IN THE SUPREME COURT OF THE STATE OF VERMONT

No. 2015-454

IN RE: B&M REALTY, LLP

Appeal From
Vermont Superior Court – Environmental Division
Docket No. 130-8-13 Vtec

BRIEF OF AMICI CURIAE
VERMONT NATURAL RESOURCES COUNCIL
AND
PRESERVATION TRUST OF VERMONT

IN SUPPORT OF APPELLANT
TWO RIVERS-OTTAUQUECHEE REGIONAL COMMISSION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF INTEREST

Amici Curiae[2] are the Vermont Natural Resources Council (VNRC) and Preservation Trust of Vermont (PTV). Both organizations' missions include strengthening downtowns and village centers while protecting Vermont's working landscape. The VNRC is dedicated to protecting Vermont's natural environments, rural character and unique sense of place, while ensuring vibrant communities. The PTV is dedicated to helping communities save and use historic places, many of which are located in the downtowns and village centers. Each organization has a significant interest in the Court's resolution of the important legal questions raised in this case, questions which relate directly to the ability of communities, regional planning commissions, and state agencies, via Act 250, to implement Vermont's long-standing policies for protecting open space and fostering investments in established communities. Each organization has long supported the role of communities and regional planning commissions to use planning as a central tool for achieving these goals through a process that fosters citizen participation and requires consideration of the full range of costs of unplanned development and sprawl.

[2] Amici Curiae have obtained the written consent of all parties to this case for filing this brief pursuant to VRAP 29.

STATEMENT OF THE CASE

Amici Curiae VNRC and PTV adopt the Statement of the Case in the brief of Appellant Two Rivers-Ottauquechee Regional Commission.

SUMMARY OF THE ARGUMENT

The decision by the Vermont Superior Court Environmental Division ("Environmental Division" or "Trial Court") to overturn the decision of the District 3 Environmental Commission ("District Commission") approving the application by B & M Realty, LLC ("B & M Realty" or "Applicant") to construct a major new development at Interstate 89's Exit 1 is inconsistent with the applicable regional plan, state law and policy, and principles of smart growth. A development of this size, sprawling across an area larger than downtown White River Junction with a town center that "mimics a small version of the Church Street Marketplace in Burlington, Vermont,"[3] is so clearly inconsistent with the Regional Plan and Act 250 that upholding the Environmental Division's decision will erode the protections the Vermont legislature established in this landmark law that has guided significant land use decisions for over four decades.

The Environmental Division did not look to the language and goals of Act 250, or the Vermont Planning and Development Act, 24 V.S.A. Chapter 117, which provides the overarching context in which local and regional plans are developed. Neither did the court follow the helpful guidance provided by the Two Rivers-Ottauquechee Regional Commission ("Regional Commission") in the Two Rivers-Ottauquechee Regional Plan ("Regional Plan"), guidance the court is obligated under Act 250 to follow. Instead, the Environmental Division invented a new test for the term "principal retail establishments" in the Two Rivers-

[3] In re B&M Realty, No. 103-8-13 Vtec, at 6 (Vt. Super. Ct. Envtl. Div. Nov. 12, 2015)(Walsh, J.) (PC at 8).

Ottauquechee Regional Plan ("Regional Plan"). This test ignores the plain meaning, context, and obvious purpose of the Regional Plan language carefully developed by the thirty communities that comprise the Regional Commission. By evaluating the terms of the Regional Plan narrowly, and ignoring the way land use planners use these terms, the Environmental Division has created a precedent that has the potential to render other municipal and regional plans meaningless.

In addition, with its narrow interpretation, the Environmental Division not only ignored the language and goals of Act 250 but a host of other state laws and policies which evince a clear and long-standing state policy of promoting growth in designated areas developed with state oversight based on local and state planning processes. The State of Vermont's policies are, in turn, based on a foundation of experience with the impacts of uncontrolled development on existing communities. Sprawl development, of the sort proposed by B & M Realty, causes a loss of open space and damage to natural resources, while harming the economic vitality of existing communities, primarily Vermont's historic downtowns and village centers. For these reasons, the Environmental Division's decision should be reversed.

ARGUMENT

I. THE ENVIRONMENTAL DIVISION FAILED TO PROPERLY CONSIDER AND GIVE MEANING TO THE PLAIN LANGUAGE, CONTEXT, AND PURPOSE OF THE REGIONAL PLAN

A. The Environmental Division Ignored the Plain Language of the Regional Plan, Which Specifically Prohibits Retail Establishments.

After correctly determining that the Regional Plan is applicable and controlling,[4] the Environmental Division proceeded to ignore the plain meaning of the plan's language and to invent a formula not existing in the plan that makes much of the language of the plan meaningless.[5] The Regional Plan provides, under the header "Town Centers" in Policy 6, 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 maintain rural character." PC at 68.

As explained by the Regional Commission in their brief, the term "principal" should be understood "in the lexicon of planning." Appellant Two Rivers-Ottauquechee Regional Commission Brief at 23. Here, because the proposed project will include 40,000 square feet of building space to house "principal retail establishments," it is subject to the prohibition on retail development at the Interstate 89 Exit 1 interchange. The use of the word "principal" by planners in this context should not be understood to apply to the entire project, as the Environmental

[4] The Regional Plan must be satisfied in order for B&M Realty to build its project. In the event of a conflict between local and regional plans, and where the proposed project has substantial regional impacts, the regional plan controls. 24 V.S.A § 4348(h). The Project at issue in this case meets the applicable Regional Plan criteria defining substantial regional impacts and so must be consistent with the Plan in order to obtain a permit. PC at 22; 10 V.S.A. § 6086(a)(10).

[5] See In re Burlington Airport Permit, 2014 VT 72, ¶7, 197 Vt. 203, 103 A.3d 153 quoting In re Curtis, 2006 VT 9, ¶2, 179 Vt. 620, 896 A.2d 742 ("[w]e construe the words of a zoning ordinance according to their plain and ordinary meaning, and the whole of the ordinance is considered in order to try to give effect to every part.").

Division suggests, but instead to the buildings, the "retail establishments," which will house the 40,000 square feet of retail to be constructed as part of the project.[6]

Further, the term "principal" is defined in the dictionary as the "most important, consequential, or influential." See Principal, Merriam-Webster.com, http://www.merriam-webster.com/dictionary/principal (last visited Mar. 9, 2016). The 40,000 square feet of building space included in the proposal to be used for retail was designed to mimic "a small version of the Church Street Marketplace in Burlington, Vermont." PC at 8. The retail use of Church Street Marketplace is unquestionably the "most important, consequential, or influential" use in that development. Similarly, the buildings proposed for retail use in the proposed development by B & M Realty qualify easily as "principal retail establishments" based on a plain reading of the Plan's language.

Turning to the remaining language in Town Center Policy 6 of the Regional Plan, there can be no debate that the Exit 1 Interchange falls outside of the categories included in this provision: "Town Centers, Designated Downtowns, or Designated Growth Centers." Finally, one could scarcely imagine a clearer example of "sprawl and strip-development along major highways" than a major new development proposed to be located in a rural area with a large block of retail proximate to the intersection of two major highways. Reading Policy 6 of the Regional Plan in its entirety and applying it to the project at issue in this matter, it is hard to imagine how the Environmental Division reached any other conclusion.

B. The Environmental Division's Interpretation of the Regional Plan Would Lead to Absurd and Irrational Consequences Inconsistent with the Purpose of the Plan.

Instead of using the most obvious meaning of this phrase, the Environmental Division selectively read the Regional Plan and turned the concept of "principal retail establishment" into

[6] See Humstone testimony at PC 145-146.

a formula not found anywhere in the Plan – not in its language or in any plausible extension of that language. The Environmental Division converted its incorrect reading of "principal" into a mathematical model based on the proportion of floor space dedicated to retail as compared to other uses of floor space within the full project proposal. PC at 23-24. Since the retail component was less than 50% of the total built space, the Environmental Division erroneously concluded that the project, and all of its component parts, did not qualify as a "principal retail establishment" subject to the Regional Plan.

The Environmental Division's test for determining whether a development is a "principal retail establishment" fails because it would allow the extension of the court's formula to ever-larger amounts of retail space without any constraint. The court reached this conclusion despite the clear intent of the Regional Commission as expressed in the plain language of the Plan, to restrict retail development. The amount of retail development proposed in the present application is already quite large relative to development in nearby villages and downtowns. PC at 131, 135-136, 147. Yet, under the Environmental Division's test, the absolute size of the retail component of a proposed development does not matter. Instead, only the proportion of the retail space relative to other uses of the space in the development matters. As long as the project includes an amount of non-retail space that exceeds the space dedicated to retail purposes, the Environmental Division would find the project consistent with the Regional Plan. This interpretation encourages gamesmanship by developers in which they propose major new retail developments in areas where they would otherwise be barred from doing so, by the ruse of nesting the proposed retail establishments within larger developments that include office parks and residential buildings -- exactly the circumstance presented by this case.

In order to hold that the Regional Plan does not apply to this proposal, the Environmental Division had to ignore the fact that the retail space component of B & M Realty's proposal is designed to be a major attraction. The design shows that the Projects purpose is a retail area by the location of the retail on ground floor and the aggregation of the retail spaces in a centralized area with a main walkway intended to mimic Church Street Marketplace in Burlington. PC at 8. A development designed to mimic Church Street Marketplace could not reasonably be construed to have any other purpose but to draw customers to shop in the retail establishments located in that development. The fact that the buildings containing retail may also have floors, which are dedicated to office space or residential uses, or are surrounded by other buildings with those uses, does not make those establishments any less retail than if those other uses did not exist.

The communities that voted in favor of the Regional Plan could not possibly have intended the result that will be occasioned if the Environmental Division's ruling is left to stand. As clearly indicated by the language of the Regional Plan, the Two Rivers-Ottauquechee Region communities instead intended to preclude such large-scale retail development. They recognized that their efforts to promote growth in designated downtowns, town centers and growth centers depended upon preventing the blighting impact of sprawl occurring outside of these designated growth areas, particularly at highway interchanges such as the one found at Exit 1 of Interstate 89.

The Regional Plan specifically prohibits development like the proposed Project off of the I-89 Exit 1 Interchange. The Regional Plan states that 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.

This language could not be plainer: A development of the nature and scale of B & M Realty's proposal, with 40,000 square feet of retail space, must not be located off of Exit 1. Such a development would unquestionably draw on regional populations, would violate the stated intent of the Regional Plan, and would lead to the absurd and irrational result of allowing ever-larger retail development as long as nested within proposals to develop even greater levels of office space and residential development.[7]

Finally, the fact that the application at issue is not for approval of a growth center, as the Environmental Court deems relevant, PC at 26, misses the point. Under the Regional Plan, the only way that the District Commission could have approved B & M Realty's proposed development was if it was proposed to be located in an area designated as a growth center.

II. THE ENVIRONMENTAL DIVISION'S DECISION IS INCONSISTENT WITH THE PURPOSE OF REGIONAL PLANNING.

The Environmental Division's ruling in this matter has the effect of virtually eliminating the benefits of regional planning, namely the ability of communities to influence the locations of major new developments in the region in order to ensure safe, orderly development, protection of natural resources, and investments in existing infrastructure. State laws, particularly Act 250 and the Vermont Planning and Development Act, 24 V.S.A. Ch. 117, are written to reward communities that put time and effort toward planning that balances competing needs for land use. Hence, consideration of regional plans is a criterion in Act 250. 10 V.S.A. § 6086(a)(10). The Vermont Planning and Development Act, as amended by Act 200 (also referred to as the

[7] See In re Hartland Group North Ave. Permit, 2008 VT 92, ¶11, 184 Vt. 606, 958 A.2d 685 citing Bergeron v. Boyle, 2003 VT 89, ¶11 n.1, 176 Vt. 78, 838 A.2d 918 (courts should avoid statutory construction that leads to absurd results).

"Growth Management Act"), complements this requirement by providing for a process that involves communities in land use management through local and regional planning, and coordination with state agencies. See 24 V.S.A. §§ 4301–4498.

These statutes are not intended to stop growth nor should they. VNRC and PTV support the goals of these statutes, which are intended to promote development where appropriate, such as in designated downtowns and growth centers through comprehensive municipal and regional planning processes. The decision of the Environmental Division contradicts the purposes of these state statutes. Further, if left in place, the Environmental Division's crabbed reading of the Regional Plan, ignoring the plain language and purposes of the Plan, will cause regional planning commissions – and municipal planning commissions as well -- to question the value of taking the time and effort to craft similar plans in other communities and regions of the state.

A. The Environmental Division's Decision Has the Effect of Defeating the Purpose of Vermont's Land Use Laws to Promote Balanced Planning and Smart Growth.

The Growth Management Act, or Act 200, with goals largely mirroring those of Act 250, was enacted as part of a statewide strategy to "encourage the appropriate development of" Vermont. 24 V.S.A. § 4302(a). Such appropriate development protects Vermont's "public health, safety, economy…[and] facilitate[s] the growth of villages, towns, and cities." Id. Along with broad land use goals, 24 V.S.A. § 4302(b), the statute also gives regional and municipal planners "specific goals" to guide regional plans. 24 V.S.A. § 4302(c). These goals are not mere guidance; regional plans are required to be consistent with these goals. 24 V.S.A. § 4302(e)(2)(A); 24 V.S.A. § 4348a(a).

Vermont's planning law includes goals preventing the type of development proposed by B & M Realty. Under this law, in planning "to maintain the historic settlement pattern of compact village and urban centers separated by rural countryside…strip development along

highways should be discouraged." 24 V.S.A. § 4302(c)(1). Conversely, "economic growth should be encouraged in locally designated growth areas." Id. B & M Realty's proposed project, away from any growth centers or towns, and in the "rural countryside," contradicts these established goals.

Additionally, regional planning emphasizes the importance of establishing the needs of a particular region, as opposed to the needs of any one community as determined in a vacuum. The goal of regional planning is to avoid the risk that communities make land use decisions that only benefit that one community, without regard to impacts of the development they approve on other communities in the region. As noted above, a regional plan must include a definition of "substantial regional impact." The Environmental Division properly recognized that such a decision belongs with the regional planning commission: "substantial regional impact is necessarily a region-specific concept that is likely best determined on a regional level." PC at 20. The court, however, then proceeded to read the Regional Plan so narrowly as to make it meaningless, thereby defeating the benefit of having a regional plan in the first place.

B. The Legislature Gave Local Citizens a Strong Voice in the Detailed Regional Planning Process; the Environmental Division's Decision Threatens to Silence this Voice and Eliminate the Value of this Process.

Vermont's unique land use planning balances the need to protect the state's landscape and natural resources with encouraging economic development by promoting growth in designated areas such as downtowns and village centers. Through an extensive planning process at the local and regional level, the legislature emphasizes its goal of including the local communities in logical and "appropriate development." See 24 V.S.A. § 4302(a).

To achieve this end, Vermont law requires that regional planning commissions "shall engage in a continuing planning process that will further…encourage citizen participation at all

levels." 24 V.S.A. § 4302(b)(2). By including those most affected by regional development, land use plans "are significant statements of community goals." In re Manchester Commons Assoc., No. 8B0500, Findings of Fact, Conclusions of Law, and Order, at 28 (Vt. Envtl. Bd. Sept. 29, 1995). Additionally, courts have recognized this citizen involvement and have focused on the "average person" when interpreting planning provisions. In re Mirkwood Group and Barry Randall, No. 1R0780-EB, Findings of Fact, Conclusions of Law, and Order, at 29 (Vt. Envtl. Bd. Aug. 19, 1996); In re John J. Flynn Estate and Keystone Dev. Corp., #4C0790-2-EB, 2004 WL 1038110, at19 (Vt. Envtl. Bd. May 4, 2004). The Two Rivers-Ottauquechee Regional Plan was developed in accordance with this process and the resulting plan reflects significant input from citizens in the region.

When drafting a regional plan, a commission must follow a series of steps that involve local communities, fellow regional planning commissions, the municipalities within a region, and state agencies. 24 V.S.A. § 4348. The statute requires "informal working sessions that suit the needs of local people," from the beginning and throughout to "solicit the participation of local citizens and organizations." Id. Eventually these sessions lead to at least "two or more public hearings," following public notice. Id. Along with the local communities, the commission must also send a copy of the proposed plan or amendment to the municipal governments, directors of "abutting regional planning commissions," the Department of Housing and Community Development, "business, conservation, low-income advocacy, and other community or interest groups…that have requested notice," and the Agency of Natural Resources. Id. All of those organizations then have opportunity to comment on the proposed plan or amendment and speak at the public hearings. Id. By involving interested parties at all levels, Vermont's law

reduces the risk of any one local government acting in a manner that negatively affects other communities in the region or that is contrary to state interests.[8]

Once a finalized version of a plan or amendment has gone through this process, all of the municipalities within the region vote on it. 24 V.S.A. § 4348. A plan cannot pass without the approval of more than sixty percent of the municipal commissioners. Id. Even after this vote, a majority of the municipal legislative bodies may veto the plan by sending notice to the commission. Id.

This detailed process requires the time and effort of all the involved parties, particularly the regional planning commission. The commission drafts a plan, hosts public meetings, considers comments from interested parties, engages in internal discussions, and makes any necessary adjustments before a vote. Through this process, planning commissions create a detailed plan for current and future development. The Regional Plan at issue consists of almost three hundred pages addressing a wide array of development issues across its thirty municipalities. See PC at 58–83. To create such a plan, the Regional Commission was required to commit significant time and public resources.

The Environmental Division's focus on one word, in this instance, in order to approve B & M Realty's application for a large, sprawling retail development near a major highway intersection negates all of this time and effort. Reading the Regional Plan in this case, or any regional plan, through a such a narrow lens, ignoring clearly stated goals in the plan, eliminates the benefits of regional planning and, over the long-term, will have the effect of interfering with other regional planning commission efforts to empower communities and citizens through the

[8] See analysis of the benefits of using a regional or state approach to reduce risks of local parochial interests trumping broader public values by Carl J. Circo, Using Mandates and Incentives to Promote Sustainable Construction and Green Building Projects in the Private Sector: A Call for More State Land Use Policy Initiatives, 112 Penn St. L. Rev. 731, 766-69 (2008).

planning process. An interpretation like the one used by the Environmental Division in its construction of the phrase "principal retail establishment," so inconsistent with planning principles and the full context and purpose of the Regional Plan, makes it even more difficult for local governments and regional planning commissions to implement the plans borne of these extensive efforts.

C. The Environmental Division's Decision Ignores Established Principles of "Smart Growth."

Vermont law recognizes the benefits of "smart growth," a concept not sufficiently considered by the Environmental Division in its opinion approving a major new development at the Interstate Exit 1 Interchange. Under the Growth Management Act, "development should be undertaken in accordance with smart growth principles as defined in subdivision 2791(13) of this title." 24 V.S.A. § 4302(c). "Smart growth principles" are defined as promoting development that maintains "historic development patterns" and keeps "mixed-use centers at a scale appropriate for the community and the region." 24 V.S.A. § 2791(13). The scale of B & M Realty's proposed development is plainly not appropriate for the Two Rivers-Ottauquechee Region and it will disrupt historic development patterns.

Smart growth principles were developed as a way to combat sprawl, as suburban expansion encroached on open space and reduced the quality of life for communities. F. Kaid Benfield et al., Solving Sprawl: Models of Smart Growth in Communities Across America 3 (2003) Addendum at A2. Sprawl is usually defined as construction that "leap frog[s] in areas without existing infrastructure, often on prime farmland." Robert H. Freilich et al., From Sprawl to Sustainability 8 (2010); Addendum at A16.

Sprawl has spawned six major crises in the United States:

1. Deterioration of existing built-up areas,
2. Environmentally sensitive land damage, including loss of wetlands, hillsides, habitats, historic, archaeological, cultural and natural resources, and the depletion and degradation of the quality and quantity of water resources,
3. Global warming due to overutilization of carbon based energy, lack of renewable energy, greenhouse gas emission from excessive vehicle miles traveled and failure to utilize green development techniques for the manmade environment,
4. Fiscal insolvency, transportation congestion, infrastructure deficiencies,
5. Agricultural and open space land conversion, and
6. Mortgage foreclosure and real estate collapse due to a lack of affordable housing available to low- and moderate-income families. Id.

Nationally, these problems have led to efforts "to organize development in appropriate directions," and "to channel development into a sustainable urban form, one that discourages low-density sprawl and encourages serviceable and walkable mixed use densities." Id. at 15; Addendum at A23. Act 250 and the Growth Management Act, along with regional and local plans and ordinances, represent Vermont's response to these problems; they constitute our state's programs and process for organizing development "in appropriate directions" and discouraging "low-density sprawl."

Contrary to the effect of approving the development proposed by B & M Realty, smart growth includes "direct[ing] development toward existing communities." Benfield, supra, at 4; Addendum at A6. It is also instructive to look to the smart growth principles developed by Amicus Curiae VNRC, which has extensive experience in working with communities to assist them in making balanced land use decisions. Many of these principles would be violated by the construction of the development proposed by B & M Realty including the following:

1. Plan development so as to maintain the historic settlement pattern of compact village and urban centers separated by rural countryside.
2. Promote the health and vitality of Vermont communities through economic and residential growth that is targeted to compact, mixed use centers, including resort centers, at a scale convenient and accessible for pedestrians and appropriate for the community.

…

4. Protect and preserve environmental quality and important natural and historic features of Vermont, including natural areas, water resources, air quality, scenic resources, and historic sites and districts.

…

9. Balance growth with the availability of economic and efficient public utilities and services and through the investment of public funds consistent with these principles.
10. Accomplish goals and strategies for smart growth through coalitions with stakeholders and engagement of the public.

VNRC Website, Smart Growth Resources, http://vnrc.org/resources/smart-growth-resources/smart-growth/ (last visited March 9, 2016). VNRC's Smart Growth webpage also includes a host of links to publications and research supporting the importance of making land use decisions in accordance with these sound principles of land use management. The Environmental Division's issuance of a permit to B & M Realty is inconsistent with this significant body of research and findings developed over decades and reflected in Vermont's laws and policies.

Along with protecting the environment generally, smart growth is also intended to limit the economic waste of sprawl, such as underutilization of infrastructure like roads, water and sewer. Benfield, supra at 186; Addendum at A9. By protecting the economic vitality of existing communities, Vermont laws and regional plans like the Two Rivers-Ottauaquechee Regional Plan help to limit this waste by keeping development within town centers and designated growth centers. B & M Realty's proposal will, if approved, draw consumers away from businesses in

nearby communities in the region in conflict with this sensible approach to economic development and smart growth principles.

Development at highway interchanges, such as the present application by B & M Realty, poses a particular risk of increasing sprawl and has long been the focus of Vermont state land use policy: "Development at interchanges that competes with villages and downtowns can undermine Vermont's efforts to maintain and improve these historic centers of social and economic activity." Vt. Dep't of Housing and Community Affairs, Vermont Interstate Exchange Planning and Development Guidelines, (2004) http://accd.vermont.gov/sites/accd/files/Documents/strongcommunities/cd/planning/GuidelinesFinal.pdf (last visited March 9, 2016).

B & M Realty has proposed a shopping center at a highway interchange, far from the nearest city center, and away from growth centers. PC at 6. Further, the proposed development is not in keeping with the scale of existing settled communities in the area. Reading the map titled "Attachment B: Hartford Growth Centers Overlay, Two Rivers-Ottauquechee Regional Commission" referenced in the testimony of Elizabeth Humstone, reveals that the B & M Realty proposal has project boundaries that cover an area rivaling the size of White River Junction's downtown; Addendum at A29. If allowed to be constructed, the proposed project would outpace development in already established community centers in the region, and defeat planning goals that help ensure incremental, transitional growth. PC at 50. Authorizing the construction of this large development in a rural landscape violates the goals of regional planning and smart growth principles.

D. The Environmental Division's Decision Would Set a Precedent Harmful to the Role of Land Use Planning Under Act 250.

The Environmental Division's interpretation method, reading one word out of context to find that the plan does not apply, despite other clear language demonstrating that the regional commission intended to bar the type of development proposed, leaves municipal and regional planners across the state with an impossible challenge. The proper standard for reviewing a regional plan is to consider how the "average person, using common sense and understanding" could interpret the meaning. In re John J. Flynn Estate and Keystone Dev. Corp., #4C0790-2-EB, Findings of Fact, Conclusions of Law, and Order at 19 (Vt. Envtl. Bd. May 4, 2004). This standard is appropriate given the nature of regional plans and the process used to develop them. It is hard to imagine how a regional planning commission could craft plans any clearer to an average person than the Regional Plan at issue in this matter.

In fact, the Two Rivers-Ottauquechee Regional Plan has been held out as a model for other regional plans. In 2013, Vermont Association of Planning and Development Agencies (VAPDA), analyzed all of the regional plans throughout the state and evaluated their conformance with Vermont's land use planning laws. Vt. Ass'n of Planning and Dev., Regional Plan Assessments 7 (2013), http://www.vapda.org/Publications/RegionalPlanAssessments.pdf (last visited March 9, 2016). The report commends the Two Rivers-Ottauquechee Planning Commission for "express[ing] their land use policies in greater detail and us[ing] more directive language." Id. VAPDA uses the provision at issue in this case, the prohibition on development of principal retail outside of designated growth areas, as a good example and "one of the most specific policies to guide development." Id.

III. THE ENVIRONMENTAL DIVISION'S DECISION IS AT ODDS WITH THE GOALS OF ACT 250 AND OTHER STATE LAWS AND POLICIES.

A. Act 250 Originated to Protect Vermont's Landscape and Resources from Uncontrolled Development.

In the late 1960s, Vermont's rate and impacts of growth alarmed Vermonters who saw the landscape so vital to the economic and environmental health of Vermont communities threatened by uncontrolled development. According to then Vermont Attorney General James Jeffords (later a United States Senator), the problem he saw was that "[d]evelopment was going all over the place – with no concept of how the sewage was going to get down into the ledge, and not run all over…it was a mess." Vt. Nat. Resources Board, Act 250: A Guide to Vermont's Land Use Law 2 (2006), http://www.nrb.state.vt.us/lup/publications/act250brochure.pdf (last visited March 9, 2016). The problems created by uncontrolled development led to formation of the Gibb Commission which "recommended a number of environmental laws, chief among them a new state system for review and controlling plans for large-scale and environmentally sensitive development" and "the power to review projects and grant permits be vested more locally, in a group of regional commissions." Id. at 3. In the months following the release of the Gibb Commission's recommendations, the Vermont legislature passed Act 250. Id. As discussed in more detail below, the criteria that the legislature included in Act 250 were designed to protect Vermont's landscape from development like the B & M Realty proposal for a major new development at Interstate 89 Exit 1.

B. The Environmental Division's Ruling is at Odds with the Overarching Goals of Act 250 to Promote Smart Growth over Sprawl Development.

The ten criteria of Act 250 are central to the Act's purpose of preserving the environment and working landscape of Vermont, as well to promote development of downtowns and villages. Sprawl is inconsistent with Act 250's criteria. Sprawl is, for instance, inconsistent with goals of water conservation, water efficiency, and protecting existing streams and rivers from the impacts

of erosion and polluted storm water runoff – issues addressed in Criteria 1 through 4. Sprawl also contributes to traffic and congestion and is the reason for Criterion 5. Criteria 8 and 9 reflect Vermont's goal to protect Vermont's open fields and forests from the impacts of development and to protect the economic benefits of our working lands, wildlife habitat, and historic settlement patterns. 10 V.S.A. § 6086(a)(1)-(5), (8), and (9).

While not part of Act 250 at the time B & M Realty submitted their application, Criterion 9L is the most recent example of the State of Vermont's official policy to restrict sprawl and promote smart growth. 10 V.S.A. § 6086(a)(9)(L). Under this recently added criteria, Act 250 now requires applicants to show that

> any project outside an existing settlement makes efficient use of land, energy, roads, utilities and other infrastructure, and either: I) will not contribute to strip development along public highways, or II) if the development or subdivision will be confined to an area that already constitutes strip development, will incorporate infill as defined in 24 V.S.A. § 2791 and is designed to reasonably minimize the characteristics listed in the definition of strip development under subdivision 6001(36) of this title.

10 V.S.A. § 6086(a)(9)(L) (emphasis added). The adoption of this explicit language reinforces the long-standing policy of Vermont to restrict strip development like the project proposed by B & M Realty.

Finally, Criterion 10, directly implicated in the present case, also demonstrates that an overarching goal of the Vermont legislature in passing Act 250 was to control sprawl and direct development to designated growth areas by empowering communities to use regional plans to guide sensible development. 10 V.S.A. § 6086(a)(10).

C. The Environmental Division's Interpretation Undermines Other State Laws and Policies which Invest in Protecting Open Space and Developing in Designated Growth Areas.

In addition to Act 250, many other Vermont laws, policies, and initiatives have been established to promote development in areas designated by communities for growth, and to protect Vermont's iconic open spaces, working farms, and working forests that drive the economy.

Vermont has established a set of state designation programs that promote the state's "landscape of compact centers surrounded by rural farm and forest land is integral to our economy, community spirit, and way of life." Vt. Agency of Commerce & Cmty. Dev., State Designation Programs 3 (2016), http://accd.vermont.gov/sites/accd/files/PlanningManualModule2low.pdf (last visited March 9, 2016). The purpose of the state designation programs is to promote "traditional settlement pattern[s]" that build the state's economy and help "achieve related goals like protecting the working landscape and our historical and natural resources." Id. In this program, cities, towns, and villages can apply for five different types of designations. These "designation programs have successfully channeled public and private resources to restoring historic buildings, creating safe and pleasant pedestrian streets, reviving commercial districts, planning for thoughtful growth, and building new housing." Id. All of these investments are for the purpose of promoting growth in designated growth areas, discouraging sprawl, and are intertwined with the work of Act 250 district commissions and regional planning commissions. Regional planning commissions approve the city, town, or villages plans and participate in the designation process.

Once designated, many options for state funding become available. Id. Such funding includes the following sources: 1) Downtown Transportation Fund, 2) Municipal Planning

Grants, 3) Strong Communities, Better connections grant program, 4) Vermont Community Development Program, 5) Transportation Alternatives Program, 6) Bicycle and Pedestrian Program, 7) Property Assessment Fund, 8) Historic Preservation Grants. Id. at 17. All of these grants exist to promote development within areas of existing development, redevelopment of existing and historical buildings, and to build in areas where the development can benefit from the substantial public investments in infrastructure by cities, towns, or villages. Id. at 3.

Also, municipalities have the option of "adopting taxing mechanisms to raise funds specifically for public facilities in the designated area." Id. at 18. One example is the Special Assessment District (or business improvement district), which allows a designated downtown to raise funds for operating costs and capital expenses to support specific projects. Id.

Finally, Vermont has developed incentives for landowners and developers to develop in designated areas. Id. at 19. These tax incentives include a: 1) State Historic Rehabilitation Tax Credit 2) Façade Improvement Tax Credit, 3) Code Improvement Tax Credit, 4) Sprinkler System Rebate, 5) Sales tax reallocation for construction materials, 6) and an exemption from land gains tax for housing projects in neighborhood development areas. Id. In addition, developers can obtain a quicker, and less expensive, Act 250 permitting process if they choose to build in designated downtowns and growth centers. Id. at 19–20. All of these incentives are directed toward investing in the existing cities, villages, and downtowns and are designed to encourage development in these areas. Sprawl undermines these investments and erodes the ability of our communities to develop the places and buildings these tax credits are designed to promote.

Collectively, these programs and state investments have led to substantial accomplishments. In downtown and village center tax credits alone from 2010 to 2015 there

have been 134 projects awarded, 51 communities served, $10.6 million in awarded tax credits, and $190 million in private investment. Id. at 20. These programs and incentives are significant and work in unison with Act 250 in a path toward smart growth and economic vitality.

In parallel with investments in our downtowns, village centers and growth centers, Vermont law and policy also encourage keeping our fields and forests from being lost to sprawl. For instance, Vermont's Current Use Program promotes keeping working farms and forests open and undeveloped through tax incentives. The law allows "valuation and taxation of farm and forest land based on its remaining in agricultural or forest use instead of its value in the market place." Vt. Dep't of Taxes, Current Use, http://tax.vermont.gov/property-owners/current-use (last visited March 9, 2016). The main "objectives of the program were to keep Vermont's agricultural and forest land in production, [and] help slow the development of these lands." Id.

In addition, the Vermont legislature passed the Working Lands Enterprise Initiative in 2012. Vt. Dept. of Forests, Parks, and Recreation, Working Lands Initiative, http://fpr.vermont.gov/forest/forest_business/working_lands (last visited March 9, 2016). This initiative results in the investment of state funds into forestry-based and agricultural businesses. It is designed to protect the working landscape which is the "backbone of Vermont's heritage and economic viability is the working landscape" Id.

The B & M Realty proposal to construct a major new development at the intersection of two major highways, outside of any designated growth areas works against all of these state programs and investments. The Environmental Division's approval of an Act 250 permit for this project ignores and undermines a comprehensive framework of laws and policies intended to prevent this type of development.

CONCLUSION

Amici Curiae, VNRC and PTV support new development when done correctly, according to the smart growth principles contained in Vermont's Act 250 as supported by the Growth Management Act, and other state laws and policies. The Environmental Division ignored the plain language of the applicable Regional Plan developed by the communities in the Two Rivers-Ottauquechee Planning Commision and approved a development that is contrary to the law and good land use policy. We ask that this Court reverse the Environmental Division's decision and deny B & M Realty's application for an Act 250 permit.

Dated: March 11, 2016.

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VERMONT RULE OF APPELLATE PROCEDURE V.R.A.P. 32(a)
CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the word count limitation set forth in V.R.A.P. 32(a). The Microsoft Office Word 2010 word processing system was used to create this Brief and according to the software word count tool it contains 6508 words.

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