VLCT NEWS REPRINT
SERVING AND STRENGTHENING VERMONT LOCAL GOVERNMENTS

LEGAL AND REGULATORY NOTES, DECEMBER 2016

Quechee Highlands Project in Hartford Does Not Conform with Regional Plan, Vermont Supreme Court Rules

The Vermont Supreme Court ruled in October that a proposed mixed-use business park project in the Town of Hartford did not conform to the Two Rivers-Ottauquechee Regional Planning Commission's regional plan. *In re B&M Realty, LLC*, 2016 VT 114. The ruling, which overturned the lower court's Act 250 approval of the development, effectively stops the project in its current state.

The applicant, B&M Realty LLC, started working with the Town of Hartford on the development, known as the Quechee Highlands Project, in 2005. Between then and 2012, B&M Realty obtained various local zoning permits for the project from the Town of Hartford.

In addition to zoning permits, the project, because of its size, also required Act 250 approval from the district environmental commission. Act 250 review is usually necessary for large-scale development projects that encompass more than 10 acres. Of the 10 criteria a project must meet in order to receive Act 250 approval, one is that the project must be "in conformance with any duly adopted local or regional plan." 10 V.S.A. § 6086(a)(10). A regional plan's provisions will apply "to the extent that they are not in conflict with the provisions of a duly adopted [town] plan." 24 V.S.A. § 4348(h)(1). If the town plan and regional plan conflict, then the *regional* plan's provisions will be given effect, but only if a project would have a "substantial regional impact." 24 V.S.A. § 4348(h)(2). In such a circumstance, a project must conform with the regional plan's specified development provisions.

The district environmental commission denied Act 250 approval because it concluded that the provisions of the 2007 Two Rivers-Ottaquechee regional plan applied and furthermore that the project did not conform to that plan. Upon appeal, the commission's decision was overturned by the environmental division of the superior court (environmental court), and the project was granted Act 250 approval. *B&M Realty A250 Applic.*, No. 103-8-13 Vtec (Vt. Super. Ct. Envtl. Div. Nov. 12, 2015). While the environmental court agreed with the commission that the project would have a substantial regional impact and that the provisions of the regional plan applied, it nonetheless judged that the project conformed with the regional plan.

Several parties, including the Two Rivers-Ottauquechee Regional Planning Commission, appealed to the Vermont Supreme Court. In short, the supreme court disagreed with the environmental court, ruling that the project did *not* conform with the regional plan, and thus did not satisfy Act 250 criteria.

In most instances, the supreme court will give substantial deference to a trial court's decision, only overturning it if there was an abuse of discretion. However, in this case, the supreme court used a de novo standard of review to determine whether the proposed project conformed with the regional plan. (The term "de novo" means starting from the beginning, as if the lower court's decision never happened.) After noting that the supreme court itself had applied an inconsistent standard of review on this issue in the past, it declared that "where the outcome of matter turns not on finding of fact,

but on interpretation of a statutory term … we employ the familiar de novo standard of review for matters of law." Accordingly, the court examined without deference the environmental court's interpretation of the terms of the regional plan as well as its legal conclusion that the project does conform to the regional plan.

The supreme court addressed several legal issues in its decision, but conformance of the project to the regional plan was the issue at the heart of the case. Whether the project conformed with the regional plan hinged on two questions: (1) was there clear, mandatory language in the regional plan that specified certain development; and (2) did the project conform to that language? The court applied three principles of interpretation to answer these questions.

First, while a regional plan's provisions must be clear and definite to "prevent arbitrary application and provide notice to landowners," the court does not require "mathematical certainty of language." Regional plans, by design, are guidance documents created to shape development of a broad geographic area. The inevitable result, the court said, is that regional plan language will be less precise than, for example, local zoning bylaws that are naturally more particularized. Ultimately, the provisions of a regional plan will be enforced where they are "sufficiently clear to give a person of ordinary intelligence a reasonable opportunity to know what is proscribed."

Second, provisions in a regional plan that "'recommend' or 'encourage' certain uses are generally insufficient to create an enforceable obligation." Instead the plan must use mandatory language such as "must" and "shall."

Finally, when considering the enforceability of a regional plan's provisions, the court will view the provisions in light of the "regional plan as a whole." In short, individual provisions of a regional plan will be referenced against the broad purposes of the plan to ensure that, on balance, they are internally consistent.

With these considerations in mind, the court found that several of the regional plan's provisions were clear and mandatory and, furthermore, that the project did not conform to those provisions.

The first provision of the regional plan that the court addressed states "[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." The court determined that this language is mandatory and the proscription is clear: don't build retail establishments outside of certain designated areas. The proposed project contradicts this language because it is plainly a principal retail establishment that is not located in a town center, designated downtown, or designated growth area. Rejecting the environmental court's conclusion that the project was not a principal retail establishment because its "total proposed retail square footage was not greater than the total square footage of any other use," the Vermont Supreme Court said such reasoning would lead to "odd results" because "under the trial court's interpretation, unlimited retail development could occur outside of growth areas consistent with the regional plan as long as such development was folded into even larger square footage development of other sorts." Such interpretation cannot be "squared" with the regional plan's overall goals.

Related to the provision above, the regional plan also contains language that "limits 'major growth or investments' into existing or planned settlement centers." The court explained that this provision is clearly mandatory and requires "major growth or investments to be located in specified areas." The environmental court had concluded that because the terms "major growth or investment" and "planned settlement area" were undefined in the regional plan, this provision was therefore too

ambiguous and unclear to be enforced. The supreme court disagreed, explaining that any reasonable person can understand what a "major development" is. Based on the fact that the proposed project would be about 115,000 square feet of new construction area – a degree of development greater than what the Town of Hartford has seen for nearly two decades – it is clear that the project is "'major development' as the term is commonly understood." Furthermore, the project's location, near Vermont's Exit 1 I-89 interchange, would not be located in an "existing or planned settlement center" as mandated by the plan.

Lastly, the court found that the project violated the provision in the Two Rivers-Ottauquechee regional plan that mandated the reservation of land at highway interchanges. That provision requires reservation of "land at [i]nterchange [a]reas for the development of services for the traveling public and transport of goods, not for the development of high traffic-generating commercial activities that are unrelated to services for the traveling public or trucking industry…." Here, the court observed that the project would be built near the Exit 1 interchange, which goes against the "obvious intent" of the regional plan's provisions to prohibit growth centers near highway interchanges.

The Vermont Supreme Court concluded its ruling by stating that these three regional plan provisions, "all of which are clear and enforceable, reinforce each other in establishing a clear and mandatory framework for development." Due to its size, nature, and location, the project contradicts that framework. Therefore, the court ruled that the proposed project cannot satisfy Act 250 criteria because it "does not conform with clear and enforceable provisions of the … [TRO] regional plan."

Towns should take note of this case because the implications go beyond the scope of the Quechee Highlands Project alone. Although the Town of Hartford approved the project, it was ultimately Act 250 review and the weight given to the regional plan that determined the outcome. Part of the reason the project was found to not conform with the regional plan was because it was not located in an "existing or planned settlement," as delineated by the regional plan. The outcome of this case may have been different if the Town of Hartford had worked with the regional planning commission to amend the regional plan to identify the location of the proposed project as a "planned settlement." The upshot here is that towns should be working closely with their regional planning commissions to ensure that towns' *local* zoning regulations and goals are reflected in *regional* plans.

The Vermont Supreme Court's decision is archived **here**.

Carl Andeer, Staff Attorney I
Municipal Assistance Center