

# LOCAL PROTECTION OF NATURAL RESOURCES AFTER JAM GOLF: STANDARDS AND STANDARD OF REVIEW

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## INTRODUCTION

In 2005, the developer J.A. McDonald asked the City of South Burlington's development review board to allow an expansion of the Vermont National Country Club from 296 to 306 house sites.<sup>1</sup> The ten additional lots would be developed on a portion of the property called the "woodland."<sup>2</sup> The woodland contains the last remaining knoll of trees on the property and is adjacent to wetlands and open space on the golf course fairway.<sup>3</sup> The Country Club is a planned residential development (PRD) in South Burlington.<sup>4</sup>

A PRD allows landowner flexibility by waiving traditional zoning regulations in order to promote another public benefit such as open space or conservation.<sup>5</sup> The City of South Burlington identified the woodland knoll of trees as an important area to be preserved.<sup>6</sup> As a result, the City denied the amended PRD application to build the ten additional house sites.<sup>7</sup> Part of the City's argument was based on its zoning ordinance, section 26.151(g), "which requires PRD designs to '*protect important* natural resources including streams, wetlands, scenic views, wildlife habitats and special features such as mature maple groves or unique geologic features.'"<sup>8</sup>

The City argued that the knoll of trees was an important natural resource because the trees provided a wildlife-corridor link between a forest and other wildlife habitat.<sup>9</sup> The City presented evidence of wildlife including deer, turkey, birds, and other animals that took advantage of berries, nuts, and shrubs on the property.<sup>10</sup> The development review board

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1. *In re* JAM Golf, L.L.C., 2008 VT 110, ¶ 2, 969 A.2d 47, 49.

2. *Id.*

3. *See id.* ¶ 3, 969 A.2d at 49 (describing the property's spatial orientation with reference to nearby terrain and vegetation).

4. *Id.* ¶ 2, 969 A.2d at 49.

5. *See* VT STAT. ANN. tit. 24, § 4417(a)(5) (2007) (Vermont approves PUDs "[t]o provide for the conservation of open space features recognized as worthy of conservation in the municipal plan and bylaws, such as the preservation of agricultural land, forest land, trails, and other recreational resources, critical and sensitive natural areas, scenic resources, and protection from natural hazards."); DANIEL R. MANDELKER, PLANNED UNIT DEVELOPMENTS 3-5 (2007) (discussing another state's intended purpose for PUDs).

6. *See* Steve Stitzel, Partner, Stitzel, Page & Fletcher, P.C., Address at the Vermont Law School Planning Workshop: JAM Golf LLC. vs. City of South Burlington: Lessons for Vermont Communities, at 3 (Mar. 20, 2009) (transcript available at [www.vermontlaw.edu/Documents/JAM%20Golf%20notes\(0\).pdf](http://www.vermontlaw.edu/Documents/JAM%20Golf%20notes(0).pdf)) (explaining that the "prominent knoll of trees . . . [was] to be preserved as important to the preexisting natural landscape of the project").

7. *JAM Golf*, ¶ 4, 969 A.2d at 49.

8. *Id.* ¶ 12, 969 A.2d at 51 (emphasis added).

9. *Id.* ¶¶ 1-11, 969 A.2d at 49-51.

10. *Id.* ¶ 10, 969 A.2d at 51.

(DRB) and the Vermont Environmental Court both supported the City of South Burlington's decision to deny the application.<sup>11</sup>

JAM Golf appealed to the Vermont Supreme Court, arguing that the lower court and DRB misinterpreted the word "important" because it was unclear whether this knoll of trees was important.<sup>12</sup> The court agreed with the developer and stated that section 26.151 is flawed "since it provides no standards for the court to apply in determining what would constitute a failure to 'protect' the listed resources."<sup>13</sup> The court decided the standards in the City of South Burlington's ordinance were not clear enough to give notice of what developers can and cannot do.<sup>14</sup> While the court found the language to be ambiguous, the City found the language appropriate given the flexible nature of PRDs.<sup>15</sup> The Court's decision highlights the difficulty of balancing the need to protect local natural resources with the need to give notice of the types of development allowed.

Municipalities have two main concerns after the *JAM Golf* decision. First, towns wonder whether their municipal standards will be struck down in court for being too vague. Second, towns worry about a loss of local control as decisions about the towns are made by courts without local input. This paper discusses opportunities to address both of these concerns.

First, this paper considers opportunities for towns to reduce vagueness in their municipal standards by improving specificity in town plans, zoning ordinances, and during the application process for PRDs and subdivisions.

Second, on-the-record review (OTR) is considered as an opportunity for towns to preserve local input during the appeals process. In Vermont, when a land use decision is appealed, the decision is heard in the environmental court and then in the Vermont Supreme Court.

The appellate courts typically review the decisions *de novo*.<sup>16</sup> A *de novo* standard of review means that the appellate court will accept new

11. *Id.* ¶ 4, 969 A.2d at 49.

12. *Id.* ¶¶ 10–14, 969 A.2d at 51–52.

13. *Id.* ¶ 13, 969 A.2d at 52 (emphasis added).

14. *Id.* ¶ 14, 969 A.2d at 52; *see* Stitzel, *supra* note 6, at 4–5 (discussing the Vermont Supreme Court's determination that section 26.151 was unconstitutional due to its lack of standards).

15. *See* Julie Beth Hinds, Senior Project Manager, VHB Pioneer, *supra* note 6, at 16–17 ("The whole point of PRDs is to choose the most important pieces of land to set aside and develop those that are consistent with community planning principles. This was a suburban PRD with a six-page decision explaining the community's rationale. The community's decision directed to staff, which was explained in the general decision—they can't take this piece for housing.")

16. *See, e.g.,* TOWN OF RANDOLPH, VT., ZONING REGULATIONS art. III, § 3.6(B) (2005), available at [http://resources.vlct.org/u/Randolph\\_ZR\\_2005.pdf](http://resources.vlct.org/u/Randolph_ZR_2005.pdf); TOWN OF LUDLOW, VT., ZONING AND FLOOD HAZARD REGULATIONS art. 2, § 270.8 (2005), available at [http://resources.vlct.org/u/Ludlow\\_ZR\\_2005.pdf](http://resources.vlct.org/u/Ludlow_ZR_2005.pdf); E-mail from Fred Dunnington, Chair of the Development Review Board for the Town of Middlebury, Vt., to author (Apr. 16, 2009, 17:12 EST) (on

evidence and have old evidence presented again as if in a new trial.<sup>17</sup> During de novo review the appellate court will not read transcripts from the local planning commission or development review board (DRB). In contrast, municipalities have the opportunity to request that appeals be heard on the record.<sup>18</sup> OTR means that the appellate court's review is limited to evidence originally presented and recorded at the local level. The record includes transcripts and evidence from the DRB deliberations, including local testimony. In OTR the appellate court will give deference to local decisions.<sup>19</sup> The court will only reverse the decision if the DRB interpreted evidence or the application of bylaws improperly.<sup>20</sup> In addition to local control, municipalities also consider the effect of OTR on citizen participation, cost, and complexity of the development process.

## I. SPECIFIC STANDARDS

The drafting of specific standards is easier said than done. Language must be broad enough to be adaptable to unique and changing circumstances, yet specific enough so that local officials have guidelines to make consistent and fair decisions.<sup>21</sup> Drafting language to protect natural resources is complicated given the differences in biodiversity on each unique parcel of land.<sup>22</sup> The process is further complicated because drafters are often non-lawyer volunteers.<sup>23</sup> Good drafting is important in general, but with land use decisions, any ambiguity or uncertainty is decided in

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file with author) (discussing Middlebury's adoption of OTR); *see also infra* note 142 (discussing Brattleboro's recent adoption of OTR).

17. *See On the Record Review*, MUNICIPAL ASSISTANCE CENTER TECHNICAL PAPER #4 (Vt. League of Cities & Towns, Montpelier, Vt.) Mar. 2008, available at [http://resources.vlct.org/u/On%20the%20Record3\\_08.pdf](http://resources.vlct.org/u/On%20the%20Record3_08.pdf); *see also* VT. STAT. ANN. tit. 24, § 4461(a)–(b) (2007).

18. VT. STAT. ANN. tit. 24, § 4471(b) (2009) (listing the authority to have appeals heard on the record).

19. *Id.*

20. *Id.*

21. *See* *Town of Westford v. Kilburne*, 131 Vt. 120, 124–25, 300 A.2d 523, 526 (Vt. 1973) (stating that zoning ordinances “should be general enough to avoid inflexible results, yet . . . they should not leave the door open to unbridled discrimination”); *see also* Jim Barlow, *What the JAM Golf Decision Will Mean for Your Municipality*, VLCT NEWS (Vermont League of Cities & Towns, Montpelier, Vt.), (Mar. 2009), at 3, available at [http://resources.vlct.org/u/ATL\\_09-03%20JAM%20Golf.pdf](http://resources.vlct.org/u/ATL_09-03%20JAM%20Golf.pdf).

22. *See* Jens Hilke, Conservation Planning Biologist, Vt. Dep't of Fish & Wildlife, *supra* note 6, at 16–17 (discussing the difficulty in drafting legal terms given the ambiguity found in nature and the difficulty determining the appropriate protection needed to protect natural resources).

23. Jim Barlow, Senior Attorney, Municipal Assistance Center, Vt. League of Cities & Towns, *supra* note 6, at 9 (“Most of the people drafting these bylaws are volunteers. They are not professionals.”); Sharon Murray, Principle, Front Porch Cty. Planning, *supra* note 6, at 18.

favor of the property owner.<sup>24</sup> A town's best intentions to protect natural resources will mean nothing unless those intentions are stated clearly in the town's plan and zoning ordinances. This section will discuss ways to improve clarity during various stages of the planning process including the town plan, the zoning ordinance, and the application process.

### A. *Town Plan*

A town plan provides the framework and policy direction for a town's land use decisions.<sup>25</sup> The plan allows residents to decide by consensus what is vital to the long-term health of the community.<sup>26</sup> Specificity in the town plan is important because a town cannot legally enact zoning laws to protect natural resources unless the resources are discussed and identified in the town plan.<sup>27</sup> If a municipality has a town plan, the plan must include a statement of objectives, policies, and programs to guide the future growth and to protect the environment.<sup>28</sup> The plan must also include a map of present and future land uses including the identification of open spaces, wetland protection, and other conservation purposes.<sup>29</sup>

#### 1. Statement of Objectives, Policies, and Programs

The trend in Vermont towns is to identify the importance of habitat protection in the town plan but without specificity. In Vermont, 223 of 251 towns have a town plan and ninety-one percent of Vermont town plans identify the importance of wildlife and/or fish habitat protection in their statement of objectives.<sup>30</sup> While a majority of towns have goals to protect

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24. *Murphy Motor Sales, Inc. v. First Nat'l Bank of St. Johnsbury*, 122 Vt. 121, 124, 165 A.2d 341, 343 (Vt. 1960) (citing *Kubby v. Hammond*, 198 P.2d 134 (Ariz. 1948)); see *Glabach v. Sardelli*, 132 Vt. 490, 494, 321 A.2d 1, 4 (Vt. 1974) (“[Z]oning ordinances are to be strictly construed in view of the fact that they are in derogation of common law property rights . . .”).

25. See RANDALL ARENDT, *GROWING GREENER: PUTTING CONSERVATION INTO LOCAL PLANS AND ORDINANCES* 19–20 (1999) (considering ways to use town plans and ordinances for conservation purposes); see also *Kalakowski v. John A. Russell Corp.*, 137 Vt. 219, 225, 401 A.2d 906, 910 (Vt. 1979) (“The plan is merely an overall guide to community development.”).

26. ARENDT, *supra* note 25, at 7 (explaining ways town plans allow communities to choose for the future).

27. VT. STAT. ANN. tit. 24, § 4401 (2007); JOHN M. AUSTIN ET AL., VT. DEP'T OF FISH & WILDLIFE & AGENCY OF NATURAL RES., *CONSERVING VERMONT'S NATURAL HERITAGE: A GUIDE TO COMMUNITY-BASED PLANNING FOR THE CONSERVATION OF VERMONT'S FISH, WILDLIFE, AND BIOLOGICAL DIVERSITY* 121 (2004) (“The natural resources important to a community must be discussed and identified in the town plan to legally justify enacting local laws to protect these resources.”).

28. VT. STAT. ANN. tit. 24, § 4382(a)(1)–(a)(2) (2007).

29. *Id.*

30. AUSTIN, *supra* note 27, at 27.

wildlife, these goals tend to be broad and aspirational rather than specific. An example of a broad goal to protect wildlife comes from the Town of Randolph. The Randolph Town Plan includes the goal of “maintain[ing] and enhanc[ing] wildlife habitat through informed decision making and public education.”<sup>31</sup> The majority of towns do not identify specific stewardship goals.<sup>32</sup> A municipality can improve specificity by indicating in its town plan the desire to protect particular resources. The Fish and Wildlife Department gives thirty-six sample conservation goals in its manual “Conserving Vermont’s Natural Heritage.”<sup>33</sup> In *JAM Golf*, the City of South Burlington wished to protect the knoll of trees in part to preserve mast-stand habitat.<sup>34</sup> Specific conservation goals for mast stands could include maintenance and protection of the functional integrity of all mast stands in a town, or an increase in acres of mast stand habitat that are either under long-term stewardship or permanently conserved within the town.<sup>35</sup> Some towns have adopted one or two stewardship goals based on their most important local priorities.<sup>36</sup> For example, Shrewsbury has identified the protection of bear corridors as a town goal. The adoption of multiple specific conservation goals will give better guidance to courts than goals to support local habitat in a broader ecological context.

## 2. Identification of Open Spaces, Wetland Protection, and Other Conservation Purposes

A town plan must also include a map of present and future land uses including the identification of open spaces, wetland protection, and other conservation purposes.<sup>37</sup> Only fifty-two percent of town plans have mapped habitat data.<sup>38</sup> Most inventory data is from state sources, primarily the Vermont Fish and Wildlife Department.<sup>39</sup> While state data is beneficial, local input adds value to the quality of data used to make planning decisions. One option to assist towns in collecting and identifying local conservation information is to create a conservation commission. A conservation commission can make an inventory of natural resources within

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31. RANDOLPH, VT., TOWN PLAN ch. 2., cl. 7 (2004).

32. Telephone Interview with Jens Hilke, Conservation Planning Biologist, Vt. Dep’t of Fish & Wildlife (Sept. 3, 2009).

33. AUSTIN, *supra* note 27, at 108–10.

34. *See In re JAM Golf, L.L.C.*, 2008 VT 110, ¶ 3 & n.1, 969 A.2d 47, 49 (Vt. 2008) (describing the ecological value of mast trees).

35. AUSTIN, *supra* note 27, at 89–91.

36. Hilke, *supra* note 32.

37. VT. STAT. ANN. tit. 24, § 4382(a)(2) (2009).

38. AUSTIN, *supra* note 27, at 27.

39. *Id.*

the town and advise the planning commission of protection priorities.<sup>40</sup> Only sixty-five of Vermont's towns have a conservation commission.<sup>41</sup> In addition, the State provides training on fieldwork-based data evaluation called "ground truthing."<sup>42</sup> Data on location can verify the existence of natural resources within the town when towns use state aerial photography or satellite imagery. The identification of specific resources within the towns gives guidance to the court on local priorities.<sup>43</sup>

### B. Zoning Bylaws

Zoning bylaws provide the regulatory standards for protection of natural resource that residents, developers, and courts must follow. A zoning ordinance determines what types of uses are authorized in different parts of town.<sup>44</sup> The town can protect forested areas by identifying them as a conservation district and preventing new development in that area.<sup>45</sup> The town can also restrict people-intensive activities near important habitat through density requirements.<sup>46</sup>

Zoning bylaws can be clarified and made more effective in several ways including: 1) the use of purpose statements; 2) specific guidance; 3) plain language; and 4) a process to modify and amend PRDs.

#### 1. Purpose Statement

A statement describing the goals of a section in an ordinance will help the court interpret the rules under the section.<sup>47</sup> Purpose statements are often relied on by courts as grounds for upholding decisions and should be used for both the entire zoning code and for each zoning district.<sup>48</sup> An example of a purpose statement for the entire zoning ordinance is "to implement the comprehensive [town] plan." A reference to the town plan is recommended because courts look at a town's zoning rules as a whole to

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40. VT. STAT. ANN. tit. 24, § 4505 (2007) (listing the powers and duties of conservation commissions).

41. VT. LEAGUE OF CITIES & TOWNS, 2008 VERMONT MUNICIPAL LAND USE REGULATION PRACTICES AND FEES 5-9 (2009).

42. Hilke, *supra* note 32; *see generally* Vt. Dep't of Fish & Wildlife, Wildlife Programs: Field Work 2004, [http://www.vtfishandwildlife.com/cwp\\_inventory.cfm#field\\_work](http://www.vtfishandwildlife.com/cwp_inventory.cfm#field_work) (last visited Dec. 12, 2009).

43. *Id.*

44. *See* tit. 24, § 4414 (2007) (listing the permissible types of zoning regulations).

45. *Id.* § 4414(1)(B).

46. *Id.* § 4414(1)(A).

47. CHARLES A. LERABLE, PREPARING A CONVENTIONAL ZONING ORDINANCE 11 (1995).

48. *Id.*

understand the overall intent of the town regulations.<sup>49</sup> Purpose statements for specific districts instruct the community on the function of different parts of town. If a town desires a particular residential district to promote pedestrian access, the city can state that the purpose of the district is to promote mixed-use development. In this district, the court will decide unclear rules in favor of mixed-use development.

## 2. Specific Guidance

In addition to considering the town plan goals and the purpose statement, the Vermont Supreme Court has been very clear about the need for specific standards.<sup>50</sup> The court has not defined what is meant by a specific standard. In fact, critics of the decision tease the court for being “unclear about telling local governments to not be unclear.”<sup>51</sup>

Although case law does not provide a “specific unambiguous bylaw” standard, previous decisions do provide guidance as to the types of bylaws the Vermont Supreme Court finds sufficiently specific. The court decided that certain steep-slope standards from the County of Bennington were specific.<sup>52</sup> Section 5.8 of the Bennington Regional County regional plan states: “On slopes greater than twenty percent, residential development should not be permitted.”<sup>53</sup> The court decided the measurable twenty percent policy was specific enough to give the court guidance.<sup>54</sup> In contrast, the court determined that the Waitsfield town bylaws on steep slopes were abstract.<sup>55</sup> The Waitsfield town plan stated the goal: “[T]o

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49. *In re* Vt. Nat'l Bank, 157 Vt. 306, 312, 597 A.2d 317, 320 (Vt. 1991) (“We consider the whole of the ordinance and try to give effect to every part.”) (citing *Slocum v. Dep't of Soc. Welfare*, 154 Vt. 474, 478, 580 A.2d 951, 956 (Vt. 1990)).

50. *See In re* MBL Ass'n, 166 Vt. 606, 607, 693 A.2d 698, 700 (Vt. 1997) (requiring language that “is clear and unqualified, and creates no ambiguity”); *In re* Molgano, 163 Vt. 25, 30–31, 653 A.2d 772, 775 (Vt. 1994) (holding that broad policy statements phrased as “nonregulatory abstractions” may not be given “the legal force of zoning laws”); *In re* Kiesel, 172 Vt. 124, 129, 772 A.2d 135, 140 (Vt. 2000) (explaining bylaws which “are designed to implement the town plan, and may provide meaning where the plan is ambiguous”) (citing *Molgano*, 163 Vt. at 30–31, 653 A.2d at 775); *In re* Miserocchi, 170 Vt. 320, 325, 749 A.2d 607, 611 (Vt. 2000) (explaining how the absence of specific standards in zoning ordinances allows decisions to be rationalized “ad hoc . . . den[ying] the applicant due process of law”); *Town of Westford v. Kilburn*, 131 Vt. 120, 124, 300 A.2d 523, 526 (Vt. 1973) (“When no such guiding standards are spelled out by the legislative body, the door is opened to the exercise of . . . discretion in an arbitrary or discriminatory fashion.”).

51. *See* Barlow, *supra* note 6.

52. *In re* Green Peak Estates, 154 Vt. 363, 368–69, 577 A.2d 676, 679 (Vt. 1990).

53. *Id.*

54. *Id.* *But see* Murray, *supra* note 6, at 20 (questioning the practicality of testing the gradient of slopes depending on whether it requires hiring an engineer and whether the gradient mean is pre- or post-construction).

55. *Kiesel*, 172 Vt. at 128, 772 A.2d at 139.

protect Waitsfield's fragile resources and sensitive natural areas” and “[p]revent the creation of parcels which will result in development on *steep slopes*.”<sup>56</sup> Given that the Waitsfield town plan did not define the gradient of a “steep” slope, the court decided that the ordinance did not provide any specific standards.<sup>57</sup>

*In re Pierce Subdivision Application* demonstrates the Vermont Supreme Court’s finding of specificity in a bylaw related to density restrictions.<sup>58</sup> *In re Pierce* involved a PRD in which the Ferrisburg Planning Commission waived the two and five acre minimum lot size requirements to promote conservation of open space.<sup>59</sup> The developer agreed to protect seventy-six percent of the PRD as open space.<sup>60</sup> A neighbor appealed the waivers, arguing that the calculations used to determine the number of lots allowed should not have included the untraveled portion of a right-of-way.<sup>61</sup>

The court addressed whether the bylaws provided the Commission with sufficient overall standards to grant a PRD permit and decided that the Ferrisburg bylaws did give sufficient guidance.<sup>62</sup> The Ferrisburg bylaws stated that “any open space land will be evaluated as to its agricultural, forestry and ecological quality.”<sup>63</sup> This bylaw is similar to the broad “protect important natural resources” guideline from *JAM Golf*.<sup>64</sup> Contrary to South Burlington’s ordinance, the Ferrisburg ordinance had specific guidance related to the disputed issue. The Ferrisburg ordinance included specific standards relating to the density of housing.<sup>65</sup> Section 5.21(D) states that “each dwelling unit shall have a minimum two acre lot exclusively associated with it and must comply with” it and “the minimum acreage for a PRD shall be 25 acres and a minimum of 60% of the total parcel shall remain undeveloped.”<sup>66</sup> These specific requirements were enough for the court to determine that the Ferrisburg bylaws met the need

56. *Id.* (emphasis in original).

57. *Id.* (“The parties are thus left to debate the Town’s intent, with landowners claiming that the Town intended to apply the prohibition only to ‘extreme’ slopes with grades over 25 percent, and the Town asserting that the prohibition includes slopes characterized as ‘severe,’ i.e., having grades between 15 and 25 percent.”).

58. *In re Pierce Subdivision Application*, 2008 VT 100, 965 A.2d 468.

59. *Id.* ¶¶ 1–5, 965 A.2d at 469–70.

60. *Id.* ¶ 3, 965 A.2d at 470.

61. *Id.*

62. *Id.* ¶¶ 24, 30, 965 A.2d at 475, 477.

63. *Id.* ¶ 22, 965 A.2d at 474.

64. *JAM Golf*, ¶ 12, 969 A.2d at 51.

65. *Pierce Subdivision Application*, 2008 VT 100, ¶ 14, 965 A.2d at 472.

66. *Id.* ¶ 23, 965 A.2d at 475.

of providing guidance to the Commission without defeating the flexible nature of the PRD.<sup>67</sup>

In contrast to the *In re Pierce* decision, the court in *In re Molgano* found that the density restrictions in the town of Manchester were ambiguous.<sup>68</sup> Section 4.2(2) of the Manchester town plan states that “[z]oning dimensional requirements should encourage a relatively low density of development while promoting open-space preservation along the highways.”<sup>69</sup> Here, the broad statement to encourage low density was considered a “nonregulatory abstraction” and not given the “legal force of zoning laws.”<sup>70</sup>

In addition to the PUD ordinance in South Burlington, the bylaws for the towns of Royalton and Clarendon are examples of court findings of vagueness. The Royalton town plan required commercial development to be located close to town villages “where feasible.”<sup>71</sup> This bylaw did not give sufficient guidance on where development would be allowed. According to the court, it was uncertain if the drafters of the town plan intended the phrase “where feasible” to refer to “economic feasibility, physical feasibility, some combination of both, or perhaps some other measure of feasibility altogether.”<sup>72</sup> Similarly, the court determined the bylaws of Clarendon to be ambiguous.<sup>73</sup> The bylaws were intended to protect the rural character of a particular district but did not include a specific policy to exclude industrial development.<sup>74</sup> When an applicant wished to build an asphalt plant, the court was not satisfied that the language “to promote residential and ‘other compatible uses’” excluded industrial development.<sup>75</sup> The court determined that “other compatible uses” was an abstract policy and a broad goal lacking specific policies or standards required by the court.<sup>76</sup>

Improving specificity in bylaws is not an exact science and a purpose statement may not be enough. Measurable objectives such as the following are necessary: twenty percent gradient; sixty percent of the parcel; a minimum of twenty-five acres; and a definition-of-terms section.

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67. *Id.* ¶¶ 24, 30, 965 A.2d at 475, 477.

68. *In re Molgano*, 163 Vt. 25, 30–31, 653 A.2d 772, 775 (Vt. 1994).

69. *Id.* at 30–31, 653 A.2d at 775.

70. *Id.* at 30–31, 653 A.2d at 775.

71. *In re Times & Seasons, L.L.C.*, 2008 VT 7, ¶ 5, 950 A.2d 1189, 1193.

72. *Id.* ¶ 23, 950 A.2d at 1198.

73. *In re John A. Russell Corp.*, 2003 VT 93, ¶ 19, 838 A.2d 906, 913.

74. *Id.* ¶ 19, 838 A.2d at 912.

75. *Id.* ¶ 19, 838 A.2d at 912–13 (emphasis added) (referring to the town plan’s usage of the phrase “other compatible uses”).

76. *Id.*

### 3. Plain Language

To avoid confusion in the interpretation of standards, certain rules of construction should be followed. Courts read bylaws according to their plain and ordinary meaning.<sup>77</sup> The first way to make sure that terms are clear is to define them.<sup>78</sup> Words that may be familiar to lawyers or planners are not always familiar to the development community or citizens.<sup>79</sup> This is especially true with scientific and technical terms but has been equally controversial for words that appear to be less technical. For example, when talking about trees, does the ordinance mean any trees, only old growth trees, or a minimum number of trees?

Another way to clarify language is to use the active voice. The active voice is clearer and avoids ambiguity about who is supposed to do what.<sup>80</sup> For example, if a document says that “[t]he plan must be submitted,” it is unclear who is supposed to submit the plan. In the active voice, the same phrase would read, “[t]he applicant must submit the plan.” Proscriptive language also helps specify the meaning of an ordinance. Instead of recommending that a plan should be submitted, the ordinance would be more effective and clear if it requires a plan “shall” be submitted.<sup>81</sup> For example, the bylaws of the Town of Andover provide that during site plan review the commission “*may*” require wildlife habitat to be included in the site plan.<sup>82</sup> The word, “*may*,” implies that providing information on wildlife habitat is optional as opposed to required.

#### *C. Planned Residential Developments*

To improve specificity, municipalities can also consider the language in bylaws related to planned residential developments. Towns can identify the particular natural resources they would like to protect in the original agreement between the developer and the town. Typically, PRDs require at least half of the parcel to be protected for open space or conservation.<sup>83</sup> In addition to specifying a percentage of the lot that is to be preserved, a

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77. *In re* Vt. Nat'l Bank, 157 Vt. 306, 312, 597 A.2d 317, 320 (Vt. 1991) (citing *Slocum v. Dep't of Soc. Welfare*, 154 Vt. 474, 478, 580 A.2d 951, 956 (Vt. 1990)).

78. Murray, *supra* note 6, at 19; *see* THE PLAIN LANGUAGE ACTION & INFORMATION NETWORK, FEDERAL PLAIN LANGUAGE GUIDELINES, <http://www.plainlanguage.gov/howto/guidelines/bigdoc/fullbigdoc.pdf>.

79. Murray, *supra* note 6, at 19.

80. *Id.*; FEDERAL PLAIN LANGUAGE GUIDELINES, *supra* note 78, at 21.

81. Murray, *supra* note 6, at 19.

82. ANDOVER, VT., ZONING REGULATIONS § 630 (2003), *available at* [http://resources.vlct.org/u/Andover\\_ZB\\_2003.pdf](http://resources.vlct.org/u/Andover_ZB_2003.pdf) (emphasis added).

83. AUSTIN, *supra* note 27, at 124.

municipality can also identify areas of land with the greatest conservation value. The protection of natural resources is more efficient when the planning commission can “identify areas of land with greatest conservation value, rather than the land . . . that is the most convenient for subdivision design.”<sup>84</sup>

The City of Montpelier has recognized the importance of this policy in their cluster development plan.<sup>85</sup> The plan requires development to be concentrated on areas that protect parts of the property that are environmentally significant.<sup>86</sup> The plan then specifies the areas of high natural resource value including, but not limited to, meadows and wildlife corridors.<sup>87</sup>

Additionally, it is important to have a process for making decisions if the developer wishes to modify or amend the agreement. The *JAM Golf* decision demonstrates how on appeal a court may not consider the PRD development as a whole. Julie Beth Hinds, planning director for South Burlington at the time of the case, recommended that “[a]ll bylaws need to say, any amendment shall take into consideration all lands involved in the PUD.”<sup>88</sup> Alternatively, the bylaws could also limit amendments to minor changes that could not reasonably have been anticipated during the approval process.<sup>89</sup> In order to give more guidance to developers and courts, towns can list the types of changes that would be considered a minor amendment. For example, minor amendments will not increase or decrease the density, lot size, or reduce open-space areas subject to conservation or buffering.<sup>90</sup> Another option is to not allow major amendments at all, but rather require a new development plan. Bylaws may also include a requirement for notice and hearing procedures before certain types of amendments are approved.<sup>91</sup>

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84. *Id.*

85. MONTPELIER, VT., ZONING AND SUBDIVISION REGULATIONS art. 7 § 713(E)(1)–(2) (2008), available at [http://www.montpelier-vt.org/upload/groups/60/files/Document\\_Library/Montpelier\\_ZoningRegs\\_14May2008\\_Article07.pdf](http://www.montpelier-vt.org/upload/groups/60/files/Document_Library/Montpelier_ZoningRegs_14May2008_Article07.pdf).

86. *Id.*

87. *Id.*

88. Julie Beth Hinds, Senior Project Manager, VHB Pioneer, *supra* note 6, at 17.

89. MANDELKER, *supra* note 5, at 50 (providing examples of restrictive amendment policies).

90. *Id.* at 50–51.

91. *Id.* at 50 (supplying an example from Manatee, Florida).

*D. Application Process for a Subdivision or PUD Subdivision Ordinance*

A town can protect natural resources by requesting that certain criteria be met during the application process. First, a town can require an applicant to provide wildlife information, a map, or a checklist with standards that will be used.<sup>92</sup> In Vermont, a list of criteria is required by state law, which states: “The bylaws shall specify the maps, data, and other information to be presented with applications for site plan approval and a review process.”<sup>93</sup> Vermont law does not require the criteria to include information related to natural resources, but many towns still include wildlife information as a criterion.<sup>94</sup> Second, a town may require an applicant to submit an analysis of the impacts of development on wildlife, though few towns actually require applicants to engage in this analysis. Currently, Bennington requires a developer to identify potential impacts to particular natural areas and include management techniques that ensure the long-term protection of the resources.<sup>95</sup> Finally, a town can require an agency or individual with expertise to review an application or accept recommendations from the conservation commission.

Towns have several options to improve the clarity of their bylaws and improve protection of natural resources. First, a town can identify specific stewardship goals in the town plan. Second, the town can provide guidance by adding purpose statements to both the entire zoning ordinance and to specific zoning districts. Third, the town can improve natural resource inventories by creating conservation commissions or obtain “ground truthing” training from the state. Fourth, the town can reduce ambiguity in

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92. CHRISTOPHER J. DUERKSEN ET AL., *HABITAT PROTECTION PLANNING: WHERE THE WILD THINGS ARE* 31 (1997).

93. VT. STAT. ANN. tit. 24, § 4416 (2007).

94. See, e.g., MONTPELIER, VT., *ZONING AND SUBDIVISION REGULATIONS* art. 3, § 308(F)(1), tbl. 401 (2008), available at [http://www.montpelier-vt.org/upload/groups/60/files/Document\\_Library/Montpelier\\_ZoningRegs\\_14May2008.pdf](http://www.montpelier-vt.org/upload/groups/60/files/Document_Library/Montpelier_ZoningRegs_14May2008.pdf) (Montpelier’s application for a PUD or subdivision permit requires an environmental features inventory “[o]n a plan at the same scale as the base plans delineat[ing] significant natural resources; wetlands; shoreline management areas; water courses; rare, threatened or endangered plant and animal species; geological sites; historic sites; scenic roads; agricultural lands; open spaces; view sheds; streams; bodies of water; woodlands; flood hazard areas; slopes with gradients greater than 20%; south-facing slopes; significant trees; significant wildlife habitats, and wellhead protection areas; and ridge lines.”).

95. BENNINGTON, VT., *LAND USE AND DEVELOPMENT REGULATIONS* art. 8, § 8.3(C) (2006), available at [http://resources.vlct.org/u/Bennington\\_LUDR\\_2006.pdf](http://resources.vlct.org/u/Bennington_LUDR_2006.pdf) (“For any subdivision encompassing all or a portion of an identified natural area, the Development Review Board shall require the submission of a management plan to identify potential impacts to the identified natural area(s) and land management techniques that will be implemented to ensure the long term protection of the resource.”).

bylaws by using objective measures such as qualitative criteria. Fifth, a town can require certain criteria during the application process including wildlife inventories, impacts to wildlife, and recommendations from the conservation commission. All of these tools will benefit the development community and courts by providing clearer guidance on what types of development are allowed, as well as additional protection to natural resources.

## II. ON-THE-RECORD REVIEW

Even using the strategies from the previous section, the best drafting is still open to interpretation. The drafters may not anticipate all uses for the property or have the financial resources to inventory all natural resources in the area. In addition to writing more specific bylaws, a town should consider a switch to on-the-record review.<sup>96</sup> Instead of ignoring the deliberations at the local level, an appellate court reviewing a decision on the record will have more awareness of the local process. Julie Beth Hinds said that “[t]here was no ‘On-the-record review and we didn’t have any standing or presence. There was no room for our local decision.’”<sup>97</sup> Local control is a primary reason towns decide to switch to OTR. In addition to local control, a town should also consider whether the adoption of OTR would decrease citizen participation, have a financial impact, or complicate the development process.

### A. Local Control

In February of 2009, Brattleboro became the twelfth town to adopt OTR.<sup>98</sup> Brattleboro switched to OTR primarily to maintain local control and give more weight to the findings of Brattleboro’s DRB.<sup>99</sup> The DRB sensed that the local work would be ignored, the proceedings would be repeated without local input, and local sentiment would be lost.<sup>100</sup> For

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96. VT. STAT. ANN. tit. 24, § 4471(b) (2007) (providing the authority for appeals to be heard on the record); see VT. LEAGUE OF CITIES & TOWNS, *supra* note 41.

97. Julie Beth Hinds, Senior Project Manager, VHB Pioneer, *supra* note 6, at 17.

98. See BRATTLEBORO SELECTBOARD, REGULAR MEETING MINUTES FEB. 3, 2009, at 4, available at <http://brattleboro.govoffice.com/vertical/Sites/%7BF60A5D5E-AC5C-4F97-891A-615C172A5783%7D/uploads/%7BC8E0FF34-3CF6-4814-81C8-E43CB46A5E30%7D.PDF> (motion to adopt OTR granted).

99. *Id.* at 3 (“Without [on the record review] their [DRB’s] decision effectively goes away as well as all the evidence that was ever submitted to the Board. It would be as if the DRB hearing never took place.”).

100. *Id.*

example, an appellate court would not know where people walk their dogs or the location of local swimming holes.

Likewise, Middlebury also switched to OTR based on local control because of their experience with a controversial development.<sup>101</sup> Middlebury's DRB denied a hotel development.<sup>102</sup> Instead of an appeal to the environmental court, the developer attempted to settle with the Middlebury Select Board through the town attorney.<sup>103</sup> The DRB did not have an opportunity to review the terms of the settlement, and no public hearing occurred.<sup>104</sup> Ultimately, the environmental court upheld the denial, but the lack of participation by the DRB and public demonstrated the need for OTR.<sup>105</sup> While responding to comments about *JAM Golf*, Jim Barlow, an attorney with Vermont League of Cities and Towns who helps towns with development review, noted: "If there is ambiguity in our bylaws, someone else will be able to interpret ambiguity. It may be interpreted in our favor and it might not and then our logic won't be applied at all."<sup>106</sup> In the case of OTR, local logic will be applied as long as the decision is consistent with the town bylaws.<sup>107</sup>

### B. Citizen Participation

Another consideration regarding whether to have appeals heard through OTR is the effect on citizen participation. There is a legitimate fear that the OTR process may impair the ability of local citizens to weigh in on development matters based on formality and finality.

The OTR process is more formal than a traditional commission or board meeting in most towns. The process requires the preparation of documents and testimony that will be saved as evidence in case of an appeal. According to the Sustainable Communities program, "[OTR] will, bring greater formality and complexity to . . . proceedings, further discouraging citizens and neighbors from participating in the review of

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101. E-mail from Fred Dunnington, *supra* note 16.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. Jim Barlow, Senior Attorney, Vt. League of Cities & Towns, *supra* note 6, at 10.

107. Posting of Mark Leonard, Zoning Administrator, Town of Morristown, mleonard@PWSHIFT.com, to vtzoningadmins@list.uvm.edu, Vermont Zoning Administrators Listserv (Apr. 14, 2006) (on file with author) ("With 'on the record' review of MAPA proceedings, the court does not weigh the relative merits of the case before it. Rather, it is only supposed to review the record and determine that the DRB correctly applied the town's bylaws in reaching its decision.").

projects that will affect their property, community and possibly their livelihood.”<sup>108</sup>

The finality of the decision is another concern. Citizen groups tend to delay paying for expert consultants until their case reaches the court level. OTR would require citizen groups to pay for attorneys upfront at the local board level and pay more attention to notices. If citizens fail to take notice of a development or delay getting involved in the development proceedings, it could be detrimental by limiting the citizens’ opportunity to present evidence. Given that there is no second chance to present evidence, citizen groups may suffer from insufficient notice. A town may alleviate some concerns associated with OTR by restricting its use for only large developments. For example, a town could require OTR for subdivision and PRD applications only. The town could then provide additional notice for these proceedings.

### C. Money

The financial cost of adopting OTR appears to be minimal. In fact, there is a potential savings of municipal attorneys’ fees. According to Tom Jackman, the former planning director for the Town of Stowe, “When we do get appealed, the DRB decision carries much more weight and we haven’t lost yet. The decline in appeals has been significant and that alone has probably wound up saving us a good deal of money.”<sup>109</sup> The Planning Commission from the Town of Derby believes that “preventing De Novo hearings is well worth the effort and in the long run less expensive in legal costs.”<sup>110</sup> In Randolph, the legal costs per appeal were also lower. The cost did not increase except for the \$300 to \$500 spent on audio equipment.<sup>111</sup> A town’s primary financial risk when adopting OTR is that the record will be inadequate. With an inadequate record, the environmental court will

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108. Vt. Natural Res. Council, *The Facts vs. Governor Douglas – Talking Points*, Jan. 28, 2009, <http://www.vnrc.org/article/articleview/23814>.

109. Posting of Tom Jackman, Director of Planning, Town of Stowe, [tjackman@townofstowevermont.org](mailto:tjackman@townofstowevermont.org), to [vtzoningadmins@list.uvm.edu](mailto:vtzoningadmins@list.uvm.edu), Vermont Zoning Administrators Listserv (Apr. 14, 2006) (on file with author).

110. Posting of JC Brimmer, Zoning Administrator, Town of Derby, [derbyza@adelphia.net](mailto:derbyza@adelphia.net), to [vtzoningadmins@list.uvm.edu](mailto:vtzoningadmins@list.uvm.edu), Vermont Zoning Administrators Listserv (Apr. 17, 2006) (on file with author).

111. Posting of Mardee Sanchez, Zoning Administrator, Town of Randolph, [mardee@municipaloffice.randolph.vt.us](mailto:mardee@municipaloffice.randolph.vt.us), to [vtzoningadmins@list.uvm.edu](mailto:vtzoningadmins@list.uvm.edu), Vermont Zoning Administrators Listserv (Apr. 24, 2006) (on file with author) (“It hasn’t increased our cost except for the \$300 - \$500 we spent on good audio equipment . . . I don’t spend any more time assisting the DRB now than I did pre-MAPA. We haven’t had to hire a staff attorney to help with the decisions or running of the meetings. And as the appeal process is shorter (presumably and for the most part) because it is on the record, I think the legal costs per appeal are actually less.”).

remand the case, and there will be additional costs to rehear the case. Many communities feel the financial risk is also low given the infrequency of remand. The remand cost is negligible when compared to the potential savings in attorneys' fees.

*D. Complexity of the Development Process: Adopting the Municipal Administrative Procedure Act*

Municipal experiences with implementing OTR range from completely positive to completely frustrating. The difference in experiences relates to the procedures already in place. If a town has already adopted the Municipal Administrative Procedure Act (MAPA), the switch to OTR may be fairly painless.

If a town decides to have courts review their decisions OTR, there are several steps it must take: adopt MAPA, define the magnitude of the development subject to OTR, adopt OTR, and improve the record creation and retention processes.<sup>112</sup>

The first step to qualify for OTR is for the town to adopt MAPA. MAPA can be adopted by vote or by a legislative body acting on its behalf.<sup>113</sup> The vote needs to be a majority vote of legally registered voters at a duly warned special or annual meeting.<sup>114</sup> MAPA includes the following provisions:

- 1) Policies against ex parte communication and conflicts of interest;<sup>115</sup>
- 2) Notice requirements;<sup>116</sup>
- 3) Procedural requirements related to how the meeting is conducted;<sup>117</sup>
- 4) Basic rules of evidence: "All testimony of witnesses and parties must be made under oath or affirmation."<sup>118</sup> Evidence that is "irrelevant or overly repetitious can be excluded."<sup>119</sup> While generally the rules of

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112. VT. STAT. ANN. tit. 24, § 4471(b) (2007) ("If the municipal legislative body has determined (or been instructed by the voters) to provide that appeals of certain appropriate municipal panel determinations shall be on the record, has defined what magnitude or nature of development proposal shall be subject to the production of an adequate record by the panel, and has provided that the municipal administrative procedure act shall apply in these instances, then an appeal from such a decision of an appropriate municipal panel shall be taken on the record in accordance with the Vermont Rules of Civil Procedure.").

113. VT. STAT. ANN. tit. 24, § 1202(a) (2005).

114. *Id.*

115. *Id.* § 1203.

116. *Id.* § 1204(a).

117. *Id.* § 1205.

118. *Id.* § 1206(a).

119. *Id.* § 1206(b).

evidence need to be applied, MAPA allows certain types of evidence to be admitted if it is the type of evidence that a reasonably prudent person would have relied on.<sup>120</sup> For example, hearsay could be considered evidence even though it would generally violate rules of evidence;<sup>121</sup>

5) Members are not allowed to participate in the decision unless they “have heard all testimony and reviewed all other evidence submitted for the board’s decision” either in person, by recording, or transcripts;<sup>122</sup>

6) The “final decision in a contested hearing needs to be in writing and shall separately state findings of fact and conclusions of law.” Copies need to be delivered to each party.<sup>123</sup>

The second step is for the town to define the magnitude or nature of development proposals that would be subject to OTR. The definition adopted can be broad to include all projects or very narrow to include very few projects. For example, a town could require only PRDs to be heard OTR. A town may also consider the following for on-the-record review: site plan review; conditional-use review; design review; preliminary and final subdivision review; local Act 250 Review; and/or appeals and variance requests.<sup>124</sup> The municipality must then designate that appeals be heard OTR either through a resolution, the adoption of a bylaw, or as otherwise instructed by voters.<sup>125</sup>

Finally, a town must take further steps to ensure that its meetings produce an adequate record for court review. In order to preserve the record, a town must record the proceedings.<sup>126</sup> Municipalities that do not have recording equipment will need to invest in equipment that is dependable and capable of producing a clear record. Staff and board members may need initial training to ensure the clarity of the record.

In addition to the production of a recording, the proceeding evidence must also be clearly presented. Training efforts for towns switching to

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120. *Id.* (“When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible under those rules may be admitted if it is of a type commonly relied upon by reasonably prudent people in the conduct of their affairs.”).

121. TECHNICAL PAPER #4, *supra* note 17, at 3.

122. tit. 24, § 1208.

123. VT. STAT. ANN. tit. 24, § 1209(a), (e) (2007).

124. VT. LAND USE EDUC. & TRAINING COLLABORATIVE, MANUAL OF PROCEDURES FOR ADMINISTRATION AND ENFORCEMENT OF VERMONT ZONING BYLAWS UNDER 24 V.S.A. 117, 119 (2005), available at [http://vpic.info/pubs/admin\\_manual.doc](http://vpic.info/pubs/admin_manual.doc).

125. *Id.*

126. *See In re Dunnett*, 172 Vt. 196, 198, 776 A.2d 406, 409 (Vt. 2001) (noting the environmental court’s holding “that the board’s practice of simply keeping minutes of hearings as opposed to audio or video recordings did not satisfy the requirements that proceedings ‘be recorded’ found in the Municipal Administrative Procedure Act”).

OTR should include training on how to speak clearly and into a microphone. Currently some cities that record meetings only have one microphone placed in front of the chair. Other testimony, even of other board members, ends up being muffled. One solution to this problem is to either have multiple microphones, or to assign a staff member or volunteer make sure that the person speaking has a microphone.

Another issue is to make sure that the recording device is working properly. Proceedings should be recessed if tapes need to be changed or there are brief technical delays so that no testimony is missed. The main difficulty for many cities will be to clearly identify who is talking and what they are talking about. The board chair should require people to identify themselves, where they live, and then ask people to not talk over one another. The chair should also describe what is going on in the meeting. For example, the chair could note for the record that “Mr. Witness is referring to x plan or y document.”<sup>127</sup> The chair is not the only one who needs to be specific about who is being identified. If one party is clear and the other party is not, then the clear party will have an advantage during the appeals process.

In addition to identifying who is speaking, the speaker also needs to identify which documents are being discussed. People are accustomed to using body language such as pointing to a map. When the dispute is OTR however; body language needs to be translated to the record. For example, instead of pointing to a map, the speaker should say the name of the document, the page number, and any other identifying subsection or grid that could help a court determine to what a witness was referring.<sup>128</sup>

The complexity of implementing these new procedures will depend on the procedures already in use. For some towns, the only difference between OTR and de novo review is the purchase of audio recording equipment. For example, in the Town of Stowe the process did not fundamentally change, since the Town already had MAPA procedures in place and the primary difference was the purchase of audio recording equipment.<sup>129</sup>

Contrary to Stowe’s experience, Town of Morristown found the process to be more complicated. Morristown was the first town to have a decision reviewed by the Vermont Environmental Court OTR. It is possible that this contributed to the technical expertise needed. The court stated that “because this is the first on-the-record appeal to proceed to consideration in

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127. DWIGHT H. MERRIAM, *THE COMPLETE GUIDE TO ZONING* 173–80 (2005).

128. *Id.*

129. Posting of Tom Jackman, *supra* note 109.

this Court, the state of the record has become confused.”<sup>130</sup> Morristown found that the court expected the kind of technical detail in the findings and conclusions that it sees from legal filings.<sup>131</sup> The Town experienced difficulty meeting the standards, in part because volunteers and a nonlegal professional zoning administrator staff the DRB. Morristown expressed concern that hiring additional professional assistance to help with the writing processes and preservation of the record would diminish the role of volunteer boards.<sup>132</sup>

*In re Leikert* represents one of the challenges presented by OTR.<sup>133</sup> The Leikert family requested a conditional-use permit to operate an auto repair shop within their home.<sup>134</sup> The Morristown DRB denied the request, which the Leikerts appealed to the environmental court. Since the initial Morristown hearing was not recorded, the environmental court remanded the matter to the DRB for another hearing to create an adequate record.<sup>135</sup> Eventually, the case reached the Vermont Supreme Court, where it was remanded again in order for the DRB to complete its findings and conclusions.<sup>136</sup> Although the Town based its decision on the adverse effect on traffic and the character of the neighborhood, the court reasoned that the DRB did not provide evidence to show that traffic would be affected.<sup>137</sup> The court recognized that “developmental review boards are often made up mostly of lay people, many of whom have limited experience or training in adjudicative matters. But property owners are entitled to a decision that leaves them with an understanding of how a board's decision was reached based on the evidence submitted.”<sup>138</sup> This decision was not the first time the court noted the importance of a DRB in explaining its reasoning. In 1990, the Vermont Supreme Court stated in the case of *In re Petition of Town of Sherburne* that when a board adequately explains its findings, those

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130. *In re J.D. Assoc.*, No. 83-5-99, at 1 (Vt. Env'tl. Ct. May 15, 2001), available at <http://vermontjudiciary.org/GTC/Environmental/Opinions.aspx> (follow “Filing Year: 2001” hyperlink; then follow “Appeal of J.D. Associates” hyperlink).

131. Posting of Mark Leonard, *supra* note 107.

132. *Id.*

133. *In re Leikert*, No. 2004-213, 2004 WL 5582097 (Vt. Nov. 2004).

134. *Id.* at \*1.

135. *Id.*

136. *Id.* at \*2.

137. *Id.* at \*2 (“As for traffic, the DRB stated that there would be limited visibility for vehicles entering and leaving the Leikerts' residence, which is located at the crest of a steep hill. Although this single sentence provides some basis for the DRB's decision regarding the effect of the proposal on traffic, it says virtually nothing about the state of the evidence on this subject.”).

138. *Id.* at \*2.

findings will generally be upheld even if the record “contains conflicting evidence.”<sup>139</sup>

In addition to explaining the findings, the DRB is also required to file briefs according to the Vermont Rules of Appellate Procedure (VRAP).<sup>140</sup> Adherence to VRAP is required for all appeals, but with OTR, failure to comply can result in the case being remanded. If the case is remanded, the local board will incur the additional costs of listening to testimony and repeating procedures. In the case of *In re Ledgewood Condo PUD*, the court stated, “Briefs submitted for on-the-record appeals must conform to the VRAP and are required to contain a ‘statement of the issues, table of contents and authorities, a statement of the case, an argument that must among other things contain citations to the record, appropriate authorities and statutes.’”<sup>141</sup> In addition to the purchase of audio equipment, a town may consider staff and volunteer capacity to prepare briefs in conformance with VRAP.

For some towns, the additional procedures are not worth the effort, especially because of the low rate of appeal. Former Brattleboro DRB chair David Gartensteinin said, “[OTR] would be ‘solving a problem that did not exist.’”<sup>142</sup> Thomas Durkin, one of two judges at the Vermont Environmental Court, agreed, noting that “it is important to . . . [consider] the scale of the problem the DRB was seeking to solve.”<sup>143</sup>

On January 8, 2009, Governor Douglas stated in his inaugural address that “we must expedite the chilling and costly effect of our lengthy appeals process by instituting ‘on-the-record review’ – one formal hearing where all evidence is submitted and examined.”<sup>144</sup> Despite many proponents of OTR, there has been little interest overall. Only thirteen cities have adopted

139. *In re Town of Sherburne*, 154 Vt. 596, 605, 581 A.2d 274, 279 (Vt. 1990).

140. Vt. R.App. P. 28.

141. *In re Ledgewood Condo Planned Unit Dev. Conditional Use Application*, No. 150-7-07, at 6 (Vt. Env'tl. Ct. Aug. 26, 2008), available at <http://vermontjudiciary.org/GTC/Environmental/Opinions.aspx> (follow “Filing Year: 2008” hyperlink; then follow “Ledgewood Condo PUD CU Amend Application” hyperlink). (quoting *In re Miller Conditional Use Application*, No. 59-3-07, slip op. at 3–6 (Vt. Env'tl. Ct. Nov. 5, 2007), available at <http://vermontjudiciary.org/GTC/Environmental/Opinions.aspx> (follow “Filing Year: 2007” hyperlink; then follow “Miller Conditional Use Application (After Remand)” hyperlink).

142. Lise, *Brattleboro Selectboard Meeting: DRB Finally Gets on the Record Review—But What Does It All Mean?*, iBrattleboro.com, Feb. 4, 2009, <http://www.ibrattleboro.com/article.php/20090203235610876>.

143. *Id.*

144. Governor James H. Douglas, Inaugural Address, at 13 (2009), (transcript available at [http://governor.vermont.gov/speeches/Inaugural\\_2009.pdf](http://governor.vermont.gov/speeches/Inaugural_2009.pdf)).

OTR.<sup>145</sup> The Natural Resource Board tried offering OTR proceedings as a three-year pilot project and no cities signed up for the program.<sup>146</sup>

Despite the lack of participation, there are good reasons to make the switch. The primary reason is to keep local control. The *JAM Golf* decision may increase the number of appeals. Towns may prefer to decide these matters locally to the extent possible, even if it means agreeing to additional procedures, because it is the locals who will be most affected by the outcome. When making the decision to adopt OTR, towns should consider: the size of the municipality; the rate of development; the frequency of appeals and the available staff resources; the importance of citizen participation and local control; and the procedures already in place.

### CONCLUSION

The *JAM Golf* case is an opportunity. Towns now have an incentive to clarify their standards and evaluate the way in which their appeals are reviewed. While the rate of appeal is low, even a few land use decisions can have a profound impact on the character of a community and the protection of resources. The *JAM Golf* decision is likely to increase the number of appeals.<sup>147</sup> Developers now know about the potential to have a decision thrown out based on vague city standards.<sup>148</sup> Practitioners have already noticed development attorneys asking city attorneys about their standards.<sup>149</sup> In addition, an applicant from a de novo community may appeal in hopes of a more favorable opinion. Courts will continue requiring specificity in town bylaws. Towns have the chance to think about what natural resources are locally valuable; map the resources; and specifically protect those resources in their town plan, zoning ordinance, and application process. Towns also have the chance to retain more local control during the appeals process. As development pressures increase, the protection of local natural resources may depend on the ability of towns to carefully consider the measures taken after *JAM Golf*.

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145. Lise, *supra* note 142.

146. E-mail from Michael Zahner, Executive Director, Vt, Natural Res. Board, to author (Apr. 13, 2009) (on file with author).

147. *What the JAM Golf Decision Will Mean for Your Municipality*, *supra* note 21.

148. *Id.*

149. See Gerry Tarrant, *supra* note 6 (explaining that lawyers are beginning to ask, “[W]hat are your standards?”).