

## **32. Criterion 10 (Local Plan and Regional Plan)**

The importance of local planning in the review and approval of developments and subdivisions: "Towns can, and should, control their own futures through comprehensive planning, zoning and subdivision regulations; reliance on Act 250 alone to address development places decisions on a town's future beyond its control." *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, Findings of Fact, Conclusions of Law, and Order at 43 n.10 (Nov. 24, 2004), *cited in Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839 -2-EB (Altered), Findings of Fact, Conclusions of Law, and Order at 46 - 47 (Nov. 4, 2005), appeal dktd. (Vt. S. Ct.)

### **I. Requirements for Issuance of Permit**

Criterion 10 requires that a project must be "in conformance with any duly adopted local or regional plan...." 10 V.S.A. §6086(a)(10). *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839 -2-EB (Altered), Findings of Fact, Conclusions of Law, and Order at 58 (Nov. 4, 2005), appeal dktd. (Vt. S. Ct.); *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R1415-EB, Findings of Fact, Conclusions of Law, and Order at 51 (Jun. 7, 2005); *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, Findings of Fact, Conclusions of Law, and Order at 37 (Nov. 24, 2004)

### **II. Burden of Proof**

The burden of proof is on the applicant who must persuade the Board or district commission that the project complies with Criterion 10. 10 V.S.A. §6088(a); *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R1415-EB, Findings of Fact, Conclusions of Law, and Order at 51 (Jun. 7, 2005); *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, Findings of Fact, Conclusions of Law, and Order at 26 (May 4, 2004)

### **III. Analysis**

The project must comply with all applicable local or regional plans. The application of Criterion 10 often raises several questions such as determining which version of the town plan to apply, interpreting whether the language is mandatory and specific, and when to refer to a zoning ordinance to clarify any ambiguities.

#### **A. Which Plan applies?**

##### **Town Plan**

##### **Time of adoption**

The town plan that was in effect as of the time that a complete application is filed applies. *Re: Raymond F. and Lois K. Ross and Rochelle Levy*, #2W0716-EB (11/2/87), *aff'd, In re Raymond F. Ross*, 151 Vt. 54 (1989); and see *Re: Burlington Broadcasters*,

*Inc. d/b/a WIZN, Charlotte Volunteer Fire and Rescue, & John Lane, #4C1004R-EB, Memorandum of Decision at 9 (Nov. 25, 2003).*

However, a plan which is in the process of being adopted at the time of the application will also apply if the town has noticed a hearing on the plan, and the plan is later adopted within a reasonable time. *Re: Russell Corp. and Crushed Rock Inc., #1R0489-6-EB (Remand)-EB, Findings of Fact, Conclusions of Law, and Order (Jan. 17, 2002) [EB #723], rev'd in part, aff'd on other grounds, In re John A. Russell Corp. and Crushed Rock Inc., 2003 VT 93, ¶¶11 - 15 (V.S.Ct. 2003) (citing 24 VSA §4387(d)).*

At the applicant's request, Town Plan amendments which occur after the application date and which favor an applicant may govern. *Re: Peter S. Tsimortos, #2W1127-EB, Findings of Fact, Conclusions of Law, and Order at 18 (Apr. 13, 2004); Re: Fred and Laura Viens, #5W1410-EB, Memorandum of Decision at 4 - 5 (Sep. 3, 2003).*

### **Location of project**

Where project is located on boundary line of two towns, a town plan cannot be given effect to the part of project outside of town boundaries. *P.F. Partnership and Harlan and Jean Bodette, #9A0169-EB (May 1, 1990), aff'd and remanded, P.F. Partnership, No. 90-276 (V.S.Ct. 1991)*

### **Regional Plan**

The regional plan will apply where a town has not adopted a town plan. *Re: Robert B. & Deborah J. McShinsky, #3W0530-EB, Findings of Fact, Conclusions of Law, and Order (Apr. 21, 1988), aff'd, In re Robert and Deborah McShinsky, 153 Vt. 586 (1990).*

## **B. Conflict between the Town Plan and Regional Plan**

### **Definition of "conflict"**

A conflict exists when one plan allows the project but the other does not. *Re: Peter S. Tsimortos, #2W1127-EB, Findings of Fact, Conclusions of Law, and Order at 24 (Apr. 13, 2004)*

### **If there is no conflict**

When town and regional plans do not conflict, a project will be reviewed for its conformance with both plans. *Re: Green Peak Estates, #8B0314-2-EB, Findings of Fact, Conclusions of Law, and Order (Jul. 22, 1986), aff'd, In re Green Peak Estates, 154 Vt. 363 (1990); Re: Heritage Group, Inc., #4C0730-EB, Findings of Fact,*

Conclusions of Law, and Order (Mar. 27, 1989); *Re: George & Barbara Musbek*, #2W0600-EB, Findings of Fact, Conclusions of Law, and Order (Jan. 13, 1986).

### **If there is a conflict**

Where local and regional plans do conflict, the regional plan is given effect only if it is demonstrated that the project under consideration would have a substantial regional impact. *In re Green Peak Estates*, 154 Vt. 363, 368 (1990); 24 V.S.A. §4348(h)(2); *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839 -2-EB (Altered), Findings of Fact, Conclusions of Law, and Order at 67 n.13 (Nov. 4, 2005), appeal dktd. (Vt. S. Ct.) (but finding no conflict); *Re: John J. Flynn Estate and Keystone Development Corp.* #4C0790-2-EB, Findings of Fact, Conclusions of Law, and Order at 30 (May 4, 2004);

Thus, if a town plan approves a project, it project can only be denied under the regional plan if it has regional impacts. *Re: Peter S. Tsimortos*, #2W1127-EB, Findings of Fact, Conclusions of Law, and Order at 24 (Apr. 13, 2004). There is no case law on the converse situation: when a regional plan approves a project but the town plan dose not. Under this scenario, however, it would seem to be illogical to hold that, if the project has regional impacts it has to be allowed, even in the face of a local plan that would deny it. Thus, a regional plan should be read to trump a town plan only when the town plan allows the project, the regional plan denies the project, and the project has regional impacts

### **C. How is a Town Plan or Regional Plan interpreted?**

Town and Regional Plans are reviewed to determine whether they can provide guidance as to whether a particular project is in conformance with their language. Two separate questions are asked: (1) Is the language in the Plan mandatory or merely a guidance? (2) Are the Plan's provisions specific or ambiguous? *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839 -2-EB (Altered), Findings of Fact, Conclusions of Law, and Order at 58 (Nov. 4, 2005), appeal dktd. (Vt. S. Ct.); *Re: Pike Industries, Inc. and Inez M. Lemieux*, #5R1415-EB, Findings of Fact, Conclusions of Law, and Order at 51 (Jun. 7, 2005); *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, Findings of Fact, Conclusions of Law, and Order at 38 - 40 (Nov. 24, 2004) [EB #838], quoting extensively from *Re: Peter S. Tsimortos*, #2W1127-EB, Findings of Fact, Conclusions of Law, and Order at 18 - 21 (Apr. 13, 2004)

### **Mandatory language vs. guidance language for Town and Regional Plans**

Weak language in a Town Plan cannot serve as a bar to deny a project. See, *Re: The Van Sicklen Limited Partnership*, #4C1013R-EB, Findings of Fact, Conclusions of Law, and Order at 55 (Mar. 8, 2002) (phrases such as “strongly encourages” and

"should focus its efforts to encourage" indicate nonmandatory elements of a town plan); *Re: Green Meadows Center, LLC, The Community Alliance and Southeastern Vermont Community Action, #2W0694-1-EB*, Findings of Fact, Conclusions of Law, and Order at 42 (Dec. 21, 2000) (while words such as "direct," "encourage," "promote," and "review" in Town or Regional Plans may provide guidance in the interpretation of such Plans and may be used to bolster more specific policies in such Plans, they do not, by themselves, constitute a mandate).

*Compare, Re: Times and Seasons, LLC and Hubert K. Benoit, #3W0839 -2-EB* (Altered), Findings of Fact, Conclusions of Law, and Order at 61 (Nov. 4, 2005), appeal dktd. (Vt. S. Ct.) ("Where feasible, commercial development *shall be located* within or close to South Royalton Village or Royalton Village, re-using existing sites where possible, or in other locations specifically recommended in this plan and its amendments. ... The use of the word "shall" makes the provision mandatory."); *Re: Southwestern Vermont Health Care Corp., #8B0537-EB*, Findings of Fact, Conclusions of Law, and Order at 54 (Feb. 22, 2001) (use of the phrase "shall be protected" in Town Plan is mandatory).

Of course, most town plans and regional plans are not written like zoning bylaws, they do not contain words such as "prohibited" or phrases such as "shall not be allowed." But this does not mean that they are legally meaningless. Town and Regional Plans by their very nature are, as the Board has recognized, *aspirational*. They indicate the direction that a Town or Region wants to take in terms of its development; they often do not set absolute restrictions or prohibitions on development. See *John A. Russell Corporation and Crushed Rock, Inc.*, Land Use Permit Application #1R0489-6, Findings of Fact, Conclusions of Law, and Order (Aug. 19, 1999), *citing, Kalakowski v. John A. Russell Corp.*, 137 Vt. 219, 225 (1979); *Casella Waste Management Inc.*, #8B0301-7-WFP, Findings of Fact, Conclusions of Law, and Order at 41 (May 18, 2000).

But despite the recognition that Town and Regional Plans are "abstract and advisory," Act 250 requires that projects comply with a "local or regional plan," if one exists. 10 V.S.A. §6086(a)(10). The Commissions are therefore "obliged *by the language of the law* itself to give regulatory effect to documents which, because their purposes are otherwise, are often not written in regulatory language." *Re: Times and Seasons, LLC and Hubert K. Benoit, #3W0839 -2-EB* (Altered), Findings of Fact, Conclusions of Law, and Order at 58 (Nov. 4, 2005), appeal dktd. (Vt. S. Ct.); quoting *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, Findings of Fact, Conclusions of Law, and Order at 38 (Nov. 24, 2004)], quoting *Re: Peter S. Tsimortos, #2W1127-EB*, Findings of Fact, Conclusions of Law, and Order at 19 (Apr. 13, 2004).

### **Specific vs. Ambiguous Provisions in a Town Plan**

If a Town Plan's provisions are specific, they are applied to the proposed project without any reference to the zoning regulations.

A provision of a town plan evinces a specific policy if the provision: (a) pertains to the area or district in which the project is located; (b) is intended to guide or proscribe conduct or land use within the area or district in which the project is located; and (c) is sufficiently clear to guide the conduct of an average person, using common sense and understanding. *Re: The Mirkwood Group and Barry Randall, #1R0780-EB, Findings of Fact, Conclusions of Law, and Order at 29 (Aug. 19, 1996).*

If a Town Plan's provisions are ambiguous, the Vermont Supreme Court's decision in *In re Molgano, 163 Vt. 25 (1994)*, instructs the Commissions to examine the relevant zoning regulations to attempt to resolve the ambiguity. *And see 10 V.S.A. §6086(a)(10)*. This does not mean that a Commission reviews a project for its compliance with the zoning regulations, but rather it sees if there are provisions in the zoning regulations that address the same subject matter that is at issue under the town plan. *Re: Dominic A. Cersosimo and Dominic A. Cersosimo Trustee and Cersosimo Industries, Inc., #2W0813-3 (Revised)-EB, Findings of Fact, Conclusions of Law, and Order at 9 (April 19, 2001); Re: Fair Haven Housing Limited Partnership and McDonald's Corporation, #1R0639-2-EB, Findings of Fact, Conclusions of Law, and Order at 19 (Apr. 16, 1996), aff'd, In re Fair Haven Housing Limited Partnership and McDonald's Corporation, Docket No. 96-228 (Vt. Apr. 23, 1997) (unpublished).*

If zoning bylaws cannot aid in the interpretation of an ambiguous plan, either because they do not exist or are not relevant, then the Commission must attempt to construe the plan as best it can, based on various rules of construction or supporting evidence of municipal legislative intent. *Re: Dominic A. Cersosimo and Dominic A. Cersosimo Trustee and Cersosimo Industries, Inc., #2W0813-3 (Revised)-EB, Findings of Fact, Conclusions of Law, and Order at 11 (Apr. 19, 2001). Re: Bull's Eye Sporting Center and David and Nancy Brooks, #5W0743-2-EB, Findings of Fact, Conclusions of Law, and Order at 20 (Feb. 27, 1997).*

#### **D. Taking evidence as to Criterion 10**

While Board may consider arguments from parties concerning whether a particular project conforms with the town or regional plan, the document – the plan – speaks for itself; "the town plan *itself is the evidence*, and the Board must make its independent judgment" about whether a project conforms to a plan. *Re: EPE Realty Corporation and Fergessen Management, Ltd., #3W0865-EB, Findings of Fact, Conclusions of Law, and Order at 40 (Nov. 24, 2004); Re: Peter S. Tsimortos, #2W1127-EB, Findings of Fact, Conclusions of Law, and Order at 20 (Apr. 13, 2004); Re: John J. Flynn Estate and Keystone Development Corp., #4C0790-2-EB,*

Memorandum of Decision at 6 (Oct. 8, 2003), quoting *Re: J. Philip Gerbode*, #6F0396R-EB-1, Findings of Fact, Conclusions of Law, and Order at 17 (Jan 29, 1992)

The statute was amended in 2001 to make it clear that the Board need not consider or be bound by interpretations of the Town Plan, even those of members of the Town Selectboard or Planning Commission:

In making this finding [whether a project is "in conformance with any duly adopted local or regional plan...."], if the board or district commission finds applicable provisions of the town plan to be ambiguous, the board or district commission, for interpretive purposes, shall consider bylaws, but only to the extent that they implement and are consistent with those provisions, and need not consider any other evidence.

10 V.S.A. §6086(a)(10); *Re: Times and Seasons, LLC and Hubert K. Benoit*, #3W0839 -2-EB (Altered), Findings of Fact, Conclusions of Law, and Order at 60 n.7 (Nov. 4, 2005), appeal dktd. (Vt. S. Ct.); *Re: EPE Realty Corporation and Fergessen Management, Ltd.*, #3W0865-EB, Findings of Fact, Conclusions of Law, and Order at 40 (Nov. 24, 2004); *Re: Fred and Laura Viens*, #5W1410-EB, Memorandum of Decision at 7 (Sep. 3, 2003).

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