IN THE SUPREME COURT OF THE STATE OF VERMONT
DOCKET NO. 2015-454

IN RE: B&M REALTY, LLP

APPEAL FROM VERMONT SUPERIOR COURT, ENVIRONMENTAL DIVISION
Docket No. 103-8-13 Vtec

Brief for Appellant Vermont Natural Resources Board

STATE OF VERMONT

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ISSUE PRESENTED

The Act 250 Applicant, B&M Realty, sought a permit to construct a mixed-use development, with over 115,000 square feet of retail, office, and residential spaces, on a site adjacent to the Interstate 89 Exit 1 (Quechee) access ramps. The district commission denied the permit because the proposal conflicted with provisions of the Two Rivers-Ottauquechee Regional Plan. That plan, as one of numerous provisions aimed at limiting sprawl, provides 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 68. The environmental court reversed, holding that this and other provisions of the plan either did not apply or were not enforceable.

The question presented on appeal is:

Did the environmental court err in holding that the Applicant demonstrated conformance with the regional plan, as required by Act 250's Criterion 10? Pp. 16-36.

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STATEMENT OF THE CASE

The central question in this Act 250 appeal is the proper standard for reviewing conformance with regional plans under Act 250's Criterion 10. The environmental court found that a proposed 115,000-square-foot mixed-use development next to the Quechee interchange did not conflict with the governing regional plan, despite multiple plan provisions specifically aimed at limiting sprawl. Both the Two Rivers-Ottauquechee Regional Commission and the Natural Resources Board have appealed that decision, to contest the environmental court's unduly cramped reading of the regional plan.

I. Regulatory Framework

Review of the environmental court's decision should be informed by the overall regulatory framework. That includes the Legislature's longstanding commitment to regional planning and its consistent efforts to support and maintain Vermont's historic development pattern of compact town centers separated by a rural landscape.

Act 250 Background

In 1970, the Vermont Legislature adopted Act 250, a groundbreaking statewide land use law, to avert harm caused by the "unplanned, uncoordinated and uncontrolled use of the lands and the environment of the state." 1969, No. 250, § 1 (Adj. Sess.). From the beginning, the Legislature intended the Act 250 review process to look, in part, to regional plans. Criterion 10 required then, as it does now,

a finding that the proposed development "[i]s in conformance with any duly adopted local or regional plan." *Id.* § 12(a)(10); 10 V.S.A. § 6086(a)(10).

Act 250's evolution reflects the Legislature's longstanding concern with protecting Vermont's town centers and mitigating sprawl. It first called for a "capability and development plan" to guide a "coordinated, efficient and economic development of the state." 1969, No. 250, § 19. Four years later, the Legislature adopted that plan. 1973, No. 85, §§ 6, 7. In its findings about planning for growth, the Legislature noted concerns about "strip development" and promoted growth in existing town centers:

> (4) PLANNING AND GROWTH
>
> (A) Strip development along highways and scattered residential development not related to community centers cause increased cost of government, congestion of highways, the loss of prime agricultural lands, overtaxing of town roads and services and economic or social decline in the traditional community center.
>
> (B) Provision should be made for the renovation of village and town centers for commercial and industrial development, where feasible, and location of residential and other development off the main highways near the village center on land which is other than primary agricultural soil.

Id. § 7(a).

While these findings are not criteria that applicants must satisfy, *see id.* § 10 (codified at 10 V.S.A. § 6086(9)), the findings reflect Act 250's purpose: "to regulate and control" land use to "protect and conserve the lands and the environment of the state and to insure that these lands and environment are devoted to uses which are not detrimental to the public welfare and interests." 1969, No. 250, § 1. In support of that purpose, the 1973 amendments to Act 250 amended Criterion 9 to add a number of concerns relevant to orderly growth and development, including

consideration of the costs of scattered development, the impact of growth on the town or region, the protection of agricultural soils, and burdens on public utility services. 1973, No. 85, § 10 (codified at 10 V.S.A. § 6086(9)).[1]

Legislative Support for Regional Planning & Smart Growth Principles

Even before Act 250, the Legislature took steps to promote local and regional planning. The 1968 Vermont Planning and Development Act "provide[d] means and methods for the municipalities and regions of this state to plan for the prevention, minimization and future elimination of" land development problems. 1967, No. 334, § 1 (Adj. Sess.) (adding 24 V.S.A. § 4302(a)). One of its "specific aims" was to "protect and preserve the historic features of the Vermont landscape and of its villages, towns and cities" and to "facilitate the growth of villages, towns and cities ... in a manner to create an optimum urban environment." *Id.* (adding 24 V.S.A. § 4302(a)(4)). The law provided for the creation of regional planning commissions and the adoption of regional plans. *Id.* (adding 24 V.S.A. §§ 4341, 4345(4), 4348). The purpose of a regional plan was to "guid[e] and accomplish[] a coordinated, efficient and economic development of the region." *Id.* (adding 24 V.S.A. § 4347).

Later amendments confirmed that a central goal of planning was to channel development to existing village and town centers and to limit strip development. The 1988 amendments to the act noted the costs associated with "[s]cattered residential development" and "strip development along highways." 1987, No. 200,

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[1] The Legislature recently amended Criterion 9(L) to "promote Vermont's historic settlement pattern of compact villages and urban centers separated by rural countryside." 2013, No. 147, § 2 (codified at 10 V.S.A. § 6086(9)(L)). This application was reviewed under a prior version of Criterion 9(L).

§ 7 (Adj. Sess.) (amending 24 V.S.A. § 4302(a)(3)(B)). The Legislature approved as a goal that "[d]evelopment shall be planned so as to maintain the historic settlement pattern of compact village and urban centers separated by rural countryside." *Id.* Other goals encouraged growth in existing village and urban centers and discouraged strip development. *Id.* Regional plans adopted after 1989 had to be consistent with these goals. *Id.* (amending 24 V.S.A. § 4302(c)); *see also* 24 V.S.A. § 4302(c)(1), (e) (2015 cum. supp.) (current law).

The 1988 amendments also required regional planning commissions to "[a]ppear before district environmental commissions to aid them in making a determination as to the conformance of developments and subdivisions with the criteria of 10 V.S.A. § 6086." 1987, No. 200, § 21 (Adj. Sess.) (adding 24 V.S.A. § 4345a(13)). That requirement remains in force today.

Further amendments in 2014 encouraged development in designated growth centers and according to "smart growth" principles. 2013, No. 146, § 4 (Adj. Sess.) (amending 24 V.S.A. § 4302(c)(1)(B)-(D). That amendment – though it postdates the application for this project – cross-references yet another legislative effort to protect and promote Vermont's existing downtown centers. With the Historic Downtown Development chapter, first adopted in 1998, the Legislature sought to "preserve and encourage the development of downtown areas of municipalities of the state" because "economically strong downtowns are critical to the health and well-being of Vermont's communities." 1997, No. 120, § 1 (Adj. Sess.) (adding 24 V.S.A. § 2790(a), (b)). That law created the Downtown Development Board and provided a process

and incentives for recognition of downtown development districts *Id.* (adding 24 V.S.A. §§ 2791-2794). The 2006 amendments to the downtown development chapter provided for designated growth centers to complement existing downtowns and village centers:

> The general assembly finds that Vermont's communities face challenges as they seek to accommodate growth and development while supporting the economic vitality of the state's downtowns, village centers, and new town centers and maintaining the rural character and working landscape of the surrounding countryside. While it is the intention of the general assembly to give the highest priority to facilitating development and growth in downtowns and village centers whenever feasible, when that is not feasible, the general assembly further finds that:
>
> (1) A large percentage of future growth should occur within duly designated growth centers that have been planned by municipalities in accordance with smart growth principles and Vermont's planning and development goals pursuant to section 4302 of this title.

2005, No. 183, § 1 (Adj. Sess.) (adding 24 V.S.A. § 2790(d)).

Those "smart growth principles" adopted in 2006 again reflect a commitment to preserving "the historic development pattern of compact village and urban centers separated by rural countryside." *Id.* (adding 24 V.S.A. § 2791(13). Growth should support "a diversity of viable businesses in downtowns and villages." *Id.* And growth should not be characterized by "scattered development located outside of compact urban and village centers that is excessively land-consumptive." *Id.* In 2013, the Legislature further amended the downtown development chapter, this time finding that "Vermont's distinctive character of historic downtowns and villages surrounded by working landscapes is recognized worldwide." 2013, No. 59, § 1 (amending 24 V.S.A. § 2790(a)(2)).

Regional Plans and the Act 250 Review Process

As noted, an Act 250 applicant must demonstrate that its proposal "[i]s in conformance with any duly adopted local or regional plan." 10 V.S.A. § 6086(10). The applicant bears the burden of proof for this Criterion 10. *Id.* § 6088(a).

Because the relevant municipality, the Town of Hartford, has an adopted municipal plan, the analysis under Criterion 10 is further governed by 24 V.S.A. § 4348(h). That statute provides that "provisions of the regional plan shall be given effect to the extent that they are not in conflict" with the municipal plan. *Id.* § 4348(h)(1). Further, "to the extent such a conflict exists, the regional plan shall be given effect if it is demonstrated that the project under consideration ... would have a substantial regional impact." *Id.* § 4348(h)(2). The regional planning commission must "[a]s part of its regional plan, define a substantial regional impact as the term may be used with respect to its region." *Id.* § 4345a(17). That definition "shall be given due consideration, where relevant, in State regulatory proceedings." *Id.*

Two Rivers-Ottauquechee Regional Plan

Adopted in 2007, the regional plan expresses "a vision for growth and management" for the region. Ex. 1001, at 1. One of its specific purposes is to "determine areas most desirable and suitable for development while encouraging appropriate and efficient expenditures of public and private funds in the process of that development." *Id.* And it "serve[s] as a basis for evaluation and review of developments and subdivisions proposed under Act 250." *Id.* at 3 (PC 60).

The plan describes the "existing settlement pattern" that consists of "clusters of residences and other activities in the form of villages and hamlets surrounded by less dense settlement, rural in character, or large spaces in natural vegetation." *Id.* at 26 (PC 62). According to the plan, "[t]his pattern must be protected and enhanced and is supported by state planning law." *Id.*

In its effort to support and enhance the region's existing settlement patterns, the plan directs major development into Regional Growth Areas – the traditional developed areas in the region, which include regional and town centers, village settlements, designated growth centers, designated downtowns, and designated village centers. *See id.* at 27 (PC 63). "Major growth or investments must be channeled into or adjacent to existing or planned settlement centers and to areas where adequate public facilities and services are available." *Id.* Among other things, the plan specifies 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." *Id.* at 33 (PC 68).

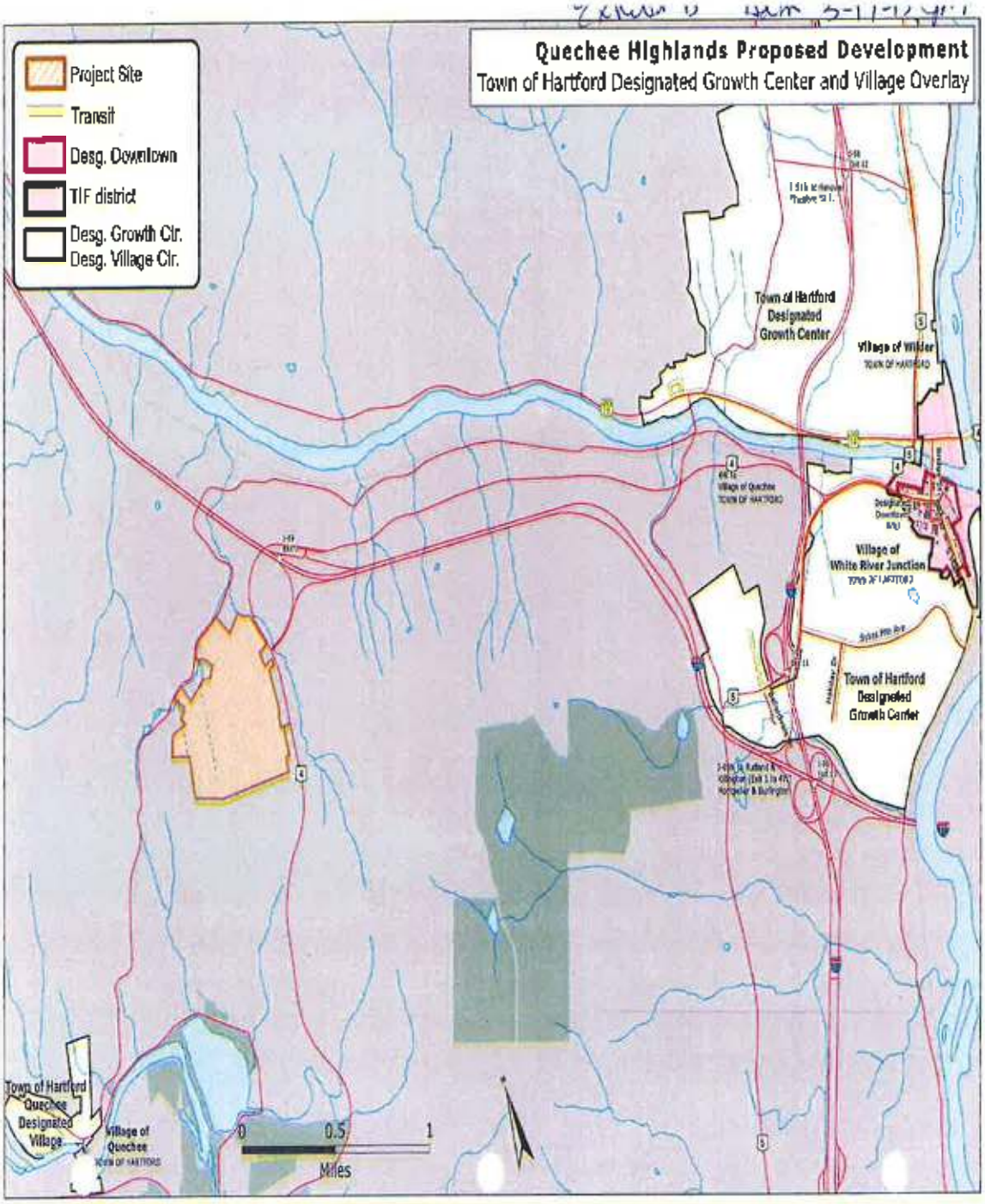
The plan also pays close attention to interstate interchanges, noting the market pressure for development in these areas and the potential for "undesirable development along roads immediate to the interchange." *Id.* at 45 (PC 69). "Interchange Area development, with its different focus, should not be promoted to the detriment of regional growth areas or the public investments made therein." *Id.* The plan addresses the Quechee Exit 1 interchange and recognizes proposals to

develop the area on the west side of Route 4. It specifies that "[t]his interchange is not an appropriate location for a growth center." *Id.* at 51 (PC 73). Rather, development "should be of a type that does not displace the development and investment that has occurred in the regional center." *Id.* "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." *Id.*

Consistent with § 4345a(17), the plan defines substantial regional impact, listing eight detailed criteria, any one of which qualifies a development as having a substantial regional impact. *Id.* at 268-70 (PC 75-77).

II. Proposed Project

The Applicant, B&M Realty, seeks an Act 250 permit for a mixed-use development on 167.7 acres near the I-89 Exit 1 interchange in Hartford. Exhibit B shows the project's location (in orange) and its distance from existing village and town centers:



The proposed project, adjacent to Route 4, is two miles from Quechee Village and five miles from White River Junction. PC 8. It is described as a "mixed use business park" with office, residential, retail, and restaurant spaces. *Id.*

The requested permit is for Phase 1 of the planned project. Phase 1 involves over 115,000 square feet of new construction, in three parts:

- *Phase 1A*: 18,142 square feet of office space; 18,142 square feet of retail space; and a 5,667 square-foot restaurant.
- *Phase 1B*: 15,110 square feet of office space; 15,110 square feet of retail space; and nine residential units.
- *Phase 1C*: 33,000 square feet of office space.

PC 8. Phase 1 also requires a 2,700-foot loop road. *Id.*

The development would have a single access point from Route 4, about 525 feet north of the southbound Exit 1 ramps. It is designed with a "center," described as a smaller version of Burlington's Church Street Marketplace. *Id.* Phase 2 is proposed as 50 residential units. *Id.*

The proposed project is located in Hartford, which has a municipal plan. In 2004, Hartford joined the Two Rivers-Ottauquechee Regional Commission and adopted that Commission's 2003 plan. The Regional Commission later adopted the 2007 Regional Plan. PC 12.

In 2005, the Applicant, together with the property's then-owners, asked the Hartford Planning Commission to amend the local zoning regulations to increase the number of acres that could be commercially developed at the site. Later that year, the Planning Commission approved the proposed zoning amendments, which created a new zoning district, the Quechee Interstate Interchange. *Id.* In 2006, the Applicant presented a site plan to the Hartford Planning Commission.

In 2012, the Applicant applied for local zoning permits. The Hartford Planning Commission gave final approval to the project on October 17, 2012.

Two months later, the Applicant filed an Act 250 permit application. After two days of hearings and a site visit, the district commission denied the permit. PC 41; District Comm'n Order, at 1. It found that the project had a substantial regional impact and did not conform to the regional plan. PC 41. Its findings cited two plan provisions: that "principal retail establishments must be located in Town Centers, Designated Downtowns, or Designated Growth Centers" and that development around the southbound Quechee interchange "must be planned based around access points that do not degrade the functionality of U.S. Route 4 or the I-89 on- and off-ramps." *Id.*

The district commission also made detailed findings about traffic impacts and mitigation that would be required – if a permit were issued – under Criterion 5. For similar reasons (traffic concerns), the district commission made an unfavorable finding on Criterion 9(K). District Comm'n Order, at 17-18, 34.

III. Environmental Court Proceedings

The Applicant appealed to environmental court, challenging the district commission's findings on traffic impacts and Criterion 10. PC 3-4. Based on the evidence presented in the de novo proceeding, the court adopted conditions to mitigate traffic concerns under Criterion 5 and accordingly made a favorable finding on Criterion 9(K). PC 15-17, 26-27. The Board does not contest those issues on appeal.

With respect to the regional plan, the court first held, on summary judgment, that the 2007 plan applied to the proposed project. PC 148-54. The Applicant argued that its right to Act 250 review of the project vested earlier, pointing to its 2005 request to amend the zoning regulations, and to the fact that it shared a sketch plan with the local planning commission in 2006. PC 150-51. Applying this Court's "vested rights" jurisprudence, the environmental court held that these preliminary steps were insufficient to vest rights, particularly given that the zoning permit applications were filed six years later, in 2012. PC 153-54. For purposes of Criterion 10, the 2007 plan governed.

After a hearing, the court reached its final decision granting the permit. With respect to Criterion 10, the court found as follows:

First, the court required the Applicant to show that its project conformed with the regional plan. PC 19. Although the Applicant contended that the regional plan was not in conflict with the municipal plan, the court found that the Applicant had not met its burden of proof on that issue. *Id.* The court further found that the proposed project would result in a substantial regional impact because it "is uncontested that the Project as proposed will be greater than 20,000 square feet and will require substantial capital improvements of a local or state highway." PC 22. Each of those facts satisfies one of the plan's criteria for a substantial regional impact. *Id.*; *see* PC 76-77.[2]

[2] In reaching this conclusion, the court rejected the Applicant's objections to the definition of substantial regional impact. PC 20-22. The court did not, however, fully address the Applicant's assertion that 24 V.S.A. § 4345a is an impermissible delegation of authority. PC 19-20.

Second, the court held the plan provision regarding the location of principal retail establishments did not apply to the project. Noting that the term "principal retail establishment" is not defined in the plan, the court relied on a dictionary definition of "principal" and concluded "the phrase 'principal retail establishment' means a project where retail is the chief, leading, or most important use." PC 24. Applying this definition, the court held that "retail is not the primary or chief use of the Project" because "less than 40,000" of the total 115,000 square feet "are proposed as retail space." *Id.*

Third, the court considered several plan provisions that provide for the protection of existing settlement patterns and mandate growth in planned settlement areas. The court concluded that these provisions were not enforceable, either because terms were not defined or provisions were "aspirational." PC 24-25.

Last, the court addressed the plan provision specifying that "Exit 1 is not an appropriate location for a growth center." PC 26. While appearing "clear and unambiguous," the court held that the provision does not apply to the project, because "no party is seeking to have the Project receive a growth center designation." *Id.*

The Regional Commission and the Board timely appealed. The Applicant cross-appealed.[3]

[3] The cross-appeal is likely improper, as the court granted the permit. In any event, the Board will address additional issues raised by the Applicant in the Board's reply brief. *See* V.R.A.P. 32(a)(7)(B)(ii).

SUMMARY OF ARGUMENT

The Vermont Legislature has for decades sought to protect Vermont's historic pattern of settlement: compact town centers separated by rural areas. As the regional plan explains, the objective of "compact development patterns and maintenance of the rural character" is a "policy with timeless applicability." PC 60. This plan is designed – as it must be – to satisfy that goal. This large-scale commercial development – located next to a highway interchange and distant from any established settlement – conflicts with the regional plan.

I. The regional plan cannot be interpreted as allowing large-scale commercial development, including a shopping center, next to the Exit 1 interchange and well outside existing settlement areas. The plan directs that principal retail establishments must be located in existing downtowns and designated growth centers. It requires that major growth be channeled into existing and planned settlement areas. It specifies limited types of development for interchange areas and provides that the Exit 1 interchange is not appropriate for a growth center. All of these provisions implement a consistent plan goal: to limit sprawl and protect the region's historic settlement patterns. The plan provisions are specific, mandatory, and consistent with state planning laws. They should be given force here.

II. The Court should not endorse an approach to regional plans that eviscerates their use in the Act 250 process. The plans serve important legislative objectives and are intended as a meaningful part of Act 250 review. The environmental court's approach, if upheld by this Court, would undermine legislative intent and harm the

decades-old planning process that protects Vermont's landscape, economic vitality, and environment.

STANDARD OF REVIEW

This Court reviews the environmental court's legal conclusions de novo and upholds those conclusions if reasonably supported by the findings. *In re Lathrop Ltd. P'ship*, 2015 VT 49, ¶ 21, 121 A.3d 630. The proper interpretation of the provisions of a regional plan is a question of law and should be reviewed de novo. The Court recently suggested that it "accord[s] deference to the trial court's finding of conformity" with a local or regional plan. *In re Chaves*, 2014 VT 5, ¶ 38, 195 Vt. 467, 93 A.3d 69. That statement, however, relied on *In re John A. Russell Corp.*, 2003 VT 93, ¶ 16, 176 Vt. 520, 838 A.2d 906, which was a decision of the former Environmental Board. The Court has elsewhere correctly distinguished between the role of the environmental court and that of the Board, which was an administrative agency interpreting its implementing statute and regulations. *See In re Vill. Assocs.*, 2010 VT 42A, ¶ 7 n.2, 188 Vt. 113, 998 A.2d 712. Thus, the Court has generally reviewed the environmental court's statutory interpretation "not with the deference given to an agency's interpretation of its own rules (a deference ... afforded the Environmental Board [a]bsent compelling indications of error), but with ... traditional de novo review." *Id.* (quotation and citation omitted). To the extent *Chaves* suggests that the environmental court's legal conclusions regarding a regional plan receive deference, it conflicts with *Village Associates* and should be

reconsidered. This Court should not defer to the environmental court's interpretation of regional plan provisions, which present a legal issue.

ARGUMENT

I. The project does not conform to the regional plan.

Consistent with this Court's guidance, the relevant provisions of the regional plan are drafted in mandatory terms and are sufficiently clear and unambiguous to apply to the proposed project. Several plan provisions prohibit a project of this scale and design at the Exit 1 interchange, outside of any established downtown or village center. The Applicant has not shown that its proposal complies with the regional plan and thus has not met its burden on Criterion 10.

A. Criterion 10 requires compliance with regional plans that contain mandatory provisions and specific, unambiguous standards to guide enforcement.

1. A plan provision must be mandatory and sufficiently clear and unambiguous to serve as an enforceable standard.

A regional plan is enforceable through Act 250's Criterion 10 when "the plan's standards are 'stated in language that is clear and unqualified, and creates no ambiguity.'" *Chaves*, 2014 VT 5, ¶ 38 (quoting *Russell Corp.*, 2003 VT 93, ¶ 16)); *see also In re JAM Golf, LLC*, 2008 VT 110, ¶ 17, 185 Vt. 201, 969 A.2d 47. An enforceable plan will contain both (1) mandatory language and (2) specific and unambiguous standards.

First, a plan's language is mandatory if it sets forth a requirement, rather than a recommendation. *See In re MBL Assocs.*, 166 Vt. 606, 607-08, 693 A.2d 698, 700-01 (1997) (mem.) (holding that plan provisions were "phrased in advisory, not

mandatory terms"; provision used "should," which plan expressly defined as "encouraged but not mandated"). Words such as "shall," "must," and "will" are commonly used to signify a mandate. On the other hand, the Court has explained that statements regarding the "purpose" of a plan, that particular activity is "encouraged" or "discouraged," or that development "should take place" in a particular manner are "broad goals" that "suggest[] something less than a mandate." *Russell Corp.*, 2003 VT 93, ¶¶ 18-19.

Second, a plan provision is specific and unambiguous if it is "sufficiently clear to give a person of ordinary intelligence a reasonable opportunity to know what is proscribed." *In re S.M.*, 2003 VT 41, ¶ 15, 175 Vt. 524, 824 A.2d 593 (mem.) (quotation omitted); *see also MBL Assocs.*, 166 Vt. at 607, 693 A.2d at 700 ("Provisions of a regional plan, like zoning ordinances, should be construed according to the ordinary rules of statutory construction."); *JAM Golf*, 2008 VT 110, ¶¶ 18-19 (finding plan unenforceable because it contains "no specific standards to guide enforcement"). In considering whether a plan provision is unambiguous, the Court should not read provisions in isolation but rather consider the plan in its entirety. *See In re 232511 Investments, Ltd.*, 2006 VT 27, ¶¶ 8-9, 179 Vt. 409, 898 A.2d 109 (declining to read zoning ordinance "in isolation" because "ambiguity is alleviated" when ordinance "is read together with the rest of the Town's zoning regulations"); *Williston Citizens For Responsible Growth v. Maple Tree Place Assocs.*, 156 Vt. 560, 563, 593 A.2d 469, 470 (1991) (construction of ordinance "not limited to consideration of an isolated sentence ... rather, we must look to the whole

of the ordinance"); *JAM Golf*, 2008 VT 110, ¶¶ 18-19 (noting "competing" objectives of city plan, which provided "insufficient guidance as to how the board or a landowner should balance these competing concerns").

2. While this Court has required a degree of specificity for plans to be enforceable, the standard must be one of reasonableness, not mathematical certainty.

While plan provisions must establish an ascertainable, enforceable standard, it is "unreasonable" to expect "mathematical certainty" in statutory and regulatory language. *See State v. Danaher*, 174 Vt. 591, 594, 819 A.2d 691, 695 (2002) (mem.); *accord Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) (upholding ordinance "marked by flexibility and reasonable breadth, rather than meticulous specificity" (quotation omitted)). And in the land-use context in particular, the "void-for-vagueness test is less strict" because (1) "imprecision and generality is necessary and inevitable" and (2) "the landowner can seek clarification of [a term's] meaning." *In re Ferrera & Fenn Gravel Pit*, 2013 VT 97, ¶ 16, 195 Vt. 138, 87 A.3d 483 (quotation omitted); *see also Rogers v. Watson*, 156 Vt. 483, 491, 594 A.2d 409, 414-15 (1991) (adopting relaxed void-for-vagueness test from *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982) and upholding zoning bylaw against vagueness challenge).[4] Indeed, the provisions of Act 250 itself require

[4] As the Court has recognized, landowners may seek guidance on the interpretation of land use regulations, including by seeking clarification from the entity charged with its enforcement. *See Beliveau*, 2013 VT 41, ¶ 15 (development review board provides landowners with interpretation of bylaws); *Rogers*, 156 Vt. at 491, 594 A.2d at 414. The opportunity for public participation in the adoption of regulations is also relevant. *Beliveau*, 2013 VT 41, ¶ 15; *see In re Rusty Nail Acquisition, Inc.*, 2009 VT 68, ¶ 14, 186 Vt. 195, 980 A.2d 758 (business owner had opportunity to participate in rulemaking process). Here, the Applicant could have sought clarification of the plan's terms. The Applicant also had the

qualitative assessments, with standards phrased as "unreasonable burden," "undue adverse effect," "significantly imperil," and other similar language. *See generally* 10 V.S.A. § 6086.

The Court has upheld local land-use ordinances despite a lack of precision in their wording. In *Ferrera*, the local ordinance prohibited any development from having "an undue adverse effect on the character of the neighborhood" and limited noise to "levels that will not be a nuisance to adjacent uses." 2013 VT 97, ¶ 4. The ordinance was not impermissibly vague for failing to specify numeric decibel levels. *Id.* ¶¶ 15-16. The Court reasoned that it was "not unreasonable for the Town to establish noise limit standards that take into account surrounding uses and the expectations created by those uses." *Id.* ¶ 16. Noting that other courts have upheld "similar qualitative noise standards," the Court held that the ordinance was not "so vague that it is essentially without an ascertainable standard." *Id.* Similarly, the Court recently rejected a landowner's claim that a bylaw distinction between "family" and "rooming-and-boarding house" was impermissibly vague. *In re Beliveau NOV*, 2013 VT 41, ¶¶ 19-20, 194 Vt. 1, 72 A.3d 918. While recognizing that the distinction required a qualitative look at the "household dynamic and interactions therein," the Court held that the terms were sufficiently clear because they gave the landowner "a *general* understanding of how to comply with the bylaws." *Id.* (emphasis added).

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opportunity to participate in the public process for development of the regional plan, which includes public working sessions, public hearings, and a public comment period. 24 V.S.A. § 4348.

This approach – marked by reasonable interpretation and some tolerance for imprecision – should apply with equal force to regional plans and their application under Criterion 10. From Act 250's inception, the Legislature has made conformance with regional plans part of the Act 250 review process. But regional plans are not zoning bylaws. They are not intended or designed to define permitted uses and geographic districts with the level of specificity expected at the municipal level. *Cf. Kalakowski v. John A. Russell Corp.*, 137 Vt. 219, 225, 401 A.2d 906, 910 (1979) (describing local plans as "an overall guide to community development" that by their nature lack specificity found in zoning bylaws). Regional plans are, however, a critical part of the Legislature's effort to "establish a coordinated, comprehensive planning process and policy framework to guide decisions by municipalities, regional planning commissions, and State agencies." 24 V.S.A. § 4302(b)(1). Applying an interpretative standard to regional plans that is more demanding than the standard applied to other similar regulatory provisions would undermine legislative intent, by making Criterion 10 essentially meaningless.

B. Applying the appropriate standards, the substantial development proposed near the Exit 1 interchange does not conform to the regional plan.

The regional plan does not permit this large, mixed-use development—which the Applicant describes as a smaller version of Burlington's Church Street Marketplace, Tr. 42—on a strip of Route 4 next to the Exit 1 interstate ramps. The environmental court's contrary holding should be reversed. The plan directs both the type of development reserved for regional growth areas (which Exit 1 is not) and the type of

development that is permitted at interchange areas, including Exit 1. First, the provision requiring that principal retail establishments must be located in town centers and other designated growth areas applies and bars this project from being built outside of those areas. Second, the requirement that major growth or investments must be channeled into or adjacent to existing or planned settlement areas is enforceable and unequivocally prohibits the project at Exit 1. Finally, several provisions expressly restrict the type of development permitted at interchange areas, and Exit 1 specifically, and the project does not fall within the category of uses or fit within the scale appropriate for this area.

1. **The project includes principal retail establishments and may not be built at this location.**

The project is prohibited under the provision requiring that "[p]rincipal retail establishments must be located in Town Centers, Designated Downtowns, or Designated Growth Centers." PC 68. The project, with roughly 40,000 square feet of retail space, includes retail establishments as a principal use. The environmental court adopted a flawed definition of "principal retail establishment" that disregards both accepted land use definitions and the goals of the regional plan. The court resorted to a dictionary defining "principal" as "chief; primary; most important" and reasoned that, with 40,000 of the project's 115,000 square feet devoted to retail space, retail is not the "primary or chief use" of the project as a whole. On that basis, the court mistakenly held that the project is not a principal retail establishment. PC 23-24.

Indeed, that holding cannot be reconciled with the generally accepted use of the term "principal" (as in "principal use" or "principal building") in land-use law. [5] The distinction between principal and accessory uses is well understood and the terms are regularly used by this Court and standard treatises. *See, e.g., In re Toor*, 2012 VT 63, ¶ 22 n.11, 192 Vt. 259, 59 A.3d 722; *In re Porter Med. Assocs.*, 139 Vt. 132, 132-33, 423 A.2d 491, 491-92 (1980); 8 E. McQuillin, Law of Municipal Corporations § 25:151 (3d ed. 2015); 2 E. Ziegler, Rathkopf's Law of Zoning and Planning § 33:21 (4th ed. 2015). For zoning purposes, "principal use" is a primary or main use of the lot. *See* 4 P. Salkin, American Law of Zoning § 41:16 (5th ed. 2015). In essence, a principal use is one that must be expressly approved under the applicable zoning regulations. For example, in a commercial district, a proposed store would be a principal use, while its parking spaces would be an accessory use. The principal use (the store) would be the subject of the permit application. Parking would be listed as an accessory use and not independently permitted. In contrast, a commercial parking lot would be a principal use, and would require a permit.[6]

The term "principal use" thus may also be defined by what it is not: it is not an accessory use. Accessory uses are permitted in a zoning district only if they are both subordinate and incidental to the principal use. McQuillin, *supra*, § 25:151; Salkin,

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[5] Appellants relied below on the accepted understandings of "principal" and "accessory" use. *See* Regional Commission's Post-Trial Mem. 15; Board's Post-Trial Mem. 10; Tr. 164 (PC 146).

[6] *See, e.g.*, Williston Unified Development Bylaw, ch. 17 ((2015) (providing "standards for some common nonresidential accessory uses," including parking, incidental retail sales, and employee services like cafeterias and childcare), available at: http://www.town.williston.vt.us/vertical/sites/%7BF506B13C-605B-4878-8062-87E5927E49F0%7D/uploads/WDB_Aug_18_2015.pdf

supra, § 41:16; Ziegler, *supra*, § 33:21. For example, a parking lot may be an accessory use to a retail store, a gift shop may be an accessory use to a museum, or a garage may be an accessory use to a dwelling. A use is accessory if it is both subordinate to the principal use, that is, typically smaller in square footage, *and* concomitant to the principal use. *See Fleury v. Town of Essex Zoning Bd. of Adjustment*, 141 Vt. 411, 415-16, 449 A.2d 958, 960 (1982) (holding that auto sales are not accessory use to service station because "auto sales are not in fact 'customarily incidental' to a service station"); *Toor*, 2012 VT 63, ¶ 18 n.4 (quoting definition of accessory use as "incidental and subordinate to the principal use").

This project is not a single lot, with a single principal use; it is a proposed *mixed-used* development, approved by the municipality as a planned development. Ex. 27, at 1-2, 5; PC 8. By definition, a planned mixed-use development has multiple primary uses. *See, e.g.*, 24 V.S.A. §§ 4303(19), 4417(a)(1) (planned development allows for "mixing of land uses"). This proposed project calls for three principal establishments or uses: retail, residential, and office space. The environmental court's analytical error was, in part, that it considered whether the entire planned development was a principal retail establishment. The right question is whether the project includes principal retail establishments—that is, retail as a primary use, not accessory or incidental to other uses.

The lower court made no finding that the proposed retail uses are accessory to the office space. And there are no facts to suggest that the retail space is accessory to the residential or office space. To the contrary, the Applicant described the

project, with its nearly 40,000 square feet of retail space, as "a smaller version of Church Street." Tr. 42 (PC 119). That is, the project includes a shopping center as a significant feature. By the Applicant's own description, the proposed retail uses are principal retail establishments with the project.

The environmental court's contrary reading also conflicts with the regional plan as a whole, which is geared toward reducing sprawl and protecting existing settlements. *See supra* 7-9; *infra* 26-31. The plan specifies that principal retail establishments should be restricted to town centers and other growth areas to "curb the blighting effects of sprawl." PC 68. Yet the court interpreted this provision to allow virtually unlimited retail development outside of town and village centers, so long as that retail development is part of a larger development. Under the lower court's reasoning, a stand-alone 40,000-square-foot retail development would be prohibited, but *this* 40,000-square-foot retail development—or something even larger—is permissible because the overall project includes an even larger amount of commercial office space. If the overall project were twice as large, the environmental court's interpretation would allow 80,000 square feet of retail development, and so on, apparently without limit. That would encourage, not discourage, massive region-altering developments outside of designated growth areas. The environmental court's approach would essentially nullify the regional plan's specific and mandatory direction regarding the location of principal retail establishments.

It is uncontested that the proposed project is not within a Town Center, Designated Downtown, or Designated Growth Center. *See, e.g.*, Ex. 6, at 27, 28

("project is not contiguous to an existing settlement"); PC 82; Ex. B, *supra* 10. Because it contains principal retail establishments—that is, it includes retail uses that are not accessory to other uses—the project conflicts with the regional plan.

2. A development of this scale is not permitted outside of existing or planned settlement centers.

The project is prohibited under the provision requiring that "major growth or investments must be channeled into or adjacent to existing or planned settlement centers and to areas where adequate public facilities and services are available." PC 63. Found in the plan's land-use goals for the future pattern of settlement, the relevant paragraph provides in full:

> **Regional Growth Areas**
>
> Due to severe physical site limitations and the relatively high costs incidental to land development in certain areas as compared to others, much of the region is neither readily available nor suited for intense development. Major growth or investments must be channeled into or adjacent to existing or planned settlement centers and to areas where adequate public facilities and services are available. Regional Growth Areas are the traditional developed areas in the region. They are differentiated into the following seven types: Regional Center, Town Centers, Village Settlements, Hamlet Areas, Designated Growth Centers, Designated Downtowns, and Designated Village Centers as well as expansion areas that are designated to accommodate future growth based on the capacity to provide infrastructure and suitable land without threatening critical resources or creating sprawl.

Id. The environmental court mistakenly concluded that this provision could not be enforced because the terms "major growth or investment" and "planned settlement center" are not defined elsewhere in the plan. PC 25. That reasoning ignores the broader context of the regional plan and relevant state law. Any common-sense

interpretation of those terms would prohibit a large mixed-use development adjacent to an interstate exchange.

First, the term "major growth or investment" is sufficiently clear to guide landowners in complying with the plan. The fact that the size of such a growth or investment is not quantified is not fatal to this provision. The term "major"—essentially, a synonym for large, important, or significant—is readily understood and interpreted by applicants and regulators. Deciding whether a development qualifies as "major" is little different from deciding whether a development imposes "unreasonable burdens" or "undue adverse effects." *Cf.* 10 V.S.A. § 6086(a)(3), (6), (7), (8); *Ferrera*, 2013 VT 97, ¶¶ 4, 15-16. Here, the project's 105,000 square feet of non-residential development is significantly more than presently exists in the vicinity of the interchange. Indeed, it is nearly 50% higher than the yearly average for non-residential construction in the entire town of Hartford (which includes White River Junction and Quechee Village) between 1998 and 2005. *See* PC 156 (excerpt from Hartford Master Plan, showing yearly average was 74,178 square feet). In that seven-year span, nearby Quechee Village saw far less than 100,000 total square feet of non-residential development. PC 157. A reasonable landowner would understand that this project represents "major growth."

In any event, if a more specific definition is required, it is readily supplied by the relevant statutes and other plan provisions. Regional plans are required to "indicat[e] locations proposed for developments with a potential for regional impact ... including office parks, shopping centers and shopping malls ... and residential

developments or subdivisions." 24 V.S.A. § 4348a(2)(C). The Legislature has provided that regional plans apply under Criterion 10 where the proposed project "would have a substantial regional impact." *Id.* § 4348(h)(2). And this plan, as required by statute, defines a substantial regional impact with specific criteria. PC 75-77. A reasonable definition of "major growth or investment," read in the overall context of the plan and the statutes it implements, is a development that has a substantial regional impact.

Second, the term "planned settlement center," read in context, is specific and unambiguous. The plan provision is labeled "Regional Growth Area" and the next sentence of the plan defines a Regional Growth Area as "the traditional developed areas in the region," giving seven types of identified growth areas. That definition, in turn, in part relies on defined statutory terms – designated growth centers, designated downtowns, and designated village centers. *See also* PC 62-68 (discussing and identifying regional growth areas); PC 82-83 (maps). Exhibit B, reproduced *supra* 10, shows that the project is well outside the Quechee Designated Village and the Hartford Designated Growth Center. The environmental court, in deeming the term "planned settlement center" undefined, did not even consider the context and definition of regional growth areas. Nor did it consider other provisions of the plan that consistently identify regional growth areas, and the subset of settlement areas contained within that definition, as the loci of activity and development. *See, e.g.*, PC 65 (intent "to preserve and encourage development of the region's downtowns and village centers"); PC 66 (plan goals include: "to provide for

intensive development only in regional growth areas" and "protect the character of rural areas and their natural resources by avoiding sprawling development"); PC 67 ("[m]ajor developments like large governmental, medical, commercial, and industrial buildings must be located in Regional Centers where utilities, facilities, and human capital are concentrated").

The project, with 115,000 square feet of retail, office, and residential space, is a "major growth or investment" with substantial regional impact that has been proposed for the wrong location: a largely undeveloped area next to an interstate exchange and well outside of any existing or planned settlement area. The environmental court, indeed, found that the project has a substantial regional impact. PC 22. The Exit 1 interchange area does not fall under any of the categories identified as regional growth areas: it is not an existing settlement and, according to the plan, should not be designated as a growth center in the future. PC 51.

The project does not conform with this provision of the plan.

3. The plan restricts development at this location specifically and at highway interchanges generally.

Several provisions of the regional plan identify the type of development that is appropriate at Exit 1 specifically and highway interchanges generally. These provisions expressly restrict development at this location and provide further guidance on interpreting the scope of development that must be directed toward regional growth areas, as discussed above.

- "[It is in the public interest to] reserve land for Interchange Areas 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, or institutional uses such as governmental offices or post offices." PC 66.

- "Appropriate uses [at Interchange Areas] include highway-oriented lodging and service facilities, trucking terminals, truck-dependent manufacturing, and park-and-ride commuter lots." PC 70.

- "The [Exit 1] 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 the interchange include residential, appropriately-scaled traveler-oriented uses, and other similar uses that are not intended to draw on regional populations." PC 73.

- "Any development planned for interchange development must be constructed to ... discourage creation or establishment of uses deemed more appropriate to regional growth areas." PC 71.

Consistent with these plan provisions, appropriate development at Exit 1 includes services for the traveling public or trucking industry—such as highway-oriented lodging and service facilities, trucking terminals, truck-dependent manufacturing, and park-and-ride commuter lots—that are scaled to fit with the surrounding area and do not draw on regional populations. Furthermore, the plan provides that development planned for interchange areas "must be constructed ... to discourage creation or establishment of uses deemed more appropriate to regional growth areas," PC 71, thus *prohibiting* large-scale, high-density development from interchange areas.

Whether viewed independently or together with the standards discussed above, these plan provisions confirm that a large-scale commercial and residential

development like this one is not appropriate for the Exit 1 area. The project is neither a transit-oriented use nor is it scaled to fit among the small, low-density residential and commercial structures currently populating the area. It is a major development that must be located in a regional growth area.

4. The plan provisions are neither ambiguous nor standardless.

While this Court on several occasions has declined to give force to regional plans or local plans under Criterion 10, those decisions are distinguishable and do not control here.

To begin with, the mandatory nature and specificity of the plan provisions readily contrast with the "broad, nonregulatory language" that the Court has found inadequate. *In re Molgano,* 163 Vt. 25, 29, 653 A.2d 772, 775 (1994). The Board and the Regional Commission are not relying on language phrased in aspirational terms, such as protecting, promoting, encouraging, or discouraging certain activities. *See id.* (finding unenforceable town plan with language such as "care must be taken" and "consideration should be given"). The town plan provisions in *Russell Corp.* similarly identified "the sort of broad goals lacking in specific policies or standards that [the Court has] consistently disallowed as the basis for the denial of a permit under Criterion 10." 2003 VT 93, ¶¶ 18-19. That plan described the "purpose" of a proposed residential district as "provid[ing] for residential and other compatible uses at densities appropriate with the physical capability of the land and the availability of community facilities and services." ¶ 18. Related provisions used non-mandatory or general language. *Id.* ("planned residential developments

and other 'techniques for preserving the rural character of these areas are encouraged,' and '[d]evelopment should take place in such a way that any irreplaceable, unique, scarce resources and natural areas are not harmed'"). The provisions here, by contrast, are mandatory and unambiguous. Development of this type is prohibited—not "discouraged"—outside of certain areas, and those areas are readily identified and depicted by lines on a map. *See supra* 10.

Nor is this a case where vague or potentially inconsistent policies undermine application of the plan. In *JAM Golf*, for example, the Court considered a plan that "require[d] residential development to be designed to protect wildlife corridors and habitat, and to protect scenic views." 2008 VT 110, ¶ 18. The plan "fail[ed] to define what in particular is to be protected, and provides no standards as to how or when development should be restricted to accomplish protection." *Id.* Further, the Court noted that the plan's policy of promoting at least some growth and development was "at odds" with its goal of protecting natural resources, and that the plan provided no guidance on how to "balance these competing concerns." *Id.* ¶ 19; *see also Chaves*, 2014 VT 5, ¶¶ 40, 42 (noting that plan is ambiguous because it evinced policy that mineral extraction should minimize adverse effects on historic sites but also promoted sand and gravel extraction and identified area containing such sites as one suitable for extraction); *In re Kisiel*, 172 Vt. 124, 130, 772 A.2d 135, 139 (2000) (holding that provision stating "steep slopes" are unsuitable for development was ambiguous because the plan contained no standard for determining when a slope is "steep" and plan itself recommended amending bylaws to create those standards).

Here, the relevant plan objectives – to channel development into regional growth areas and limit sprawl – are internally consistent and stated in mandatory language. And the plan specifically addresses highway interchange development, including Exit 1, in a manner that is consistent with other requirements for development. Instead of inconsistency, the plan provisions reinforce the same objectives. The only inconsistency arises from the environmental court's interpretation, as noted above. *Supra* 25.

And while some plan terms are not specifically defined, terms like "principal retail establishment," "major growth," and "planned settlement area" are readily understood in the context of the document as a whole or through consultation with established external sources. The case is distinguishable from *In re Times & Seasons, LLC*, where the Court found ambiguity in a plan provision directing development to village centers "where feasible." 2008 VT 7, ¶ 23, 183 Vt. 336, 950 A.2d 1189. The Court did not reject the use of the term "feasible" generally, as the term has a "plain and ordinary meaning," but observed that the *type* of feasibility was not specified. *Id.* It was "uncertain if the drafters of the town plan intended the phrase to refer to economic feasibility, physical feasibility, some combination of both, or perhaps some other measure of feasibility altogether." That kind of regulatory guesswork is not in play here.

II. This Court should adopt a standard for applying regional plans that gives full force to the legislative intent underlying Act 250 and relevant planning and development statutes.

The Court's approach to regional plans and Criterion 10 should take into account legislative intent, both for Act 250 and for closely related planning and development statutes. Regional plans seek "to guide the future growth and development of land and of public services and facilities, and to protect the environment." 24 V.S.A. § 4348a; *see also id.* § 4347 ("A regional plan shall be made with the general purpose of guiding and accomplishing a coordinated, efficient and economic development of the region ... ."). The Legislature has unequivocally directed that these plans be part of the Act 250 review process. 10 V.S.A. § 6086(10); 24 V.S.A. §§ 4345a(13), 4348(h). And the Legislature has required regional plans to carry out broader development goals, including longstanding efforts to protect Vermont's historic settlement patterns and to limit sprawl. The court below insisted on an unreasonable degree of specificity, even though the plan addresses this type of development and this geographic location; parsed phrases and sentences without looking at the overall plan; and failed to consider relevant statutes. That approach disserves the Legislature's purposes and should not be followed by this Court.

First, regional plans by definition will not contain the level of detail found in zoning bylaws. Zoning bylaws "permit, prohibit, restrict, regulate, and determine land development," including "the use of the land and the placement, spacing, and size of structures and other factors specified in the bylaws related to public health, safety, or welfare." *Id.* § 4411(a). They typically list the specific primary and

accessory uses permitted in each zoning district, the density of structures, size of lots, setbacks, and area and height of buildings. And as explained above, the Court has accepted a degree of imprecision even for zoning. *See supra* 20. The Court should not endorse a standard for regional plans that requires an unattainable degree of specificity and detail. While merely "aspirational" language is insufficient, the Court must apply a reasonable standard in interpreting a plan's mandatory terms, including the terms here prohibiting principal retail uses contributing to sprawl.

Second, the interpretation of regional plans should follow their purpose and function, by looking to the plan as a whole and to the governing statutes that the plans implement. It is particularly concerning that the environmental court declined to give effect to plan provisions that implement a consistent and longstanding legislative objective: "to maintain the historic settlement pattern of compact village and urban centers separated by rural countryside." 24 V.S.A. § 4302(c)(1). In reaching that decision, the lower court looked to specific sentences and phrases, but failed to consider the plan as a whole, and the way in which the plan achieves the Legislature's longstanding objective. For example, in deeming the term "planned settlement area" undefined, the court disregarded the statutory provisions for designated downtowns and designated growth areas – even though the plan discusses those statutes at length. Similarly, in dismissing the plan's statement that "Exit 1 is not an appropriate location for a growth center," the court reasoned only that the Applicant was not seeking a growth center designation.

Missing was any recognition that allowing this substantial commercial and residential development at the interchange was inconsistent with both the plan as a whole and the Legislature's intent in developing the programs for designated centers.

The Court's decision here will govern future cases and have real consequences for development across Vermont. It may have particular impacts along the State's interstate highways and at interchanges: places where visitors first encounter Vermont's landscape and see the salutary effects of Vermont's comprehensive land-use-planning efforts over many decades. The contested provisions of this plan are at the heart of the plan's goals for regional development: that the region "continue to grow and develop economically" while "avoid[ing] substantial alteration of its special character, its landscape and quality of life." PC 62. And this plan is not vague or ambiguous by relevant standards; far from it. The Vermont Association of Planning and Development Agencies has ranked this plan's land use component highly, because it contains "the most specific policies to guide development within each planning area"—citing as an example the restriction on location of principal retail establishments. VAPDA, *Regional Plan Assessments* 7, TRORC-1 (June 2013).[7] The policies are "clear and specific" and "can be effectively used to manage the region's future growth and development." *Id.* A holding that these provisions of the regional plan are not specific enough to apply in Act 250 would deprive

[7] *Available at* http://www.vapda.org/Publications/RegionalPlanAssessments.pdf.

Criterion 10 of any meaningful force and undermine the Legislature's intent that regional plans be part of the Act 250 process.

CONCLUSION

The decision below should be reversed.

Dated: March 11, 2016

STATE OF VERMONT

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CERTIFICATE OF COMPLIANCE

Bridget C. Asay, Assistant Attorney General and Counsel of Record for the Vermont Natural Resources Board, State of Vermont, certifies that this brief complies with the word count limit in V.R.A.P. 32(a)(7)(A). According to the word count of the Microsoft Word processing software used to prepare this brief, the text of this brief contains 8,893 words.

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