court held that the version of the Regional Plan applicable to this application is the one adopted in 2007. Unless otherwise specifically noted, all references in this Brief are to the 2007 Regional Plan.

Regional Plan. Tr. at 144. Rather B & M argued that the Regional Commission could not meet its burden of demonstrating that the Project would have substantial regional impact. PC at 84.

At trial, the Regional Commission called Elizabeth Humstone as its witness. Ms. Humstone has been a professional planner in Vermont for more than 40 years, including service as a planner with the Agency of Commerce and the Agency of Transportation, and as chair of the Vermont Housing and Conservation Board. PC at 85-86; 128-130.

Ms. Humstone testified about the factual bases for a finding that the Project would have a substantial regional impact.

The first criterion in the Regional Plan for determining whether a project would have substantial regional impact is whether it would "modif[y] "existing regional settlement patterns" by:

> (a) shifting activity from an existing regional development area to a major new area of regional development;
>
> (b) locating in an area which does not presently contain development of similar type or scale; or
>
> (c) resulting in activities currently served or planned for by development elsewhere in the region.
> PC at 75.

Ms. Humstone testified that the Project would be located in a rural area with "very limited development today" and that there is "nothing of that scale" in the area currently. PC at 131.

The Regional Plan specifies that development of the type and scale proposed by B & M be located in Regional Growth Areas. The Regional Plan defines Regional Growth Areas as:

> [T]he traditional developed areas in the region. They are differentiated into the following seven types: Regional Center, Town Centers, Village Settlements, Hamlet Areas, Designated Growth Centers, Designated Downtowns, and Designated Village Centers as well as expansion areas that are designated to accommodate future growth based on the capacity to provide infrastructure and suitable land without threatening critical resources or creating sprawl.
> PC at 63. *See also* PC at 81.

The Regional Plan also includes maps that locate the designated Regional Growth Areas. PC at 82-83.

Ms. Humstone testified that the Project site is located between the State-designated growth center in Hartford and the State-designated village area in Quechee. The 120,000 square feet of development proposed for Phase I of the Project would far exceed all of the growth in Quechee Village during the period from 1998 to 2005. Phase I would be equivalent in scale to 40 percent of all non-residential growth that occurred in White River Junction during that same period. PC at 135-136, 147.

The Regional Plan also specifies that a project would have substantial regional impact if it involved a commercial use with 20,000 or more square feet of gross floor area. PC at 77. The Project would exceed that threshold by a factor of six. PC at 140.

The Regional Plan also defines development that would cause substantial regional as development:

> (b) contributing five percent or more to the peak hour Level of Service (LOS) D on a regionally significant local or State highway in or immediately adjacent to regional growth areas or LOS C on regionally significant local or State highways in rural areas.
>
> ... (d) necessitating substantive capital improvements, such as widening or signalization of regionally significant local or State highways;
> PC at 75-76.

Ms. Humstone noted that the Applicant's traffic engineer acknowledged in his testimony that the Project would increase peak hour traffic by more than 5 percent at the Route 4 and Route 5 interchange area, and that the Project developer proposed construction of a turning lane and signalization at the northbound ramp off I-89 as an attempt to mitigate traffic congestion. PC at 139 (referencing testimony by David Saladino at transcript pages 100-100).

Ms. Humstone also provided additional factual bases for determining whether the Project would conform to the requirements of the Regional Plan. Specifically, she testified that:

- There is no municipal water or sewer service available at the Project site. PC at 132.
- The Regional Plan specifies in its future land use area map the designated Regional Growth Areas, and the Project is not located in any of these. The closest Regional Growth Area is three miles away. PC at 132-134.
- In light of the scale of the Project, it would be:

  > [A] major growth or investment. It is not being channeled into what the regional plan has defined as regional growth areas or existing or planned settlement centers in areas where adequate public facilities and services are available. The plan makes clear that regional growth areas are traditional developed areas in the region and it enumerates what those are." PC at 143.

- The Project has the characteristics of a growth center, but would be located at Exit 1 where the Regional Plan expressly states should not be the site of a growth center. PC at 145.
- The Project would contain principal retail establishments. On cross examination, Ms. Humstone explained that as used by planners, a

"principal retail establishment" is the primary occupant of a space in a building." PC at 145-146.

In their post-trial memoranda, the Regional Commission and the Natural Resources Board both argued that the Act 250 permit should be denied because the Project would have substantial regional impact, and would not conform to the requirements of the Regional Plan. PC at 87-115.

The trial court issued its decision on November 12, 2015, reversing the District Environmental Commission and finding that the Project would conform to the Regional Plan. PC at 3-25.

The trial court agreed with the Regional Commission and the NRB that the Project would have substantial regional impact, under the criteria set forth in the Regional Plan, because it would exceed 20,000 square feet and require substantial capital improvements to adjoining highways. PC at 20-22.

The trial court interpreted the term "principal retail establishment" as a project in which retail is the overall principal use. The court held that because the approximately 40,000 square feet of proposed retail was less than half of the Project size, the provisions of the Regional Plan relating to location of principal retail establishments did not apply to the project. PC at 23-24.

The court held that while the protection of existing settlement patterns was an "overarching theme" for the Regional Plan, there were "no clear guide or criteria" to implement this goal. The Court found that this plan provision was "merely an aspirational policy statement." PC at 24.

The court acknowledged that the Regional Plan stated that "major growth or investments must be channeled into or adjacent to existing or planned

settlement centers and to areas where adequate public facilities and services are available." However, the court found that on the absence of a definition of "major growth or development," this standard "gives unfettered discretion to the Regional Commission." PC at 24-25.

Finally, the court acknowledged that the Regional Plan states that Exit 1 was not an appropriate location for a growth center. However, the court found that this provision of the Regional Plan did not apply because "no party is seeking to have the Project receive a growth center designation." PC at 26.

Based on this reasoning, the trial court found that the Project would conform to the Regional Plan. It imposed several conditions related to traffic under Criterion 5, and remanded the matter to the District Environmental Commission to issue an Act 250 permit for the Project.

The Regional Commission filed its appeal to this Court on December 10, 2015.

STATEMENT OF THE ISSUES

Did the trial court err in finding that the proposed 120,000 square-foot Project conformed to the requirements of the Regional Plan when the Project (a) would *not* be located in the areas specified by the Regional Plan for growth of this type and scale; and (b) would be located at an Interstate interchange where the Regional Plan specifically excludes the proposed uses?

STATEMENT OF THE STANDARD OF REVIEW

The Supreme Court reviews the Environmental Division's rulings on questions of law or statutory interpretation *de novo*. *In re Village Associates Act 250 Permit*, 2010 VT 42A, ¶7, 188 Vt. 113, 998 A.2d. 712.

The Supreme Court will not overturn Environmental Division's factual findings "unless, taking them in the light most favorable to the prevailing party, they are clearly erroneous." *Id*.

The Supreme Court defers to the Environmental Division's construction of a zoning regulation unless it is clearly erroneous, arbitrary, or capricious." *Brisson Stone LLC v. Town of Monkton*, 2016 VT 15, ¶ 11, ___ Vt. ___, ___ A.3d ___.

SUMMARY OF ARGUMENT

The Regional Plan specifies that major development should occur in defined Regional Growth Areas, and should not occur at Interstate 89, Exit 1. These provisions implement the statutory requirement that regional plans "indicate locations proposed for developments with a potential for regional impact." 24 V.S.A. § 4348a(a)(2)(C). These provisions also implement, in plain language and in defined locations, the stated purposes of the Regional Plan. Pages 16 to 21.

By engaging in abstract interpretation of text snippets, rather than applying purposeful and clear planning directives to a factual record, the trial court reached a conclusion that rendered ineffective both the Regional Plan and Criterion 10 of Act 250. Pages 21 to 23.

A regional plan must be general enough to allow flexibility across a region, and yet be stated with sufficient clarity to be implemented fairly in Act 250 cases and Public Service Board proceedings. This Regional Plan strikes a reasonable balance between the hyper-specific and the vaguely general. Its provisions should be enforced under Criterion 10 because the Regional Plan defines clearly which uses are not allowed in certain areas where a regional issue or concern is at stake. The trial court's arbitrary interpretation of the Regional Plan would negate the statutory purpose of directing projects of regional impact to areas identified in regional plans, and would undermine other important statutory functions of regional plans. Pages 23 to 27.

ARGUMENT

I. The provisions of the Regional Plan are sufficiently clear, as applied to the proposed Project, to be enforced under the standards established by this Court.

Criterion 10 of Act 250, 10 V.S.A. § 6086(a)(10), requires that an applicant for a land-use permit demonstrate that the project would conform to the requirements of a regional plan.

The legal standards for reviewing a project's conformance to a regional plan are well established, and the Regional Commission does not challenge them here. The issue in this appeal is how these legal principles should be applied to interpreting the Regional Plan.

A finding of non-conformity must be based on a "specific policy" set forth in the plan, *In re Green Peak Estates*, 154 Vt. 363, 369, 577 A.2d 676, 679 (1990), and stated in language that "is clear and unqualified, and creates no ambiguity." *In re MBL Associates*, 166 Vt. 606, 607, 693 A.2d 698, 700 (1997). Broad policy statements phrased as "nonregulatory abstractions" may not be given "the legal force of zoning laws." *In re John A. Russell Corp*., 2003 VT 93, ¶ 16, 176 Vt. 520, 523, 838 A.2d 906, 912 (2003) (internal citation omitted).

Holdings of the former Environmental Board are precedents for the Environmental Division. 10 V.S.A. § 8504(m). Following the *Russell* decision, the Environmental Board established standards for determining whether a provision of a plan is sufficiently specific to mandate conformance under Criterion 10:

> A provision of a town plan evinces a specific policy if the provision: (a) pertains to the area or district in which the project is located; (b) is intended to guide or proscribe conduct or land use within the area or district in which the project is located; and (c) is sufficiently clear to guide the conduct of an average person, using common sense and understanding. *In re John J. Flynn Estate and Keystone Dev. Corp.*, #4C0790-2-EB, 2004 WL 1038110, *19 (Vt. Envtl. Bd. May 4, 2004).

This standard is wholly consistent with the approach taken by this Court in reviewing the Environmental Division's interpretation of municipal zoning bylaws. As discussed *infra* at 23-27, zoning bylaws may be drafted with a different degree of specificity than regional or town plans. However, the principles used by this Court for interpreting statutes or bylaws remain an appropriate guide.

In *In re Tyler Self-Storage Unit Permits*, 2011 VT 66, 190 Vt. 132, 27 A.3d 1071, this Court applied the following principles in reversing the then-Environmental Court's construction of the meaning of "retail sales/rentals" in a zoning ordinance.

First, this Court held that it is "essential" to interpret bylaws to give effect to the intention of the drafters. "The legislative intent is most truly derived from a consideration of not only the particular statutory language, but from the entire enactment, its reason, purpose and consequences." *Id*. at ¶ 13.

Second, the bylaws must be interpreted in light of their "plain language . . . words otherwise undefined are ordinarily defined by reference to the nearest available dictionary." *Id*. at ¶ 10.

"Zoning ordinances must establish standards which are "general enough to avoid inflexible results, but also specific enough to avoid leaving the door open to unbridled discrimination." *Id*.

This balance between reasonable clarity and undue specificity is particularly important when construing a regional plan. As discussed in more detail *infra* at 23-27, a regional plan must address a far broader range of development issues than a typical zoning code, and over a much larger geographical area.

In demonstrating compliance with Criterion 10, the burden of proof lies with the applicant. 10 V.S.A. § 6088(a). In this case the applicant offered no testimony respecting Criterion 10, and the only factual evidence was the description of the Project in the application materials. The trial court's Criterion 10 analysis did not include *any* factfinding. Only the Regional Commission presented factual evidence in connection with Criterion 10, and none of Ms. Humstone's factual testimony was disputed in the record.

A. The Project is not proposed for areas designated by the Regional Plan for this type of development.

Applying the foregoing interpretive principles, the clarity of a particular policy in the Regional Plan must be assessed by its specificity and its context within the Regional Plan. In this case, the policies are plainly stated and directive, and the context unambiguous.

First, the Regional Plan specifies *where* major regional growth must be directed by defining Regional Growth Areas and specifically locating them on a map:

> Major growth or investments must be channeled into or adjacent to existing or planned settlement centers and to areas where adequate public facilities and services are available. Regional Growth Areas are the traditional developed areas in the region. They are differentiated into the following seven types: Regional Center, Town Centers, Village Settlements,

> Hamlet Areas, Designated Growth Centers, Designated Downtowns, and Designated Village Centers as well as expansion areas.
> PC at 63, 82-83.

Second, the Regional Plan explains in detail *why* substantial regional growth must be directed to Regional Growth Areas:

> First in importance in formulation of the proposed land use pattern for the region is consideration of the existing settlement pattern. The region has already been settled into clusters of residences and other activities in the form of villages and hamlets surrounded by less dense settlement, rural in character, or large spaces in natural vegetation. This existing settlement pattern has demonstrated itself to be of a sociological, psychological, and aesthetic benefit to the region, while at the same time providing a system of centers both efficient and economical for the conduct of business enterprise and for the provision of social and community facilities and services. This pattern must be protected and enhanced and is supported by state planning law." PC at 62.

The mandate of the Regional Plan is unambiguous: Major growth or investments *must* be channeled into or adjacent to existing or planned settlement centers, and to areas where adequate public facilities and services are available.

In designating the areas suitable for major growth and investment, the Regional Plan implements a statutory requirement. Regional plans must "indicat[e] locations proposed for developments with a potential for regional impact." 24 V.S.A. § 4348a(a)(2)(C).

Under Vermont's Historic Downtown Development Act, all state designations of growth centers must conform to the regional plan. 24 V.S.A. § 2793c(c)((5)(A) & (B). Because the Regional Plan does not identify the Project location as a growth center, the State would be statutorily barred from designating the location as a growth center.

The Regional Plan expressly references Vermont's Historic Downtown Development Act when describing the Regional Plan policy of guiding

development to State-designated downtowns and villages, and to other Regional Growth Areas identified in the Regional Plan. PC at 63-64. That is, the Regional Plan is expressly crafted to advance the legislative policies of fostering development in historic downtowns and villages.

The record is undisputed that the Project site is at least three miles from any area designated by the Regional Plan for major growth. PC at 133.

The trial court's reason for treating these provisions of the Regional Plan as "merely an aspirational policy statement" was the absence of a specific definition for "major growth." PC at 24.

The sections of the Regional Plan that specify the location of major growth and investment implement the statutory requirement of "indicating locations proposed for developments with a potential for regional impact." 24 V.S.A. § 4348a(a)(2)(C). A plain construction of the term "major growth" in light of the statutory purpose would be "growth with a potential for regional impact."

The Regional Plan establishes standards for determining when a project would create substantial regional impact, and the trial court found that this Project met that standard. PC at 20-21. The Project is six times larger than the standard for a commercial project with substantial regional impact, and substantially larger than all recent growth in the Hartford Growth Center or Quechee Village. PC 131, 134, 147.

The trial court chose to ignore these undisputed facts and essentially found the provision of the Regional Plan requiring major growth to occur in Regional Growth Areas to be too vague to be enforceable under any circumstance.

That is, even if the Project were designed to replicate the Church Street development in Burlington rather than merely to imitate it, the Court's reasoning would have found the provisions of the Regional Plan inapplicable. Rather than find that the term "major growth" fits as applied to this Project, the trial court held that the presence of *any* ambiguity renders the Regional Plan unenforceable under *all* circumstances.

This fact-free approach to application of the Regional Plan also allowed the Court to ignore the indisputable fact that there is no municipal water and sewage infrastructure at the Project site—a requirement under the Regional Plan for locations of major growth. PC at 66-68, 132. The Court made no findings whatsoever on the lack of infrastructure because of its preference for scrutinizing the text for possible ambiguities rather than applying the text to the facts of the Project.

The Regional Plan's policy of directing major growth to designated Regional Growth Areas is sufficiently clearly written, and consistent with the plan's stated purposes and applicable statutory purposes, to be enforced under Criterion 1o.

B. The Project is proposed for a location specifically excluded by the Regional Plan for this type of development.

The Regional Plan articulates a general policy of reserving land at Interstate interchanges for the development of services for the traveling public and transport of goods, not for the development of high traffic-generating

commercial activities unrelated to services for the traveling public or trucking industry. PC at 70.

The Regional Plan then states a specific, mandatory policy that "interchange development must be constructed to . . . discourage creation or establishment of uses deemed more appropriate to regional growth areas." PC at 70-71.

The Regional Plan then states a specific, mandatory policy for each Interstate exit located within the region. For Exit 1, the proposed site of this Project, the Regional Plan states:

> This interchange is not an appropriate location for a growth center. White River Junction, the Regional Center and a Vermont Designated Downtown, is located 3.5 miles to the east. Development at this interchange should be of a type that does not displace the development and investment that has occurred in the regional center. The types of land development appropriate for this interchange include residential, appropriately-scaled traveler-oriented uses, and other similar uses that are not intended to draw on regional populations.
> PC at 73.

The meaning of this prescription for Exit 1, interpreted according to its plain language and stated purposes, is that the type of development designated by the Regional Plan for growth centers should not occur at Exit 1. Rather growth at Exit 1 should be reserved for services that meet the needs of the traveling public, or for housing.

The trial court found that this provision of the Regional Plan does not apply to the Project because "no party is seeking to have the Project receive a growth center designation." PC at 26. This interpretation capriciously flips the meaning so that the Regional Plan's specific policy for growth at Exit 1 is deemed irrelevant to determining the type of uses appropriate for Exit 1. Yet the text

states explicitly what type of development *is* appropriate for Exit 1—services for the traveling public and housing. The text also states explicitly what type of development *is not* appropriate for Exit 1—uses that would draw shoppers from throughout the region.

The court's interpretation of the text would allow any type of development at Exit 1 as long as no one seeks to designate it as a growth center. Put in plain English: the court has interpreted the text to allow Exit 1 to become the location of major growth as long as Exit 1 is *not* formally designated as a growth center.

This reading arbitrarily negates the oft-stated purpose of the Regional Plan to guide major development to growth centers, and the clear statement that "[t]his interchange is not an appropriate location for a growth center." PC at 73.

This reading is also wholly at odds with the purpose of the Vermont Historic Downtown Development Act to recognize "the particular importance of Vermont's downtowns as historic regional centers providing services and amenities to nonresidents and further recognize[] their need for targeted support in avoiding continued loss of commercial and residential land use to the surrounding area." 24 V.S.A. § 2790(a)(2).

Courts should interpret a plan to avoid a construction that would lead to absurd or unintended results. *In re Ambassador Ins. Co., Inc.*, 2008 VT 105, ¶ 18, 184 Vt. 408, 965 A.2d 486 (2008)(reversing trial court in interpretation of statute governing priorities in liquidation proceedings.)

The Regional Plan's policy of limiting growth at Exit 1 to services for traveling public and housing is sufficiently clearly written, and consistent with

the plan's stated purposes, to be enforced under Criterion 1o. The trial court's arbitrary interpretation should be rejected.

C. The proposed Project location is not appropriate for the proposed retail uses.

The Regional Plan requires that "[p]rincipal retail establishments must be located in Town Centers, Designated Downtowns, or Designated Growth Centers to minimize the blighting effects of sprawl and strip development along major highways and [to] maintain rural character." PC at 68, 82-83. It is undisputed that the Project is not located in a Town Center, Designated Downtown or Designated Growth Center.

At trial, the applicant's expert testified that the Project's retail component would exceed 40,000 square feet. None of this retail has been identified as ancillary to another primary use. However, the trial court found that in the absence of a specific definition in the Regional Plan of "principal retail establishment, " the Regional Plan would only apply if more than 50 percent of total project space were devoted to retail. PC at 24.

This reading by the Court is not consistent with the stated purposes of the Plan, and would produce capricious results. The court's reading would allow a massive retail development in any location whether the total development square footage for other uses is even slightly larger than the retail—no matter how large the retail component. Under this reading, for example, Church Street in Burlington would not be a principal retail location because upper-floor office space is larger in total than ground-floor retail. Or in a mixed-use project, there could be concentrations of retail in a cluster of buildings that would draw

regional shoppers, as long as there was slightly more square footage elsewhere on the property for other uses.

Elizabeth Humstone testified that in the lexicon of planning, "principal retail use" refers to principal use of an establishment—not the aggregate use of all spaces on a 168-acre site. PC at 146. The first floors of the Project buildings would all be used for retail. In effect, the Project would create a new mini-downtown with first-floor retail throughout, and with offices or residences above.

A court must consider "the entire enactment, its reason, purpose and consequences." *Delta Psi Fraternity v. City of Burlington*, 2008 VT 129 ¶7, 185 Vt. 129, 969 A.2d 54 (reversing trial court's construction of statute relating to tax exemptions.)

The trial court failed to apply this well-established interpretive principle. By engaging in abstract interpretation of text snippets, rather than applying purposeful and clear planning directives to a factual record, the court reached a conclusion that rendered ineffective both the Regional Plan and Criterion 10.

II. The trial court's demand for regional plans to be written like regulatory codes would undermine effective regional planning in Vermont.

Regional Plans serve "the general purpose of guiding and accomplishing a coordinated, efficient and economic development of the region which will, in accordance with the present and future needs and resources, best promote the health, safety, order, convenience, prosperity and welfare of the inhabitants as well as efficiency and economy in the process of development." 24 V.S.A. § 4347.

This purpose of guiding development is implemented in both regulatory and non-regulatory ways. As examples of coordinated planning and development, the Agency of Transportation is statutorily directed to seek exceptions to federal highway standards to comply with regional plans, 19 V.S.A. § 10c(a); projects financed by the Vermont Economic Development Authority, 10 V.S.A. § 280l(a)(4), and Vermont Economic Progress Council must conform to regional plans, 32 V.S.A. § 5930a; and watershed basin plans must conform to regional plans, 10 V.S.A. § 1253(d)(2)(g).

Besides with Act 250's Criterion 10, the provisions of regional plans are given regulatory effect in applications for Certificates of Public Good (CPG) under 30 V.S.A. § 248(b)(1) (Section 248); for groundwater withdrawal permits, 10 V.S.A. § 1418(e)(3); and for right-of-way permits, 19 V.S.A. § 1111(b).

Regional plans also must be drafted in a manner appropriate for an entire region. This Regional Plan applies, among other places, to development in the Towns of Hartford, Randolph, Rochester, Woodstock, Pomfret, Bethel, Corinth, Granville and Vershire—communities quite varying in character and scale.

A regional plan must be general enough to allow flexibility across a region, and yet be stated with sufficient clarity to be implemented fairly in Section 248 and Act 250 proceedings.

The former Environmental Board's definition of that degree of clarity for enforcement under Criterion 10 requires the provision of the plan (a) to pertain to the area where the project is located; (b) to guide or proscribe land use within that area; and (c) to be sufficiently clear to guide the conduct of an average person, using common sense and understanding. *In re John J. Flynn Estate and*

Keystone Dev. Corp., #4C0790-2-EB, 2004 WL 1038110, *19 (Vt. Envtl. Bd. May 4, 2004). This definition is wholly consistent with this Court's holdings about the interpretation of regional plans, *supra* at 14.

The trial court in this case has demanded much more of the Regional Plan. The court effectively required an express definition to be stated for all substantive terms, and demanded that the text be construed without reference to how it would be applied in a specific case. Any perceived ambiguity is fatal. Precision is all. If this were the necessary mode of interpretation, then regional plans would be required to read like building codes.

Yet that is precisely the approach condemned by the Vermont Public Service Board (the PSB) in Section 248 proceedings. In *Petition of Rutland Renewable Energy, LLC*, 2015 WL 1227471 (Vt.P.S.B. 2015),[4] the PSB found that sections of the Rutland Town Plan were *unenforceable* in Section 248 proceedings precisely *because they were too specific*. The PSB held that certain Town Plan provisions were so specific that they "would effectively act as a zoning bylaw, and their application in this proceeding would circumvent the statutory exemption from zoning found in 24 V.S.A. § 4413(b)." *Id* at 50.

The Environmental Court and the PSB are both required by statute to apply land-use provisions of town and regional plans in permit proceedings. Yet the trial court here has demanded, as a condition of the Regional Plan's enforceability in Act 250, a degree of specificity that according to the PSB renders regional plans unenforceable in Section 248.

[4] This case is currently on appeal to this Court in Docket No. 2015-230.

As with interpretation of statutes, courts must not assume that the drafters of regional plans are "grammar schools," and "it is hardly reasonable to expect legislative acts to be drawn with strict grammatical or logical accuracy." *State v. Lynch*, 137 Vt. 607, 613, 409 A.2d 1001, 1005 (1979)(rejecting interpretation of statute based on grammatical dissection). Some play in the grammatical joints can be expected in any planning document, but the trial court sought to hold the Regional Plan to a higher standard than many legislative acts.

The Regional Plan in this case has been drafted to strike a reasonable balance between the hyper-specific and the vaguely general. The Regional Plan does not go into precise detail as to every use that is allowed or prohibited. It defines clearly which uses are not allowed in certain areas where a regional issue or concern is at stake, but then leaves discretion to its member towns to define more specifically what they would prefer for their communities.

As previously discussed, the Regional Plan prescribes for Exit 1: "The types of land development appropriate for this interchange include residential, appropriately-scaled traveler-oriented uses, and other similar uses that are not intended to draw on regional populations." PC at 73.

Within that frame, municipalities can develop zoning regulations appropriate for their community by defining the type of residential development and traveler-oriented services to be authorized by the zoning, and by specifying other consistent uses. Some towns might want gas stations; some might not. One can imagine the outcry among municipalities if regional plans were required to spell out in zoning-like detail every use that is permitted in every district in the region.

In 1991, the former Environmental Board denied an Act 250 permit for a "shopping village" in Waterbury. The project was of similar scale to the one now before this Court. The Board applied an earlier version of the Regional Plan, and denied the Act 250 permit on the grounds that the project was not located in an area with existing sewage infrastructure, and would create strip development outside areas of existing development. *Waterbury Shopping Village*, 1991 WL 177078 (Vt. Env. Bd., #5W1068-EB, July 19, 1991) at 20-21.

The Two Rivers-Ottauquechee Regional Commission since then has revised and refined its Regional Plan to provide further guidance to developers and municipalities alike. The same underlying purposes upheld in 1991 animate the Regional Plan today.

The Legislature enacted Criterion 10 as a requirement for an Act 250 permit to assure that regional planning was *not* merely aspirational. Criterion 10 was the first of a cascade of statutory requirements intended to make regional planning an effective tool in the allocation of public resources, protection of the environment, development of infrastructure and the siting of growth. *See supra* at 24. The trial court's arbitrary reading of the Regional Plan, if not reversed by this Court, would upend these decades of effort. Such a reading would undermine the clearly stated purposes of the Regional Plan, and negate the state's statutory purpose of directing growth of this scale to areas identified in regional plans to receive it.

Conclusion

The decision of the trial court should be reversed.

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CERTIFICATE OF COMPLIANCE

Robert E. Woolmington, counsel for the Appellant, hereby certifies that this brief complies with the word count limit of 9,000 words specified in V.R.A.P. 32(a)(7)(A). According to the word count of Microsoft Word 2013, the text of this brief (excluding title page, statement of issues, table of contents, table of authorities, signature block, and certificate of compliance) contains 6,383 words.

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