

**JAM Golf LLC. vs. City Of South Burlington:  
Lessons for Vermont Communities**

**A Workshop for Vermont Planners, Land Use Attorneys &  
Natural Resource Professionals**

**Vermont Law School,  
South Royalton, VT  
March 20, 2009  
Workshop Notes**

9:00 - 9:10     **Introduction**

*Kinvin Wroth*, Director, Land Use Institute, Vermont Law School

Thank you to our principal partners: the Vermont Natural Resources Council and the Vermont Planners Association, in particular Brian Shupe and Jamie Fidel. The Northern New England Chapter of the American Planning Association was also called upon to make sure planners are able to obtain continuing education credits for at10ding.

We are talking about something that we have all understood to be an important milestone, the JAM Golf opinion decided in August by the Vermont Supreme Court. The bottom line, seems to be, in your plans, you can say what you like about visions and goals or what you believe to be necessary and important, but if the plan is to have regulatory force under ACT 250 or because there is no regulation in the town or because as in JAM Golf the plan is incorporated in the bylaws, then the plan as well as the bylaws should lay out specific requirements those who are subject to the regulatory impact can understand and follow. That poses a major challenge. What is specific, how specific does one have to be in the drafting and what are the sources for that specificity; the statutory guidance in Chapter 117? Model ordinances that various organizations have produced? That is the challenge.

The challenge is a critical one for every one in this room at three different levels at least:

- In reviewing existing plans and bylaws, to see whether they meet those standards
- The drafting and amending of new bylaws pursuant to those standards and

- Finally under the review of a local panel, the Environmental Court or the Vermont Supreme Court whether the language viewed in hindsight as applied in a particular situation satisfies those standards.

It is our hope that those questions will be to some extent be addressed and answered in today's discussions.

## **9:10 – 10:30 Panel Discussion: Overview of JAM Golf LLC. vs. City of South Burlington and Implications for Vermont Communities**

### ***Jamey Fidel* (Moderator), Forest and Biodiversity Program Director & Legal Counsel, Vermont Natural Resources Council**

At VNRC we have been working with municipalities for quite some time, particularly with regard to conservation planning. We find a lot of communities find it time intensive and labor intensive to understand with specificity and in an upfront manner what the critical natural resources are in a community and what level of protection each resource deserves before going through a site specific review for projects that are proposed. When we first read the case we thought it might have a chilling effect on the confidence that communities have to enforce their natural resource protection standards but later saw some of the silver lining. Perhaps the case is a wake-up call and an opportunity for communities to really look at not only how to have more predictable and clear standards for the conservation of natural resources, but also to have a comprehensive approach, a more updated approach to thinking, mapping, and planning in the state and to come up with a comprehensive strategy for the town that is clear and proactive for natural resource protection I hope today we will flesh out both the obstacles and opportunities that are present in the JAM Golf decision.

### ***Steve Stitzel*, Stitzel, Page & Fletcher, P.C.**

Thirty years ago I probably spent more time in this room when it was the new VLS library than I did in my house. Thanks to VNRC and VPA for hosting the conference and offering an opportunity for me to speak here this morning. The firm Stitzel, Page and Fletcher represented the City of South Burlington in all aspects of this decision and

continues to do so in the remand at the Environmental Court. Amanda Lafferty who did much of the trial court work is here today and will also be able to share insights into the case. I wanted to start by giving a quick overview of the property involved in the proceeding. There are plans posted on the wall in the back that you can look at another time. The project was a planned residential development, an 18-hole golf course, involving over 400 acres of land on two side of Dorset Street in South Burlington. What you can see in this slide, is an outline in the rectangle, the limits of a portion of the PRD that was involved in this proceeding. The balance is on the opposite side of Dorset Street. The project has been under development since 1996. This particular case involved a proposed amendment to the PRD application to incorporate a new 10 lot subdivision, in what was the last remaining knoll of trees, a prominent knoll of trees which had originally been planned to be preserved as important to the preexisting natural landscape of the project. In the case before the environmental court, a good portion of the City's presentation focused on this section (Section 26.151.) of "will protect natural resources." There were two aspects. The first is that the plan provided a wildlife corridor link between the forest to the north of the project and other open lands and wildlife habitat to the south. The other aspect focused on the scenic views from public places. The Environmental Court decision fully supported the analysis presented by the City and was based on the evidence that you see including the project woodland. This is the point we were making to the trial court and the trial court agreed with that and denied the request for the 10 proposed house sites. Then the matter went to the VT Supreme Court. What is important to understand from at least the legal analysis perspective is that there were no constitutional issues at the trial court level. Because it had not been raised at the trial court level, the applicant was legally precluded from raising it at the Supreme Court and the applicant did not. What the applicant argued at the Supreme Court was that the court misinterpreted the word "important" - that it was difficult to define and that the findings at the trial court did not support that this particular knoll of trees was important. There was no constitutional claim by the applicant. The briefs that were submitted by both parties did not address any constitutional arguments. The Supreme Court in late August of 2008 *sua sponte*, on its own motion, presented the constitutional claim that has been the focus of the court in that decision, proclaimed that Section 26.151 was flawed since it

provides no standards for the court to apply in determining what would constitute a failure to “*protect the listed resources.*” It is important to note from a legal perspective that, first; it is rare for the Supreme Court to raise an issue *sua sponte*. Secondly, as a general rule of law, courts will only bring constitutional questions if there is no other alternative to address the case. Constitutional questions are to be brought only during matters of extreme importance and you should not engage in discussing them and establishing standards unless it is absolutely necessary to do so.

Let me lay background about the concept of unconstitutional vagueness under Vermont law. There are three different concepts, legal standards involved in vagueness. These were discussed at length in an earlier decision, *In Re Handy*. The first deals with separation of power and unlawful delegation, the second issue deals with equal protection and the third due process. The concept in the non-delegation context is that if a legislative power is delegated to act towards a lesser body, it has to provide very specific standards in that delegation of authority. It is not clear in Vermont if this applies at the municipal level. It is typically applied in the state legislature to agencies. The second concept is equal protection. The focus of that is discrimination. Typically where there is a claim of discrimination involving standards it’s that “... I have been treated differently then other people have been treated under this same provision,” with the goal that individuals are treated the same as others have been. Finally we get to due process. In the context of this case, it deals with the issue of whether the applicant has fair notice of what is to be expected under applicable regulatory provisions, and the fair notice of provisions. Courts in looking at the issue of fair notice will engage in review of prior decisions and prior actions between applicants in the community to see whether there was notice of particular standards. This is a project that had been in development since 1996, with many proceedings before the local reviewing bodies by prior reviewing bodies applying standards at issue here. So, unfortunately, what happens with this concept of vagueness even though there are three different concepts is that the cases that discuss them frequently get combined so it is not clear which form of vagueness is being addressed in a particular case. In this particular case, the Supreme Court declared that the section provides “no guidance about what can be fairly expected” - that is the concept of notice.

Such standardless discretion violates a property owner's due process rights. Of the three vagueness concepts recognized in Vermont constitutional law, the court declared that we are dealing with due process, a failure to provide adequate notice. Looking at that, we go to a decision handed down from the Vermont Supreme Court on August 1<sup>st</sup> of 2008. JAM Golf was decided on August 22, 2008. The first case is In Re Pierce, where the court stated, "We will invalidate ordinances that fail to provide adequate guidance but we will uphold standards even if they are general and will look to the entire ordinance and not just the challenged subsection to determine the standard to be applied." And that in fact had been the practice in dealing with this type of issue, dealing with the entire ordinance and other matters to see what can be provided to supplement what might be provided in a particular standard. The court went on to discuss that Pierce involved a PRD, much like in JAM Golf, and the concept of PRDs is to provide flexibility and the court began to analyze other provisions to give effect and uphold against a vagueness standard. If we go to the vagueness standard articulated in JAM Golf, we will not uphold a statute that fails due to "unbridled discrimination." Now compare that with In Re Pierce decided 30 days earlier in which the Supreme Court in Pierce said, "We will uphold standards even if they are general" - that whole second part of the standard was absent in JAM. The suggestion being that we're going to look at the provision and that the provision will stand or fall on its own merit. There is no explanation in JAM Golf for this difference, even more surprising there is no mention of Pierce in the JAM Golf decision. We go further. Remember in Pierce the analysis looked at the PRD aspect of the project and the ordinance provisions. The entire analysis in this decision, JAM Golf, focused on one word: the meaning of the word "protect," without looking elsewhere in the bylaws to give meaning to that term and aid in the application to the particular project. Now going back the vagueness analysis in Pierce, the court focused on the PRD provision. The question is where did this analysis, which seems to be different, come from? We believe there is a decision not cited in JAM Golf but is the legal authority relied on. Look at this 2000 decision from a Georgetown ordinance which said, "If all natural beauty must be conserved, then all development must be banned." The case wasn't mentioned but the analysis is similar, if we look at the legal precedent cited in JAM Golf to support its conclusion that this bylaw provision is vague. The Town of Westford v. Kilburn case is a

longstanding case decided on vagueness grounds, but wasn't decided on constitutional grounds. The decision talks about delegation from a select board. The court then turned to the zoning enabling statute and said that the select board failed to comply with the enabling statute. This is an example of a court not going to the constitutional issue. We then go to State v. Chambers which was decided on constitutional grounds – but decided on non-delegation grounds. And, in In Re Miserocchi the Supreme Court interpreted in a way that would avoid the vagueness question so they didn't have to declare it unconstitutional. In Re Handy is a case that raised a vagueness challenge based on notice, is on point, and is a case where there was absolutely no standard in a state statute. For those of you familiar with the former statute on interim zoning, a developer could get approval if they got the consent of the select board but there was no standard in the state statute that in any way established any standards and the court on that basis said that is was an unconstitutional provision. One final note, the end result of JAM Golf is to strike the provision of the ordinance. In constitutional matters it is common for a court to look at an ordinance as applied in a particular case as unconstitutional. That doesn't mean it is unconstitutional in all cases and the provision is not “stricken”. Only that you applied it in an unconstitutional manner. When the word strike is used it suggests that on its face, not even considering the application, on its face, the provision is unconstitutional and must be taken out of the bylaw or be amended to bring it within constitutional bounds. The Vermont Supreme Court has in the past been extremely reluctant to bring a facial challenge to address the unconstitutionality of a statute. The court has decided to address them on an as applied basis not striking the provision completely. With those comments and that background, as individuals involved in developing regulatory standards, to go forward we address new standard guidance provided by JAM golf. If you review the Pierce subdivision case and JAM Golf the standards are in between. What I envision is that communities will need to develop new standards and to find appropriate language as there are new challenges. At this point, the issue which was the decisive issue in JAM Golf has not been briefed. The City asked to reargue the case and the court denied the request.

***Gerry Tarrant, Tarrant, Marks and Gilles***

Up until about a half an hour ago I was calling this Jam Golf, but it is J.A.M golf and that's not the only confusion. I look at this as an opportunity. I think that as we travel down the road of JAM Golf, and the next series of cases, there will be more cases because lawyers being what they are will address these issues and come up with different ways to apply the language in these decisions and how they present it to the Environmental Court and other tribunals. I have already seen it. I have seen it in depositions, the lawyer will ask, what are your standards. It's starting already, you are going to see this, and everyone has to understand the cases like Steve understands them.

I think everyone remembers WC Fields. He was a funny man. He was also a man who probably didn't lead the cleanest life. A lifelong agnostic, on his death bed, with a bible, he said, "I am looking for a loophole." Don't wait to look for a loop hole.

There are three things that you need to keep in mind: standards, standards, standards. And that is not new. We can go through this but to help you at a local level we need guidance. No matter how you turn the words, and how the court writes its decisions, the court is looking for standards and guidance. Professor Wroth and Steve Stitzel referred to some cases. I happen to work with Paul Gilles and he doesn't look at 20<sup>th</sup> century cases. We were talking about this and he said look at the 1856 case, Barnes v. Dyer. The Justice looked at an assessment and he struck it down because the standard was not just and equitable. Is it just and equitable in view of benefits to the premises? Exceptions do not state upon what view the assessment in question was made. If said clause is liable to a different construction then it furnishes no legal standard of assessment. Did the court determine based on the abutting land, on value, or of the personal convenience to the defendant on the ability to pay, or of all of these combined. Who can say? One man has one view, one man another view. Just and equitable in respect to what? The words import no special limitation. He went on to say, it is everywhere stated, no man should contribute more than his portion. Unless this is so there is no protection against arbitrary injustice. Courts must fix a rule to be a guide in all cases, a uniform certain rule, as far as reasonably practicable. Even though this assessment related to taxes, whether in tort law

or regulatory law there are very general standards. I lay that out because there are other strong similarities in other areas of law. In this case Justice Burgess said, in land use law and then he went on to write his decision. You can pick apart these decisions. They are similar in many respects. Both involved PRDs, at same time, the same type of decision making with waivers and analysis. One big difference I see, and that Steve Stitzel sees, is that he was unable to bring arguments that the opponents were able to argue in Pierce. How did they reach the decision in Pierce? It was well laid out. It was well argued. There were arguments that there weren't standards, and yet the court went to great lengths to find that they would uphold the ordinance. Both decisions involved PRD applications. That is important. In Pierce the court noted that the Vermont legislature authorized PRDs to encourage flexible planning. The modifications and waivers are part of the process of approving a PRD. The court emphasizes in Pierce that a PRD by its nature does not fit the traditional zoning scheme. To the extent that you use Pierce it is limited to PRDs. In essence the court felt that flexibility in terms of standards were necessary. Nevertheless, in Pierce it searched for guidance and found enough to justify the PRD. Then along came JAM Golf. As lawyers we know these cases didn't just come along three weeks later, they were both before the court. The court knew the issues of both cases at the same time. They were both written by Burgess. Three of the justices were the same. The court in Pierce emphasized "the consideration of these waivers is folded into the analysis of the PRD itself. The proper inquiry is whether the bylaw created sufficient standards to create a PRD permit and whether the waiver complied with these standards" But what are standards? We know that saying just and equitable is not a standard. It wasn't in the 1854 case. The two cases don't just refer to standards. They refer to ad hoc decision-making, denying due process. They refer to sufficient overall standards and sufficient criteria to guide the court's discretion. In Jam they refer to the ordinance as standardless. No standards to apply. Ordinances must specify sufficient conditions and safeguards. They say, "We will not uphold a standard that fails to provide adequate guidance." The language offers no guidance as to what is accepted. The court uses different words time after time that tell us they are looking for something that tells the decision maker what to do. Let me suggest some solutions before we get into more of this discussion. A simple answer to JAM Golf would be to insert language in your bylaws that provides that any

matter that required any decision, waiver, or standards must comply with the conditional use section (Title 24, § 4414(3)(a)). Now Title 24 provides general standards that you must follow. This is a section you can compare to the undue adverse effect. The court would say, “Undue adverse affect ‘as to what’”? The general standards may be supplemented by more specific criteria with respect to any of the following and lists a number of other criteria. Then it says other standards that the bylaws may require. And then it goes further to say which other statutes may be adopted as standards for conditional use. It’s telling planners and lawyers where to look. You can go even further - you can go to Act 250, but it wants standards. The word, “standards” comes up several times. Performance standards. The legislature continues to use the word “standards.” JAM Golf is on remand before Judge Wright so there will be more decision making in that case. These issues are going to be litigated in the future, in the very near future, by lawyers and in land use matters. Now is the time to plan to address these. Thank you.

***Jim Barlow, Senior Attorney, Municipal Assistance Center, Vermont League of Cities & Towns***

I try to help local officials understand what “standards” mean. I am available to consult with them. Most of the people drafting these bylaws are volunteers. They are not professionals. They turn off their television and one or two nights a week they try to figure this out and draft bylaws. The people that do this don’t think of themselves as the government. One of the first lessons from JAM Golf, - a reminder for communities - is that you are the government. When the constitution says that no state shall deprive life, liberty, property, or due process of law, that document is referring to you. That is lesson number 1. Lesson 2 is that part of good government is the notion that before you apply rules to people, you tell people what those rules are. Whether you couch it in due process terms or good government terms it is a basic notion of fairness. There is a fear that comes out of this case that standards and local government has to be perfect. I don’t think that is the case. The basic notion is that there be a balance. In 1973, a case pointed out that bylaws need to be flexible enough, but not leave the door open to unbridled discrimination. This case points out to us that we were leaning towards the unbridled discrimination side. This is a reminder to kick ourselves back to the middle. Decisions

can't be ad hoc. There have to be standards. Basically we would all agree standards are okay as long as we know what those standards are. The reality is that unless you adopted on the record review, your decision will be reviewed de novo. What that means for communities is that, the less clear we are in developing these standards, the more likely that someone else will get to decide what we mean. If there is ambiguity in our bylaws, someone else will be able to interpret ambiguity. It may be interpreted in our favor and it might not and then our logic won't be applied at all. Looking at it from the perspective of helping local governments, one of the questions I get is how much will this have a practical effect in Vermont? How much concern should we really give this? We should give it some concern, but not as if dark clouds are on the horizon. This will not radically change zoning in Vermont. The majority of decisions are 5-12 lots, single family dwellings with clear standards in place, permits are granted and everything rolls out pretty well. Also, there is a presumption of validity; valid unless a court determines otherwise. It is legal until a court determines otherwise. We don't have to be concerned that there is something that is unenforceable. Generally apply it as writ<sup>10</sup>. The environmental court has been dealing with ambiguous bylaws for decades. Ambiguity is a function of familiarity. The more we see something the more comfortable we are with it. The Environmental Court will generally try to work around the ambiguity. I don't litigate but I read the cases every month and I see a practical approach. I think the practical approach will continue. If you are an applicant that wants to argue, you have to have money to make that argument. The reality is that the majority of applicants don't. Most of our applications are for single family dwellings. We should be concerned. When we are reviewing our bylaws, we need standards. I am not so sure it is the end of the day. I also think there is a lot of irony. We can't sandbag. We have to be upfront about the rules we are going to apply. The City never had the opportunity to bring up the arguments. Court is unclear about telling local governments to not be unclear.

***Tim Duane, Associate Professor of Law, Vermont Law School***

I moved here on July 30<sup>th</sup>. My first month seemed to be an exciting month for land use in Vermont. This also means I know nothing about this issue, in the Vermont context. I am not going to be the student who repeats what they learn that day on the exam. There

would be a good likelihood that I wouldn't pass. As suggested by Gerry these issues go way back and apply to a variety of contexts, goals, fairness and standards. What I hope to do briefly today is suggest that there are other states that have experienced this - put Vermont in a context where we draw on or completely ignore those other states. Let me compare the Vermont situation compared to California and Oregon. They share some features with Vermont and are different in other respects. There is a big difference in terms of scale. I was struck, doing work in Sierra Nevada, to find Vermont's Act 250 and 200, which one reads from afar and then learns is different in actuality than as summarized. The branding of Vermont, artisan organic, hand-crafted land use. I also looked at Oregon, because it also had a state wide land use system. California's growth in 1990 equaled Oregon's growth over 20 years between 1970 and 1990. I learned in the *Picket Fence Review*, in 2007, Vermont grew by 522 people. California has grown by an average of 411,000 per year. It would take 768 years for Vermont to grow as much as California has grown. Think Magna Carta: multiple orders of magnitude. California has had an opportunity to create a lot of case law - to figure out differences, and how to accommodate growth. There is a Goldilocks standard, that one is too hot, that one is too cold. Between multiple versions, that is the Goldilocks standard. Resolves undue discrimination. While familiarity can help determine whether porridge is just right, it can also lead to conflicts of interest, and can lead to constitutional concerns. There is also a need to let government succeed. One thing that struck me about the Oregon system, is that it is somewhere between Vermont and California. When their system was adopted, their plans had to be acknowledged by the state. Through the process of acknowledgement every jurisdiction had their system acknowledged. Similar to Coastal Commission in California. Until Coastal Commission approves your system, you don't have local control. The town of Malibu is still governed by the coastal commission. The state of Oregon had to figure out their 14 goals, but weren't sure what they meant or how to reconcile them. A goal regarding agricultural resources. And a city would say, "Mmm that's a little too hot." Not litigation. In California, just sit for three hours and hear about the zaniest case law. Is a purple house a significant impact? In California we have lots and lots of cases, what is an acceptable standard. In Vermont, we have far fewer, but enough to create confusion. But one doesn't have the extensive case law to determine

what is just right. Once that happens, everyone proceeds and no one has to go to court, because we clearly won't win. In the Oregon intermediate approach, through acknowledgment of what was acceptable plans, some notion of conformity was developed. There was the issue of, "How do you monitor?" The institutional structures in which this occurred were quite different. Not just a matter of scale. One thing that shocked me was that the words "may" and "shall" appear in the order that I didn't expect. Oregon is a "shall/shall" state. In California it is "shall/may." Thou "shall" develop plans but we don't care if there is any substance to them at all. In a 1970's case over open space which was required by state law consistency req. Example, I will shut down...if you don't have an open space law. So they developed an open space law where the supervisors preserved 2/10 or one percent of open space. And they were in compliance because it was a "shall/may" state. Vermont ironically, is a "may/shall" state. You "may" do zoning, you "may" do plans but if you do... you "shall" do it in this way. I would like to commend Professor Wroth's paper (*Tim paraphrases from Professor Wroth's paper*) Provisions must articulate standards I contemplate how this short term remedy. Talking plans need not have regulatory effect, if a plan those provisions the ultimate lesson...let the plan be visionary...may let the bylaw....shall...but I also urge you to think about how that short term remedy fits into a larger structure. State's planning regime. Thinks about how the state can provide technical expertise and analysis which are necessary to provide clear standards at the outset.

### **Questions:**

Q: For an on the record community: if someone brings up these questions, do they have to bring these up at the local level what to do?

A: There is case law If the issue has not been raised at a local level at a DRB the Environmental Court will not review it when the matter comes there. When the review is OTR, it is absolutely necessary that it occur at the local level, otherwise there is nothing for the court to review if there is no local record. The only exception is where a constitutional issue is raised at the Environmental Court level—this is allowed. You may

raise in an Environmental Court appeal, a constitutional issue, partly to recognize the legal expertise of the court and not have local DRBs wrestling with tough constitutional questions.

Q: What is the difference between Pierce and JAM that led the Supreme Court to the very different conclusions? Having a bad day with the JAM case?

A: (Gerry) These are collaborative decisions. There are five members. They meet and discuss. I would be shocked to know that they made these decisions independent of each other. The fact that they came out three weeks later, doesn't mean they hadn't considered it. They would almost certainly have known the facts and circumstances of both cases because they came out within three weeks of each other. The JAM case had almost no dialogue in the argument, in the briefing, explaining the decision. In Pierce, there was a lot of dialogue that had been laid out by the neighbors. They were the ones attacking a lot of the provisions. In JAM there was none. South Burlington must have had embedded standards because they have a well developed system of bylaws. I know Justice Dooley was on the planning commission for years. Even though that's how we shall evaluate them. The justices realized they were going to shoot one case down and one case up. It is not entirely clear why because Steve Stitzel was not even able to make his arguments. Steve and South Burlington never had a chance. Judge Wright will have a chance, but restrictions will be imposed. You do your planning or have someone else make the decision. Justice Burgess came from the attorney general's office. That's why you cross different disciplines. He gave everyone a lesson in how he views planning. You can't second guess the Supreme Court. We just have to accept the Supreme Court's decision. We need standards that overcome the local hope to avoid committing to standards. Its fair, sometimes you don't have to worry about it because it won't get to the Supreme Court. This is a good opportunity. For years people didn't put standards in plans. Constitutionally you are required to.

A: (Tim) Why did they do it here? Facts drive decisions, even though they claim to be doing it the other way around. They both are law. Both constitute the law. Use the

bookend approach. Try to figure out what they have in common, what they have that is different. It is our job to understand what lies between them. What do they have in common and what lies between them? Certainly, they were not trying to overrule Pierce with JAM.

Q: It seems with the Handy case, there was a statutory change. One response is a statutory change in the past. Can we use a statutory fix here?

A: (Jim) Good question, No, unless we go to a “shall/shall” model of planning and zoning in Vermont. The lack of standards is because this is a local government. We authorize municipalities. The reason is that we operate with local municipalities. The legislative case would have to make the change in every case for every municipality, making standards apply across the state.

(Gerry) But we are “shall/shall” with conditional use. There is a “shall/shall” model here....this is educational. It gives you the kind of feel for what you should do.

Q: Undue adverse effect – is that safe?

A: If we change the statute, then we become open to the possibility of getting it overturned, litigation, high costs. Anxiety by neighbors, all those people have to go to litigation. Not fair to make the public incur those costs. Will litigation test these standards? Undue adverse effect? It is probably sufficient? We will not confine the PSB to what the legislature confined them to be. We have all kinds of agencies, its not just zoning. You have to put the right hat on with the right ... circle each decision. Would I know what this means?

Burgess is not a land use planner. He based his decision only on the law. The Supreme Court looks at them differently than planners, the Environmental Court. They are only assessing THE LAW. They may come to it from an assessment point of view.

Q: If they look at the overall intent as well as the specific language, can we clearly define the language specifically and how it applies to the overall intent?

A: (Duane) Given a broad federal goal of protecting all vertebrates - that needed specific regulations to achieve that goal. For example, protecting viable populations of invertebrates; we shall maintain 60% levels of vertebrates and how you will evaluate? Having laid it out, more specificity would help. It isn't just specificity that matters, but it must also be constitutional. Specificity that says no one can move a tree in the town, but it may not be constitutional. Rather than rolling the dice, refer to what is important. Key phrase: "theory of assessment." We need a quarter allows the developer, the city, the neighbors, and courts to know whether the removal of the trees... guidance to be specific must be taken in light of the need to put forth a theory of assessment.

Q: (Wroth) I was curious about the somewhat bizarre, although not for California standards, Chambers case (cited in JAM Golf): in this case they went beyond the face of the ordinance to find something below the surface. Could you have found... in Pierce?

A: (Steve) Yes. Illustrates the importance of advocacy in the appellate process and the importance of how the issue was presented.

Q: Somewhat ambiguous terms where a larger city has interpreted a standard. How do the differences between the large and small towns'/cities' interpretations of similar ordinances come into play here?

A: (Jim) What it could mean is that the Environmental Court looks at language in a smaller community and says, "I know how they have applied it over there, and we see the language routines." There are about six to eight documents informing municipal bylaws in the state. The Environmental Court probably uses these to determine meaning and hopefully the local government does the same. What may be unique?

With OTR it is crucial issues are brought at local level. The one exception is constitutional issues. You may raise a constitutional issue that you didn't raise at the local level. Which recognizes the courts legal expertise for tough constitutional issues?

What is the difference between Pierce and JAM?

I suggested these are collaborative decisions. I think there was no give and take in dialogue about JAM. In Pierce it was laid out clearly by the neighbors and there was give and take with the neighbors. I would be surprised if they didn't have standards.

**10:45 – 11:45      Panel Response: Working with Vermont  
Communities in Light of JAM Golf Decision**

***Brian Shupe* (Moderator), Sustainable Communities Program Director, Vermont  
Natural Resources Council**

Switching from an interpretation of JAM to the views of practitioners. Explain how it will change the work they do in communities. This is a sounding board of practitioners who inventory natural resources, analyze that and implement those policies. They will briefly respond to what they have heard this morning, describe how this might change local communities and the work they do. Julie Beth Hines was the planning director for South Burlington at the time of this case.

(BIOS)

***Juli Beth Hinds*, Senior Project Manager, VHB Pioneer**

When Jim said there is a lot of irony in the case, you have no idea about the irony in this case. When I was at the Mad River... I was told there was an area that meant 10 lots or the end of the world. The JAM Golf was 10 lots or the end of the world. The city took the latter view. What frustrates me is how did we lose the forest view, the In re Pierce view on this case amongst the trees. This was amended to an existing PRD. The whole point of PRDs is to choose the most important pieces of land to set aside and develop those that are consistent with community planning principles. This was a suburban PRD with a six-page decision explaining the community's rationale. The community's decision directed

to staff, which was explained in the general decision – they can't take this piece for housing.

There was no “On the record review and we didn't have any standing or presence. There was no room for our local decision. Failure to define notice. Failure to define standards What about the standard of common sense? What about the standard of looking at the whole parcel. If you look in the decision at 14 and 19 another frustration here is that here is a case where the Supreme Court has bipolar disorder. Policy of managed growth... choosing where to develop... preserve status quo. Then at 14 the decision says how much less than total preservation we cannot know because the regulations do not say. Total destruction, how do we articulate that balance? What concerns me most is that any policy is at odds with complete preservation of the status quo. With any comprehensive plan, status quo...there is no such thing. The decision doesn't leave room for balance. The courts are human. Much of what this decision reflects back to me...we are wasting our golf course. We had a court reacting to the time it took to litigate. Footnote 2 - already protracted litigation. If we looked at who filed which motion for extensions, guess who caused the delay? It was not the city. The smack came back to the city and at the bylaw the presumption is that that regulatory body is the one causing the delay. It simply isn't the case. It is disturbing because it colored the decision. It is also a reaction to a city vs. angel on pinhead litigation. Species...10 acre woodlot. The case got ridiculous. Trying to save trees. We were down to this issue of wildlife. There was animosity towards the expert witness. Was it junk science to say this was wildlife habitat and who is this guy to say we need it for the turkeys? This is a slap at the trial court. Jim pointed out that there is fear that we have to have perfect ordinance based on perfect plans and a predictable plan for every property. There is room to work on planning for natural resources. It was colored by the applicant and the decision? Given the uniquely awful circumstances that created this, we don't have to take this situation so seriously. Instead of ranting what we can do? Suggestion 1: All bylaws need to say, any amendment shall take into consideration all lands involved in the PUD. Supposed to be obvious but this case is saying “State the obvious for the applicant and the court.” You don't get to whack down the 10 acres of hard woods which are a notable feature.

Do we need statutory help? I don't think it's the right fix b/c there is nothing that can be done about a belligerent applicant. When we read the Pierce case, can we as a community in our bylaws and our plan sufficiently articulate our Pierce analysis of these lands? Is it a ridgeline? How do we articulate the general principles? A lot of communities don't. There are enthusiastic volunteers, but no overall picture. This is a conversation that they need to have on a regular basis. We certainly had a well articulated theory about why this wooded area was important in the context of South Burlington but I like the ideas that we are working on. But we should use that as a starting point. We will work from a theory...we continue to need required education for our boards similar to New York state. I like Gerry Tarrant starting with conditional use criteria and applying undue adverse effect. We never got to storm water. You take out those trees and you are in trouble. I can't wait till Act 250. My great despair is the loss of context. We should keep our boards focused on the content for PUD development.

***Sharon Murray, Principle, Front Porch Community Planning***

Bogey Bylaws: I will say as Julie Beth pointed out that South Burlington's bylaws weren't Bogey. In Irish it also means ghostly or without substance. As many people have said today this is a new case but an old concern. These issues underlying this case have been around a long time, at least in Vermont. The JAM Golf raises these issues to a constitutional level which is scary because litigation. At the local level, we have been struggling with the fact that poorly crafted or vague standards are hard to administer and enforce. With regard to due process, as planners we look at it in two ways. Procedural to make sure fair and equitable. Now with 117 there is a lot of guidance. Hearing requirements are spelled out. We have to make decisions based on findings. We aren't as good at the substantive, which was the core issue with the JAM case. Content needs to be clear, unambiguous and understandable. It also needs to be reasonably related to clear public policy or goals.

Lawyers are the ones interpreting the bylaws but not writing them. It is typically the responsibility of volunteers. Volunteers are of 10 writing them without assistance or legal council. Some hire me... "better advice for half the price." Or they work with RPC to

draft the regulations. It is important that, if you are drafting you understand the basics of land use law. Writing the regulations is difficult especially for planners. We tend to use plannereeze. We use a passive voice and don't want to offend people. We use "recommendations" and "shoulds." This is what we like. But when writing regulations you need to switch gears. We should not hide behind words. Avoid the silent you. One example is "a grading plan shall be submitted." We should state things clearly. If you have a lot of things that need to be considered, be clear about whether an "and/or" is needed, use plain English. We should use active versus passive voice. Make sure to use the right word, "is – it – and - or." Be careful about words and punctuation. Also the recommendation is to limit jargon. Words like "undue adverse impact." These are not easily understandable by applicants, or apparently the Supreme Court. It is important to explain things. Definitions are key. If you can afford to have someone illustrate concepts, it helps. You are probably familiar with "B-notes" and an "Oops list." Some towns have started these B-notes or Bylaw notes. They keep a list. As they go through they keep a record until they update the next time. It helps to be specific. It helps to keep a record so they can be applied consistently.

Recommended book, *Planning in Plain English*. Has a list of substitute words to use. It gives you an idea of how to switch from passive to active voice. I am the chair of my DRB. If I don't have clear standards it's tough to make a good decision. Without clear standards the decisions can become arbitrary and capricious. How do we put meat on the bones? We need to be more comfortable playing God. This is not a role that planners like to play, because it is not participatory. A lot of regulations include "shoulds." What does that mean? If you mean it, you have to say "thou shall do this." You have to be proscriptive. A lot of regulations have vague considerations. I have worked with a lot of communities who incorporate the site plan by reference. This will be regulated in accordance with 117. Then 117 says you may consider parking, lighting, etc., but what does that mean? One case had to do with a PUD in Bakersfield. The court said "We prefer communities incorporate standards not just reference them." A volunteer board that doesn't have the statutes next to them. The other thing we look at and we reference are technical standards: quantitative versus qualitative. There has been some discussion

of this post JAM Golf. Ambiguous and inflexible. We are still going to be using descriptive standards. But as noted in JAM, the standards need to have guidance attached to them to make them bounded.

When I am drafting a regulation, I go back to see if the five “Ws” have been met. Who is supposed to do what? What are they supposed to do? Where are they supposed to do it? Why do they need to do it? What is the purpose?

I have offered a true life example.

Development is prohibited on slopes over 25%. From the view of the applicants, How do I know if the slopes over 25%? I guess I will have to hire an engineer. Engineers say is it pre-construction or post-construction? One project denied a permit because with a berm it was over 25%. Then with the lawyers, what is development? Well it is defined in the statute. It is unreasonable. What is reasonable? 3% property with driveway needed for access on land with slope greater than 25%. No slopes no development or do you apply common sense and then you will be considered arbitrary?

What is happening is we develop context. What does that mean? The downside is that regulations are getting longer. This is from a regulation that hasn't been challenged yet. It deals with areas of wildlife habitat in subdivision regulations. This basically says, what we want to protect and why we want to protect it. In Essex, a significant features map, with in house GIS, identifies what's on the ground. Maps aren't on the scale of what is on the ground. If GIS shows steep slopes, then go out and check it. Maps are a good indicator. Then planning commissions should do more site visits. Some regulations include specific instructions. Step by step and even better when accompanied by illustrations. Definitions are critical. Hopefully most of the words you use are in *Webster's Dictionary*. If you are using legal or scientific terms you need to define them. One town went to court over the definition of the term “stream.” These definitions come from VLCT's model ordinance. As you know, it is an ongoing process. We need to go back to the plan and then update regulations. I keep an “Oops list.” It is also important to look at purpose statements. Zoning districts should have purpose statements, one of the best ways to determine the character of the area. Most planning commissions cannot

write regulations on their own. It is too complicated. They may be able to do housekeeping things. They need help. For rural communities it really requires that we beef up the regulations and then it goes beyond what volunteers can do. I would suggest one resource that we don't use enough are the town attorneys. If problems come up ask town attorneys. I have them review new regulations to make sure they should stand up in court. The internet is a great resource now. Many of you are familiar with the zoning listserv. As a planner I use the internet a lot. These issues go beyond Vermont. The models out there are all over the place. If you type in "steep slope" you will be surprised by the results. But the internet is still no substitute for professional advice, even if you don't want to hire a consulting firm.

***Jens Hilke, Conservation Planning Biologist, Vermont Department of Fish & Wildlife***

Awesome. It is an honor to be here. I have worked with a number of towns represented in this room. It is a pleasure to see you in the daylight. I have become increasingly nocturnal. I was asked to talk specifically about how this decision has affected my work. In a nutshell I will say "not that much." We are still asking about "what level of protection is appropriate." In that regard things haven't changed that much. The methodology used - it amazes me given how much ambiguity there is in nature and here we are discussing ambiguity in legal terms. One of my stock answers with regard to the natural world is "it depends." In terms of specificity on what resources we are talking about it is interesting that we are talking about South Burlington who had a good idea about the resources they are talking about. Most towns don't have natural resource inventories, and towns don't know what resources they have beyond the state wide data. We look at the map and think we've got it. Less money available to do on the natural resource inventory field work. The only way to have current resources, you need field work. More and more towns are relying on the state wide data. Some data is inappropriate at a town wide scale. Some of it falls apart at a parcel level scale. In my world, I talk about three different levels of heritage elements, the way we look at the landscape. We talk about the landscape scale (Big blocks of continuous habitat connected

by corridors), species level scale (individual populations of salamanders), and community scale. What do we do when we don't know that much? Increasingly, I encourage towns to have landscape scale with what they know about species level scale. I talk about a "no regrets policy." If you only know where you have continuous blocks, it's a good place to start. The thing about that is that each of those scales has its own set of rules. At the landscape level there is much greater flexibility, when you look at a huge block of contiguous block we have a lot of flexibility for management and planning. That block can accommodate some development. We can develop around the edge and not necessarily affect the block. We have a lot more flexibility at that scale. With rare and endangered species there is little if any flexibility. You can't take a corner off the rare turtle habitat and expect the turtle to be okay. Different standards for different scales. As I work in "which standards do we use?" – it depends on the scale we are talking about and the community values. Science can't necessarily tell you what is more important. I will never tell you a moose is more important than a salamander. It would be easier if we had an ecological fix to say "that is the super important stuff, and don't worry about other species." We are at a place where science, law, and community values merge. If we circled every possible habitat of every species, it would be a significant portion of the town and that may not sell very well. So those values need to be taken into account. In my reading of the JAM Golf, the court talked about the tension between development and natural resource protection. Show me a town that doesn't have that tension. We as a society have not figured out this balance. I will say I am amazed at how few towns have engaged in where there values are. Moving forward from JAM Golf, "What do we love about our town?" "What do we want our town to look like in 20 years?" "What threats prevent that vision?" Those sorts of discussions are the first step that so few of us have engaged in. We go right to the process level without a good look at the values. Another point I would like to make is education.

Understanding science takes time. I think it is a task worth engaging in. Education shouldn't be limited to the conservation commission. The conservation commission should educate the town so that it is no surprise where the conservation areas are. Make the info part of the culture of the town, so the maps are celebrated in the town halls where people can see them and know them. There is an opportunity for people to say I have a

rare plant and be honored, until finding that my son's graduation fund (AKA developing my land) is gone. Regulatory and non-regulatory tools will flow easier as the understanding grows out there in town.

***John Austin, Director of Wildlife, Vermont Department of Fish & Wildlife***

I hate following Jens. Jens is a real talent. We hired him a couple of years ago. He hit the ground running with a program designed to provide specific guidance to communities dealing with these specific issues, how you represent the community's interest with regulatory and non-regulatory issues. I want to touch on the state's perspective on not just this case but local conservation protection relative to the state's interest. The Vermont Fish and Wildlife Department's perspective is this, "There is no greater challenge and there is no greater threat, to citizens of the state, than threats to the loss of habitat from development and the activities associated with development." Parallel track with climate change. Our ability to cope with climate change rests entirely on the environment's resiliency. The only way we can do this is to provide suitable habitat for species. People need to make the right choices on the land that they own. As we found, it has worked to provide some level of technical guidance. You can say what you want about their effectiveness. The challenges have become more complex as the population has grown. People's understanding of resource values have changed over time. Wildlife in contrast are always going to move. The interests with regard to their population will change. Their needs will change over time. The challenges and interests that communities deal with will have to be flexible. This is a fascinating topic which is the heart of wildlife conservation today. Wildlife conservation hinges on what goes on private land. Wildlife action plan governs action of this department, sets out a roadmap for wildlife conservation. That document was developed by a whole host of interests. It includes all kinds of interests, including ski resorts and timber organizations. Throughout that document, you see over and over again the only key to effective long term conservation tool is working with private landowners about how to protect land. With public surveys, there is overwhelming strong support for conservation. Even if they don't care whether they see a black bear, they want to know that they are out there. This is what the people want.

People appreciate the fact that conservation is in the hands of private landowners. This case doesn't change things a whole lot. We were thinking about this issue before. How do we encourage communities to be more specific in town planning and zoning ordinance? We requested that Brian Shupe and Sharon Murray did a survey... info helpful...wide spectrum of how communities develop this issue. Some communities are sophisticated in how they deal with it. Set of guidance, product one stop shopping for communities. What info is most important to communities, "How do I map it, how do I protect it?" Response is overwhelming. People need guidance. We are all going to need to step up to the plate and deal with the communities. Clear standards for habitat protection. Sharon illustrated examples of how you can do it. It has to be done in a way that is flexible. The devil is in the details. There is no bright line. The drafting has to be done in a way that people can use sound judgment. Wetlands is a good example. People could identify wetlands in their jurisdiction, and we can protect it in different ways. For example, if it has high conservation value, you can't develop within 500 feet. What I worry about is that communities think they have to spend an incredible amount of time and money to identify what is there. There has got to be a balance. The other issue is that I am disappointed that the court didn't look at the PUD. If you develop this way, there is predictability for the developer, but what about predictability for the citizen? Amendments cause problems. I think they did it the right way. That is the way planning works. This area is important to use. Communities and the state as well and the federal government... who draws the line to accommodate some level of development? If you continue to allow development, the issue becomes more complicated as time goes on. You can focus on areas that are essential... deer winter habitat. Even if you look at those, you reach a point where our provisions have allowed us to reach a certain level of development. Cumulative development.

Peg Elmer: We wanted to have a discussion on where to go from here. What else do you need from the resources you have here?

## Questions

Q: For Julie Beth, how should the town of South Burlington define the term “protect”?

JB: Maybe it is a failure of imagination. But we never felt like a PUD would be accused of overprotecting. The next step was to pick a value 300 feet on three linear levels. In that case protect means “stay out if you are in the protected zone.” We have a problem with the bifurcated view of the Supreme Court where it is either total preservation or total destruction. Where do we fall if the community value is to create new centers of activity?

Q: Don’t be afraid to dump the word protect. Protect agriculture soils. Minimize impacts on? That may mean there is a 2 acre piece here and 100 acres over there or are you talking about preservation. You can require PUDs under your statutes.

If we start with a premise that PUDs are a good thing and we have a decision out there that may make developers gun shy about PUDs. How can communities promote PUDs? I see this as a thorn moving down that road. Even though we deal with touchy issues overall, PUDs can be a good thing. What strategies can we use going forward to encourage developers to use PUDs? If we mandate it will we meet stiff resistance in the courts?

JB: I don’t see this case as discouraging PUDs. One of the most frustrating things is that the environmental court and the Supreme Court treated this as a site plan. If we can work with the Pierce standards and good conditional use type criteria for PUDs, these are the values that we are working with and in the process we can grant you more density. We need to articulate our values up front.

Jens: My understanding is with clustered development, realtors need to be trained in how to sell conservation development. I think that is an important step that we often leave out.

How can you deal with this second prong? You can assure the developer certainty. You can amend to decrease conservation but not increase. Is it possible to avoid amending it?

We have some good examples of it, but it is politically hard. Land trusts like to stay at arms length away. PUD process was more onerous than subdivision standards. We need to creative ways to provide that level of protection. Design incentives. We can't just protect through PUDs.

Some years back, the state moved in that direction. We were revisiting issues. We do recommend stewardship requirements. Some communities are reluctant. We recommend communities create a land conservation fund.

No more questions? Time for lunch.