

GIVINGS AND TAKINGS: CHALLENGES TO REGULATION UNDER VERMONT’S ACT 250

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INTRODUCTION

John McGill never wanted to become a litigant in a decades-long fight over Vermont environmental regulation. With his passion for mountain biking and can-do attitude toward building new trails, the affable 59-year-old could often be found with a rake or shovel in his hand scratching in new lines amidst a crisscross of old skid roads on the southeast side of Umpire Mountain.² In 2007, McGill and his wife purchased 1,100 acres of forestland in Victory, Vermont, enrolling it in current use to harvest timber, remedy erosion problems from prior logging operations, and build a new network of mountain bike trails.³ Umpire Mountain, with a steep-but-not-too-steep slope pitch and a topsoil layer that allowed bike tires to stick in turns between jumbles of granite, was a perfect spot for McGill's recreation vision. By early 2019, McGill and his collaborating trail builders had created over 20 miles of winding singletrack on the mountainside and built a reputation for mountain bike trails worth travelling to from many states away.⁴ Then, Vermont's District Seven Act 250 Environmental Commission called.

Unbeknownst to McGill or his trail-building partners, the Victory town clerk had inquired with the local environmental administrators as to whether McGill's trail project, known to all as the Victory Hill Sector (VHS), needed further permitting under state law.⁵ The Environmental Commissioner for District Seven, based in nearby St. Johnsbury, is empowered to issue Jurisdictional Opinions (JOs) as to whether certain land uses fall under the purview of Act 250, Vermont's omnibus environmental statute.⁶ When the Commissioner passed down the JO, McGill and company were shocked and distressed to find out that, because they had charged visiting mountain bikers a small fee and hosted multiple yearly mountain bike races, their trail work "qualifie[d] as a 'development' pursuant to" Act 250.⁷ Prior to the JO, no trail builder in Vermont had considered that their trail project might qualify for heightened environmental regulatory scrutiny.⁸ If trails *did* trigger such

2. Justin Trombly, *Victory Hill Sector Shuts Down Trails After Act 250 Permit Ruling*, VTDIGGER (June 24, 2019, 7:29 PM), <https://vtdigger.org/2019/06/24/victory-hill-sector-shuts-down-trails-after-act-250-permit-ruling/>.

3. Victory Hills Trails, Victory Hill Sector, Conservation Collaboratives, LLC, Carol Easter, JO #7-286, § II Facts and Documents, VT. NAT. RES. BD. DIST. NO. 7 ENV'T COMM'N (May 3, 2019).

4. Trombly, *supra* note 2.

5. *Id.*; Trombly, *supra* note 2.

6. Act 250 empowers District Commissions to issue a type of advisory opinion about jurisdiction over affected projects, parcels, and land uses that may be in an ambiguous regulatory zone. VT. STAT. ANN. tit. 10 § 6007(c); CINDY CORLETT ARGENTINE, ACT 250: A GUIDE TO STATE AND REGIONAL LAND USE REGULATION, 22-23, 54 (2008). If an applicant is displeased with the JO, they may appeal to the Vermont Environmental Court. ARGENTINE at 54.

7. Victory Hills Trails, JO #7-286, § II, VT. NAT. RES. BD. DIST. NO. 7 ENV'T COMM'N.

8. Lisa Lynn, *Should Act 250 Apply to Trails?*, VT. SPORTS (Aug. 29, 2019), <https://vtsports.com/should-act-250-apply-to-trails/>.

scrutiny, every trail system of a certain size, no matter how environmentally oriented or community-minded, would need to file complex permitting paperwork and potentially expose itself to years of litigation concerning any ecological effects it might have. If the court upheld the Victory Hill Sector JO on appeal and compelled McGill to apply for an Act 250 permit, it would stymie trail development and halt recreational use of a renowned resource until McGill completed the permitting—which might take several years.⁹

One of the few, if any, legal pathways available to McGill would have been a regulatory takings challenge to the state environmental law claiming that the regulation was unconstitutional. The concept of takings begins with the Fifth Amendment to the United States Constitution. The Takings Clause focuses the question of government land takings on two matters of law: (1) the “public use” of the land taken; and (2) the “just compensation” given to the land’s private owner.¹⁰ With any legal taking, a court must query both elements: valid public utility for the land and adequate compensation for the transfer.¹¹

The idea of public utility supports a variety of durable restrictions on private land use. Restrictions imposed on private landowners, the logic goes, benefit the public as a whole. In Vermont, the comprehensive environmental legislation enshrined in 1970’s Land Use and Development Law—known to all as Act 250—has spawned an arcane web of land use regulations and restrictions that have far-ranging and controversial implications for development advocates and conservation-minded citizens alike.¹² With Act 250 recently turning 50 years old, Vermont is due to reassess the legal principles behind the legislation and to engage in thorough Act 250 revision.¹³

The intersection of Vermont’s environmental regulations and Fifth Amendment takings jurisprudence demonstrates the need for reform. The overlap of Act 250 and takings also highlights conflicting values—statewide consistency against local control; entrenched interests against emergent needs; and economic growth against ecological preservation—to address in the reform process. This Note will focus especially on the connections

9. See Act 250, VICTORY HILL TRAIL CLUB, <https://victoryhillmtb.com/act-250-2/> (last visited Dec. 21, 2023) (summarizing the Club’s uncertain future pending the resolution of Act 250 jurisdiction).

10. U.S. CONST. amend. V.

11. See generally *Kelo v. City of New London*, 545 U.S. 469, 479–83 (2005) (defining public utility under the Takings Clause); see also *Penn Cent. Transp. Co. v. N.Y.C.*, 438 U.S. 104, 124 (1978) (defining “compensation”).

12. VT. STAT. ANN. tit. 10, ch. 151; Emma Cotton, *In Towns with No Zoning, Reopened Supreme Court Decision Has Big Implications for Act 250*, VTDIGGER (Nov. 23, 2021, 1:39 PM), <https://vtdigger.org/2021/11/23/in-towns-with-no-zoning-reopened-supreme-court-decision-has-big-implications-for-act-250/>.

13. *History of Act 250*, VT. NAT. RES. BD., <https://nrb.vermont.gov/act250-program/history> (last visited Dec. 21, 2023).

between these regulatory takings claims and the outdoor recreation industry in Vermont. Ski-area development forms an ideal case study for Act 250's regulatory application because the ski industry sits at the crossroads of the Act's twin intentions—to be economically oriented, yet conservation-minded. Understanding how regulations are—and have been—applied to ski-area development helps frame the discussion of Act 250's impact. Equally relevant is the question of whether future recreation projects, such as the Victory Hill Trails system, will trigger Act 250 jurisdiction.¹⁴ And the weight of Act 250 goes far beyond the recreation resources in and of themselves. The application of Act 250 regulation to housing and development projects in ski-area towns and outdoor recreation hotspots¹⁵ provides a lens on the potential incongruities of the regulatory scheme and opportunities for revision.

This Note investigates the constitutional land use framework, which can undergird the Act 250 conversation in Vermont. By applying federal takings doctrine to Act 250 regulatory questions in Vermont and examining cases in which the two have overlapped, this Note will illuminate a constitutional framework for analysis. One way to look at progressive land use policy is as an adjudication between “the conflicting interests of the parties,”¹⁶ dependent on a balancing of needs between individual actors. In Vermont, this policy often surfaces as conflicts between private landowners and state or local regulation.¹⁷ In a takings context, courts have decided where private land use rights end, where an effective regulatory regime begins, and how to decide

14. See Lynn, *supra* note 8 (“While the Victory Hill decision may seem like an isolated incident, it fueled something of a firestorm in the trail building community.”).

15. Ski-area towns, more broadly referred to as “mountain towns,” are generally defined by their proximity to existing alpine-ski infrastructure. See BLISTER Podcast, *Reviewing the News & Mountain Sex w/ Cody Townsend* (Sept. 2022) (Ep.229), BLISTER REVIEW, at 46:59 (Oct. 5, 2022), <https://blisterreview.com/podcasts/reviewing-the-news-mountain-sex-w-cody-townsend-september-2022-ep-229> (defining the proverbial “mountain town” as a locale where the “economy, culture, and community is completely centered around the mountains,” especially with respect to alpine-ski resorts); see also Lynn, *supra* note 8. What defines a “recreation hotspot” that is not also a ski-area town is less clear. One way to define such places in Vermont is to consider funding allocated through the Vermont Outdoor Recreation Economic Collaborative (VOREC) to municipalities and local nonprofits for trails and outdoor-infrastructure projects. *Vermont Outdoor Recreation Economic Collaborative*, VT. AGENCY OF NAT. RES.: DEP’T OF FORESTS – PARKS & RECREATION, <https://fpr.vermont.gov/VOREC> (last updated Dec. 13, 2023). In 2022 alone, VOREC awarded \$4.5 million to 24 separate local projects around the state, including projects in the Mad River Valley, the Killington area, and the Northeast Kingdom. See *Congrats to the 2022 VOREC Community Grant Recipients!*, VT. MOUNTAIN BIKE ASS’N (Mar. 28, 2022), <https://vmba.org/congrats-to-the-2022-vorec-community-grant-recipients/>.

16. See Joseph William Singer, *The Ownership Society and Takings of Property*, 30 HARV. ENV’T L. REV. 309, 313 (2006) (contrasting land use policy as “guidance in choosing between the conflicting interests of the parties” with policy that “adopt[s] conceptions of what ownership means” prior to “apply[ing] a decision procedure”).

17. See Richard O. Brooks, *Legal Realism, Norman Williams, and Vermont’s Act 250*, 20 VT. L. REV. 699, 713 (1996) (discussing the effect of “legal realism” on Environmental Board and Environmental Court decision-making processes under Act 250).

when regulations overreach.¹⁸ A reinvigorated public conversation and legislative effort to reform Act 250 must involve a similar dual purpose, centered around both environmental conservation and economic development. Vermonters must agree on what regulatory limits on private property to condone and promote. They must also agree on an economic framework that justifies the restrictions posed by Act 250.¹⁹ This Note will explore theoretical approaches to regulatory takings in relation to Act 250 and the potential for regulatory reform. Analytically, this Note will examine cases where takings challenges and Act 250 have intersected to frame a discussion about the meeting of landowners' rights and state interests, as well as a discussion about the role of Vermont's outdoor-recreation economy.

Part I of this Note will approach land use regulation in Vermont from a historical and ecological angle, discussing the genesis of Vermont's unusual approach to regulating private land ownership and commercial development. One question that Act 250 raises is how to stop commercial development from outstripping efforts for ecological protection; equally important is the question of how to make protection and conservation a matter of public interest, not just a regulatory hurdle for developers to clear. Looking at the background of Act 250 also requires understanding the legal theory of its foundations alongside the development history of the Vermont ski industry. Because this Note addresses takings jurisprudence as it intersects with Act 250, Part I glosses the history of takings jurisprudence to provide context for challenges to Act 250 regulation under the theory of regulatory takings. Part I provides a foundation to understand Act 250 as a product of historical need and regulatory importance and to consider how the underpinnings of the Act may look different 50 years after its passage.

In Part II, this Note will discuss Act 250's past and present statutory application as it has intersected with the twin poles of the Takings Clause, analyzing decisions about permissible private uses of land and those concerning the economic value of legally restricting certain uses. To analyze Act 250 legal decisions as they pertain to landowners' rights to challenge overreaching regulations, this Note will focus on cases in the Vermont court system where the regulatory application of Act 250 became the basis for a takings claim. Vermont was the first state to enshrine a takings provision in its state constitution, which declares that "whenever any person's property is taken for the use of the public, the owner ought to receive an equivalent in

18. See discussion *infra* Section II(D).

19. See Fred Bosselman, *Four Land Ethics: Order, Reform, Responsibility, Opportunity*, 24 ENV'T L. 1439, 1441 (1994) (suggesting that "only a pluralistic process in which multiple land ethics are debated will be a satisfactory basis for the resolution of many of the current bitter conflicts over land in America").

money.”²⁰ Thus, takings in Vermont are at the heart of the state’s constitutional legal framework. With Act 250 standing tall as Vermont’s foremost environmental law, the intersection of takings and environmental regulation speaks to the state’s deepest-held legal ambitions and priorities.

Vermont’s legal restrictions on development of recreational resources and development that would affect recreational resources intersects with Takings Clause jurisprudence when landowners seek out a method to challenge regulations that may have overstepped their bounds. On balance, Act 250 chooses to protect entrenched environmental values over emergent economic demands, and outdoor recreation is an example of an economy constrained by such regulation.²¹ According to eminent Act 250 scholar Richard O. Brooks, to recognize this choice in relation to takings challenges requires viewing “judicial decision-making as part of a normative realm requiring reasoned ethical choice among conflicting values and principles.”²² With continued development pressures on wild lands and recreation hotspots, Vermont courts will likely hear more takings challenges that emerge as a result of Act 250’s broad regulatory scope. The effort toward Act 250 reform rightly involves a review of Takings Clause jurisprudence as applied to state regulation, with a close eye on the resolution of prior cases. This Note argues that the state needs added regulatory specificity to move forward with Act 250, and that those involved in the regulatory process must learn the lessons of past takings challenges to address the friction between private land rights and the state regulatory regime.

I. BACKGROUND

A. Historical Background: Act 250 at 50 Years Old

Act 250 is the legislative product of the bureaucratic tension between economic growth and “smart” development. At the heart of that tension was an ongoing conversation at the gubernatorial level about three major issues that were becoming more and more visible at midcentury: “[t]he decline of Vermont’s farming, the growing dependence on tourism, and the spread of the “delights” of modern urbanization. . . .”²³ When officials in the administration of then-Governor Deane C. Davis began discussing the passage of comprehensive environmental regulation in the late 1960s, the

20. VT. CONST. ch.1, art. II; John Echeverria, *From a “Darkling Plain” to What?: The Regulatory Takings Issue in U.S. Law and Policy*, 30 VT. L. REV. 969, 969–70 (2006).

21. See VT. STAT. ANN. tit. 10, § 6042(a)(6)(A)(2015) (“[E]conomic development should be pursued selectively so as to provide maximum economic development with minimal environmental impact.”).

22. Brooks, *supra* note 17, at 718.

23. *Id.* at 709.

goal was to “ensure quality change” as part of the Vermont landscape.²⁴ Prior to Act 250, Vermont lacked comprehensive land use regulation at the state level, leaving it vulnerable to the depredations of development.²⁵ At the same time, certain regions or counties were poised to become hotbeds of development—for instance, the ski-area towns of Wilmington and Dover in southern Windham County.²⁶ Other areas in the less-developed northeast region of the state would presumably retain a more “rural” character, lacking the economic drivers that tourism and the ski industry offered (and continue to offer). Different areas of the state varied substantially, not just in the *need* for developmental land use regulation, but also in the potential *application* of the regulatory system in practice. Recognizing the variety of needs and applications within the state, Governor Davis and the architects of Act 250 decided that “the power to review projects and grant permits [should] be vested more locally, in a group of regional commissions.”²⁷

Act 250 has a dual structure, with nine District Commissions serving as the primary regulatory bodies reviewing development applications that fall under the purview of Act 250.²⁸ The District Commissions have historically approved over 98% of the applications submitted; if denied at the Commission level, the landowner may appeal the application to the Vermont Environmental Board, which became a sub-function of the state Environmental Court in 2005.²⁹ The District Commissions satisfy the local-control element, while the appeal function at the state level allows for broader oversight of individual projects by those beyond the immediate community.³⁰ Typically, the parties filing appeals are developers whose project applications were denied at the Commission level; however, other parties, such as municipalities and environmental groups, can also bring challenges at the state level.³¹

Not all developmental projects fall under Act 250 jurisdiction, and not all land uses involve obtaining an Act 250 permit.³² Most projects that fall under Act 250 require applications because they are for a “commercial

24. VT. NAT. RES. BD., *supra* note 13.

25. *Id.*

26. *Id.*

27. VT. NAT. RES. BD., ACT 250: A GUIDE TO VERMONT'S LAND USE LAW 3 (2000) <https://townofwoodstock.org/wp-content/uploads/2016/02/act250brochure.pdf>.

28. *Id.* at 11–15. In applying for an Act 250 permit, landowners must demonstrate to the District Environmental Commission that the proposed development meets ten “criteria.” *Id.* The criteria range in type from water and air pollution (Criterion 1) to “Aesthetics, Historical Sites, and Rare or Irreplaceable Natural Areas” (Criterion 8). *Id.* The burden of proof for most—though not all—criteria and sub-criteria is on the applicant. VT. STAT. ANN. tit. 10, § 6086(a)(1–10); ARGENTINE, *supra* note 6, at 57.

29. VT. NAT. RES. BD., *supra* note 13.

30. ARGENTINE, *supra* note 6, at 54.

31. *Id.* at 29–32 (participating in Act 250 Hearings); KEVIN KENNEDY, ACT 250: PROBLEMS AND PERSPECTIVES 2–3 (1993).

32. ARGENTINE, *supra* note 6, at 3.

purpose,” and they involve more than ten acres total.³³ Other projects subject to Act 250 review include the construction of housing developments with ten or more units, subdivision into ten or more lots, building roads to house developments, upper-elevation construction of any kind (defined as above 2,500 feet of elevation), and any governmental project over ten acres that involves construction of any kind.³⁴ Act 250’s jurisdiction is not comprehensive, but it covers a remarkable breadth of land use ventures. Moreover, the most visible, significant, and controversial projects—e.g., new housing developments, commercial zones in once-rural areas, and ski-area expansion—trigger Act 250 and direct community attention to the review process as a bulwark against unwanted development.³⁵

B. Economic Background: Outdoor Recreation-Industry Concerns in Vermont

One of the most topical ways to assess Act 250’s impact is to look at how the courts have decided issues concerning ski-area expansion. In Vermont, the ski industry and environmental regulation go hand in hand. Concerns over the development pressures that popular ski areas create were a major impetus for enacting Act 250.³⁶ Outdoor recreation, a significant economic driver in Vermont,³⁷ depends as much on the scenic beauty of the Green Mountain State’s forested uplands and bucolic valleys to draw visitors as it does on continued development and expansion of ski-area infrastructure and trails systems.

Vermont’s first rope tow, a predecessor to the modern chair lift, was installed in Woodstock in 1934, heralding the start of a major industry.³⁸ By

33. *Id.* Although “commercial purpose” has been expanded within the statutory definition since the 1970s, it is sufficient to understand that most projects deemed “commercial” in nature are owned by businesses or LLCs and charge a fee for a service of some kind.

34. *Id.* Act 250 jurisdiction is itself a contentious topic, especially when it comes to outdoor recreation and the seemingly *de minimis* impacts of certain projects. *See* VT. STAT. ANN. tit. 10, § 6001(3)(a) (defining “development” to include three separate jurisdictional terms, regardless of other circumstances shaping the developmental context); *see also* Bradford R. Farrell, *Riding the Trail to Expanding Vermont’s Economy: The Case for Simple Recreational Trail Regulation*, 23 VT. J. ENV’T L. 413, 420 (2022) (noting that § 6001(3)(a) does not “define the triggering [jurisdictional] language” itself but instead relies on the Natural Resource Board’s agency rules). More scholarship is needed to determine the historical development of the present jurisdictional issues and the best path forward for jurisdictional reform.

35. *See* 2 RICHARD O. BROOKS, *TOWARD COMMUNITY SUSTAINABILITY: VERMONT’S ACT 250* 3 (1997) (“Vermont’s Act 250 has sought the sustainable development ideal in its . . . permitting of a community’s development conditional upon protecting natural resources.”).

36. VT. NAT. RES. BD., *supra* note 13.

37. *See* Vt. Exec. Order No. 04-20 (Oct. 5, 2020) (noting, in part, that outdoor recreation in Vermont brings in “\$2.5 billion in consumer spending”).

38. Jeremy Davis, *The History of Vermont Skiing: 100 Years of Growth*, VERMONTER.COM, <https://web.archive.org/web/20061017063409/http://www.vermonter.com/skihistory.asp> (last visited Dec. 10, 2022).

1940, Stowe Mountain Resort, already a hub for winter recreation of other kinds, had built a chair lift to ferry skiers over a mile up Mount Mansfield at previously unimaginable speeds; in the 1950s, dozens of ski areas, including Mount Snow, Okemo Killington, and Sugarbush, began operations.³⁹ Vermont's list of ski areas peaked at 81 total in 1966, only to decline over the subsequent decades due to inconsistent snow, the high costs of trail expansion and infrastructure maintenance, and the accelerating market capitalization by corporate ski-area conglomerates.⁴⁰ Those resorts that have weathered the intervening decades, however, have prospered and made a name for themselves among northeastern ski enthusiasts.⁴¹ Vermont ski resorts received skier traffic of 3.8 million skier days during the winter of 2021-22, making alpine skiing a \$1.6 billion industry that season.⁴² As the ski industry in Vermont has grown from its humble beginnings to its present position as an economic behemoth earning billions of dollars every winter, Act 250 has both shaped the industry's development and guided its environmental perspective.⁴³

Legal scholars have described Act 250's permissive attitude toward ski-area development as "an anomaly in the allowance of land use permits under Act 250."⁴⁴ Indeed, the rapid growth of the ski industry in the 1960s, spurred on by the opening of Interstates 89 and 91, largely motivated the passage of comprehensive environmental legislation.⁴⁵ This conflict—between a growing local ski industry and an environmental anti-development agenda—partly indicates that comprehensive land use planning requires "a consensus on goals and policies which even a relatively homogenous state like Vermont could not achieve."⁴⁶ In the case of the ski industry, the high water demands of human-made snow (requiring river and stream diversion or artificial ponds) often generates conflict borne of the "contrary demands" for water resources.⁴⁷ Lacking a standard of stricter compliance, however, those

39. *Id.*

40. *Id.* Arguably, increased environmental oversight has also bogged down the ski industry since Act 250's passage.

41. *Id.*

42. *Vermont's Ski Industry Reports 6.5% Business Rebound for 2021-22 Winter Season*, VERMONTBIZ (June 15, 2022, 8:36 AM), <https://vermontbiz.com/news/2022/june/15/vermonts-ski-industry-reports-65-business-rebound-2021-22-winter-season>.

43. See generally Jonathan Isham & Jeff Polubinski, *Killington Mountain Resort: A Case Study of Green Expansion in Vermont*, 26 VT. L. REV. 565 (2002) (discussing the evolution of Killington Mountain Resort through the "Permit Chronology" of its Act 250 applications).

44. James Murphy, *Vermont's Act 250 and the Problem of Sprawl*, 9 ALB. L. REV. ENV'T OUTLOOK 205, 227 (2004).

45. VT. NAT. RES. BD., *supra* note 13.

46. Brooks, *supra* note 17, at 709.

47. BROOKS, *supra* note 35, at 5.

opposing development can use permit hearings, both at the local and regional level, as recourse to or a stopgap against the proposed ski-area expansions.⁴⁸

Understanding Act 250, a regulatory scheme with a significant economic effect on Vermont, requires an analysis of case law concerning challenges to ski-area development. Some of these cases involve corporate ski areas litigating development and expansion issues related to snowmaking, trail cutting, and resort expansion.⁴⁹ Regulatory judgments about ski-area development also apply to recreation projects of other types.⁵⁰ Ski resorts typically operate as for-profit entities under larger out-of-state corporate ownership.⁵¹ However, more economically modest recreational resources also fall under Act 250 jurisdiction, including newly built recreation trails for Nordic and backcountry skiing, mountain biking, and hiking; existing trail corridors expanding onto public land or threatened by private development; and recreational facilities deemed to interfere with the “viewshed” of a scenic area.⁵²

Recreation functions as a critical part of Vermont’s tourist economy. Tourism as an economic driver has increased beyond what Vermont legislators could have imagined in the 1960s, when the state was just beginning to transition away from a natural resources-based economy.⁵³ Act 250’s jurisdictional control over for-profit ski areas and not-for-profit recreational trails alike means that engaged citizens must consider regulatory reform a make-or-break issue for Vermont’s recreational resources and the “recreation economy” in the 21st century.⁵⁴

C. Theoretical Background: Vermont’s Landscape as “Contested Commodity”

Vermont’s demographic history and Town Meeting-based form of local government make it an ideal state to analyze land use through the theoretical

48. See Robert F. Gruenig, *Killington Mountain and Act 250: An Eco-Legal Perspective*, 26 VT. L. REV. 543, 549 (2002) (discussing how “Act 250’s substantive criteria are supplemented by citizen participation”).

49. See generally Isham & Polubinski, *supra* note 43 (surveying the litigation within the ski industry arising from apparent or real violation of Act 250 requirements).

50. See *Killington, Ltd. v. State*, 668 A.2d 1278, 1284 (Vt. 1995) (noting that a takings claim brought by a ski area is analogous to a claim brought by a non-commercial “property owner”).

51. *Who Owns Which Mountain Resorts*, NAT’L SKI AREAS ASS’N, https://www.nsaa.org/NSAA/Media/Who_Owns_Which_Mountain_Resorts.aspx (last visited Dec. 21, 2023).

52. *Dover Valley Trail*, 2007 Vt. Env’tl. LEXIS 77 (Vt. Env’t 2007); *In re Kisiel*, 772 A.2d 135 (Vt. 2000); *In re Free Heel*, 2007 Vt. Env’tl. LEXIS 36 (Vt. Env’t 2007).

53. BROOKS, *supra* note 35, at 20.

54. Farrell, *supra* note 34, at 439.

lens of neo-prudentialist legal theory,⁵⁵ recognizing (per Richard O. Brooks) that “the reality on which law works is itself a reality shaped by human perceptions and concepts.”⁵⁶ Prior to Act 250, Vermont’s piecemeal approach to environmental protection led to a wide variety of regional discrepancies in handling critical planning issues—water quality, zoning, development controls, and highway layout, to name a few.⁵⁷ The legislative success in passing an omnibus bill for environmental protection and land use regulation in 1970 demonstrates an unusual legislative consensus—one that would be even rarer today.⁵⁸ Understanding how Vermont’s consensus-building worked then—and works now—requires a discussion of the state’s numerous local participative democratic institutions, as they intersect with the deep roots of American private-property concerns and post-industrial theories of land as both environment and commodity.⁵⁹

How then, to build a new community consensus around land use for a “new” and far different Vermont than the state that Act 250 initially regulated? Two distinct principles for legal analysis would help lawyers, judges, and community leaders build a new consensus. First is the neo-prudentialist understanding of the law, which eloquently argues for the importance of “recogniz[ing] judicial decision-making as part of a normative realm requiring reasoned ethical choice among conflicting values and principles.”⁶⁰ Critically, a neo-prudential viewpoint on Act 250 would allow decision-makers in the legislature to see reform not as a mechanical “updating” of a regulatory agenda, but instead as an active negotiation between the “conflicting values” that will shape Vermont.⁶¹ Second, such active negotiation must be grounded in the contradictions or conflicts that it seeks to inhabit and thus resolve: for example, the ski-area investor who needs additional water resources opposed by the local environmentalist who opposes stream diversion. Neo-prudential thinking about Act 250 would recognize the tension between water in the form of human-made snow, as a

55. Neo-prudentialism, a theoretical continuation of mid-20th-century legal realism, emphasizes the interplay between the established legal structure of human communities and the “decision-making context” of policy-making. Brooks, *supra* note 17, at 718.

56. *Id.*

57. VT. NAT. RES. BD., *supra* note 13.

58. Peter Hirschfeld, *Vt. Legislature Adjourns, But Vetoes on Budget and Other Bills Likely Await*, VT. PUB. (May 12, 2023, 11:36 PM), <https://www.vermontpublic.org/local-news/2023-05-12/vt-legislature-adjourns-but-vetoes-on-budget-and-other-bills-likely-await>.

59. See *In re Interim Bylaw*, Waitsfield, 742 A.2d 742, 743–44 (Vt. 1999) (analyzing democratic institutions regarding land use in Vermont and the effect of a temporary zoning-board bylaw on a landowner’s ability to develop); see also Bosselman, *supra* note 19, at 1455–57; Singer, *supra* note 16, at 313–15; MARGARET RADIN, *CONTESTED COMMODITIES* (1996) (discussing, *inter alia*, land use theories).

60. Brooks, *supra* note 17, at 718.

61. *Id.* at 718–19 (describing how the neo-prudentialist position moves from an understanding of each party’s position—for instance, in an Act 250 appeals hearing—to a “search for mutual support among competing positions”).

monetizable, saleable commodity, and an untrammelled brook as part of Vermont's natural landscape.⁶² Only regulation borne of consensus can adequately square the monetizable with the nonmonetizable and the economic with the ecological.

D. Takings Background: Can Act 250 Go "Too Far"?

"...[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." – Oliver Wendell Holmes⁶³

Takings are arguably one of the most complex issues in land use theory and practice. This Note does not provide a comprehensive depiction of takings law from the origin of takings jurisprudence—usually attributed to Oliver Wendell Holmes's seminal opinion in *Pennsylvania Coal*⁶⁴—through the Supreme Court's recent reconsiderations, as in *Koontz v. St. Johns*.⁶⁵ For the purposes of this Note, it is sufficient first to distinguish the nature of a regulatory takings claim from other takings challenges; and second, to understand the regulatory takings test that the Vermont state courts distilled from previous federal takings cases.

Regulatory takings differ from physical takings in that they do not involve a physical appropriation or permanent physical occupation of the land in question.⁶⁶ Instead, a regulatory takings claim succeeds or fails based on whether the challenged regulation has such negative economic effects on an owner's rights to property that the regulatory action is "substantively equivalent to an eminent domain proceeding."⁶⁷ Regulatory action that overreaches as such is sometimes referred to as *inverse condemnation*, given its similarities to loss of property through eminent domain.⁶⁸ In such a case, a landowner must bring a regulatory takings challenge against the government body administering the regulation.⁶⁹ The central question a court must consider in determining whether the regulation constitutes a taking is,

62. RADIN, *supra* note 59, at 107 ("Society as a whole recognizes that things have nonmonetizable participant significance. In legal culture this social recognition may be reflected in regulating (curtailing) the free market.").

63. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

64. *See, e.g., Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 105 (2d Cir. 1992) ("In determining what constitutes a taking, I would begin with the classic, if vague, formulation provided by Mr. Justice Holmes. . .").

65. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 599 (2013).

66. *Takings*, CORNELL LEGAL INFO. INST., <https://www.law.cornell.edu/wex/takings> (last updated Dec. 2022).

67. VT. NAT. RES. BD., ENVIRONMENTAL CASE NOTES (E-NOTES): ANNOTATIONS OF VERMONT SUPREME COURT, ENVIRONMENTAL BOARD, ENVIRONMENTAL COURT, AND ENVIRONMENTAL DIVISION ACT 250 DECISIONS 52 (2019), <https://nrb.vermont.gov/sites/nrb/files/documents/E-NOTES.pdf>.

68. CORNELL LEGAL INFO. INST., *supra* note 66.

69. *Id.*

in Justice Holmes's inimical phrase, whether the regulation has gone "too far."⁷⁰ Or, rephrased for the Act 250 land use context, has the regulation exceeded what a governmental body can rightly decide about a private landowner's ability to develop their land as they see fit?⁷¹

As controlling precedent for Vermont courts, the most comprehensive application of regulatory takings jurisprudence to an Act 250 appeal involved the permit denial of a 1980s-era development plan to build a 78-unit subdivision near Stratton Mountain.⁷² In *Southview v. Bongartz*, the Second Circuit held that, under applicable federal takings law, the plaintiff-developer did not have a valid physical-takings claim against the Vermont Environmental Board.⁷³ The Board had denied Southview's appeal after the District Environmental Commission turned down their original permit application on grounds that the 78-unit subdivision would further fragment a 280-acre deer-wintering area and thus "imperil necessary wildlife habitat" under Act 250 criteria 8(A).⁷⁴ The claim that the Second Circuit reviewed was a physical-takings claim, but the court provided guidance on regulatory takings issues all the same:⁷⁵

A regulation will not effect a compensable taking if it "substantially advance[s] legitimate state interests" and leaves the "owner [with an] economically viable use of his land." By contrast, a taking will generally be deemed to have occurred if the regulation authorizes a permanent physical occupation . . . or, in the "extraordinary circumstance" when regulation "deprives land of *all economically beneficial use*."⁷⁶

In the *Southview* analysis, regulatory takings issues only arise in "'extraordinary circumstance[s]," and only when regulation "'deprives land

70. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

71. This is undoubtedly a simplistic formulation of regulatory takings law as a broad and complex body of jurisprudence. With legal challenges to Act 250, however, the fundamental question of law hews close to the *Pennsylvania Coal* test. When deciding questions of fact, the Vermont Supreme Court looks to subsequent takings cases to provide an analytical framework. For instance, the *Penn Central* test allows a court to conduct ad hoc fact-finding to determine whether a regulation has deprived a property owner of economic value of their land. See *Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 105 (2d Cir. 1992) (discussing the tension between the legal question of "'where [land use] regulation ends and taking begins'" and ad hoc fact-finding); *In re Interim Bylaw, Waitsfield*, 742 A.2d 742, 743–44 (Vt. 1999) (holding that property owners failed to present adequate facts to support their argument of economic deprivation).

72. *Southview*, 980 F.2d at 89–90.

73. *Id.* at 84.

74. *Id.* at 90.

75. *Id.* at 100 (clarifying that the *Southview* opinion's discussion of takings "represents only [Judge Oakes's] views and not the opinion of the [Second Circuit] panel").

76. *Id.* at 105–06 (citations omitted).

of all economically beneficial use.”⁷⁷ With *Southview* as precedent, the bar for a valid regulatory takings claim is high. Yet a high bar need not dissuade plaintiffs who feel that Act 250 has unconstitutionally infringed upon their private property rights. This Note assesses two post-*Southview* regulatory takings challenges that were not successful.⁷⁸ Nevertheless, both cases provide insight on Act 250’s constitutional dimensions and future challenges that may yet succeed, and how, in certain instances, Act 250 regulation may go “too far.”⁷⁹

II. ANALYSIS: ACT 250, REGULATORY TAKINGS, AND VERMONT’S OUTDOOR-RECREATION ECONOMY

A. Act 250 Jurisdiction, Recreation Projects, and a (Climate-)Changing Vermont

Act 250 is a creature of Vermont’s outdoor-recreation industry through and through. Born of Governor Davis’s concern over burgeoning ski area-related development, the Act’s jurisdiction over alpine skiing and other forms of outdoor recreation—hiking and mountain biking especially—applies to all forms of recreation infrastructure proposed at elevations above 2,500 feet.⁸⁰ For the Green Mountains, this is a mid-elevation point above which most ski areas build lifts and hiking trails wend their way to higher ridges.⁸¹ As a result, a large proportion of new recreation infrastructure involves the high-elevation Act 250 jurisdiction.⁸² But the relationship between Act 250 and outdoor recreation is much broader than permitting applications for trail networks themselves. How a community or municipality chooses to institute its land use controls often affects Act 250 hearings on development permits, which then forces the community to ask questions about their common values around development and preservation. Meanwhile, the permitting processes themselves are far from simple.

Lengthy regulatory processes within the state’s purview effectively maintain the status quo of recreation development—whether that involves protecting access to beloved hiking spots or limiting the potentially lucrative expansion of a major ski area. Act 250 can effectively protect recreation

77. *Id.* at 106 (citations omitted).

78. *In re Interim Bylaw, Waitsfield*, 742 A.2d 742 (Vt. 1999); *Killington, Ltd. v. State*, 668 A.2d 1278 (Vt. 1995).

79. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

80. 10 VT. STAT. ANN. tit. 10, § 6001(3)(a)(vi) (2023).

81. *Elevation Data, VT. CTR. FOR GEOGRAPHIC INFO.*, <https://maps.vermont.gov/vcgi/html5viewer/?viewer=vtmapviewer> (check box for “Elevation” filter layer and use plus/minus toggles to zoom in on central Green Mountains; areas in pink are above 2,500 feet) (last visited Dec. 21, 2023).

82. See Farrell, *supra* note 54, at 433.

assets and access to mountain trails, as in *In re Kiesel*, where the Town of Waitsfield used Act 250 review to prevent development from impeding local access to a municipal forest in the eastern uplands of the Mad River Valley.⁸³ However, Act 250 can also stand as both a roadblock to future recreation development and a procedural hurdle for complex upper-elevation development.⁸⁴ *Killington, Ltd. v. State*, involving a proposed ski-area expansion that encroached on sensitive black-bear habitat, is an example of Act 250 as a complex review process that raises potential takings questions.⁸⁵ *Killington* also makes it clear how negotiations between parties outside of an Act 250 review context can be more effective than litigatory challenges.

Cases around Act 250 and takings provide high-level guidance on future development and regulatory practice, especially as one looks into the climate-change future. The influx of new homeowners and renters in Vermont during the Covid-19 pandemic made effective development planning in real-estate hotspots an urgent item on the agenda of many municipalities.⁸⁶ Regulating future housing developments involves a close understanding of Act 250's jurisdictional authority across the state. Areas hit hard by the housing boom are often the same areas with well-established and popular recreation infrastructure, such as alpine-ski resorts and trail systems.⁸⁷

Maintaining a strong recreation economy in Vermont depends on the long-term viability of the alpine-ski industry. Alpine resorts depend on robust snowmaking to keep operations going through increasingly frequent warm spells, thaws, and snowless droughts.⁸⁸ Increasing snowmaking capacity at resorts will almost always invoke Act 250 jurisdiction for elevation-related reasons.⁸⁹ As such, Vermont's outdoor-recreation development future—as it relates to housing, trail networks, open space, ski-area sustainability, recreation infrastructure, and more—is intimately tied to how courts handle Act 250 and how its regulatory scheme can be adapted and improved at multiple levels of the process.

83. *In re Kiesel*, 772 A.2d 135, 137 (Vt. 2000).

84. JULIA LEMENSE ET AL., MOUNTAIN RESORTS: ECOLOGY AND THE LAW 271 (2009).

85. *Killington, Ltd. v. State*, 668 A.2d 1278, 1280 (Vt. 1995).

86. Anne Wallace Allen & Colin Flanders, *Nowhere to Go: Vermont's Exploding Housing Crisis Hits Moderate Wage Earners*, SEVEN DAYS, <https://www.sevendaysvt.com/vermont/nowhere-to-go-vermonts-exploding-housing-crisis-hits-moderate-wage-earners/Content?oid=33532880> (Nov. 2, 2021, 4:26 PM).

87. *Id.*

88. Alan J. Keays, *Resorts 'Bounce Back' with 3.9 Million Skier Visits, Up 21 Percent*, VTDIGGER, (June 15, 2017, 6:41 PM), <https://vtdigger.org/2017/06/15/resorts-bounce-back-3-9-million-skier-visits-21-percent>.

89. ACT 250: A GUIDE TO VERMONT'S LAND-USE LAW, *supra* note 27.

B. Case Study: Waitsfield, the Mad River Valley, and Conflicts in Local and Regional Planning

The two cases discussed below—*In re Kiesel* and *In re Interim Bylaw*—demonstrate some of the manifold development pressures that the Mad River Valley underwent during the 1990s. Ski-industry expansion and increased recreation-related visits to the area represent two of the associated pressures, along with increased interest among real-estate developers to capitalize on the housing boom.⁹⁰ An area with popular recreation opportunities can easily become a victim of its own success, with the popularity of the area putting pressure on housing stock and driving up prices beyond sustainable levels.⁹¹ As the hub of the Mad River Valley, Waitsfield's land use regulations and growth—or anti-growth—intentions came to the fore as landowners proposed different projects in undeveloped areas in the surrounding uplands, especially in the Northfield Range.

The Northfield Range exemplifies the multiple overlapping uses for an area that create the “contrary demands” that Richard O. Brooks argues must provide the baseline understanding for Act 250 reform at the state or local level.⁹² The Range runs north-south along the eastern edge of the Mad River Valley and forms the upland portion of the towns of Moretown, Waitsfield, and Warren.⁹³ The Northfield Range is largely undeveloped and, though traversed by hunters during deer season and intrepid hikers and skiers, is rarely discussed as a place for outdoor recreation.⁹⁴ By contrast, the mountains to the west of the Mad River, which form a ridge approximately 1,500 feet higher than the Northfield Range, are the home of Sugarbush Resort's two ski areas—Lincoln Peak and Mt. Ellen—and Mad River Glen's trails, which descend from Mt. General Stark.⁹⁵ Many hikers' favorite section of Vermont's Long Trail, the so-called Monroe Skyline, runs from Lincoln Gap to Appalachian Gap across the alpine summits of Mts. Abraham, Lincoln, Ellen, and the Starks.⁹⁶

The ski areas, hiking trails, and roadway access to Lincoln and Appalachian Gap that make the Mad River Valley an outdoor-recreation hotspot also define and form the character of the Valley as a whole. The

90. See generally WAITSFIELD PLAN. COMM'N & WAITSFIELD SELECTBOARD, HISTORIC DEVELOPMENT, WAITSFIELD TOWN PLAN 21–23, 25 (2005) (discussing demographic changes and increased development pressures).

91. *Id.*

92. BROOKS, *supra* note 35, at 5.

93. See *infra* Appendix 1, *Mad River Valley Recreation Map*, GAIA GPS (2003).

94. Kara Sweeney, *Note: What's on the Horizon? Takings Jurisprudence and Constitutional Challenges to Ridgeline Zoning in Vermont*, 26 VT. L. REV. 221, 247–48 (2001).

95. See *infra* Appendix 1, *Mad River Valley Recreation Map*, GAIA GPS (2003).

96. *Long Trail: Monroe Skyline*, BACKPACKER MAG. (Sept. 20, 2013), <https://www.backpacker.com/trips/long-trail-monroe-skyline/>.

massive popularity of skiing at Sugarbush, which was acquired by the national ski-area conglomerate Alterra Resorts in 2020, is an enormous recreation asset to the Mad River Valley and a substantial draw to visitors and second-home owners.⁹⁷ With more undeveloped land across the Valley in the Northfield Range uplands, town planners and community members alike would reasonably look to the east as an escape valve for some of the pressures on the Valley as a whole. Setting a plan in motion to do so, however, would require the “consensus on goals and policies” that Richard O. Brooks has noted as difficult to achieve.⁹⁸

The Town of Waitsfield, in crafting a municipal plan and setting forth intentions for upland development (or non-development) in the 1990s, would have had to consider three possibilities. One, the Northfield Range could have been considered primarily as a potential zone for recreation: in 1991, the Town received a donation of a 360-acre parcel on the eastern slopes and summit of Scrag Mountain (one of the higher points in the Northfield Range, at 2,911 feet).⁹⁹ By expanding town assets that were already bringing a small number of hikers and skiers into the Valley's eastern uplands, Waitsfield could have leaned into the recreation opportunities of the Scrag Mountain parcel.¹⁰⁰ Two, the Town could have seen the Northfield Range as an undeveloped upland that should remain as free from human interference as possible.¹⁰¹ By maintaining such an undeveloped area, Waitsfield could have laid the groundwork for continued wildlife habitat and wild land in relatively close proximity to a fast-growing town center. Three, the Town could have indicated its preference that the Northfield Range become a logging hotspot by writing provisions into the Town Plan that encouraged the sale of timber leases.¹⁰²

Did Waitsfield signal its interest to assure that land use in the Northfield Range would take one of the three forms? In the two cases this Note will discuss, Waitsfield grappled with the competing demands on the Range without expressing a distinct conclusion or consensus preference on the use

97. Anne Wallace Allen, *After a Dismal 2020-21 Ski Season, Ski Areas Report Strong Early Sales*, SEVEN DAYS, <https://www.sevendaysvt.com/vermont/after-a-dismal-2020-21-season-ski-areas-report-strong-early-sales/Content?oid=34217422> (Dec. 14, 2021, 2:40 PM).

98. Brooks, *supra* note 17, at 709.

99. WAITSFIELD PLAN. COMM'N & WAITSFIELD SELECTBOARD, WAITSFIELD TOWN PLAN 11-12 (2017).

100. *See id.* (describing the history of the Scrag parcel, which would later form the basis for the Scrag Mountain Forest).

101. *See generally* RICHARD O. BROOKS ET AL., LAW AND ECOLOGY: THE RISE OF THE ECOSYSTEM REGIME 325–64 (Richard O. Brooks & Ross A. Virginia eds., 2002) (discussing wildlife preservation and habitat conservation as an increasingly important planning objective during the second half of the 20th century).

102. *See* ARGENTINE, *supra* note 6, at 3. Logging is an activity usually exempt from Act 250 jurisdiction, meaning that the Town would not have run afoul of the Environmental Commission in encouraging further timber harvest in the Northfield Range. *Id.*

of the eastern uplands.¹⁰³ Indeed, *In re Kiesel* (as a strict Act 250 case) and *In re Interim Bylaw* (as a takings case) demonstrate that the Town was going through the ad hoc process of deciding on land use issues as they cropped up.¹⁰⁴ If the municipality had clearly decided on how development would proceed, it was primarily in the negative, in assuring that development would not infringe on the recreation opportunities in the newly created Scrag Mountain Forest. In both Mad River Valley cases that this Note will discuss, the Vermont Supreme Court decisions ultimately privilege an entrenched idea of outdoor recreation, holding out the community's enjoyment of designated (and non-designated) open space as a vaunted form of land use planning.¹⁰⁵ This is hardly an obvious or one-sided decision. Other ski area-centered municipalities, such as Killington/Pico (the town of Sherburne) and Stratton/Bromley,¹⁰⁶ have consistently looked to expand the housing stock in the immediate ski-area vicinity to provide visitor lodging and year-round workforce housing.

Whether certain regulations are constitutionally sound and further a legitimate local or state interest, the broader efforts to protect the Northfield Range implicit in both cases demonstrate how, at times, Act 250 protects only one type of recreation-related land use. While local Waitsfield landowners can access their favorite local trails without additional development marring the landscape, a town regulatory scheme that discourages upland development without providing suitable alternatives is bound to encounter resistance.

1. *Kiesel* and Act 250 Criteria 10

In re Kiesel is an example of how local regulations and Act 250 review sometimes run at cross-purposes in a manner detrimental to local authority and landowners looking to develop their properties. In 1997, the District Five Act 250 Environmental Commission reviewed and authorized subdivision development on a property owned by Mark and Pauline Kiesel at the upper end of Bowen Road, which runs from East Warren Road in Waitsfield up to the Northfield Range.¹⁰⁷ Bowen Road is the main access point for the municipal Scrag Mountain Forest.¹⁰⁸ The Kisiels had received prior approval

103. See WAITSFIELD PLAN. COMM'N, *supra* note 99, at 11-1. Again, the Town's multi-faceted understanding of how land use in the Northfield Range would proceed during the 1990s followed the formula set out in later Town plans. *Id.*

104. *In re Kiesel*, 772 A.2d 135, 135 (Vt. 2000); *In re Interim Bylaw*, Waitsfield, 742 A.2d 742, 743 (Vt. 1999).

105. Brooks, *supra* note 17, at 709.

106. See *In re Eustance Act 250 Jurisdictional Opinion*, 970 A.2d 1285, 1296 (Vt. 2009) (concerning a subdivision near Bromley Ski Area that was unopposed by the municipality).

107. *In re Kiesel*, 772 A.2d at 136-37.

108. *Id.* at 142.

from the Waitsfield Planning Commission to upgrade the road to suit additional vehicle traffic needed to access the subdivision.¹⁰⁹ However, the Planning Commission conditioned the approval on maintaining hiking access to the Forest via a public right-of-way trail that the Kisiels would construct next to Bowen Road.¹¹⁰ Concerned that the Environmental Commission's Act 250 permit approval would allow the landowners to circumvent the conditions imposed by the town Planning Commission, the town of Waitsfield, in effect, withdrew the conditional approval and appealed the Act 250 approval to the Environmental Review Board.¹¹¹

The Act 250 Environmental Review Board's assessment of the permit as appealed hinged on two interpretive issues concerning the application of the Waitsfield Town Plan to the Kisiels' proposed development. The first issue on appeal was whether the permit granted by the District Five Act 250 Environmental Commission undermined the Town Plan's intent to "maintain[] the 'status' of class 4 roads" and how the plan applied to Bowen Road, where the Kisiels' proposed development would be built.¹¹² The second issue concerned the Plan's "goal of precluding development on 'steep' slopes," and whether the site of the Kisiels' development on a mountain hillside fell within that purview.¹¹³ The Review Board concluded that the Kisiels' proposal to make Bowen Road passable "was not in compliance" with the roadways-related intentions of the Town Plan, and that the Kisiels' development proposal ran afoul of the steep-slope criteria in the Plan.¹¹⁴ Thus, the Review Board found that the Kisiels' proposal failed to "conform[] with any duly adopted local . . . plan" under Act 250 Criterion 10.¹¹⁵

The Vermont Supreme Court's decision in *Kiesel* hinged on the issue of whether the language of the Waitsfield Town Plan should be given controlling authority when reviewing Act 250 cases under Criterion 10. The Court found that the Town Plan would not control the Act 250 review process if not implemented in accordance with a reasonable construction of the language in the Plan.¹¹⁶ As a matter of interpretation, Justice Dooley articulated a "plainly erroneous" standard of review for future cases where Act 250 and local planning would seem to conflict:

109. *Id.* at 137.

110. *Id.*

111. *Id.* at 137–38.

112. *Id.* at 137.

113. *Id.*

114. *Id.*

115. *Id.*; VT. STAT. ANN. tit. 10, § 6806(a)(10) (2022).

116. *In re Kiesel*, 772 A.2d at 143.

Although Act 250 gives to the [Act 250 Environmental Review] Board, and this Court on appeal from the Board's decisions, the power to override a town's implementation of its own plan, this power should be exercised only when the local construction of the town plan is *plainly erroneous*. No other policy will maintain local control of land use planning and promote fairness and consistency in state and local regulatory review.¹¹⁷

Justice Dooley's defense of "local control" in *Kiesel* speaks as much to the procedural issues inherent in Act 250 decisions as to the constitutional issues implicated in the conflict between local decision-making at the town level and Review Board-level fact-finding. In *Kiesel*, the Town of Waitsfield's appeal of the District Five Environmental Commission's Act 250 permit ended up back in Act 250 jurisdiction with the Act 250 Environmental Review Board.¹¹⁸ Subsequently, after the Review Board denied the Act 250 permit initially granted by the town planning commission, the Kisiels appealed the decision to the Vermont Supreme Court, bringing the issue out of the land use-specific legal regime and into the realm of statutory interpretation.¹¹⁹ Such a shift of venues sets up one of the inherent conflicts of a Criterion 10-based Act 250 judicial decision: can a court adequately use statutory interpretation as a form of decision-making about a local or regional plan?

Kiesel, as a case that was "tried and appealed as a straightforward issue of textual interpretation," stands for the proposition that specific language within a town or regional plan can carry the force of law.¹²⁰ The *Kiesel* Court distinguished the ambiguity around "'steep' slopes" and lack of "any specific standards" in the Waitsfield Town Plan from the uncertainty presented by a prior case, *In re Green Peak Estates*, where a regional plan had specified that "[o]n slopes greater than 20%, residential development should not be permitted."¹²¹ Even though the town plan at issue in *Green Peak Estates* did not specify a maximum grade for building lots, the specificity of the regional plan meant that denying an Act 250 permit to build on a "slope exceeding 20[0%]" was "consistent with the overall approach to use of the region's intermediate uplands."¹²² The alignment of a general provision in a town plan with a specific provision in a regional plan meant that the town plan

117. *Id.* (emphasis added).

118. *Id.* at 137 ("Notwithstanding the earlier permits granted by the Town, the Town appealed the Commission's decision to the Board, which received extensive pre-filed testimony, conducted a site visit, and held an evidentiary hearing.").

119. ARGENTINE, *supra* note 6, at 203–04.

120. *In re Kiesel*, 772 A.2d at 145 (Amestoy, C.J., dissenting).

121. *Id.* at 138–39.

122. *Id.* at 138.

could have the force of law and carry regulatory authority—an authority that the court in *Kiesel* denied to the Town of Waitsfield.

Following in the steps of *Kiesel*, Vermont courts can enforce such specific language through Act 250 Criterion 10, but only if the plan or plans are adequately specific in their provisions. The Court criticized Waitsfield for enacting an unenforceable town plan: “The town plan sets forth an abstract policy against development on steep slopes, but provides no specific standards to enforce the policy.”¹²³ The Court found no issue with a “policy against development on steep slopes,” but only with the abstractions baked into the plan itself, holding that “in the absence of pertinent zoning bylaws” that had been voted on and approved through the municipal process, “the [Act 250 Review] Board may not ‘give nonregulatory abstractions in the Town Plan the legal force of zoning laws.’”¹²⁴ If a town plan’s provision does not provide numerical specificity of the type exemplified in *Green Peak Estates*, it may be a “nonregulatory abstraction[.]” that is not legally relevant to an Act 250 decision.¹²⁵ Enforceability thus hinges on specific provisions in a town plan, which can subsequently become part of an Act 250 review process under Criterion 10.

Returning to Dooley’s “clearly erroneous” standard of review, however, towns have some flexibility to maintain authority not delegated to the Act 250 Review Board. *Kiesel* contains strict language precluding nonregulatory elements in town plans from carrying the legal force of zoning laws, but the clear-error standard gives municipalities the latitude to enact and enforce a town plan without oversight from the Review Board. Such a standard of review creates a fine-line distinction between the local control codified by Vermont statutes and the statewide review and appeals process enabled by the multi-tiered Act 250 jurisdictional system.

2. Takings Issues in the Mad River Valley

Kiesel also raises the question of elevation-dependent zoning in the Green Mountain uplands. As development pressures increase on potentially buildable land high above scenic valleys, including the Mad River Valley, towns must respond to development pressure by restricting where new housing will be located. In the late 1990s, as *Kiesel* was making its way toward the Vermont Supreme Court, Waitsfield was taking action to codify development restrictions on residential housing built above 1,700 feet of elevation, first in a patch-through bylaw passed in 1997 and then in a

123. *Id.* at 140.

124. *Id.* (quoting *In re Molgano*, 653 A.2d 772, 775–76 (1994)).

125. *Id.*

subsequent Town Plan.¹²⁶ Whether the Waitsfield Selectboard's adoption of the interim bylaw was partly motivated by the Kisiels' earlier suit is not clear. But the mounting development pressures on the Northfield Range—which could be considered a town recreation hub, an undeveloped upland, or a potential timber-harvesting zone—meant that the Town had to make regulatory choices that would be codified as zoning law. The Town, in challenging the Kisiels' permit and passing the later bylaw, made a tacit set of decisions about permissible land use in the eastern uplands, favoring certain entrenched uses and disfavoring others.

To disfavor certain productive uses—especially housing development—put the Town in the line of fire for a legally justified accusation of regulatory takings. Edmund and Deborah Stein, who owned 130 Northfield Range acres above the 1,700-foot threshold when the bylaw was passed, challenged the interim bylaw as a facially unconstitutional taking of their property.¹²⁷ When the trial court dismissed their initial challenge, the Steins appealed to the Vermont Supreme Court—the same court that would pass down judgment on *Kiesel* just a few months after deciding the Steins' appeal.¹²⁸ The Court considered two potential avenues for the plaintiffs to display the facial unconstitutionality of the bylaw—two species of takings, as it were: “To prevail under such a [facial takings] challenge, plaintiffs must show either that the ordinance in question does not substantially advance a legitimate state interest or that it denies an owner an economically viable use of his land.”¹²⁹ The Steins' argument that the bylaw constituted a taking would have needed to show either a deficit on the Town's side—that the bylaw did not further a “legitimate state interest”—or a deprivation of the Steins' economic interests as landowners.¹³⁰

First, under the avenue of “legitimate state interest,” the Court held that the Town was within its powers to pass and enforce the bylaw as a function of its ecological goals, finding that “the town has a legitimate interest in resource protection and preservation.”¹³¹ As legal onlookers commented at the time, it was an unusual step for the Court to introduce a defense of the

126. WAITSFIELD PLAN. COMM'N & WAITSFIELD SELECTBOARD, *supra* note 90, at 121–23.

127. *In re Interim Bylaw*, Waitsfield, 742 A.2d 742, 743 (Vt. 1999).

128. *Id.*

129. *Penn Cent. Transp. Co. v. N.Y.C.*, 438 U.S. 104, 104 (1978). A regulatory action that merely denies the property owner *an*—but not all—economically viable use of their land would constitute a taking if the regulation also carries other implications for the property owner, such as by “interfer[ing] with distinct investment-backed expectations.” *Id.* at 124. Subsequent cases have clarified that a regulation that “denies *all* economically beneficial or productive use of land” would constitute a *per se* taking. *Palazzolo v. R.I.*, 533 U.S. 606, 617 (2001) (emphasis added).

130. *In re Interim Bylaw*, 742 A.2d at 744.

131. *Id.*

town's action *sua sponte*.¹³² The Town's interest in protecting the Northfield Range uplands had not received comprehensive examination by the Selectboard or codification in the Town Plan in the preceding decade. The persistent ambiguity of the Town's hopes for the Northfield Range—should it be a recreation hotspot? Should it remain undeveloped? Should the Town encourage logging?—meant that the *Interim Bylaw* Court had to make something of a *sua sponte* decision about which interest, precisely, the bylaw in question was furthering.

Second, under the avenue of “denial of . . . economically beneficial use,” the Court again made a *sua sponte* determination of how the Town could effectively argue that the bylaw did not constitute a regulatory taking: “the interim bylaw allows for several uses above 1,700 feet, including . . . agricultural and forestry purposes.”¹³³ Here, the Court appeared to misunderstand how “economically beneficial use” could rightly be construed in the Mad River Valley context. Forestry and timber harvest, though not economically valueless, are not what the Town of Waitsfield had—or has—in mind as an economic driver: “Our resource-based economy, founded on agriculture and forestry, is now built on recreation and an enviable quality of life.”¹³⁴ The *Interim Bylaw* Court, it seems fair to say, understood the “investment-backed expectations” of the Steins as being premised on a resource-extraction economy. The Court did not consider the Steins’ investment in light of the Mad River Valley’s status as a recreation hotspot and development-pressured area with limited space to expand.¹³⁵

A future case challenging an anti-development regulation, in the Mad River Valley or elsewhere, would need to analyze whether the regulation constituted a taking based on the agreed-upon metrics for economically viable future growth in the area.¹³⁶ The *Interim Bylaw* decision appeared to pick out certain aspects of the Town of Waitsfield’s development goals

132. Sweeney, *supra* note 94, at 246; *see also Sua Sponte*, BLACK’S LAW DICTIONARY (11th ed. 2019) (explaining that a court makes a determination *sua sponte* when it does so of its own accord, rather than as a result of a challenge, motion, or party assertion).

133. *In re Interim Bylaw*, 772 A.2d at 744.

134. WAITSFIELD PLAN. COMM’N, *supra* note 99, at 1-1.

135. Penn Cent. Transp. Co. v. N.Y.C., 438 U.S. 104, 124 (1978); *In re Interim Bylaw*, 772 A.2d at 744. The additional irony of the *Interim Bylaw* Court suggesting, tacitly, that the Steins turn to logging and timber extraction as a way of drawing income from their 130 acres is that the bylaw in question was passed partly in response to a large and unsightly clearcut in the southern Northfield Range. *Id.* The clearcut, visible from the center of Waitsfield and frequently remarked upon by Waitsfield residents, was located in the town of Warren and was largely permitted due to the laxer land-use standards in Warren. Sweeney, *supra* note 94, at 223–24. Needless to say, Waitsfield would have gone to great lengths to prevent the Steins from clear-cutting—or perhaps even selectively harvesting—their property. *In re Interim Bylaw*, 772 A.2d at 743–44.

136. Indeed, a revised Criterion 10 could include a sub-heading defining the regulatory force of a local economic-development plan that had been adopted by a town, county, or regional development cooperative.

without considering the character of the region and its future direction. A successful future challenge to a local ordinance prohibiting a type of development critical for the profitable use of land in a spatially constrained, high-growth area could also rely on the *Kiesel* Court's discussion of "nonregulatory abstractions," which should not be given legal weight. The Steins could have argued that although the Selectboard passed the bylaw that prevented development above 1,700 feet, the bylaw should be held void because it was abstract in its purpose, if not in the text itself. A nonregulatory abstraction, per *Kiesel*, cannot be determinative of a development application. If a future landowner hoping to develop property were otherwise discouraged by the Town Plan, such a landowner could challenge the regulatory schema as void for vagueness, arguing that the nonregulatory abstraction fails to reach the level of legal authority.¹³⁷

Interim Bylaw established that in a takings context, the Town of Waitsfield's goal to keep land at or above certain elevations undeveloped constituted "a legitimate interest in resource protection and preservation."¹³⁸ An onlooker can presume that the Vermont Supreme Court would go through a similar analysis when confronted with other *facial* challenges to development limitations at the town level. But the story might be different if a plaintiff presented the Vermont courts with a challenge to such regulatory limitations *as applied*. Onlookers concerned with the holding of *Interim Bylaw* noted at the time that the Court decided the case on summary judgment, even though, under *Penn Central* and subsequent takings cases, the issue of whether a property owner suffered an economic burden should rightly be considered a question of fact.¹³⁹

Interim Bylaw might have been a very different case if the plaintiffs were challenging the constitutionality of Act 250 regulations made and decided at the state level, rather than local regulations in the form of an interim bylaw passed by the Waitsfield Selectboard. As Section II(D) further discusses, takings jurisprudence changes form depending on the regulatory environment in which a taking may occur. As such, a state-level Act 250 decision raises different constitutional questions than a local decision. Such a state-level decision also raises the question of who a regulation's beneficiaries are. When a community decides to put forth a bylaw that limits development, the town's adoption of such a bylaw benefits those who appreciate access to open space, as in the case of access to the Scrag Mountain Forest in *Kiesel*. But such a bylaw disadvantages those who would rather see the housing stock in the area continue to grow in proportion to

137. *Void for Vagueness*, CORNELL LEGAL INFO. INST., https://law.cornell.edu/wex/void_for_vagueness (last visited Dec. 21, 2023).

138. *In re Interim Bylaw*, 772 A.2d at 744.

139. Sweeney, *supra* note 94, at 253.

demand, even if it meant expansion to higher elevations and the piecemeal elimination of some undeveloped spaces.

C. Case Study: Killington Mountain Resort and Snowmaking for Vermont's Climate-Change Future

If the Mad River Valley is the prototypical Vermont community reliant on ski areas as a local economic driver, then Killington Mountain Resort—located 50 miles south along the spine of the Green Mountains—is the model of a ski area reliant on the community for infrastructure, developable land, and workforce housing. In 1956, a group of local skiers leased property on the north aspect of Killington Peak—the second-highest mountain in Vermont—and developed four lifts and seven down-mountain trails.¹⁴⁰ At the time, resort-based alpine skiing was a relatively recent arrival to North America from Europe, and resort development in Vermont had mostly been confined to the area around Mount Mansfield and Stowe.¹⁴¹ Located at the high point of Vermont Route 4 between the towns of Mendon and Sherburne, the minimal land-development pressures on the Killington area allowed the resort to grow quickly in the 1960s and 1970s, even after the passage of Act 250 focused scrutiny on such ski-area development and its local effects.¹⁴² The ski area's rapid development in the early years set the stage for Killington as Vermont's prototype of the modern mega-resort. In a state that records upwards of five million annual skier days, Killington has established itself as the forerunner for skier visits and ski infrastructure alike.¹⁴³ With almost 2,000 acres of developed, skiable terrain, Killington's physical size alone would subsume a dozen smaller Vermont resorts.¹⁴⁴

To grow from its humble roots to its current megalithic size, Killington had to acquire additional land—to increase skiable acreage—and find a way to keep the skier visits coming by generating artificial snow that would support the resort through Vermont's fickle winter weather patterns and

140. *The History of Killington Ski Resort and Our Surrounding Town*, THE KILLINGTON GRP., <https://www.killingtongroup.com/the-history-of-killington-ski-resort-and-our-surrounding-town/> (last visited Dec. 22, 2023).

141. LEMENSE ET AL., *supra* note 84, at 271.

142. *See id.* at 275 (“The passage in 1970 of . . . Act 250[] initially did little to impede Sherburne Corporation’s rapid development and grandiose plans for expansion at Killington Resort into the 1980s.”). Vermont ski-area lore is full of discussion of the heady early days of Killington: “Killington expanded like no other ski area had. . . . Peak after peak was opened, with a high variety of runs and lifts.” Davis, *supra* note 38.

143. Exact numbers on skier days are hard to come by, since they are usually considered industry proprietary information, but the Vermont Ski Areas Association has confirmed that Killington outpaces other resorts in the state for skier days. Keays, *supra* note 88. Killington recorded near or above one million skier days per winter in the early 2000s, though resort visitation may have declined in the intervening years. LEMENSE ET AL., *supra* note 84, at 275.

144. THE KILLINGTON GRP., *supra* note 140.

periods of thaw. In 1986, a reorganized Killington ownership coalition began to develop additional skiable terrain on the southeast side of Killington Peak in the Madden Brook drainage, which descends through the unincorporated location of Parker's Gore to the town of Mendon.¹⁴⁵ The development plan involved combining leased and owned land in Parker's Gore and Mendon to create a new "wilderness" ski area, disconnected by elevation and aspect from the rest of the resort.¹⁴⁶ To make the Parker's Gore expansion a reality, the ownership coalition initially applied for an Act 250 development permit that, if approved, would have allowed the resort to dam Madden Brook to create a multi-acre snowmaking pond.¹⁴⁷ The initial damming-for-snowmaking permit application did not discuss the plans for future trails, but Mendon residents had heard of the resort's intentions for Parker's Gore, which would involve a significant amendment to the Mendon Town Plan in addition to an Act 250 permit.¹⁴⁸ The District Environmental Commission denied the permit, reasoning that the application was incomplete in light of the larger development project affecting Parker's Gore and the Town of Mendon.¹⁴⁹ Indeed, as Killington applied for—and subsequently appealed—the Madden Brook snowmaking-pond permit, the resort had also applied for an Act 250 permit to log sections of Parker's Gore, which would turn a timber-sales profit and pave the way for subsequent ski-trail development.¹⁵⁰

There is no requirement within Act 250 that an Environmental Commission reviewing an Act 250 application need consider the cumulative impact of a ski area's multi-stage development project.¹⁵¹ The Commission, which had denied the snowmaking-pond permit on an incompleteness basis, reused the initial fact-finding process in hearing the application to log sections of Parker's Gore, concluding that both applications violated Act 250 Criterion 8(a), which concerns sensitive wildlife habitat.¹⁵² Because Parker's Gore contained sensitive black-bear habitat, the Commission reasoned, Killington had the burden as applicant to demonstrate that the proposal as a

145. "Gore," derived from the Old English word for "triangular piece of ground," is the Vermont designation for unincorporated land that was left over after formal surveying. Most of Vermont's gores are high-mountain redoubts slotted between valley towns on all sides. Mark Bushnell, *Then Again: A Use for Vermont's Leftover Bits and Pieces*, VTDIGGER (Mar. 26, 2017), <https://vtdigger.org/2017/03/26/then-again-a-use-for-vermonts-leftover-bits-and-pieces/>.

146. LEMENSE ET AL., *supra* note 84, at 288.

147. Anecdotal evidence suggests that the proposed snowmaking pond was unusually large for the era: most of the major snowmaking infrastructure now present at Vermont's ski resorts was absent as of the mid-80s.

148. LEMENSE ET AL., *supra* note 84, at 290.

149. *Id.* at 290–91.

150. Although timber harvests do not typically trigger Act 250, the elevation (above 2,500 feet) of the proposed logging meant that the proposal underwent Act 250 scrutiny. *Id.* at 291.

151. *Id.*

152. *Id.* at 290–91.

whole did not “imperil necessary black bear habitat.”¹⁵³ When Killington appealed the Commission’s decision to the Vermont Environmental Board, however, the Board considered both the snowmaking pond and the logging together in relation to the Criterion 8(a) issue.¹⁵⁴ The Board reasoned that both proposals would take away from sensitive black-bear habitat, both by encroaching on hibernation ground and by cutting stands of beech trees that provided an ursine food source.¹⁵⁵ The Killington ownership coalition, believing that they had exhausted administrative remedies within the Act 250 appeals system, appealed the Board decision to the Vermont Supreme Court. There, the coalition alleged a regulatory taking of the Parker’s Gore land owned by the resort.¹⁵⁶

The ensuing case, *Killington, Ltd. v. State*, demonstrated the complexity of bringing a takings challenge following a lengthy Act 250 review process. The state Supreme Court deemed the takings appeal unripe because the resort had not made the “mitigation undertakings” that would allow completion of the Parker’s Gore project without damaging the black-bear habitat and violating Act 250 Criterion 8(a).¹⁵⁷ The proposed mitigation, emerging from the Act 250 appeals process, involved eliminating the proposed—and likely necessary—snowmaking pond and limiting skier traffic in the Parker’s Gore bear habitat after April 1 each year.¹⁵⁸ Killington argued that, because the mandated mitigation efforts would render the Parker’s Gore project infeasible, the Act 250 decision had stopped the resort from “using the land for its only reasonable, economically viable use—skiing.”¹⁵⁹ The Court did not consider the merits of this argument because it deemed the takings case unripe: “Killington has prematurely filed a takings claim before a definitive final decision has been rendered determining allowable property uses.”¹⁶⁰ In essence, to satisfy the ripeness verdict, Killington would have had to continue working on the Parker’s Gore project for years at a time—without recouping any economic benefit in the form of ski-area expansion—to prove the impossibility of mitigation in accordance with Act 250.

Killington, Ltd. suggests that future takings cases involving Act 250 jurisdiction will only be ripe for appeal on constitutional grounds once all “mitigation undertakings” are completed.¹⁶¹ This is equally problematic law for ski areas and surrounding communities alike: it suggests that developers

153. *Id.* (quoting a 1989 Environmental Board hearing).

154. *Id.* at 290.

155. *Id.*

156. *Killington, Ltd. v. State*, 668 A.2d 1278, 1281 (Vt. 1995).

157. *Id.* at 1283.

158. *Id.* at 1281.

159. *Id.*

160. *Id.* at 1284.

161. *Id.* at 1283–84.

may be subject to decades of appeal before finding resolution on potential subsequent projects. Though the Court used *Penn Central* to provide takings-law backing for the judgment on ripeness, the analogy between a legendary New York City high-rise and an undeveloped drainage off of a high ridgeline in the Green Mountains is hardly exact.¹⁶² Though Parker's Gore would have been, by all accounts, a fantastic recreational addition to Killington's suite of terrain,¹⁶³ it was hardly the only option for resort development and expansion. The resort thrived, and continues to thrive, irrespective of the abandoned Parker's Gore project.¹⁶⁴ An improved review process for ski-area projects would create an efficient system for appeals to undergo Environmental Commission and Review Board analysis and reach final verdicts without asking for extensive, time-sapping mitigation efforts. Once the Review Board reached a final decision on the Act 250 issues of a ski area's proposed development, it would be clear to all involved whether the restrictions on the project constituted a regulatory taking. The lack of ripeness in *Killington, Ltd.* only served to extend the appeals process without providing a clear regulatory imperative.

The functional benefits that did emerge from the abandoned Parker's Gore project suggested that Act 250 is more effective than regulatory appeals litigation at promoting community consensus. Following the unsuccessful result in *Killington, Ltd.*, the resort ownership coalition began negotiations with the state Agency of Natural Resources (ANR), local landowners and land-trust organizations, and the Town of Mendon to donate the Parker's Gore land to the state in exchange for developable land elsewhere on Killington Peak.¹⁶⁵ In 1996, the resort filed a Memorandum of Agreement to allow the land swap to take place and for the resort to use a different water source, Woodward Reservoir, for its snowmaking needs.¹⁶⁶ Over 3,000 acres in Parker's Gore that Killington had owned became part of the Coolidge State Forest, which encompasses most of the range south of Killington Peak.¹⁶⁷ In return, the state gave the resort 1,000 acres to add to the base and summit area on the already-developed north aspect of Killington Peak.¹⁶⁸

Negotiation between opposing parties in the Parker's Gore dispute led to better results. The process of negotiating the Memorandum and the land swap brought in conservation organizations, who had been granted party status during the hearing process in order to oppose Killington's proposed Parker's Gore development, as part of a broader conversation about land use in the

162. *Id.* at 1284; *Penn Cent. Transp. Co. v. N.Y.C.*, 438 U.S. 104, 124 (1978).

163. *THE KILLINGTON GRP.*, *supra* note 140.

164. *See* Keays, *supra* note 88 (discussing long-range statistics on skier usage at Killington Resort).

165. *LEMENSE ET AL.*, *supra* note 84, at 294–95.

166. *Id.*

167. *Id.* at 295.

168. *Id.*

area.¹⁶⁹ This manner of deliberation between parties proved much more effective than the initial review process had been.¹⁷⁰ Killington could address community concerns while drafting the Memorandum and retain the ability to expand the resort and increase skiable acreage without intruding on bear habitat. Those opposed to development in Parker's Gore could effectively use the bear-habitat issues under Act 250 Criterion 8(a) as leverage for an important land swap without relying on protracted litigation in the state courts. Because Killington no longer possessed the land that had been subject to Act 250 regulation, the takings issue of *Killington, Ltd.* was essentially rendered moot: the parcel that could not provide an economically viable use was swapped out for parcels that could be of use.¹⁷¹

The out-of-court conclusions of the Parker's Gore dispute also contribute to better future planning for the resort as a whole. As part of the Memorandum, Killington agreed to use a "growth center concept" as part of future resort planning.¹⁷² Future resort expansions, the parties agreed, would revolve around a "concentrated" area of development on the north side of Killington Peak, while the resort would preserve "large areas of open space" on other aspects.¹⁷³ Given the state of Killington today, with a hyper-developed base area and base access road standing in stark contrast to the vast Coolidge Range and Coolidge State Forest beyond, the growth-center concept seems to have been a substantial success. Taking a longer view, the Memorandum thus not only protected the black-bear habitat defined during the Parker's Gore hearings, but effectively protected a variety of other sensitive high-elevation animal and plant communities.¹⁷⁴

D. Making Act 250 Review Compliant with Takings Jurisprudence

Act 250, both as a bulwark against development and a process of legal review, is only as effective as it is constitutionally sound. The process of appealing an Act 250 decision on regulatory-takings grounds has established precedent in Vermont.¹⁷⁵ But there is little clarity on how, or in what land-use and development contexts, plaintiffs could bring such a challenge in the future. Moreover, there is minimal clarity for real-estate developers,

169. *Id.*

170. See VT. STAT. ANN. tit. 10, § 6085(c)(1) (outlining hearing procedures and defining party status before Act 250 District Commissions); ARGENTINE, *supra* note 6, at 29; Gruenig, *supra* note 48, at 549–50 ("Act 250 provides citizens with a forum to advocate mitigation efforts for those proposed developments having adverse ecological impacts.").

171. LEMENSE ET AL., *supra* note 84, at 295.

172. *Id.*

173. *Id.*

174. *Id.* at 288, 290 (discussing elevation-dependent ecology in the Coolidge Range).

175. *Act 250 Program*, VT. NAT. RES. BD., <https://nrb.vermont.gov/act250-program> (last visited Dec. 21, 2023).

recreation-infrastructure proponents, town selectboard members, and other interested parties on where Act 250 and related regulation ends and Takings Clause issues begin. Lessons from *Kiesel*, *Interim Bylaw*, and *Killington, Ltd.* may help guide future Act 250 review and determine where future limitations on development may create inherent takings issues.

1. Limiting “Nonregulatory Abstractions” per *In re Kiesel*

The issue of “nonregulatory abstractions” denoted by Justice Dooley in his *Kiesel* opinion merits further analysis for municipalities and communities subject to the complexities of Act 250 review processes. Following *Kiesel*, town planners and zoning boards should be well apprised of the limits to legally binding language in town plans and should know to draft plans that are sufficiently specific to have the force of law. Moreover, parties challenging language in a town plan during the Act 250 review process should take from Dooley’s opinion the distinction between nonregulatory abstractions and controlling language that is relevant to local review processes as well as Act 250 hearings and appeals. Critically, to maintain local control over the regulatory process and not turn every development project into a tangled web of Act 250 appeals, local land-use leaders must limit nonregulatory abstractions and make sure that they give town and regional plans adequate force of law.

2. Promoting Growth-Center Development in Recreation Hotspots

The “growth center concept” at the heart of the Killington Memorandum is worth examining at a broader level as a potential solution for other land-use conflicts in Vermont. Indeed, though this Note’s analysis focuses on recreation hotspots such as Killington and the Mad River Valley, which experience development pressures due to visitors, second-home owners, and area transplants, the growth-center concept could be used effectively in many different contexts.¹⁷⁶ For example, to transplant one of the lessons of Parker’s Gore and the Memorandum to the Mad River Valley, an updated Waitsfield Town Plan for the 2020s and beyond might include specific language to encourage cloistered growth near Irasville, on Route 100, and to bolster developers’ abilities to introduce proposals for high-density workforce housing and affordable rental properties.¹⁷⁷ The town could draft specific proposals to increase housing stock and availability of workforce housing without promoting development in upland areas that need greater protection,

176. See LEMENSE ET AL., *supra* note 84, at 295 (discussing other implementations of the growth-center concept in Vermont).

177. WAITSFIELD PLAN. COMM’N, *supra* note 99, at 12-11.

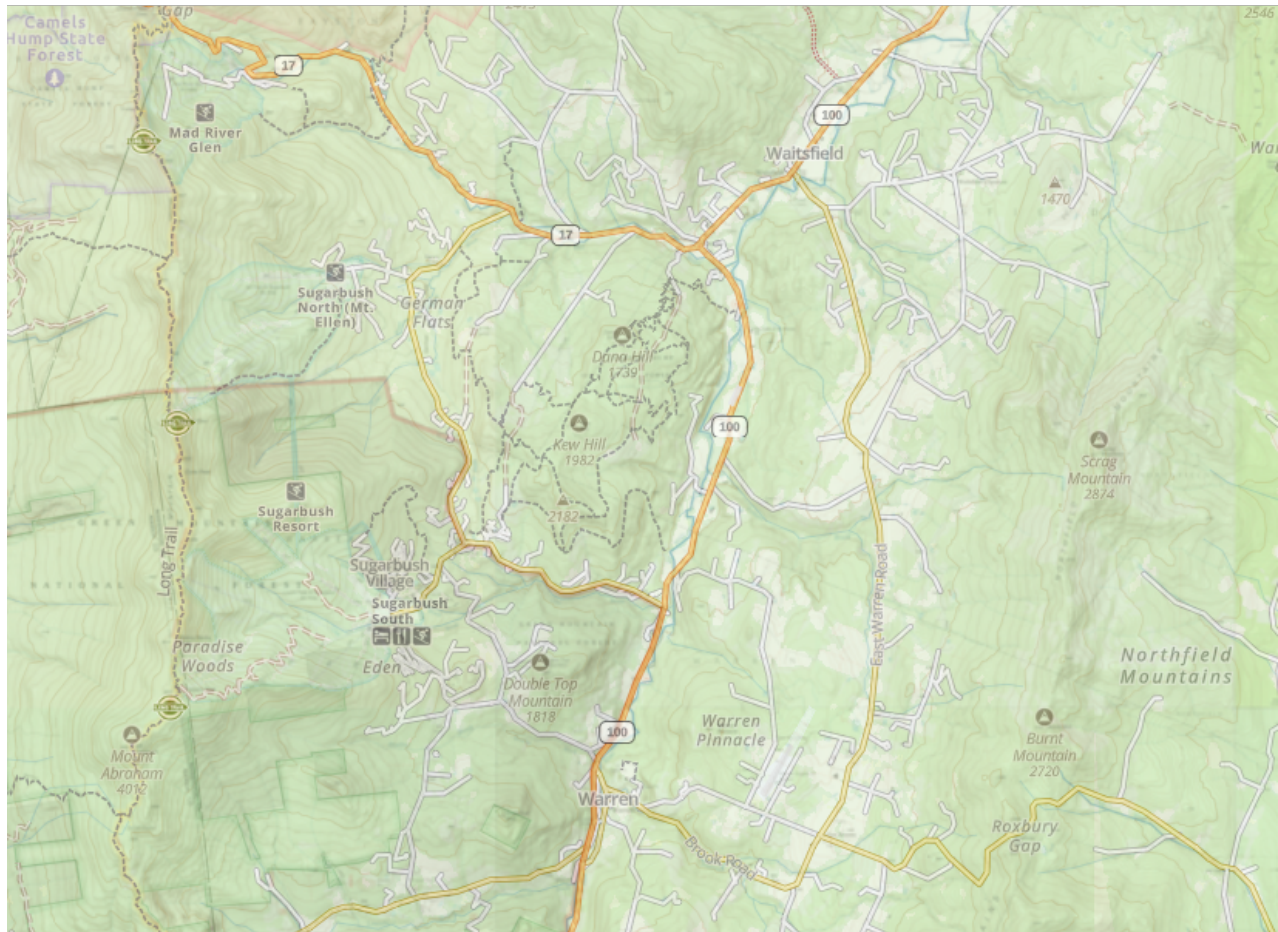
both for their recreational and ecological value. Waitsfield could get out in front of the housing-pressure problem, which has been causing development conflicts for decades, by agreeing on a durable growth-center concept for the area. Such a concept would help to shape policy and avoid future *Kiesel*-like disputes in which housing demand, local regulations, and Act 250 collide.

CONCLUSION

The aim of this Note has been to examine takings challenges to Act 250 regulation as a lens on effective reform and the contradictions contained therein. This Note proposes Takings Clause jurisprudence as an important tool for improving Act 250 and allowing parties on both sides of the regulatory coin a different perspective on the mandates of the regulatory process. A takings challenge to state regulations manifests the contradictions inherent in maintaining local control—something that Vermonters fiercely value, yet sometimes mismanage. Regulators, local officials, community members, and private landowners can all benefit from a reassessment of how Act 250 can protect entrenched values and satisfy emergent needs. By reviewing how Vermont courts have treated past cases involving outdoor recreation-related development demands, stakeholders can rethink the divide between economic development and ecological preservation.

Moreover, a solid understanding of takings jurisprudence and of Fifth Amendment issues around private property and development must inform the reconfiguration of Act 250 as a tool for conservationists and regulators. Those looking to reform Act 250 should consider the areas of tension between valid regulatory restrictions and landowners' rights that crop up during takings challenges. Such a reform effort can use the lessons of development-pressured communities that have successfully negotiated between the needs of conflicting parties and found economically viable paths forward. Ultimately, a hopeful view of a wisely reformed Act 250 sees Governor Davis's vision expanding to fit the legal needs of communities across Vermont as they meet the climate-change future head on.

*Appendix 1. Mad River Valley Recreation Map*¹⁷⁸



178. *Mad River Valley Recreation Map*, GAIA GPS (2003).