

**RIDING THE TRAIL TO EXPANDING VERMONT’S
ECONOMY: THE CASE FOR SIMPLE RECREATIONAL TRAIL
REGULATION**

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Introduction.....	414
I. Background.....	416
A. Legal History	416
B. The Structure.....	419
II. Whether Recreational Trails Trigger Act 250.....	422
A. One-Acre Jurisdiction.....	423
B. Ten-Acre Jurisdiction.....	433
C. Qualifying for a State or Municipal Purpose	434
D. The Takeaways	435
III. Alternative Regulatory Model: Amending Act 250 to Exempt Trail Networks that are Members of the Vermont Trail System.	436
IV. Policy Behind the Regulatory Reform.....	438
Conclusion	439

INTRODUCTION

The one certainty surrounding Vermont's Act 250 is that there is no shortage of opinions regarding its merits and shortcomings. The most recent controversy added to the Act 250 debate is the regulation of the recreational trail networks in Vermont.¹ The legislature formed a working group as part of Act 194 relating to rural and economic development.² The group is called the recreational trails working group, and it "evaluate[s] the strengths and challenges associated with regulation of recreational trails under 10 V.S.A. Chapter 151 (Act 250)."³ This Note will discuss the implications of Act 250's application to recreational trails, and why, based on its history and structure, it is inadequate for trail regulation.

The Vermont Legislature passed Act 250 in the spring of 1970,⁴ and from its inception, the Act has been ripe for contention.⁵ The Act was introduced in response to the opening of the interstate highways in the 1960s, which ushered in a new era for Vermont's economy.⁶ Opening the interstate highway resulted in a transition from a primarily agricultural economy towards a more recreational and second home-oriented interest in rural lifestyles.⁷ The industrial shift in Vermont raised property values, increased the tax base, and led to rapid development with little oversight.⁸

Then-Governor Dean C. Davis realized the issues associated with this rapid development while campaigning in Windham, Bennington, and Windsor Counties.⁹ While on the campaign tour, the governor witnessed

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1. *See generally Report to the Act 47 Commission Regarding Act 250 and Recreational Trail Regulation in Vermont*, DEP'T FORESTS, PARKS & RECREATION (Oct. 1, 2018), https://fpr.vermont.gov/sites/fpr/files/About_the_Department/Commissioner/Library/Act%20194_Act%20250_%20rec%20trails%20report%2010.1.18_%20FINAL.pdf [hereinafter *Act 47 Report*] (showing the opinions from multiple stakeholders involved in trail regulation).

2. *Id.*

3. *Id.*

4. *History of Act 250*, STATE VT. NAT. RES. BD., <https://nrb.vermont.gov/act250-program/history> (last visited Oct. 24, 2020).

5. *Act 250 Revamp Mired in Montpelier Quagmire*, SEVEN DAYS (Apr. 10, 2019), <https://www.sevendaysvt.com/vermont/act-250-revamp-mired-in-montpelier-quagmire/Content?oid=27057750>.

6. *History of Act 250*, *supra* note 4.

7. *See id.* (explaining that the interstate highway saved drivers at least an hour because it more closely connected Boston and New York); *Southview Assocs. Ltd. v. Bongartz*, 980 F.2d 84, 87–88 (2d Cir. 1992) (illustrating the shift in Vermont's industry).

8. *History of Act 250*, *supra* note 4.

9. *The Origins of Act 250 A Talk With Former Governor Dean C. Davis*, VT. ENV'T REP. FALL 1989, <https://legislature.vermont.gov/Documents/2018/WorkGroups/Act250/Reports%20and%20Resources/W-Vermont%20Environmental%20Report%20Fall%201989~The%20Origins%20of%20Act%20250~12-13-2017.pdf> [hereinafter *Origins of Act 250*].

projects that “w[ere] almost entirely connected to ski area development which was going along very rapidly at the time.”¹⁰ Governor Davis noticed problems like hastily designed roads that were inadequate for winter travel—and even “open sewers running into ditches.”¹¹ These issues reached a boiling point in the summer of 1968,¹² when the International Paper Company proposed a 20,000-acre recreation and vacation development project in Stratton and Winhall.¹³ For many Vermont residents, this proposed development encompassed the fear of permanent and unregulated alterations to the state’s natural beauty. The Stratton and Winhall developments were the final straws for this growing problem in Vermont,¹⁴ and Governor Davis sought to control the situation by forming the Governor’s Commission on Environmental Controls.¹⁵ This commission began a legislative undertaking that resulted in Act 250.

Act 250 was a much-needed control on “large-scale . . . environmentally sensitive developments.”¹⁶ However, the breadth of Vermont’s evolving development illustrates that the Act is too inflexible to evolve with Vermont’s needs.¹⁷ The debate over Act 250’s scope charges emotions for both supporters and opponents; as lobbyist Ed Larsen said, “[w]henver changing [Act 250] comes up, the developers scream, the environmentalist scream, the lawyers scream and the judges scream.”¹⁸ With the addition of the current debate over the Act’s application to trail networks, bikers, hikers, sport vehicle operators, and horseback riders now have reason to join the screaming.¹⁹

This Note will explore the jurisdictional issues surrounding Act 250 and Vermont’s recreational trails. Part I of this Note will discuss Act 250’s history and the structure of the Act. Part II will discuss the specific issues surrounding Act 250’s application to recreational trails. Part III will discuss whether recreational trail networks can trigger Act 250. Part IV will discuss the options for an alternative regulatory model governing recreational trail networks. Finally, this Note will conclude by recognizing the need for some form of oversight on this growing industry but will reassert the need for a more accommodating system of review.

10. *Id.*

11. *Id.*

12. *Southview Assocs. Ltd. v. Bongartz*, 980 F.2d 84, 88 (2nd Cir. 1992).

13. *Id.*

14. *Id.*

15. *History of Act 250*, *supra* note 4.

16. *Id.*

17. *Report of the Commission on Act 250*, STATE VT. GEN. ASSEMBLY (Jan. 11, 2019), <https://legislature.vermont.gov/Documents/2018.1/WorkGroups/Act250/Final%20Report/W~Ellen%20Czajkowski~Commission%20on%20Act%20250%20Final%20Report~1-11-2019.pdf>.

18. *Act 250 Revamp Mired in Montpelier Quagmire*, *supra* note 5.

19. *Conservation Collaboratives, LLC*, JO #7-286 (May 3, 2019).

I. BACKGROUND

A. Legal History

To understand whether Act 250 should encompass recreational trail networks, it is crucial to understand the history that necessitated Act 250's implementation. Before Act 250, Vermont wholly lacked a legal framework for protecting its natural vitality and combating modern sprawl. Planning and municipal oversight were never recognized in Vermont until a municipal ordinance following "the great Montpelier fire of 1875."²⁰ In response, the town Select Board said all town buildings were to be constructed out of brick or stone to prevent future fires.²¹ However, the Supreme Court of Vermont voided the ordinance in 1916 based on an invalid exercise of the police power.²² Montpelier's attempt at municipal control was hardly land-use planning, but it does illustrate the concerns that laid the foundation for future Vermont municipal and state planning.²³

Despite continued attempts at forming state leadership that could have had foresight regarding development, Vermont failed to implement any meaningful state or municipal planning.²⁴ There was an attempt to form the Vermont Development Society in 1897, the Vermont Improvement Association in 1906, and the Vermont Board of Trade in 1911.²⁵ None of

20. Paul Heller, *Out of the Ashes Two Fires in 1875 Redefined Montpelier's Heroes- and Future*, TIMES ARGUS (Nov. 10, 2014), https://www.timesargus.com/news/out-of-the-ashes-two-fires-in-1875-redefined-montpelier-146-s-heroes-151-and/article_db3af4fc-33ea-5b7c-b3e2-b76034eee504.html. The great Montpelier fire of 1875 was actually two fires that redefined the town and shaped what it is today. *Id.* The first fire started in a Mainstreet tin shop at 12:45 a.m. in early March. *Id.* Fire crews were immediately summoned and were able to subdue the fire, but only after it destroyed multiple buildings. *Id.* Unfortunately, at 2:30 a.m. the Montpelier Fire Chief noticed a light in a nearby building, and "[w]hile . . . still discussing whether or not it was a reflection from the burning ruins, the flames burst from the roof just above the window and the flames began anew." *Id.* Flames quickly consumed the building that was built mainly of wood. *Id.* The fire continued to spread west, quickly engulfing the whole commercial block, at which point the exhausted fire brigades sent for help. *Id.* Help arrived from Barre, "pulled by a four-horse team" one hour and forty-five minutes after the request. *Id.* Although the Barre crew was quite helpful in the fire's ensuing battle, the damage was extensive and resulted in the capital city's first building codes, many of which were later struck down by the Supreme Court of Vermont in 1916. *Id.*; State v. Gitchell, 90 Vt. 57, 96 A. 383 (1916).

21 See *Challenges and Recommendations on Improving the Structure of Planning in Vermont*, VT. BY DESIGN 1, 7 (Jan. 2006), https://www.vtrural.org/sites/default/files/Planning_VT-by-design.pdf [hereinafter VT. BY DESIGN]; Gitchell, 90 Vt. at 57 (illustrating the lack of planning in Vermont and the subsequent effort following the great Montpelier fire).

22. Gitchell, 90 Vt. at 57 ("the ordinance is an unreasonable interference with property rights, and therefore not a valid exercise of the police power.").

23. VT. BY DESIGN, *supra* note 21, at 48.

24. See generally K.R.B. Flint, *A Program of Civic Preparedness for Vermont Communities*, NORWICH UNIV. REC., Feb. 1919, at 12, <https://accd.vermont.gov/sites/accdnew/files/documents/CD/CPR/DHCD-Planning-TownPlanningVermont-1921.pdf> (showing Vermont's numerous failed attempts at instituting planning entities).

25. *Id.*

these organizations (which were aimed at developing leadership for a “bigger better Vermont”)²⁶ gained traction until 1912 with the Greater Vermont Association.²⁷ Although this organization offered the promise of statewide planning and foresight, the absence of an actual plan led to the continued duplication of work and the wasting of valuable energy.²⁸

The absence of planning was the central premise in a pamphlet written by K.R.B. Flint, a prominent political science professor who led the Department of Social Studies at Norwich University.²⁹ Norwich University printed the pamphlet that advocated for strong statewide planning capabilities.³⁰ It noted the town planning movement had received careful consideration in most American states but had received little attention in Vermont:³¹

In the average Vermont community, industries are located by accident, streets are laid out as the need requires, and sewers are laid down with no thought of how they will fit with extensions of the new sewerage system; a man builds a house, not knowing whether it will sometime be on a wart or in a ditch; the danger of fire is always present; trees are planted in haphazard fashion and the natural beauties marred—because there is no plan, no thought of the morrow.³²

The pamphlet called for a legal framework to support town and land-use planning, noting that it “would be unwise for a municipal corporation to prepare a plan at considerable cost without first having obtained authority to carry it into execution.”³³

Vermont took a major step towards land-use planning with the Planning Act of 1921.³⁴ Although it is not certain K.R.B. Flint’s pamphlet influenced the Planning Act, the pamphlet is indicative of the issues that lead to the legislation. The 1921 Act regulated public property through town officials by mandating that they consult municipal plans designed to give structure to the development of the town’s highways and public areas before they made any binding decisions.³⁵ The Planning Act did not authorize municipal control

26. *Id.*

27. *Id.* at 11.

28. *Id.*

29. *See generally id.*; *VT. BY DESIGN*, *supra* note 21, at 7–8.

30. *See generally* Flint, *supra* note 24 (illustrating the need for state and municipal planning).

31. *Id.* at 7–8.

32. *Id.* at Introductory Note.

33. *Id.* at 8–9.

34. *VT. BY DESIGN*, *supra* note 21, at 8.

35. *Id.*

over private areas in the town.³⁶ Because the Act lacked control over private property, it was a very limited advancement in Vermont land-use planning.³⁷

Finally, in 1968, a modern version of Vermont municipal planning came to light.³⁸ Vermont is a Dillon's Rule state, which means towns have no authority to conduct planning and regulation unless the State expressly grants them authority to do so.³⁹ Even though the legislature expressly granted the authority in 1968, the legislation did not mandate planning and zoning development.⁴⁰ In some cases, the Vermont Supreme Court voided municipal ordinances on procedural violations of the 1968 legislation.⁴¹ And in many cases, the Court struck down municipal zoning ordinances for overstepping their granted authority under the state's enabling legislation.⁴² Then the interstate highway system opened, causing a shift in Vermont demographics and ultimately resulting in extreme land-use issues.⁴³ The narrow authority of the state's enabling act for municipal zoning did not adequately protect Vermont's natural vitality. Governor Dean C. Davis recognized the need for controlling the rapid development and put together the commission that established Act 250 as it is known today.⁴⁴

Examining Act 250's development plainly reveals that the legislature never contemplated recreational trail regulation. The Act's structure is even more revealing because the criteria applied to an Act 250 property creates inequitable confusion. When going through the application process, James Cochran (general manager of Cochran's Ski Area) was informed by an Agency of Natural Resources (ANR) official that they "look at this bike trail

36. *Id.*

37. *Id.*

38. *Id.* at 8-9.

39. *Valcourt v. Vill. of Morrisville*, 104 Vt. 119, 121, 158 A. 83, 85 (1932). This case was a tort action against a municipal corporation utility provider who allegedly provided equipment and maintenance for the transmission of electricity. Negligent maintenance paired with the disposal of surplus electricity resulted in high voltage being passed to the plaintiff's farm and burning down the buildings. *Id.* at 84. The Court adopted the definition of municipal power as stated by Justice John F. Dillon in his work on municipal corporations which says: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable." *Id.* at 85 (quoting John F. Dillon, *THE LAW OF MUNICIPAL CORPORATIONS* 173 (James Cochrane et al. eds. 2nd ed. 1873)). In relying on the Dillon rule, the Court ruled *Valcourt* had the authority to dispose of the surplus electricity outside of its municipal boundaries, but since they were not expressly authorized to do so by the state, the disposal was a purely contractual arrangement, and the municipal corporation was not protected by the doctrine of *ultra vires*. *Id.*

40. VT. BY DESIGN, *supra* note 21, at 8-9.

41. *See, e.g., Flanders Lumber & Building Supply Co. v. Town of Milton*, 128 Vt. 38, 258 A.2d 804 (1969) (saying Milton's zoning ordinance was unlawful because it was not enacted in pursuit of a valid municipal plan).

42. *See, e.g., Morse v. Vt. Div. of State Bldgs.*, 136 Vt. 253, 388 A.2d 371 (1978) (saying unless the town has express authority it must yield to state control).

43. *History of Act 250*, *supra* note 4.

44. *Origins of Act 250*, *supra* note 9.

the same way [they] would look at a 20-unit housing development.”⁴⁵ Given that the “passage of Act 250 ‘represented the culmination of an effort to create a process that would subject subdivisions and other large developments in Vermont to administrative review so as to ensure economic growth without environmental catastrophe[.]’”⁴⁶ it is easy to see why there is confusion regarding trail jurisdiction.

The purpose behind Act 250 shows why it is appropriate for and has been successful at large scale development control.⁴⁷ The structure further demonstrates that “Act 250 was never intended to cover every land-use change or ‘interfere with local land-use decisions, except where substantial changes in land use implicate values of state concern.’”⁴⁸

B. The Structure

Act 250 permit applications are complicated.⁴⁹ The application process requires extensive document filings with multiple copies of the “proposed development [plan] . . . showing the intended use of the land, the proposed improvements, [and] the details of the project.”⁵⁰ Notice of the project must be sent to planning commissions, town clerks, the environmental board, and local newspapers; the applicant must also provide a list of all adjoining landowners and notify the adjoining landowners as the District Commission deems appropriate.⁵¹ If any adjoining landowner requests a hearing, one must be held on the application for the permit.⁵²

Permit applications are required if Act 250’s jurisdiction is triggered.⁵³ The Act’s relevant jurisdictional sections are defined in the following manner:

The construction of improvements on a tract or tracts of land, owned or controlled by a person, involving more than 10 acres of land within a radius of five miles of any point on any involved land, for

45. Telephone interview with James Cochran, General Manager, Cochran’s Ski Resort (Oct. 3, 2020) (on file with author).

46. PAUL S. GILLIES, *UNCOMMON LAW, ANCIENT ROADS, AND OTHER RUMINATIONS ON VERMONT LEGAL HISTORY* 283 (The Vermont Historical Society, 2013) (quoting *Southview Associates Ltd. v. Bongartz*, 980 F.2d 84, 8788 (2nd Cir. 1992)).

47. John Vogel, *Act 250 Review*, VPR (Feb. 21, 2019), <https://www.vpr.org/post/vogel-act-250-review#stream/0>.

48. GILLIES, *supra* note 46, at 283 (quoting *In re Agency of Admin.*, 141 Vt. 68, 71, 444 A.2d 1349, 1352 (1982)).

49. *In re Agency Admin.*, 141 Vt. 68, 81, 444 A.2d 1349, 1355 (1982).

50. 10 V.S.A. § 6083(a)(1)–(4) (2022).

51. 10 V.S.A. § 6084 (2022).

52. 10 V.S.A. § 6085 (2022).

53. 10 V.S.A. § 6081 (2022).

commercial or industrial purposes in a municipality that has adopted zoning and subdivision bylaws.⁵⁴

The Act also applies to the construction of improvements on more than one acre of land in a town that has not adopted zoning or subdivision bylaws.⁵⁵ However, if a town has adopted zoning or subdivision bylaws, the town may still elect to have the Act 250 requirements imposed.⁵⁶ Despite the fact the statute establishes definitions that trigger Act 250 Jurisdiction, it does not define the triggering language within the statute itself. The important jurisdictional terms related to this issue are the following: construction of improvements, commercial purpose, involved land, and the limitations on jurisdiction imposed by Rule 71.⁵⁷

Act 250 does not define construction of improvements, and the NRB promulgated rules to provide additional Act 250 implementation guidance.⁵⁸ Rule 2(C)(3) defines construction of improvements as “a physical change to a project site” but exempts actions taken in preparation of a permit that have no significant impact on the criteria listed in § 6086(a)(1) through (10).⁵⁹ The exemption must be de minimis construction that a person demonstrates will have no significant impact on the criteria listed in § 6086(a)(1) through (10).⁶⁰

Additionally, Rule 2(C)(4) defines commercial purpose to mean “the provision of facilities, goods or services by a person other than for a municipal or state purpose to others in exchange for payment of a purchase price, fee, contribution, donation or other object or service having value.”⁶¹ Although this seems to provide adequate guidance regarding the commercial purposes that trigger Act 250 review, the definition has been subject to continuing litigation.

For example, in *In re Baptist Fellowship of Randolph, Inc.*, the Vermont Supreme Court held that a mandatory fee-for-service was not necessary to

54. 10 V.S.A. § 6001(3)(A)(i) (2022).

55. 10 V.S.A. § 6001(3)(A)(ii) (2022).

56. 10 V.S.A. § 6001(3)(A)(iii) (2022).

57. 12-4-060 VT. CODE R. § 2(C)3–5, 71 (2022). Act 250 has many statutory definitions in both the Act and NRB rules, the majority of the confusion surrounding trail regulation stems from these four areas of the NRB rules. *See* 10 V.S.A. § 6001–6111 (2022) (consisting of numerous statutory and regulatory definitions).

58. *Statutes, Rules and Policies*, NAT. RES. BD., <https://nrb.vermont.gov/regulations> (last visited Oct. 27, 2020).

59. 12-4-060 VT. CODE R. § 2(C)(2) (2022). The criteria that cannot be significantly impacted are: (1) air and water pollution; (2) water supply; (3) impact on water supply; (4) erosion and soils ability to hold water; (5) transportation; (6) educational services; (7) municipal services; (8) aesthetics and natural scenic beauty; (9) impact of growth on the earth, soil, conservation, utility services, settlement patterns, and effects of scattered development; and lastly (10) local and regional plans. 10 V.S.A. § 6086 (2022).

60. 12-4-060 VT. CODE R. § 2(C)(2) (2022); 10 V.S.A. § 6086 (2022).

61. 12-4-060 VT. CODE R. § 2(C)(4) (2022).

satisfy the exchange for element.⁶² This understanding of commercial purpose supports a definition that encompasses a donation-based organization, but the court limited this definition in a later opinion in *In re Laberge Shooting Range*. There the court said, “[b]ecause Laberge did not charge a fee or rely on donations to provide use of the range, the environmental court properly concluded that the range did not operate for a commercial purpose and was therefore not under Act 250 Jurisdiction.”⁶³ Therefore, the definition of commercial purpose only encompasses organizations that either provide a service in exchange for a fee or accept donations and—rely—on those donations for providing the service.⁶⁴

The next important definition for understanding Act 250 Jurisdiction is involved land, which Rule 2(C)(5) defines. The NRB rule provides a lengthy definition that consists of three situations. The first is land that is within a radius of five miles from the land used as part of the project when “there is a demonstrable likelihood that the impact on the values sought to be protected by Act 250 will be substantially affected by reason of that relationship.”⁶⁵ Second, for municipal projects, involved land is understood to include “[t]hose portions of any tract or tracts of land to be physically altered and upon which construction of improvements will occur for state, county, or municipal purposes including land which is incidental to the use.”⁶⁶ Further, for the incidental land “there [must be] a demonstrable likelihood that the impact on the values sought to be protected by Act 250 will be substantially affected by reason of that relationship.”⁶⁷ The third definition for involved land is a narrow definition for stormwater offset projects. The land is limited to land owned and controlled by the applicant that is actually used for the offset project.⁶⁸

Notably, the NRB narrowed the area around a trail that can be controlled by Act 250 once the trail has triggered one of the jurisdictional definitions in 10 V.S.A. § 6001(3)(A).⁶⁹ This limitation is NRB Rule 71, which was promulgated to limit the jurisdictional territory of Act 250 to a trail corridor with a width of ten feet.⁷⁰ However, the district commissioner evaluating the trail may extend or narrow the corridor if they deem it appropriate.⁷¹ Additionally, any land outside the corridor that is “directly or indirectly impacted by the construction, operation or maintenance of the trail

62. *In re Baptist Fellowship of Randolph, Inc.*, 144 Vt. 636, 639, 481 A.2d 1274, 1276 (1984).

63. *In re Laberge Shooting Range*, 208 Vt. 441, 445, 198 A.3d 541, 544 (2018).

64. *Id.*

65. 12-4-060 VT. CODE R. § 2(C)(5)(a) (2022).

66. 12-4-060 VT. CODE R. § 2(c)(5)(b) (2022).

67. 12-4-060 VT. CODE R. § 2(c)(5)(b) (2022).

68. 12-4-060 VT. CODE R. § 5(c) (2022).

69. 12-4-060 VT. CODE R. § 71 (2022).

70. 12-4-060 VT. CODE R. § 71 (2022).

71. 12-4-060 VT. CODE R. § 71 (2022).

corridor” will fall within Act 250 Jurisdiction.⁷² These determinations are made after Act 250 is triggered, and their outcomes have severe impacts on private landowners and Vermont’s recreational trail network viability.

Once a project is determined to involve more than one or ten acres of land under the definition in Rule 2(C)(5), the evaluating district commissioner will review the project based on ten criteria designed to protect the purposes of Act 250.⁷³ The ten criteria are: (1) air and water pollution; (2) water supply; (3) impact on water supply; (4) erosion and soils ability to hold water; (5) transportation; (6) educational services; (7) municipal services; (8) aesthetics and natural scenic beauty; (9) impact of growth on the earth, soil, conservation, utility services, settlement patterns, and effects of scattered development; and lastly (10) local and regional plans.⁷⁴

Even though these criteria limit the scope of review, the Vermont Supreme Court has stated that Act 250 has a broad purpose: “to protect and conserve the environment of the state.”⁷⁵ Further, “[t]o achieve this far-reaching goal, the Environmental Board is given authority to conduct an independent review of the environmental impact of proposed projects, and in doing such, the Board is not limited to the considerations listed in Title 10.”⁷⁶ Crucially, jurisdiction must be determined before a review is triggered; whether Vermont recreational trail networks should trigger or already trigger Act 250 Jurisdiction is the central issue facing recreational trail networks.

The central jurisdictional issue is further complicated by follow-up considerations like the addition of new trails or alteration to existing trails. The project’s completion does not end the relationship with Act 250; its jurisdiction runs with the land, and any material change to the completed project requires an amended permit.⁷⁷ Additionally, if a change to the existing development is substantial, the project must go through a new application process and be reevaluated based on the criteria listed above.

II. WHETHER RECREATIONAL TRAILS TRIGGER ACT 250

At the outset, it is important to note that both the working group established by the legislature to review Act 250’s jurisdiction over recreational trails and a large number of the stakeholders (trail networks) agree that some level of state oversight is necessary for trail networks of a

72. 12-4-060 VT. CODE R. § 71 (2022).

73. *What are the 10 Criteria?*, NAT. RES. BD. (2020), <https://nrb.vermont.gov/act250-permit/criteria>.

74. 10 V.S.A. 151 § 6086 (2022); *What are the 10 Criteria?*, *supra* note 73.

75. *In re Juster Assocs.*, 136 Vt. 577, 580, 396 A.2d 1382, 1384 (1987).

76. *In re Hawk Mountain Corp.*, 149 Vt. 179, 184, 542 A.2d 261, 264 (1988).

77. 12-4-060 VT. CODE R. § 34 (2022).

certain size.⁷⁸ However, whether Act 250 is the appropriate mechanism for that oversight is highly debatable.⁷⁹ There is no doubt that in some situations, a trail network will trigger Act 250. This Note will now examine three possible situations that trigger Act 250 Jurisdiction: one-acre projects; ten-acre projects; and qualification of the trail for a state, county, or municipal purpose.⁸⁰ The analysis of these three jurisdictional scenarios will illustrate that both the complexity of the process and the criteria used to evaluate trail networks are ill-suited for recreation trail management and should remain in place to control modern sprawl and large developments as initially designed.⁸¹ This Note will explore the entirety of the process by examining the relevant differences between a one-acre and ten-acre jurisdiction. Finally, this Note will examine what advantages trails offer as a public purpose.

A. One-Acre Jurisdiction⁸²

As noted in Part II, a project involving more than one acre in a town that has not adopted zoning or subdivision bylaws triggers Act 250.⁸³ Vermont is nearly split in half with the numbers of towns, cities, or gores⁸⁴ that have or have not adopted some form of zoning ordinances.⁸⁵ One hundred thirty of Vermont's 262 towns qualify as one-acre jurisdictions.⁸⁶ The first determination made in a one-acre town is the purpose of the project.⁸⁷ Is it personal, commercial, or state-oriented? As the Supreme Court of Vermont noted, the "primary indication of the intent of Act 250's drafters is that they explicitly chose to include language limiting Act 250 Jurisdiction

78. Diane B. Snelling, *Report to the Act 47 Commission Regarding Act 250 and Recreational Trail Regulation in Vermont*, DEP'T FORESTS, PARKS & RECREATION, 1, 3 (Oct. 1, 2018) https://fpr.vermont.gov/sites/fpr/files/About_the_Department/Commissioner/Library/Act%20194_Act%20250_%20rec%20trails%20report%2010.1.18_%20FINAL.pdf.

79. *Id.*

80. 10 V.S.A. § 6001(3)(A)(i)–(ii), (v) (2022).

81. GILLIES, *supra* note 46, at 283 (quoting *Southview Associates Ltd. v. Bongartz*, 980 F.2d 84, 87–88 (2d Cir. 1992)) (saying Act 250 is an "effort to create a process that would subject subdivisions and other large developments in Vermont to administrative review so as to ensure economic growth without environmental catastrophe.").

82. Not all the cases cited in this section are from one-acre jurisdictions. However, the legal analysis is the same once jurisdiction is triggered. Furthermore, the takeaway of these examples is the projects Act 250 is being applied to and not standards of review associated with the appeals.

83. 10 V.S.A. § 6001(3)(A) (2022).

84. Mark Bushnell, *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/>. Gores are relatively small land areas that were not allocated to towns when Vermont was initially surveyed in 1787. At one-point, Vermont had sixty gores in various locations around the state; today, only three remain. For more on gores visit *Id.*

85. *List of 1 Acre and 10 Acre Towns*, NAT. RES. BD. (Nov. 19, 2021), <https://nrp.vermont.gov/documents/1-10-acre-towns>.

86. *Id.*

87. 10 V.S.A. §§ 6081, 6001 (2022).

to only those improvements operated for a commercial purpose.”⁸⁸ Therefore, when a trail network is operated and made available in exchange for donations (not even required purchases), and the trail network relies on those donations to expand and maintain the trails, Act 250 Jurisdiction is triggered.⁸⁹

The next step is to determine whether there is enough “actual land disturbance”⁹⁰ to meet the one-acre requirement.⁹¹ This is where the ambiguity starts, and it does not end for the remainder of the process. As previously noted, involved land is:

[t]he entire tract or tracts of land, within a radius of five miles, upon which the construction of improvements for commercial or industrial purposes will occur, and any other tract, within a radius of five miles, to be used as part of the project or where there is a relationship to the tract or tracts upon which the construction of improvements will occur such that there is a demonstrable likelihood that the impact on the values sought to be protected by Act 250 will be substantially affected by reason of that relationship.⁹²

Determining what constitutes the disturbed land should be rather simple to calculate. However, based on the statutory definition provided, the calculation ends up being quite convoluted due to the disturbed land’s subjective nature.

The evaluation is not limited to the actual construction areas; instead, it includes areas that may be used on a semi-regular basis to support and maintain the trail system.⁹³ For example, when an old log lands in areas in which vehicles may park to access the trail network.⁹⁴ The evaluation includes areas where tents are erected to host different events.⁹⁵ The evaluation will also include other areas that the district commissioner determines are involved in the construction, improvement, or maintenance of the trails, including seemingly attenuated areas that illustrate a relationship

88. *In re Laberge Shooting Range*, 208 Vt. 441, 454, 198 A.3d 541, 544 (2018).

89. *See id.* at 454; *In re Baptist Fellowship of Randolph, Inc.*, 144 Vt. 636, 639, 481 A.2d 1274, 1276 (1984) (ruling that when a nonprofit receives and relies on donations it is operating for a commercial purpose).

90. Exec. Order No. 04-20 (2020) (restricting involved land to actually disturbed land but only for the Vermont Trail System).

91. 10 V.S.A. § 6001(3)(A)(i)–(ii), (v) (2022).

92. 12-4-060 VT. CODE R. § 2(c)(5)(a) (2022).

93. *See* 12-4-060 VT. CODE R. § 2(c)(5)(a) (2022); *Conservation Collaboratives LLC., JO #7-286* (May 3, 2019) (showing how areas that are incidental to the main development are used to calculate the project’s acreage).

94. *Id.*

95. *Id.*

to the trail network and substantially affect the values protected by Act 250.⁹⁶ Thus, if a district commissioner believes a trail network should pass through the Act 250 process, they have considerable latitude to make determinations that trigger jurisdiction.

The ambiguous nature of one-acre town jurisdiction is further complicated if it is in a town that has elected to keep Act 250 standards under 24 V.S.A. Chapter 59 even after adopting its own zoning and subdivision bylaws. Notably, the section defining this jurisdiction refers to construction or improvements on land involving more than one acre “owned or controlled by a person.”⁹⁷ The lexical ambiguity regarding who controls the involved land and whether landowner agreements are sufficient to demonstrate control of the property raises many unanswered questions for Vermont’s recreational trail networks.

The Supreme Court of Vermont has not spoken directly on the issue of control in a trail context. However, in a declaratory ruling regarding *In re Trono Construction*, the Court “considered commonsense criteria such as common ownership or management, common funding, shared facilities and continuity in time of development” to help determine whether there was common ownership or control.⁹⁸ The *In re Trono Construction* ruling likely constitutes jurisdiction for all trails in a network so long as they are developed through a common trail organization. The control determination raises many questions for these different lot owners and how Act 250 affects their property. This includes questions about the extent of the jurisdiction, and what an owner can do to take their property out of Act 250 once the jurisdiction over the trail corridor has been triggered.⁹⁹

Once the commissioner establishes jurisdiction over a recreational trail network, they evaluate the network based on the criteria laid out in 10 V.S.A. § 6086 to determine whether the project will receive a permit.¹⁰⁰ The first criterion is that the project must “not result in undue air and water pollution.”¹⁰¹ The commissioner should evaluate headwaters, waste disposal, water conservation, floodways, streams, shorelines, and wetlands in making

96. 12-4-060 VT. CODE R. § 2(c)(5)(a) (2022).

97. 10 V.S.A. § 6001(3)(A)(iii) (2022) (emphasis added).

98. *In re Declaratory Ruling # 149 Trono Constr. Co.*, 146 Vt. 591, 592, 508 A.2d 695, 696 (1986).

99. Luckily, Governor Phil Scott issued Executive Order 04-20 that limits Act 250 Jurisdiction to the trail corridor determined by the District Commissioner, but this is a temporary gesture and does not provide the necessary overall clarity for landowners wishing to allow the public to benefit from utilizing trails on private land. *Promoting and Providing Regulatory Certainty for Recreational Trails*, OFF. GOVERNOR PHIL SCOTT (Oct. 5, 2020), https://governor.vermont.gov/sites/scott/files/documents/EO%2004-20%20-%20Promoting%20and%20Providing%20Regulatory%20Certainty%20for%20Recreational%20Trails_1.pdf.

100. See 10 V.S.A. § 6086 (2022) (listing criteria for evaluation).

101. 10 V.S.A. § 6086(a)(1) (2022).

this determination.¹⁰² Admittedly, some of these sub-criteria should be considerations for any conscientious trail builder, such as the effect on streams and wetlands. Trail builders should always get the appropriate wetland permit if operating in a qualifying area for something other than an allowed use.¹⁰³ However, waste disposal and water conservation are likely not necessary considerations for even the most considerate trail builder. The remote nature of these trails means they do not have waste disposal receptacles throughout the trail network, and there is likely no system that will directly draw on the municipalities water resources.

In a traditional commercial context, a criterion-one analysis bears little similarity to an appropriate trail evaluation. In *In re North East Materials Grp., LLS/Rock of Ages Corporation Act 250 Permit*, the Supreme Court of Vermont evaluated the North East Materials Group's air quality measuring method's sufficiency.¹⁰⁴ The takeaway of this analysis is less about the legal standard that was applied to evaluate the air quality measuring method's sufficiency and more about the situation it was applied to. In *In re North East Materials Grp., LLS/Rock of Ages Corporation Act 250 Permit* the Supreme Court of Vermont reviewed lower court findings regarding a challenge to a quarrying operation's Act 250 permit.¹⁰⁵ The quarrying operation consists of "approximately 930 acres in Barre and 230 acres in Williamstown."¹⁰⁶ The activities on those 1,160 acres consists of crushing, drilling, blasting, removing, and transporting rock to crushing equipment.¹⁰⁷ This is where the appropriate Act 250 review takes place—not on the recreational trail corridors in Vermont that are a maximum of 10 feet wide.¹⁰⁸

The second criterion is water supply.¹⁰⁹ The statutory language asks whether the project has "sufficient water available for the reasonably foreseeable needs of the subdivision or development."¹¹⁰ This criterion is not designed for trail evaluation and is only applicable to trailside development, but that is where the relationship ends.

The case, *In re Hinesburg Hannaford Act 250 Permit*, provides an example of where a proper criterion-two analysis is applied.¹¹¹ Although

102. 10 V.S.A. § 6086(a)(1)(A)–(G) (2022).

103. See *Vermont Wetland Rules*, VT. AGENCY NAT. RES. (Jan. 21, 2020), https://dec.vermont.gov/sites/dec/files/documents/wsmc_VermontWetlandRules.pdf (illustrating what is an allowed use for wetland permitting purposes).

104. *In re N. E. Materials Grp., LLC/Rock of Ages Corp. Act 250 Permit*, 2019 VT 55, ¶ 31, 210 Vt. 525, 217 A.3d 541.

105. *Id.* at ¶ 1.

106. *Id.*

107. *Id.*

108. 12-4-060 VT. CODE R. § 2(C)(5)(a) (2022).

109. See 10 V.S.A. § 6086 (2022) (listing criteria for evaluation).

110. 10 V.S.A. § 6086 (2022).

111. *In re Hinesburg Hannaford Act 250 Permit*, 2017 VT 106, ¶ 5, 206 Vt. 118, 179 A.3d 727.

Hannaford sought approval under Act 250 for all criteria except criterion two, the situation demonstrates where criterion two is applicable.¹¹² The store did not seek approval under criterion two because the town of Hinesburg was updating its municipal water supply system, and the current system was incapable of supplying the necessary water for the Hannaford project.¹¹³ A recreational trail network will not be a draw on a municipal water supply. This criterion is applicable for stores and lodging built to support crowds using a recreational trail network, but it is ambiguous and impracticable for the trail network itself.

The third criterion is relatively simple; it mandates that the project “[w]ill not cause an unreasonable burden on an existing water supply if one is to be utilized.”¹¹⁴ This criterion can largely be ignored for trail jurisdiction purposes, as the trail project itself will not be a drain on the existing water supply.

In the case *In re Pike Industries, Inc. and Inez Lemieux*, the NRB reviewed an application for a quarrying operation in Williamstown, Vermont.¹¹⁵ The criterion-three analysis involved sampling metamorphic rock and evaluating the quarry’s risk of creating a depression that would pull groundwater from all directions, thereby reducing water levels in the aquifer.¹¹⁶ Responding to these concerns, Pike Industries agreed to periodic monitoring of the neighboring wells to evaluate their impact on the aquifer.¹¹⁷ This project illustrates where a criterion-three analysis is paramount to ensuring basic amenities for properties surrounding a commercial project. However, a recreational trail network does not require this type of analysis; trail building is surface-level excavation incapable of creating depressions that affect neighboring water supplies at a level warranting Act 250 review.

The fourth criterion mandates that the project “[w]ill not cause unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result.”¹¹⁸ This condition is relevant to trail building. Trails must be built in a structurally sound manner to ensure erosion control and consistent safety for the public benefiting from the trail’s availability. This criterion is in line with preexisting sustainable trail building techniques that have been commonplace in the industry for more than ten years.¹¹⁹

112. *Id.*

113. *Id.*

114. 10 V.S.A. § 6086(a)(3) (2022).

115. *Pike Industries Inc., #5R1415-EB* (Jun. 7, 2005) (findings of fact, conclusions of law, and order).

116. *Id.* at 10.

117. *Id.* at 14.

118. 10 V.S.A. § 6086(a)(4) (2022).

119. *Mountain Bike Trail Building Essentials: The Benchcut*, SINGLE TRACKS (Apr. 5, 2010), <https://www.singletracks.com/trail-advocacy/mtb-trailbuilding-essentials-the-benchcut/>.

Admittedly, soil erosion is a concern for conscientious trail builders, but Act 250 level review is still unwarranted. In the commercial context, criterion four is satisfied by obtaining one of three permits: (1) a Construction General Permit; (2) an Operational Storm Water Discharge Permit; or (3) a Multisector General Permit.¹²⁰ Obtaining one of these permits entitles the applicant to a presumption of compliance with criterion four.¹²¹ A Construction General Permit is for the construction phase only.¹²² The permit is then cancelled and does not deal with the maintenance of the project.¹²³ The Operational Storm Water Discharge Permit's is limited in application to impervious surfaces (*e.g.*, a parking lot).¹²⁴ If a recreational trail network has parking lots that trigger the jurisdictional requirements when evaluated in the aggregate, then a criterion-four analysis would be appropriate. Otherwise, it is improbable that the trails themselves would be considered impervious, and therefore, they are outside of criterion-four review.¹²⁵ The final permit, a Multisector General Permit, deals with post-construction project operations.¹²⁶ This permit aims at preventing industrial waste from entering waterways; however, it is not concerned with erosion.¹²⁷ Because erosion is a main concern of conscientious trail builders, it is clear this permit is ill-suited for trail building purposes.

The fifth criterion requires that the project “[w]ill not cause unreasonable congestion or unsafe conditions with respect to the use of highways, waterways, railways, airports and airways.”¹²⁸ Transportation to and from trail networks may become overly congested in limited situations. In 2019, East Burke, Vermont, hosted 4,000 attendees for the New England Mountain Bike Association (NEMBA) festival.¹²⁹ The number of individuals at this festival exceeded the town’s infrastructure, which prompted the organizers to “apologize for unmanaged growth and size.”¹³⁰ NEMBA fest was canceled in East Burke for the 2020 season partially due to concerns surrounding events like this and their impact on the local population.¹³¹ Responses like the cancellation underscore the need to evaluate these concerns at a local level but do not necessarily highlight a need for state-level review.

120. *Criterion 4 (Erosion and Capacity of Soil to Hold Water)*, NAT. RES. BD. (last visited Feb. 6, 2021), <https://nrb.vermont.gov/sites/nrb/files/documents/4final.pdf>.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. 10 V.S.A. § 6086(a)(5)(A) (2022).

129. *NEMBAfest Cancelled*, BIKE MAG. (Jan. 17, 2020), <https://www.bikemag.com/industry-news/nembafest-cancelled/>.

130. *Id.*

131. *Id.*

An example of warranted state-level review is *In re Agency of Transportation*.¹³² The Agency of Transportation appealed an Environmental Board decision requiring a more extensive cattle underpass in a highway improvement project.¹³³ The Board determined that without the larger cattle underpass, the project failed criterion five of its Act 250 permit.¹³⁴ The Supreme Court of Vermont upheld the Board's determination.¹³⁵ However, the important takeaway is the nature of the project. The Act 250 permit review evaluated the safety of roadway conditions based on cattle crossings. Although bikers and hikers may cross state highways in the same manner as cattle, the trail project is not where a criterion-five review should take place. Instead, if there is a need for an underpass, the trail organization should have to pay for the update in the same manner as a farmer would for his cattle.¹³⁶ Just as the farmer should not be subject to Act 250 review for having cattle in their field, the trail organization should not undergo Act 250 review for having runners and riders on the trails.

The sixth criterion requires that the project “[w]ill not cause an unreasonable burden on the ability of the municipality to provide educational services.”¹³⁷ Trail networks do not negatively impact educational services. There may even be evidence to the contrary. In 2019, an engineering company named Precision Composites based out of Lyndonville, Vermont, was filling positions by leaning on the outdoor recreation incentives provided through Kingdom Trails.¹³⁸ This model could presumably be used to attract teachers in addition to engineers, and the additional \$16 million coming into the local economy through trail visitors certainly increases the funding available for local education.¹³⁹

In the case *In re Wal-Mart Stores, Inc.*, the Supreme Court of Vermont upheld an Environmental Board finding that Wal-Mart failed criterion six in their Act 250 application.¹⁴⁰ The case is a good illustration of multiple criteria, but the criterion six issue arose because the Wal-Mart application illustrated an increased burden on the local educational system by estimating the project would add six children to the local school system.¹⁴¹ Even though

132. *In re Agency of Transp.*, 157 Vt. 203, 203, 596 A.2d 358, 358 (1991).

133. *Id.* at 203.

134. *Id.* at 207.

135. *Id.*

136. *See id.* (saying when a larger than standard underpass is required the farmer must pay one fourth of the difference in cost).

137. 10 V.S.A. § 6086(a)(6) (2022).

138. *Company Capitalizes on Vermont Recreation to Recruit Workers*, WCAX (Jan. 11, 2019), <https://www.wcax.com/content/news/Company-capitalizes-on-Vermont-recreation-to-recruit-workers-504236071.html>.

139. *What's a Trail Really Worth*, VT SPORTS (Dec. 1, 2016), <https://vtsports.com/whats-trail-really-worth/>.

140. *In re Wal-Mart Stores, Inc.*, 167 Vt. 75, 87, 702 A.2d 397, 405 (1997).

141. *Id.*

Wal-Mart did not “bear the burden of proof,” once it made a showing of any increased educational burden, the board is allowed to require a showing of why that increase is not undue.¹⁴² This criterion may be applicable for a small number of the state’s larger networks in the recreational trail context. However, the increased revenue to the town should offset any increase in educational burden, and if required, the networks should have little trouble making this showing.¹⁴³

Criterion seven mandates that the project “[w]ill not place an unreasonable burden on the ability of local governments to provide municipal or governmental services.”¹⁴⁴ Trails may provide some burden on local services, as seen with the NEMBA fest, but they also offer economic stimulation that enables municipalities to update and maintain their services. The Vermont Trails & Greenways Council¹⁴⁵ reported that four trail networks in Vermont bring \$30.8 million to the state annually.¹⁴⁶ Even if a trail network is burdening a local municipality (an unlikely event for most trail networks), it can provide the solution by offering funds to the local municipal services to expand as necessary.

The inquiry under criterion seven focuses on the reasonableness of the burdens imposed on the local government.¹⁴⁷ This often requires a secondary growth study to illustrate the reasonableness of the burdens imposed in a commercial context.¹⁴⁸ Again, *In re Wal-Mart Stores, Inc.*, provides a good example of this criterion. In that case, the Environmental Board required similar showings of reasonableness under criteria six and seven aimed at determining whether the Wal-Mart would cause an undue burden on the town’s financial capacity.¹⁴⁹ Recreational trail networks should have little trouble satisfying the required showings for two reasons. First, they are an asset to the community, as illustrated in the criterion six analysis. Second, it is important to look at the differences between the applicants. Wal-Mart is a national corporation capable of making large scale changes to the community landscape. Recreational trail networks are local organizations run by people in the community and are inherently concerned with preserving the values

142. *Id.*

143. *See infra*, Part V (illustrating the financial benefits of a recreational trail network).

144. 10 V.S.A. § 6086(a)(7) (2022).

145. *What to Know about VTGC*, VT. TRAILS & GREENWAY COUNCIL, <https://vermonttgc.org/about> (last visited May 2, 2022). “The Vermont Trails and Greenways Council (VTGC) is an independent advisory board that works with the Vermont Agency of Forests, Parks and Recreation (FPR) to support Vermont trails and recreation.” *Id.*

146. *Economic and Fiscal Impact Analysis of the Vermont Trails and Greenway Council Member Organizations*, DEP’T FORESTS, PARKS & RECREATION 12 (2016), https://fpr.vermont.gov/sites/fpr/files/Recreation/Learn_More/Library/Final%20Report-%20Impact%20Analysis%20-%20VT%20Trails%20and%20Greenways.pdf.

147. *In re Wal-Mart Stores, Inc.*, 167 Vt. at 83.

148. *Id.*

149. *Id.*

that have made the trail network possible. Therefore, it is apparent that a criterion-seven review is far more appropriate in situations like *In re Wal-Mart Stores, Inc.* compared to a local recreational trail network aimed at increasing access to Vermont's beautiful wilderness.

Criterion eight focuses on the project's impact on the area's scenic and natural beauty and protecting "the irreplaceable natural area."¹⁵⁰ This criterion is possibly the most important Act 250 criteria, and it provides methods for challenging a development when it threatens endangered species and wildlife habitat.¹⁵¹ It mandates a balancing test for the project's economic and recreational benefit compared to the losses it may impose.¹⁵² It requires all feasible means of limiting destruction of a habitat to be implemented.¹⁵³ Finally, organizers must consider whether there are acceptable alternatives within the control of the applicant.¹⁵⁴ Vermont's scenic beauty is mostly undisturbed by trail networks, and the networks provide a vehicle for people to experience Vermont's natural beauty. To be clear, this is not to suggest there is no impact of trails on Vermont's environment. Still, there needs to be a more specific way to evaluate the impact and not subject the trails to the same balancing considerations as a twenty-unit housing development.

The case *In re Quechee Lakes Corp.* illustrates a relevant criterion-eight application.¹⁵⁵ The Quechee Lakes Corporation appealed a finding by the Environmental Board regarding criterion eight.¹⁵⁶ The Environmental Board rejected the assertions of a Quechee Lakes Corporation's expert who testified that the condominium development would have little impact on the landscape's natural aesthetics.¹⁵⁷ The Supreme Court of Vermont held that the Board was the proper authority to determine the expert's veracity because it is the trier of fact.¹⁵⁸ However, the more important takeaway is that criterion eight applied to a "twenty-eight-unit condominium project on a high ridge overlooking the Quechee valley."¹⁵⁹ This type of project is unequivocally appropriate for applying Act 250 criterion-eight review and is in stark contrast to the prototypical low impact recreational trail network meandering through the Vermont woods.

Criterion nine is vast; it includes twelve sub-criteria and another twelve sub-sub criteria.¹⁶⁰ The criterion intends to require developments to be in

150. 10 V.S.A. § 6086(a)(8) (2022).

151. 10 V.S.A. § 6086(a)(8) (2022).

152. 10 V.S.A. § 6086(a)(8) (2022).

153. 10 V.S.A. § 6086(a)(8) (2022).

154. 10 V.S.A. § 6086(a)(8)(A)(i)–(iii) (2022).

155. See *In re Quechee Lakes Corp.*, 154 Vt. 543 (1990) (analyzing the criterion-eight application).

156. *Id.* at 554.

157. *Id.* at 555.

158. *Id.*

159. *Id.* at 543.

160. 10 V.S.A. § 6086(a)(9)(A)–(L) (2022).

“conformance with a duly adopted capability and development plan, and land use plan when adopted.”¹⁶¹ This is an important consideration for Vermont’s trail networks. However, as discussed below in the alternative regulatory model and policy sections,¹⁶² there are more effective ways of achieving this criterion without subjecting trail networks to the extensive and ambiguous Act 250 analysis.

Criterion nine and its vast sub-criteria were appropriately applied in *In re Wal-Mart Stores, Inc.*¹⁶³ There, the Supreme Court of Vermont reviewed the Environmental Board’s decision to deny an Act 250 permit to Wal-Mart based on a failure to comply with criterion 9(A).¹⁶⁴ Criterion 9(A) requires the Board to review a town or region’s ability to accommodate growth.¹⁶⁵ In *In re Wal-Mart Stores, Inc.*, the Board determined that the competitive market in the town was unable to sustain the Wal-Mart development, and the market’s ability to accommodate growth is central to the meaning of criterion 9(A).¹⁶⁶ The Court upheld that determination, securing “financial capacity” as a factor under criterion 9(A).¹⁶⁷ This holding is important because it illustrates the importance of criterion nine for safeguarding a community’s holistic wellbeing. Importantly, a recreational trail network is an addition to the holistic wellbeing as opposed to a detriment to the area’s financial and aesthetic prosperity.¹⁶⁸

The tenth and final criterion requires compliance with local and regional plans.¹⁶⁹ This is something that trail networks should be required to consider, and local municipalities should be empowered to review and regulate. However, it is not something that needs to be evaluated by already-busy state agencies that are charged with reviewing and managing large scale developments.

In the commercial context, *In re Times & Seasons, LLC.* provides a case study for an appropriate denial of an Act 250 permit due to failure to satisfy criterion ten.¹⁷⁰ Times & Seasons wished to build a 4,800 square foot gift shop and deli in South Royalton, Vermont.¹⁷¹ However, the company failed to show that its project “would not be feasible if located as directed by the

161. 10 V.S.A. § 6086(a)(9) (2022).

162. *See infra*, Part IV.

163. *In re Wal-Mart Stores, Inc.*, 167 Vt. 75, 78–79, 702 A.2d 397, 405 (1997).

164. *Id.* at 81.

165. *Criterion 9(A) (Impact of Growth)*, NAT. RES. BD., <https://nrb.vermont.gov/sites/nrb/files/documents/9afinal.pdf> (last visited Feb. 10, 2021).

166. *In re Wal-Mart Stores, Inc.*, 167 Vt. at 78–79.

167. *Id.* at 81.

168. *See infra*, Part V (showing the financial boost a recreational trail network brings to a community).

169. 10 V.S.A. § 6086(a)(10) (2022).

170. *See generally* *In re Times & Seasons*, 2008 VT 7, 183 Vt. 336, 950 A.2d 1189.

171. *Id.* at ¶ 1–2.

town plan.” Absent showing financial infeasibility, the current site did not fall within the town plan, and therefore, it failed to satisfy criterion ten.¹⁷² This enforcement illustrates an appropriate application of Act 250 to limit modern sprawl and maintain Vermont’s natural beauty. However, recreational trail networks seek to increase access to that natural beauty, not place 4,800 square-foot gift shops in Vermont’s rural areas.

The foregoing criteria are designed for “reviewing and managing the environmental, social and fiscal consequences of major subdivisions and developments in Vermont.”¹⁷³ The Act has been successful in combating speculative development and modern sprawl while maintaining traditional settlement patterns based around village centers.¹⁷⁴ Combating urban sprawl and maintaining Vermont’s scenic beauty is essential for the preservation of Vermont’s culture and values. However, there is no need for this protection to extend to a recreation industry that already relies on the values being protected by Act 250. A regulatory framework is warranted, but that framework must balance the policy concerns associated with growing Vermont’s outdoor industry and the protection of the state’s forest block and wild areas. A regulatory framework with industry-specific goals would eliminate much of the ambiguity explained in the criteria above.¹⁷⁵ Unfortunately, under the current framework, ten-acre towns fair similarly to the one-acre towns, and the ambiguity in the evaluation criteria persists.

B. Ten-Acre Jurisdiction

Ten- and one-acre jurisdictions are similar in multiple ways. First, the definition of *construction of improvements* is the same.¹⁷⁶ Second, the definition of *commercial purpose* remains the same.¹⁷⁷ Third, the determination of *involved land* remains the same, but the triggering acreage increases to ten acres.¹⁷⁸ Fourth, they are both equally challenging to navigate regarding jurisdictional determinations.¹⁷⁹ Finally, the same criteria apply after jurisdiction is triggered.¹⁸⁰

172. *Id.*

173. *Act 250 Program*, NAT. RES. BD., <https://nrb.vermont.gov/act250-program> (last visited May 2, 2022).

174. Deb Markowitz, *Modernizing Act 250*, VPR (Feb. 13, 2019), <https://www.vpr.org/post/markowitz-modernizing-act-250#stream/0>.

175. *Supra* Part III(A) (author’s discussion of how Act 250 factors are ambiguous).

176. 12-4-060 VT. CODE R. § 2(c)(3) (2022).

177. 12-4-060 VT. CODE R. § 2(c)(4) (2022).

178. 12-4-060 VT. CODE R. § 2(c)(5)(a)–(c) (2022).

179. *See In re Agency Admin.*, 141 Vt. 68, 81, 444 A.2d 1349, 1355 (1982) (saying Act 250 is a complicated matter).

180. 10 V.S.A. § 6086 (2022).

Once a trail network is determined to have a commercial purpose, a commissioner makes an acreage determination to determine jurisdiction.¹⁸¹ This determination may be even more ambiguous at the ten-acre level than the one-acre level. With the higher number of trails usually involved in a ten-acre determination, a larger area is more likely to be classified as “impacting the values sought to be protected by Act 250.”¹⁸² These areas can include the acreage between the trails if the network impacts wildlife movement, the parking lots used for the trail network (even if they are preexisting for other purposes), and even open fields where a tent is placed on a predictable schedule to run events.¹⁸³

The ambiguity used to determine the acreage involved in the project is an immediate indicator of Act 250’s inability to constructively regulate recreational trails. The ambiguity means that districts will have varying determinations regarding what qualifies a trail for Act 250 review. These district determinations will force some trail systems to appeal decisions from the district level. In contrast, others will avoid the process entirely. The uneven application of the Act 250 system results in extreme legal and regulatory impositions on limited trail networks because it is based solely on local officials’ ambiguous determinations. There needs to be an alternative model that creates a best practices regulatory framework that balances industry considerations with the important values Act 250 seeks to protect. This suggested model will be discussed below.

C. Qualifying for a State or Municipal Purpose

Before evaluating that alternative model, there is a current classification limiting the acreage determination to land that has been disturbed.¹⁸⁴ The Vermont Trail System (VTS) is a classification that trail networks can apply to become a part of under 10 V.S.A. Ch. 20.¹⁸⁵ Governor Phil Scott issued Executive Order No. 04-20, requiring the chair of the NRB to clarify that “a VTS trail project will require ten acres or more of actual land disturbance to trigger Act 250 Jurisdiction, regardless the size of the parcel(s) the trail may cross.”¹⁸⁶ The disturbance of ten-acres established through Executive Order 04-20 means that trail networks that are part of the VTS can build roughly

181. GILLIES, *supra* note 46, at 283.

182. 12-4-060 VT. CODE R. § 2(C)(2) (2022).

183. Conservation Collaboratives LLC., *supra* note 19.

184. 12-4-060 VT. CODE R. § 71 (2022); *Promoting and Providing Regulatory Certainty for Recreational Trails*, *supra* note 99.

185. *Act 250 Rules*, VT. NAT. RES. BD. (Dec. 4, 2015), <https://nrb.vermont.gov/sites/nrb/files/documents/2015%20Adopted%20Rules.pdf>.

186. *Promoting and Providing Regulatory Certainty for Recreational Trails*, *supra* note 99.

twenty miles of hand-built trails and ten miles of machine-built trails.¹⁸⁷ The Executive Order also requires recommendations from the Commissioner of Vermont Forests, Parks, and Recreation (FPR) for future improvements to recreational trail oversight by March 1, 2021.¹⁸⁸ Executive Order 04-20 is an excellent step in the right direction that hopefully pulls recreational trails out of Act 250 review. Additionally, the Executive Order calls for best-management-practices based on regulatory recommendations from the Commissioner of the FPR.¹⁸⁹ This regulatory framework largely already exists and will be examined below.¹⁹⁰

D. The Takeaways

Once a recreational trail network plans to expand past the one-acre or ten-acre jurisdictional thresholds, then Act 250 is the only current state level review. However, just because Act 250 is an available regulatory model does not mean it should be applied. The ambiguity involved in the Act 250 process renders the Act inefficient for regulating recreational trails and relies too heavily on subjective district level determinations. Trail development is unlike housing and commercial development and should not be subject to the same system of review. Act 250 plays a vital role in maintaining Vermont's beauty and natural landscape, and Vermont should establish an alternative regulatory model to carry these goals forward in Vermont's recreational trail networks. In the words of the Act 47 Commission (established to examine Act 250 issues),¹⁹¹ "[t]he purpose of [the] Act 250 jurisdictional threshold is to focus Act 250 review on projects that have the greatest potential for significant impact due to their size or scope, or where the forms of adequate regulatory review do not exist."¹⁹² The Supreme Court of Vermont recognized limitations on Act 250's purpose saying:

[A]lthough the purposes of Act 250 are broad, the Legislature . . . did not purport to reach all land use changes within the state, nor to impose the substantial administrative and financial burdens of the Act, or interfere with local control of land use decisions, except

187. *Chapters & the State of Vermont Act 250 & RTP Funding Summary*, VT MOUNTAIN BIKE ASS'N (Feb. 2018), <https://vmba.org/wp-content/uploads/2018/02/Chapter-Act250-RTP-Summary.pdf>.

188. *Promoting and Providing Regulatory Certainty for Recreational Trails*, *supra* note 99.

189. *Id.*

190. *See infra*, Part III.

191. *Commission on Act 250: The Next 50 Years*, VT. GEN. ASSEMBLY (Dec. 15, 2018), <https://legislature.vermont.gov/committee/detail/2018.1/333>.

192. *Act 250 and Trails Questions for Comments*, DEP'T FORESTS, PARKS & RECREATION, https://fpr.vermont.gov/sites/fpr/files/About_the_Department/Commissioner/Library/VMBA.pdf (last visited May 2, 2022).

where values of state concern are implicated through large scale changes in land utilization.¹⁹³

Recreational trail networks do not fit within this purpose of Act 250. In *Southview Associates Ltd.*, the Supreme Court of Vermont recognized that “the Legislature intended Act 250 to protect Vermont’s environmental resources with an eye towards maintaining . . . existing recreational uses of the land—such as hunting, for example—and preserving lands, when possible, that have special values to the public.”¹⁹⁴ Bike riding and hiking are much closer to hunting than building a superstore in what used to be a farmer’s pasture. Recreational trails have special value to the public and are what Act 250 intends to protect, not regulate. Act 250’s unsuitability for trail regulation is why Vermont needs to implement an alternative regulatory model to remove any question about the relationship between Act 250 and recreational trails.

III. ALTERNATIVE REGULATORY MODEL: AMENDING ACT 250 TO EXEMPT TRAIL NETWORKS THAT ARE MEMBERS OF THE VERMONT TRAIL SYSTEM.

On October 5, 2020, Governor Phil Scott issued Executive Order 04-20 calling on the Commissioner of Forests, Parks and Recreation (FPR) to report back and make recommendations for a “best-management-practices driven program” for recreational trail management.¹⁹⁵ The Governor called on the Commissioner of the FPR to recommend a regulatory framework that largely already exists.

The Vermont Trail System (VTS) recognizes “the important role that trails play in Vermont.”¹⁹⁶ Currently, the Agency of Natural Resources (ANR) and FPR recognize the VTS.¹⁹⁷ The VTS is declared a public purpose, which means the ANR *may* spend public funds in support of the VTS.¹⁹⁸ The VTS statute offers a regulatory avenue for recreational trails in Vermont that does not involve Act 250 review. The VTS statute says the ANR *may*:¹⁹⁹

193. *In re Agency Admin.*, 141 Vt. 68, 81, 444 A.2d 1349, 1355 (1982) (citing *Comm. to Save the Bishop’s House, Inc. v. Med. Ctr. Hosp. of Vermont, Inc.*, 137 Vt. 142, 151, 400 A.2d 1015 (1979)).

194. *Southview Associates Ltd. v. Bongartz*, 980 F.2d 84, 89 (2nd Cir. 1992).

195. *Promoting and Providing Regulatory Certainty for Recreational Trails*, *supra* note 99.

196. Vermont Department of Forests, Parks and Recreation, *Vermont Trail System*, AGENCY NAT. RES, <https://fpr.vermont.gov/recreation/partners-and-resources/vermont-trail-system> (last visited May 2, 2022).

197. *Id.*

198. 10 V.S.A § 441(c) (2022).

199. 10 V.S.A § 444 (2022) (emphasis added).

- (1) acquire land by permission to develop and maintain the VTS;²⁰⁰
- (2) purchase land in fee simple absolute or any lesser property interest to develop and maintain the VTS;²⁰¹
- (3) assign the responsibility for any trail to a nonprofit agency so long as they manage it for the public purpose defined in the statute;²⁰²
- (4) coordinate governmental entities that wish to help develop the VTS;²⁰³
- (5) distribute maps and information that help develop and maintain the VTS;²⁰⁴
- (6) “[d]evelop and oversee the implementation of the Vermont trails plan . . . which] may include guidance on expenditure of funds, standards, provision for uniform signing, user and landowner education programs[.]”;²⁰⁵ and
- (7) provide for public involvement with the VTS.²⁰⁶

Section 444 in title ten of the Vermont statutes provides the necessary enabling legislation for the Vermont ANR to regulate the members of the VTS without the heavy-handed presence of Act 250. Subsection 6 of § 444 allows the ANR to develop a “Vermont trails plan . . . [which] may include . . . standards.”²⁰⁷ The Agency may make applications and membership in the VTS dependent on adhering to the standards promulgated by the ANR. Existing VTS networks and the ANR can develop the standards together, so they represent a sustainable long-term plan which evaluates the VTS’s impact on the climate, environment, wildlife, and forest blocks. The benefit of this review over the Act 250 model is that it allows for the enforcement of the standards without a subjective, lengthy, and expensive permitting process.

However, establishing this model alone will not cure the Act 250 issue. One of the two following alternative actions needs to happen to solidify this new regulatory model. First, the legislature could amend Act 250 to exempt recreational trail networks that are members of the VTS. Alternatively, the Natural Resources Board (NRB) could amend rule 71 of its Act 250 rules to

200. 10 V.S.A § 444(1) (2022).

201. 10 V.S.A § 444(2) (2022).

202. 10 V.S.A § 444(3) (2022). The statutory purpose is “to provide access to the use and enjoyment of the outdoor areas of Vermont, to conserve and use the natural resources of this state for healthful and recreational purposes, and to provide transportation from one place to another, it is declared to be the public policy of this State to provide the means for maintaining and improving a network of trails to be known as the ‘Vermont trails system.’” 10 V.S.A § 441(a) (2022).

203. 10 V.S.A § 444(4) (2022).

204. 10 V.S.A § 444(5) (2022).

205. 10 V.S.A § 444(6) (2022).

206. 10 V.S.A § 444(7) (2022).

207. 10 V.S.A § 444(6) (2022).

clarify the Act does not apply to members of the VTS.²⁰⁸ The second option involving the NRB updating rule 71 is the more efficient form of regulatory overhaul, but it may violate chapter 2 § 5 of the Vermont Constitution.²⁰⁹ Based on the possible constitutional violation, the most secure reform option is to impress upon the legislature the need to amend Act 250 to exclude members of the VTS from its definition of development in § 60013(A) of Act 250.²¹⁰ Although amending Act 250 has been no easy task,²¹¹ there are extensive economic policy considerations supporting the exemptions of VTS members from Act 250 review.

IV. POLICY BEHIND THE REGULATORY REFORM

In Executive Order 04-20, Governor Phil Scott stated the recreation economy in Vermont accounts for “34,000 direct jobs and \$2.5 billion in consumer spending.”²¹² Additionally, the Vermont Trails & Greenways Council (an advisory council for the FPR on the VTS) released a recent report that four major trail networks alone account for \$30.8 million per year in economic activity.²¹³ Of that \$30.8 million, \$15 million is “considered net new to the state” of Vermont.²¹⁴ These figures are consequential for a state that is known for its aging population and diminishing taxable work force.²¹⁵

Census Bureau data shows that as of 2018, 18% of Vermont’s population was over the age of 65.²¹⁶ Additionally, over a ten-year period the population of Vermont only grew 0.8% while the number of people over the age of 65 increased by 57%.²¹⁷ And even more concerning is the decline in individuals aged 34–44 by 23%.²¹⁸ What does this all mean for the future of Vermont’s taxable income and fiscal health? It means there is an aging population with less taxable income and a lack of young workforce participants to fill the gap.²¹⁹ Even though there is a perception that Vermont is a good place to

208. 12-4-060 VT. CODE R. § 2(C)3–5, 71 (2022) (clarifying Act 250’s jurisdiction over trails).

209. VT. CONST. Chapter 2 § 5 (“The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others.”).

210. 12-4-060 VT. CODE R. § 34 (2022).

211. John Dillion, *Gov. Scott Vetoes Act 250 Update, Says Bill Creates Uncertainty for Trails, Forests*, VPR (Oct. 6, 2020), <https://www.vpr.org/post/gov-scott-vetoes-act-250-update-says-bill-creates-uncertainty-trails-forests#stream/0>.

212. *Promoting and Providing Regulatory Certainty for Recreational Trails*, *supra* note 99.

213. *Economic and Fiscal Impact Analysis of the Vermont Trails and Greenway Council Member Organization*, *supra* note 146.

214. *Id.* (emphasis added).

215. *See generally Taxes: 5 Risks to Vermont’s Tax Base*, THE INFORMED VERMONT (Apr. 3, 2018), <https://theinformedvermonter.com/497-2-risk-to-tax-base/> (showing Vermont’s aging population results in a decreased working age population).

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

retire,²²⁰ recent migration patterns suggest that “[s]ince 2010, there has been a modest outward migration [of higher reporting income individuals].”²²¹

This data supports Vermont’s outdoor industry expansion because Vermont’s economy needs alternative forms of tax revenue. The evidence shows that only four recreational trail networks bring in \$15 million in new sales and \$2 million in new tax revenue for the state.²²² These numbers “outline the benefits . . . [that] these trails allow . . . organizations as well as the state and legislature to rightfully prioritize recreation in Vermont as a major source of tourism income and local spending.”²²³ Danny Hale, the Executive Director of the Vermont ATV Sportsman’s Association, Inc. and Chairman of the Trails & Greenways Council added, “[i]t’s high time that we all recognize this opportunity.”²²⁴ It is also high time that Vermont creates an alternative regulatory framework for recreational trails that does not involve Act 250 review to capitalize on the public good these trails offer.

CONCLUSION

Act 250 is not an effective system for recreational trail oversight. There are too many jurisdictional ambiguities regarding the acreage required to trigger Act 250, and the criteria in § 6086 are not adequately related to the trail building practices. Alternatively, the legislature should consider the proposed regulatory scheme in Part III to establish the necessary best practices regulatory model that will expand a much-needed sector of Vermont’s economy while maintaining the principles sought in Act 250 review.

220. *10 Great Small Cities for Retirement*, AARP, <https://www.aarp.org/home-garden/livable-communities/info-10-2011/Great-Charming-Small-Cities-for-Retirement.html#quest1> (last visited May 2, 2022).

221. *Taxes: 5 Risks to Vermont's Tax Base*, *supra* note 215 (explaining that this group accounts for 46% of filers in the state of Vermont).

222. *Trails Blaze the Way for Vermont's Economic Future*, AGENCY NAT. RES., <https://anr.vermont.gov/node/922> (last visited May 2, 2022).

223. *Id.*

224. *Id.*