

Nova Law Review

Volume 20, Issue 2

1996

Article 12

The Vermont Barrier: How Economic Protectionism Kept Wal-Mart Stores, Inc. Out of St. Albans, Vermont

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I. INTRODUCTION

Wal-Mart Stores, the world's largest retailer, is experiencing opposition to the execution of its expansion plans from citizens' groups in different areas of the country, particularly in the northeast United States.¹ In Hornell, New York, a group called "Taxpayers Against Floodmart" obtained a court order to stop construction on a partially completed 125,000 square-

1. See David Morris, *Superstore Invasion Provides a Good Test of Local Democracy*, BUFF. NEWS, Feb. 14, 1995, at C3.

foot Wal-Mart store.² Wal-Mart also faced opposition in several other New York towns, namely East Aurora, Lake Placid, and Catskill.³ Wal-Mart expansion plans have also been hindered in towns in several New England states.⁴

In fact, until recently, Vermont was the only state in the Union without a Wal-Mart store.⁵ However, that may be changing according to one media article entitled *Wal-Mart Breaks Vermont Barrier*.⁶ The report explained that Wal-Mart will take over a 50,000 square-foot property in Bennington, Vermont, which was formerly operated by F.W. Woolworth.⁷

This article will introduce the reader to the tangible legal opposition which Wal-Mart has faced from these citizens' groups in the northeast. Its purpose is to expose what is referred to as the "Vermont barrier" through a case study of the opposition faced by Wal-Mart in one particular community. Furthermore, this article will discuss how Wal-Mart was excluded from St. Albans, Vermont through the practical application of the Vermont Land Use and Development Act, commonly referred to as Act 250.⁸

Part II of this article provides a background explanation of Act 250 and its application and execution by the several district environmental commissions ("commission") and the Vermont Environmental Board ("Board"), the governmental bodies charged with executing the provisions of Act 250. Part III explores how Act 250 was applied in the Board's recent decision to void a land use permit granted to the retailer by one of the commissions.⁹ The Board's decision was primarily based on its belief that the project would result in a net job loss for the local region and adversely impact the tax base of local municipalities.¹⁰

2. Sharon Linstedt, *Citizens Group Blocks Hornell Project for Wal-Mart, Wegmans*, BUFF. NEWS, Feb. 1, 1995, at C6.

3. *Id.*; see also Peter P. Donker, *Chain's Decision to Locate in Sturbridge Splits Tourist-Dependent Town*, SUNDAY TELEGRAM (Worcester, Mass.), Mar. 26, 1995, at E1.

4. Linstedt, *supra* note 2, at C6. These towns include Bath, Maine; North Kingston, Rhode Island; the Connecticut towns of Cromwell, Plainville, New Milford, Newington, East Windsor, and Branford; the Massachusetts towns of Greenfield, Westford, Quincy, Plymouth, Saugus, Lee, Billerica, Somerset, and Sturbridge; and the Vermont towns of Williston and St. Albans.

5. Donker, *supra* note 3, at E1.

6. *Wal-Mart Breaks Vermont Barrier*, PALM BEACH POST, June 4, 1995, at 2E [hereinafter *Wal-Mart*].

7. *Id.*

8. 1969 Vt. Laws 250 (codified at VT. STAT. ANN. tit. 10 §§ 6021, 6026 (1993)).

9. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 1, 3, 60 (Vt. Envtl. Bd. Dec. 23, 1994).

10. *Id.* at 27-29.

Part IV explains some of the arguments which the retailer is making in the pending appeal in the Supreme Court of Vermont. Part V analyzes the effect of Act 250 as an economic barrier in light of our nation's ambitions of achieving economic union. Finally, part VI submits that it is the practical application of Act 250 which is the "Vermont barrier" and that Wal-Mart cannot break this barrier by opening a store in an existing retail property.

II. LAND USE AND DEVELOPMENT LAW IN VERMONT

Commonly referred to as Act 250,¹¹ Vermont's law governing land use and development requires a permit¹² before commencing land development.¹³ The power to issue permits¹⁴ is vested in nine commissions¹⁵ and the Board.¹⁶ The Board is vested with the authority to promulgate rules governing the proceedings before itself and the several commissions.¹⁷ Persons seeking a permit must first file an application with the appropriate commission in accordance with the rules promulgated by the Board.¹⁸ Once a decision is made by a particular commission, the Board hears appeals of those decisions.¹⁹

A. *Composition of the Commissions and the Board*

Through Act 250, the Vermont Legislature created the nine commissions and the Board. The Governor of Vermont is vested with the power to appoint members and alternates to each of these bodies.²⁰ Appointments

11. See VT. STAT. ANN. tit. 10 §§ 6001-92 (1993); *In re Presault*, 292 A.2d 832, 833 (Vt. 1972). The court observed that it was interpreting "the Vermont Land Use and Development Act passed by the 1969 Adjourned Session of the Legislature as Act No. 250." *Id.*

12. VT. STAT. ANN. § 6081.

13. *Id.* § 6001(3). This section defines development as "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 commercial or industrial purposes." *Id.*

14. *Id.* § 6086.

15. *Id.* § 6026. This section divides the state into nine numbered districts and creates a district environmental commission for each district. VT. STAT. ANN. § 6026.

16. *Id.* § 6021 (creating the State Environmental Board).

17. *Id.* § 6025(a). This section directs the Board to "adopt rules . . . to interpret and carry out the provisions of this chapter . . ." *Id.*

18. *Id.* § 6083.

19. VT. STAT. ANN. § 6089(a).

20. *Id.* §§ 6021, 6026(b).

of Board members are made "with the advice and consent of the senate."²¹ Thus, the members of the commissions and the Board are political appointees of the governor, not officials popularly elected by the citizenry.²²

The several commissions are composed of three members from the district in which the particular commission sits.²³ One of the three members of each commission is appointed as the chair and serves a term of two years, while the other two members are appointed for terms of four years.²⁴ The chair of each commission serves "at the pleasure of the governor" while the other two members can be removed only with a showing of cause.²⁵

The Board, on the other hand, is composed of nine members.²⁶ The chair is appointed for a term of two years, while the other eight members are appointed for terms of four years.²⁷ As with the commissions, the chair serves "at the pleasure of the governor" while the other eight members can be removed only for cause.²⁸

B. *Permit Applications and Their Evaluation*

As noted above, parties required to obtain a permit to lawfully execute their development plans must file an application with the appropriate commission.²⁹ Notice of the application must be given by the applicant on or before the date of filing to specifically enumerated parties including the municipality, and municipal and regional planning commissions where the proposed development is located.³⁰ Notice must also be provided to the Board, as well as any state agency directly affected, and any other municipality or state agency, or person the commission or Board deems appropriate.³¹ Such notice includes sending a copy of the application to the appropriate parties and publication in a local newspaper.³²

21. *Id.* § 6021(a).

22. *Id.*

23. *Id.* § 6026(b).

24. VT. STAT. ANN. § 6026(b).

25. *Id.* § 6026(c).

26. *Id.* § 6021(a).

27. *Id.*

28. *Id.* § 6021(c).

29. *See supra* note 13 and accompanying text.

30. VT. STAT. ANN. § 6084(a).

31. *Id.* § 6084(b).

32. *Id.*

The Supreme Court of Vermont has observed that “processing a permit application first involves consideration . . . of the ten criteria of 10 V.S.A. § 6086(a), each of which involve myriad subcategories of concern.”³³ These criteria address several concerns including water or air pollution, soil erosion, and traffic.³⁴ In turn, as alluded to above, some of these criteria have “myriad subcategories of concern.”³⁵ For example, under the criterion addressing water or air pollution, the Vermont Legislature has addressed issues concerning headwaters, waste disposal, water conservation, and any relevant wetland rules.³⁶

One might naturally expect all of the criteria cited thus far to be included within the statutorily vested province of such bodies designated as a district environmental commission or a State Environmental Board. However, Act 250 includes other criteria which the uninitiated might be surprised to see included within the province of such bodies. For example, Act 250 includes other criteria addressing impact on schools and local government services, impact of growth, costs of scattered development, public investments and facilities, and conformance with local and regional plans.³⁷ The Board has labeled these as fiscal criteria.³⁸

These fiscal criteria are particularly interesting because they have been interpreted by the Board to justify an investigation into not only the effect of a proposed development upon the ecological environment, but also its effects upon the *economic* environment.³⁹ Such conclusions by the Board concerning the relevance of a proposed development’s competitive effects on the economy are especially significant since the Supreme Court of

33. *In re Wildlife Wonderland, Inc.*, 346 A.2d 645, 653 (Vt. 1975). These criteria are often referred to by a number which corresponds to their respective codification as subdivisions under § 6086(a), followed by a parenthetical indication of what the particular criterion relates to. For example, at § 6086(a)(8), the district commissions and Board are charged by statute not to grant a permit before finding that the proposed development “[w]ill not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas.” VT. STAT. ANN. § 6086(a)(8). Accordingly, this subdivision has been referred to as criterion eight (historic sites). *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 4 (Vt. Env’tl. Bd. Dec. 23, 1994).

34. VT. STAT. ANN. § 6086(a).

35. *In re Wildlife Wonderland*, 346 A.2d at 653.

36. VT. STAT. ANN. § 6086(a)(1).

37. *Id.*

38. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 26 (Vt. Env’tl. Bd. Dec. 23, 1994).

39. *Id.* at 27.

Vermont has “accorded ‘a high level of deference’ to the interpretation of Act 250 by the Board.”⁴⁰

Act 250 dictates that the applicant does not have the burden of proving compliance with all ten criteria.⁴¹ Depending on the particular criterion in controversy, the burden of proof may be on either the applicant or the party opposing the applicant.⁴² However, the Supreme Court of Vermont has noted that:

Nothing in the language of the statute prevents the Board from finding against the applicant on an issue even though the applicant does not have the burden of proof on that issue. In fact, the statute requires the Board to make a finding on each factor . . . irrespective of the placement of the burden of proof.⁴³

Furthermore, permits may be granted with certain conditions prescribed by the issuing authority.⁴⁴ The Vermont Legislature has directed that applications should not be denied by the Board or commissions unless those bodies find that the proposed development plan, if realized, would be detrimental to public health, safety, or general welfare.⁴⁵

C. *Procedures Before the Commissions and Board*

The Board is vested with the authority to promulgate rules to execute the provisions of Act 250.⁴⁶ Accordingly, the Board has issued rules governing the presentation of evidence and the proceedings generally before the Board and the several commissions.⁴⁷ The *Environmental Board Rules* contemplate several methods for the presentation of evidence to the Board including prehearing conferences, prefiled testimony, and live hearings before the commissions or Board.⁴⁸ Also, the Board may conduct site

40. *In re Denio*, 608 A.2d 1166, 1169 (Vt. 1992) (citing *In re Vitale*, 563 A.2d 613, 615 (Vt. 1989)).

41. VT. STAT. ANN. § 6088.

42. *Id.*

43. *In re Denio*, 608 A.2d at 1170 (citing VT. STAT. ANN. § 6086(a)).

44. VT. STAT. ANN. § 6086(c).

45. *Id.* § 6087(a).

46. *Id.* § 6025(a) (directing the Board to “adopt rules . . . to interpret and carry out the provisions of this chapter . . .”).

47. See ENVTL. BD. R. 17 (1993).

48. *Id.* at 16-18.

visits to observe the location of the subject development.⁴⁹ Thus, brief discussion of some of these rules will reveal how the proceedings before the Board and commissions are conducted.

One forum contemplated by the *Environmental Board Rules* for the expedition of proceedings before the commissions and the Board is the prehearing conference, governed by Environmental Board Rule 16.⁵⁰ Rule 16 states that the purposes behind prehearing conferences are to clarify issues in controversy, identify relevant sources of evidence which may be presented at hearings, and obtain appropriate stipulations of the parties.⁵¹ Prehearing conferences are conducted by a delegate authorized by the commission or Board who, if an actual member thereof, may make preliminary rulings regarding scheduling, party status, and other preliminary matters.⁵² Thus, the prehearing conference presents a method used by the commissions and the Board to expedite Act 250 proceedings.⁵³

Environmental Board Rule 17(D) also allows parties to submit prefiled testimony in writing.⁵⁴ However, prefiled testimony is intended only to facilitate the presentation of the direct testimony of the particular witness.⁵⁵ The witness must be present at the hearing to present the written evidence, to affirm its truthfulness, and to remain available for cross-examination.⁵⁶ To further expedite proceedings, if the other parties have received copies of the written testimony, the Board or commission may dispense with direct examination and order that cross-examination of the witness proceed immediately.⁵⁷

Hearings are available upon request by those parties required by statute to receive notice of the permit application.⁵⁸ However, hearings are not required if not requested by any such party.⁵⁹ Rule 18 addresses the conduct of hearings, setting a quorum requirement of more than half the

49. *See, e.g., In re Quechee Lakes Corp.*, 580 A.2d 957, 962 (Vt. 1990) (concluding that "the Board's partial reliance on knowledge garnered from the site visits was not erroneous").

50. ENVTL. BD. R. 16.

51. *Id.* at 16(A)(1)-(3).

52. *Id.* at 16(B).

53. *Id.* at 16(A).

54. *Id.* at 17(D).

55. ENVTL. BD. R. 17(D)(2).

56. *Id.*

57. *Id.*

58. VT. STAT. ANN. § 6085.

59. *See id.*

members of the relevant body which may be waived by agreement of all parties.⁶⁰

The order of the presentation of evidence is within the discretion of the commission or Board as it deems expeditious and equitable.⁶¹ The admissibility of evidence presented at hearings is governed by the Vermont Administrative Procedure Act.⁶²

Act 250 also contemplates the creation of Environmental Board Rules concerning the acceptance of certain permits issued by other state agencies as evidence which creates a rebuttable presumption of compliance with certain Act 250 criteria.⁶³ For example, under Environmental Board Rule 19(E), the issuance of a Discharge Permit or a Water Supply and Wastewater Disposal Permit creates a rebuttable presumption that waste materials can be disposed of without resulting in undue water pollution.⁶⁴ The issuance of these permits creates a rebuttable presumption of compliance with the criteria concerning waste disposal and streams.⁶⁵

D. *Party Status to Proceedings Before the Commissions and Board*

Party status is desirable because it enables individuals or groups with such status to present evidence to the commission or Board.⁶⁶ Party status to the proceedings before the commission can derive directly under statute or indirectly from the rules promulgated by the Board.⁶⁷ The Board is charged with making rules concerning party status to the proceedings before the commissions and itself.⁶⁸ Act 250 directs that “[p]arties shall be those who have received notice, adjoining property owners who have requested a hearing, and such other persons as the board may allow by rule.”⁶⁹

Pursuant to the legislative charge, the Board has addressed party status through Environmental Board Rule 14. Rule 14(A), which addresses parties

60. ENVTL. BD. R. 18.

61. *Id.* at 17(C).

62. VT. STAT. ANN. tit. 3 § 810 (1993).

63. *Id.* tit. 10 § 6086(d).

64. ENVTL. BD. R. 19(E).

65. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 12, 13, 15 (Vt. Env'tl. Bd. Dec. 23, 1994).

66. *See* ENVTL. BD. R. 17. This particular rule is written, like many of the others, in terms of what “parties” may do. *Id.*

67. VT. STAT. ANN. § 6085(b).

68. *Id.* § 6085(c).

69. *Id.*

by right, closely follows the statutory language of Act 250 outlined above and does not broaden the class of persons or groups eligible for party status.⁷⁰

Through rule 14(B), the Board uses its statutorily granted rule-making authority to broaden the prospective class of parties to the proceedings before the Board or several commissions.⁷¹ Rule 14(B) allows the Board or commission to grant party status to a petitioner in either of two ways. First, party status may be granted if the Board or commission is persuaded by the petitioner that the proposed development will affect the petitioner's interest under any of the several Act 250 criteria.⁷² Second, party status may be granted if the petitioner sufficiently demonstrates that the petitioner's participation will materially assist the Board or commission through presenting evidence or argument.⁷³

Through rule 14, the Board uses its rule-making authority to create a class of individuals and groups contemplated, but not specifically addressed by the Vermont Legislature, who may participate alongside those parties statutorily defined.⁷⁴ Other provisions of rule 14 address the procedural requirements for obtaining party status.⁷⁵ These procedural requirements differ according to whether the individual or group seeks to implement party status accorded by statute or seeks a permissive grant of party status.⁷⁶

E. *Appealing Commission Decisions: The Province of the Board*

Decisions of the commissions are appealable to the Board.⁷⁷ Parties wishing to appeal the decisions of the commissions must file a notice of appeal with the Board within thirty days of that decision.⁷⁸ The notice of appeal must include a statement of the issues to be addressed in the appeal as it⁷⁹ controls the scope of the appellate hearing before the Board.⁸⁰

70. ENVTL. BD. R. 14(A); VT. STAT. ANN. § 6085(c).

71. ENVTL. BD. R. 14(B).

72. *Id.* at 14(B)(1)(a).

73. *Id.* at 14(B)(1)(b).

74. *See* VT. STAT. ANN. § 6085(c).

75. ENVTL. BD. R. 14.

76. *Id.*

77. VT. STAT. ANN. § 6089(a).

78. *Id.*

79. *Id.*

80. *Id.*; *see also In re Taft Corners Assocs.*, 632 A.2d 649, 653 (Vt. 1993).

The Board conducts a de novo review on all findings requested by any party that files an appeal or cross-appeal.⁸¹ In its “first confrontation with the Vermont Land Use and Development Act,”⁸² the Supreme Court of Vermont commented on the de novo nature of appeals to the Board, stating:

A de novo proceeding at an appellant level commonly designates a hearing as though no action whatever had been instituted in the District Environmental Commission below. A de novo proceeding is one in which all the evidence is heard anew, and the probative effect thereof determined. A de novo proceeding contemplates those parties who had an interest in the original proceeding being allowed to appear and participate as proper parties at the second set of hearings.⁸³

However, while the Board may scrutinize and even disregard the factual findings of the commissions, the Board has no jurisdiction to decide issues not raised before the district commission.⁸⁴

Act 250 expressly makes the factual determinations of the Board conclusive, provided only that such determinations are supported by substantial evidence.⁸⁵ Substantial evidence is that which is, “relevant and which a reasonable person might accept as adequate to support a conclusion.”⁸⁶

F. *Appealing Board Decisions to the Supreme Court of Vermont*

Decisions of the Board can be appealed to the Supreme Court of Vermont.⁸⁷ The right to appeal decisions of the Board to the supreme court is reserved for those parties whose status as such in the lower proceedings was derived directly from the statute.⁸⁸ Those receiving

81. VT. STAT. ANN. § 6089(a).

82. *In re Preseault*, 292 A.2d 832, 833 (Vt. 1972).

83. *Id.* at 835 (citations omitted).

84. *In re Taft Corners Assocs.*, 632 A.2d at 650.

85. VT. STAT. ANN. § 6089(c).

86. *In re Denio*, 608 A.2d 1166, 1170 (Vt. 1992) (citing *In re McShinsky*, 572 A.2d 916, 919 (Vt. 1990)).

87. VT. STAT. ANN. § 6089(b).

88. *Id.* This section provides that appeals to the Supreme Court of Vermont shall be “by a party as set forth in section 6085(c) of this title.” *Id.* Section 6085(c) dictates that parties to hearings before the commissions and Board:

shall be those who have received notice, adjoining property owners who have requested a hearing, and such other persons as the board may allow by rule. For the purposes of appeal only the applicant, a state agency, the regional and

permissive grants of party status before the district environmental commission or Board are excluded from the class of parties eligible to appeal Board decisions to the Supreme Court of Vermont.⁸⁹

Appeals of decisions of the Board are reviewed under a more deferential standard before the supreme court than the *de novo* nature of review by which appeals of district environmental commission decisions are conducted.⁹⁰ Because Board findings of fact are expressly made conclusive by Act 250, the supreme court will not reweigh conflicting evidence.⁹¹ Thus, on appeal before the supreme court, evidence is viewed in a light most favorable to the prevailing party below.⁹² Therefore, Board decisions are not easily set aside by resorting to the supreme court.

III. THE *ST. ALBANS* CASE

A. *The Setting, the Parties, and Their Positions*

The proposed Wal-Mart store was to be erected in the town of St. Albans, Vermont.⁹³ The town is a different political entity from the city of St. Albans.⁹⁴ The proposed site is located about two miles from the city's downtown.⁹⁵ Both the town and the city are located in Franklin County, near the northeast arm of Lake Champlain.⁹⁶ Because the pro-

municipal planning commissions and the municipalities required to receive notice shall be considered parties.

Id. § 6085(c). Thus, the Supreme Court has commented that:

"appeal" is used in two different senses in 10 V.S.A. § 6085(c). One refers to the transfer from the District Commission to the Environmental Board. . . . However, "appeal" is also used with reference to appellate review, and . . . this statute limits those eligible to come to this Court. . . . Viewing the statute any other way makes it internally inconsistent, if not incomprehensible.

In re George F. Adams & Co., 353 A.2d 576, 577 (Vt. 1976).

89. VT. STAT. ANN. § 6089(b).

90. See *In re Wildlife Wonderland, Inc.*, 346 A.2d 645, 648 (Vt. 1985).

91. *Id.*

92. *In re Hawk Mountain Corp.*, 542 A.2d 261, 263 (Vt. 1988) (citing *In re Brileya*, 515 A.2d 129, 131 (Vt. 1986)).

93. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 7-8 (Vt. Envtl. Bd. Dec. 23, 1994).

94. *Id.* at 8.

95. *Id.*

96. *Id.*

posed development involved forty-four acres, more than the ten acre threshold under Act 250,⁹⁷ a permit was required.

Several parties participated in the proceedings before the District Six Environmental Commission and the Vermont Environmental Board regarding the proposed development.⁹⁸ The permit applicants included the St. Albans Group, which owns the land upon which the store was to be constructed, and Wal-Mart Stores, Inc.⁹⁹ Opposing the applicants before the Commission, and again on appeal before the Board, were the Franklin/Grand Isle County Citizens for Downtown Preservation ("Citizens") and the Vermont Natural Resources Council ("VNRC").¹⁰⁰ The parties advocated their positions before the Board for much of 1994, until the Board eventually issued its order, finding against the applicants, and voiding Land Use Permit No. 6F0471 on December 23, 1994.¹⁰¹

The Citizens initially attacked Wal-Mart along several fronts, petitioning the Commission for party status with respect to many Act 250 criteria, including: waste disposal, streams, wetland rules, soil erosion, traffic, impact on schools and local government services, historic sites, impact of growth, costs of scattered development, public investments and facilities, and conformity with local plan.¹⁰² The Commission granted the Citizens party status on the criteria addressing local government services, historic sites, impact of growth, costs of scattered development, and public investments and facilities, while denying the group party status on the remaining criteria.¹⁰³

VNRC's attack on Wal-Mart, on the other hand, was not as widespread as that of the Citizens. VNRC petitioned the Commission for party status on fewer criteria: historic sites, impact of growth, costs of scattered development, public investments and facilities, and conformity with local plan.¹⁰⁴ The Commission denied VNRC's petition for party status on all these criteria.¹⁰⁵

97. See VT. STAT. ANN. § 6001(3).

98. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 3-4 (Vt. Env'tl. Bd. Dec. 23, 1994).

99. *Id.* at 8.

100. *Id.* at 3, 4.

101. *Id.* at i.

102. *Id.* at 4.

103. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 4 (Vt. Env'tl. Bd. Dec. 23, 1994).

104. *Id.*

105. *Id.*

Despite this opposition, the applicants initially succeeded in obtaining a permit.¹⁰⁶ On December 21, 1993, a Land Use Permit was issued by the District Six Environmental Commission, authorizing construction of a 126,090 square-foot Wal-Mart Store.¹⁰⁷ However, Wal-Mart could not rest upon its initial success because on January 20, 1994, the Citizens and VNRC filed appeals with the Board, excepting to the Commission's decisions regarding all the criteria for which they sought party status.¹⁰⁸ The groups also appealed the District Commission's refusal to grant them party status on the relevant aforementioned criteria.¹⁰⁹

On February 2, 1994, the applicants filed a cross-appeal in which they excepted to the Commission's grant of party status to the Citizens on all relevant criteria except the criterion addressing conformance with the relevant local plan and argued to sustain the Commission's denial of party status to VNRC.¹¹⁰

B. *The Proceedings Before the Board*

On April 15, 1994, the Board issued a memorandum of decision addressing party status.¹¹¹ The Board denied party status to both the Citizens and VNRC on the criterion addressing historic sites.¹¹² However, the Board denied the balance of the applicants' cross-appeal, granting both the Citizens and VNRC party status regarding the other criteria on which they sought status as such.¹¹³ Thus, the Board conducted a *de novo* review of a multitude of Act 250 criteria.¹¹⁴

106. *Id.* at 3.

107. *Id.*

108. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 3 (Vt. Envtl. Bd. Dec. 23, 1994).

109. *Id.* at 4.

110. *Id.*

111. *Id.*

112. *Id.*

113. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 4-5 (Vt. Envtl. Bd. Dec. 23, 1994). Later, on May 11, 1994, following motions presented by the applicants for reconsideration of the party status issues, the Citizens, and VNRC, the Board stood by its April 15, 1994 ruling concerning party status. *Id.*

114. *Id.* Specifically, review was conducted under those criteria addressing water pollution, soil erosion, traffic, impact on schools, local governmental services, impact of growth, costs of scattered development, public investments and facilities, and conformity with local plan. *Id.* The Board further limited the water pollution criterion issues to headwaters, waste disposal, streams, and wetlands. *Id.* at 5.

During June and July of 1994, the parties met for prehearing conferences and filed prefiled testimony.¹¹⁵ The Board convened hearings on July 7, 13, and 14. Also in July, the Board visited the site of the proposed Wal-Mart store.¹¹⁶

The Board conducted deliberations to consider the evidence on several dates from August until December, when the Board issued its Findings of Fact, Conclusions of Law, and Order on December 23, 1994.¹¹⁷ This document exposes much of the "Vermont barrier" because the document reveals the deliberations of the Board in evaluating permit applications. In particular, the Board's concerns for the protection of the St. Albans economy from the competitive force which Wal-Mart presents are expressly and openly confessed.¹¹⁸

C. *Ecological Concerns Allayed*

The ecologically-related criteria under which the Board reviewed the St. Albans' Wal-Mart permit application were those criteria addressing headwaters, waste disposal, streams, wetland rules, and soil erosion.¹¹⁹ Many of the Board's findings of fact supported its conclusions of law regarding compliance with multiple criteria.¹²⁰ The Board found that the proposed Wal-Mart project complied with each of these ecologically-related Act 250 criteria.¹²¹ The fact that the Board found for Wal-Mart on these criteria supports the conclusion that the "Vermont barrier" has been erected from the mortar of economic protectionism rather than from truly environmental or ecological concerns.

115. *In re* Wal-Mart Stores, Inc., No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 5 (Vt. Envtl. Bd. Dec. 23, 1994). These maneuvers included the filing of prefiled direct and rebuttal testimony, lists of witnesses and exhibits, and written evidentiary objections, pursuant to Environmental Board Rule 17(D) (prefiled testimony) and 17(E) (prehearing submissions). ENVTL. BD. R. 17.

116. *In re* Wal-Mart Stores, Inc., No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 5 (Vt. Envtl. Bd. Dec. 23, 1994).

117. *Id.* at i.

118. *See id.* at 27-29.

119. *Id.* at 4-5.

120. *Id.* at 7. The Board instructed that its findings of fact "should be read as cumulative," stating "[w]here findings from the general category or another specific category are relevant, they are assumed and are not repeated." *In re* Wal-Mart Stores, Inc., No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 7 (Vt. Envtl. Bd. Dec. 23, 1994).

121. *Id.* at 11-16.

In evaluating the permit under the ecologically-related criteria addressing waste disposal and streams, the Board expressed concern for the excessive amounts of plant nutrients, particularly phosphorus, in St. Albans Bay, which is located in the northeast arm of Lake Champlain near the town and city of St. Albans.¹²² Excessive amounts of phosphorus promote blooms of algae, which can negatively impact water quality.¹²³ St. Albans Bay has for many years contained excessive amounts of phosphorus, and despite millions of dollars of public investment to reduce nutrient loading, water quality in the Bay has not been "significantly improved."¹²⁴ Stevens Brook, a tributary of the Bay, is suspected of carrying a prominent amount of phosphorus into the Bay.¹²⁵ The fact that stormwater runoff from the proposed St. Albans Wal-Mart would be guided into Stevens Brook made the Board's concerns regarding the phosphorus levels in St. Albans Bay relevant to the subject case.¹²⁶

The site of the proposed Wal-Mart was being used as a corn field, and the Board recognized that after completion, the proposed development would

122. *Id.* at 8-12. The criterion addressing waste disposal required that the applicants prove that, "the development or subdivision will meet any applicable health and environmental conservation department regulations regarding the disposal of wastes, and will not involve the injection of waste materials or any harmful or toxic substances into ground water or wells." VT. STAT. ANN. § 6086(a)(1)(B).

The criterion addressing streams required that the applicants prove that "the development or subdivision of lands on or adjacent to the banks of a stream will, whenever feasible, maintain the natural condition of the stream, and will not endanger the health, safety, or welfare of the public or of adjoining landowners." *Id.* § 6086(a)(1)(E).

123. *In re* Wal-Mart Stores, Inc., No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 9 (Vt. Envtl. Bd. Dec. 23, 1994). The Board noted that algal blooms often negatively impact water quality by decreasing water transparency and producing noxious odors, which fosters a "corresponding significant decline in recreational values." *Id.* The Board recognized that agriculture, which is not regulated by Act 250, is a major source of the excessive levels of phosphorus and other plant nutrients in the Bay. *Id.*

124. *Id.* at 9-10.

125. *Id.* at 10. The highest concentrations of phosphorus in the Bay have been measured where Stevens Brook flows into St. Albans Bay. *In re* Wal-Mart Stores, Inc., No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 10 (Vt. Envtl. Bd. Dec. 23 1994).

126. *Id.* at 9. On January 9, 1994, the applicants obtained Discharge Permit No. 1-1159 from the Wastewater Management Division of the Department of Environmental Conservation of the State of Vermont Agency of Natural Resources. *Id.* This permit authorized the applicants to discharge stormwater runoff in the manner described in the permit: "Stormwater runoff from the access roadway, parking and building roofing via catch basins and a closed collection system to a sedimentation/detention basin. The basin discharges via a stabilized outlet to an existing grassed drainageway to Stevens Brook." *Id.*

actually result in less phosphorus discharge into Stevens Brook than pre-development levels.¹²⁷ The fact that post-development phosphorus flows would be reduced by development helped the applicants obtain a discharge permit from the Department of Environmental Conservation of the State of Vermont Agency of Natural Resources (“ANR”).¹²⁸

The city’s wastewater treatment plant had also been a major contributor of plant nutrients into St. Albans Bay until a major 1987 upgrade of the facility resulted in a striking reduction in its contribution of plant nutrients into the bay.¹²⁹ On September 9, 1993, the applicants obtained a Water Supply and Wastewater Disposal Permit which approved connecting the Wal-Mart project to the city’s existing wastewater facilities.¹³⁰

Pursuant to Environmental Board Rule 19, the applicants created a rebuttable presumption of compliance with the criteria addressing waste disposal and streams.¹³¹ The Citizens sought to rebut the presumption of compliance with these criteria by arguing that although the project would reduce the pre-development amount of phosphorus discharge, the continued discharge would constitute undue water pollution of St. Albans Bay because the applicants had not gone far enough in designing their project to reduce the projected phosphorus discharge.¹³²

The Citizens also criticized ANR’s Draft Stormwater Procedures, which guided that agency’s decision to issue the Discharge Permit.¹³³ The Citizens felt that ANR’s draft procedures were inadequate to protect the environment because rather than setting a “natural state” design standard, the

127. *Id.* at 10.

128. *See In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 9-11 (Vt. Envtl. Bd. Dec. 23, 1994); *see also infra* note 130 and accompanying text.

129. *See In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 9-10 (Vt. Envtl. Bd. Dec. 23, 1994).

130. *See id.* at 8-9. The applicants obtained Water Supply and Wastewater Disposal Permit No. WW-6-0229 from the Department of Environmental Conservation of the State of Vermont Agency of Natural Resources. *Id.* at 9. The permit allowed a maximum of 9731 gallons per day to be discharged into the city’s system. *Id.*

131. *Id.* at 12-15.

132. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 13-14 (Vt. Envtl. Bd. Dec. 23, 1994). The Citizens contended that the projected levels of phosphorous discharge were unduly high because the applicants had “not taken all feasible and reasonable measures to reduce the level of phosphorous in the project’s stormwater runoff.” *Id.* at 14.

133. *Id.*

draft procedures merely required that the proposed development not increase the levels of plant nutrient discharge.¹³⁴

Addressing the Citizens' arguments, the Board noted that it could properly consider the adequacy of ANR's draft procedures because of the Board's "supervisory role over ANR."¹³⁵ The Board stated concern that because the existing site was used for agricultural purposes, and that agriculture is a major source of the plant nutrients in St. Albans Bay,¹³⁶ pre-development nutrient contribution levels may be an inadequate benchmark.¹³⁷

Despite the Board's concerns regarding the phosphorus contribution levels expected from the project, the Board believed that it would be unfair to find the relevant compliance presumptions rebutted by the Citizens since the applicants had designed the project in accordance with the regulations

134. *Id.* at 10-11, 13-14. ANR's Draft Procedures state that "[t]he control of stormwater runoff requires the use of detention structures such that the post-development peak flow from the site does not exceed the pre-development peak flow based on the runoff from a 10-year, 24 hour design storm." *Id.* at 10-11.

135. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 14 (Vt. Envtl. Bd. Dec. 23, 1994). Here, the Board cited *In re Hawk Mountain Corp.*, 542 A.2d 261, 264 (Vt. 1988). In that case, the Supreme Court of Vermont observed that:

The legislative scheme [of Act 250] indicates that the legislature intended to confer upon the Board powers of a supervisory body in environmental matters. For example, although 10 V.S.A. § 6082 provides that the permit required under Act 250 does not replace permit requirements from other state agencies, 10 V.S.A. § 6086(d) provides that the Environmental Board is not bound by the approval or permits granted by the other agencies. Permits and Certificates of Compliance from other agencies create a presumption that the project satisfies the relevant 10 V.S.A. § 6086(a)(1) criteria; however, the Board must conduct an independent review of the proposed development and may deny the Act 250 permit if it finds the Certificate of Compliance or other required permits were improvidently granted.

Id. (citation omitted).

Thus, the Board could properly disregard ANR's issuance of the discharge permit in evaluating the proposed St. Albans Wal-Mart development's compliance with Act 250.

136. *See supra* note 123 and accompanying text.

137. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 10 (Vt. Envtl. Bd. Dec. 23, 1994). Here, the Board stated that "[u]sing such as a benchmark clearly presents little or no real potential of improving the Bay's water quality." *Id.* at 14. The Board noted that other states have required that projects be designed to achieve "natural state" nutrient contribution levels, and that such a standard may be best suited to improve the water quality in St. Albans Bay. *Id.* The Board also criticized ANR's use of draft procedures which by definition have not been finalized as a basis for permit issuance standards. *Id.* at 15.

then being used by ANR.¹³⁸ Based on these conclusions, the Board found the St. Albans Wal-Mart project complied with the criteria addressing waste disposal and streams.¹³⁹

The Board also evaluated the Wal-Mart project under the criterion addressing soil erosion, noting that the project was designed in accordance with ANR's *Vermont Handbook of Soil Erosion and Sediment Control*.¹⁴⁰ The design called for the construction of sedimentation basins and silt barriers.¹⁴¹ The Board was convinced that the applicants had sufficiently discharged their burden of proof and that the St. Albans Wal-Mart project, as designed, complied with the criterion addressing soil erosion.¹⁴²

The issues before the Board in its evaluation of the St. Albans Wal-Mart application also included the criteria addressing headwaters and wetland rules.¹⁴³ Because the Board found that the project would not affect any relevant headwaters or wetlands, the project was deemed to comply with both of these criteria.¹⁴⁴

138. *Id.* The Board warned that future conclusions on future applications might be different regarding design according to existing regulation. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 15 (Vt. Envtl. Bd. Dec. 23, 1994).

139. *Id.* at 15-16.

140. *See id.* at 4, 11, 16. This criterion directed the Board not to issue a permit unless it found that the proposed St. Albans Wal-Mart would "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." VT. STAT. ANN. § 6086(a)(4).

141. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 11 (Vt. Envtl. Bd. Dec. 23, 1994). As an example of other soil erosion control measures, the Board noted that the project designers envisioned that upon completion, "[d]rainage paths with slopes greater than five percent will be stone lined. Drainage paths with slopes between one percent and five percent will be seeded and protected with erosion matting. Drainage paths with slopes that are less than one percent will be seeded and mulched." *Id.* Thus, it is clear that the Board paid detailed attention to the applicants' plans to control soil erosion.

142. *Id.* at 16.

143. *Id.* at 5, 8, 11-12, 16.

144. *Id.* at 11-12, 16. The criterion addressing headwaters involves:

the quality of the ground or surface waters flowing through or upon lands which are not devoted to intensive development, and which lands are:

- (i) headwaters of watersheds characterized by steep slopes and shallow soils; or
- (ii) drainage areas of 20 square miles or less; or
- (iii) above 1,500 feet elevation; or
- (iv) watersheds of public water supplies designated by the Vermont department of health; or
- (v) areas supplying significant amounts of recharge waters to aquifers.

Thus, the Board found that the St. Albans Wal-Mart project complied with all of the ecologically-related criteria under which review was conducted.¹⁴⁵ This finding supports the conclusion that the construction of the "Vermont barrier" is justified by protectionist concerns for the local economy rather than ecologically-grounded concerns for the environment.

D. *Protectionist Fears Displayed*

The Board conducted a review of the St. Albans Wal-Mart project under several fiscal criteria: impact on schools and local government services, impact of growth, costs of scattered development, and public investments and facilities.¹⁴⁶ The Board found against the applicants on all but one of these criteria, finding compliance with the criterion addressing public investments and facilities.¹⁴⁷

As with the ecologically-related criteria under which the Board reviewed the project, many of the Board's findings of fact supported its conclusions of law regarding compliance with multiple criteria.¹⁴⁸ The Board considered both direct and indirect growth caused by the project, as well as the associated public benefits and costs.¹⁴⁹ The Board found the effect of the project on retail competition to be a common issue relevant to all these fiscal criteria.¹⁵⁰ The Board concluded that "the competitive effect of a project on existing businesses is relevant to the Act 250 criteria."¹⁵¹ The Board elaborated, stating that:

VT. STAT. ANN. § 6086(a)(1)(A). The Board made specific factual findings regarding the characteristics of the site of the project in relation to this statutory description of headwaters, and found that none would be affected by it. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 8, 12 (Vt. Env'tl. Bd. Dec. 23, 1994).

The criterion addressing wetland rules directs a determination prior to permit issuance that "the development or subdivision will not violate the rules of the water resources board, as adopted under section 905(9) of this title, relating to significant wetlands." VT. STAT. ANN. § 6086(a)(1)(G). As with the criterion addressing headwaters above, the Board made specific factual findings and determined that "the proposed project will not violate the Wetland Rules." *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 16 (Vt. Env'tl. Bd. Dec. 23, 1994).

145. *Id.* at 11-16, 27-29.

146. *Id.* at 16-53.

147. *Id.* at 34, 48, 51-53.

148. *See supra* note 120 and accompanying text.

149. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 17-26 (Vt. Env'tl. Bd. Dec. 23, 1994).

150. *Id.* at 27-29.

151. *Id.* at 27.

[t]he issue is protection of the tax base. It is clear to the Board that . . . the General Assembly intended that the Board and district commissions consider that part of the economic impact of a development is any reduction in the tax base caused by a proposed development. For example, [the] Criteria [addressing impact on schools and local governmental services] . . . speak in terms of the "ability" of a local government to provide services, which can only be determined by reference to the available tax base. Similarly, Criterion 9(A) [addressing impact of growth] speaks of the impact of a project on a town's "financial capacity." Also, Criterion 9(H) [addressing costs of scattered development] refers to a project's "indirect" costs.¹⁵²

Here, the Board confessed that its objections to the St. Albans Wal-Mart project were driven by protectionist concerns for the local economy.¹⁵³ Deeming the effects of the St. Albans Wal-Mart upon retail competition relevant to these fiscal criteria, the Board endeavored to determine just what these effects would be.¹⁵⁴

The Board first discussed its findings under the criterion addressing impact of growth.¹⁵⁵ The applicants bore the burden of proof on this

152. *Id.* (citations omitted).

153. *Id.*

154. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 19-24, 42-49 (Vt. Envtl. Bd. Dec. 23, 1994).

155. *Id.* at 17-19, 29-34. The Vermont Legislature has directed in the criterion addressing impact of growth that:

In considering an application, the district commission or the board shall take into consideration the growth in population experienced by the town and region in question and whether or not the proposed development would significantly affect their existing and potential financial capacity to reasonably accommodate both the total growth and the rate of growth otherwise expected for the town and region and the total growth and rate of growth which would result from the development if approved. After considering anticipated costs for education, highway access and maintenance, sewage disposal, water supply, police and fire services and other factors relating to the public health, safety, and welfare, the district commission or the board shall impose conditions which prevent undue burden upon the town and region in accommodating growth caused by the proposed development or subdivision. Notwithstanding section 6088 of this title the burden of proof that proposed development will significantly affect existing or potential financial capacity of the town and region to accommodate such growth is upon any party opposing an application, excepting however, where the town has a duly adopted capital improvement program the burden shall be on the applicant.

VT. STAT. ANN. § 6086(a)(9)(A). Because the town of St. Albans had such a duly adopted plan, the burden of proof was on the applicants. *In re Wal-Mart Stores, Inc.*, No. 6F0471-

criterion.¹⁵⁶ The project would result in little direct population growth, as all but about five of the employees at the St. Albans Wal-Mart would be hired from the local labor market.¹⁵⁷ These five employees would bring six children.¹⁵⁸ Thus, the direct population growth expected from the project was minor. The Board, however, expressed more concern for what it called secondary growth than the direct growth mentioned above.¹⁵⁹ As had occurred in other New England communities where Wal-Mart had located, the project was likely to cause the development of other “highway-oriented businesses in the area.”¹⁶⁰ On this issue of secondary growth, the Board found that the applicants had provided no specific evidence concerning the anticipated public costs and public benefits caused thereby, and had simply argued that “the proposed project will have an unquantified but positive impact on the ability of the Town of St. Albans and the Franklin County region with regard to the costs of development caused by the project.”¹⁶¹ Such an argument was inadequate to sustain their burden of proof under this criterion, and the application was denied pursuant thereto.¹⁶²

The Board next considered the application under the criterion addressing costs of scattered development.¹⁶³ First, the Board held that

EB, Findings of Fact, Conclusions of Law, and Order at 30 (Vt. Envtl. Bd. Dec. 23, 1994).

156. *See id.*

157. *Id.* at 17.

158. *Id.*

159. *Id.* at 18-20, 30-34.

160. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 18 (Vt. Envtl. Bd. Dec. 23, 1994). Here, the Board elaborated on what it meant by highway-oriented development, stating “[t]hese types of stores are generally highway-oriented development, and typically can include fast-food franchises such as Burger King and Kentucky Fried Chicken, pizza and sandwich shops, gas stations, banks, video rental stores, new shopping centers, and expansion of existing shopping centers.” *Id.*

161. *Id.* at 33. Consultants from RKG Associates, Inc., testified on behalf of the applicants in this regard. *Id.* at 18. Their testimony was deemed not credible, supposedly because they accounted for “only public benefits from secondary growth in the form of increased tax revenues and [did] not consider any public costs.” *Id.* at 19. The Board believed that such a credible numerical study was feasible. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 19 (Vt. Envtl. Bd. Dec. 23, 1994).

162. *Id.* at 33-34. Here, the Board declared that it needed “specific projections as to the total growth and rate of secondary growth to be caused by the proposed project and the anticipated costs and benefits associated with such growth.” *Id.*

163. *Id.* at 19-26, 34-49. This criterion directs that:

The district commission or board will grant a permit for a development or subdivision which is not physically contiguous to an existing settlement

this criterion was applicable to the St. Albans Wal-Mart project application because the project indeed constituted scattered development since it was not physically contiguous to an existing settlement.¹⁶⁴ Evaluation under this criterion involves a determination of whether the public benefits outweigh the public costs, in which case the project is in compliance.¹⁶⁵ Thus, the Board attempted to discern just what these costs and benefits were.¹⁶⁶

As one might have expected, conflicting evidence was presented to the Board concerning the issues of public costs and public benefits.¹⁶⁷ The

whenever it is demonstrated that, in addition to all other applicable criteria, the additional costs of public services and facilities caused directly or indirectly by the proposed development or subdivision do not outweigh the tax revenue and other public benefits of the development or subdivision such as increased employment opportunities or the provision of needed and balanced housing accessible to existing or planned employment centers.

VT. STAT. ANN. § 6086(a)(9)(H).

164. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 34-42 (Vt. Env'tl. Bd. Dec. 23, 1994). Four Board members, including the chair, dissented from this finding. *Id.* at 42. The Board undertook a lengthy discussion of the term "existing settlement" as used in the statutory language of this criterion, concluding that:

the phrase "existing settlement" as used in that criterion means an extant community center similar to the traditional Vermont center in that it is compact in size and contains a mix of uses, including commercial and industrial uses, and, importantly, a significant residential component. It is a place in which people may live and work and in which the uses largely are within walking distance of each other. The term specifically excludes areas of commercial, highway-oriented uses commonly referred to as "strip development."

The Board further concludes that, to be contiguous to an existing settlement, a proposed project must be within or immediately next to such a settlement and must be compatible with the settlement buildings in terms of size and use.

Id. at 39 (footnote omitted). This discussion by the Board will likely haunt, or at least hinder, future attempts by Wal-Mart to enter the Vermont market because this definition of "existing settlement" seems tailor-made to exclude Wal-Mart's characteristic superstores. One is unlikely to find many other buildings which are compatible with the firm's superstores in terms of size and use. The exclusion of their superstores from this definition means this criterion should always be held applicable, and the firm will need to overcome the burden of proof by presenting inherently intangible and conjectural public cost and benefit estimations.

165. *See id.*

166. *Id.* at 19-24, 42-48.

167. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 43-45 (Vt. Env'tl. Bd. Dec. 23, 1994). Testifying for the applicants were the consultants RKG Associates, Inc. *See supra* note 161 and accompanying text. Elizabeth Humstone and Thomas Muller testified on behalf of the Citizens and VNRC. *In re Wal-Mart*

Citizens and VNRC filed a joint set of fiscal impact charts.¹⁶⁸ Reportedly due to significant differences in accounting for particular items in the calculations, the Board found the numbers presented by the Citizens and VNRC more credible.¹⁶⁹ Siding with the Citizens and VNRC on the accounting, the Board commented on the significance of the differences in the fiscal calculations:

All of this means that many more existing businesses will suffer or go out of business from competition with the proposed Wal-Mart, and therefore many more jobs will be lost, than projected by the Applicants. The loss of such businesses and jobs is likely therefore to have a much more negative effect on the tax base of the Franklin County towns than the Applicants project. Accordingly, the public costs of the proposed Wal-Mart are likely to be much higher than the Applicants estimate.¹⁷⁰

Again, the Board openly revealed its protectionist concerns for the local economy.

Using the numbers provided by the Citizens and VNRC, the Board calculated the net annual public benefit to be approximately \$109,000 in 1995 dollars, countered against and outweighed by \$315,000 in total annual

Stores, Inc., No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 43-45 (Vt. Env'tl. Bd. Dec. 23, 1994). As one might further expect, RKG testified that the proposed project would result in a net public benefit, while the opposition testified that the project would result in a net public loss. *Id.*

168. *Id.* at 6. This was most likely a tactical decision, as the credibility of both the Citizens' and VNRC's numbers would be reduced if they stood in conflict with each other.

169. *Id.* at 43-44. The Board observed that the differences in the projections were caused by conflicting assumptions made by the parties regarding three factors which affected their projections:

(a) the annual average sales per square foot for the proposed Wal-Mart; (b) the recapture of "leakage," that is purchases by Franklin County residents presently made in other places such as Chittenden County that would be made at the proposed Wal-Mart; and (c) the percentage of total sales that would be made to Canadian citizens.

Id. at 43.

The Board noted that RKG used a sales per square foot number which was less than the national average at Wal-Marts, which Muller and Humstone used, and ultimately found the Muller/Humstone assumptions more credible on all three assumptions. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 43-44 (Vt. Env'tl. Bd. Dec. 23, 1994).

170. *Id.* at 45.

costs.¹⁷¹ Of the public cost figure, \$129,000 was attributed to losses in tax receipts caused by competition from the Wal-Mart store.¹⁷² Here again, the failure of the applicants to offer specific calculations concerning public benefit from secondary development hurt their cause because without any credible numbers for this factor, the Board could not establish a higher estimated total net annual public benefit figure.¹⁷³ The absence of these numbers also precluded imposing mitigating conditions, such as impact fees.¹⁷⁴

171. *Id.* at 45-48. The Board explained the benefit figure, stating “[t]he benefits will consist of approximately \$77,000 in property tax revenues to the Town and approximately \$32,400 in increased state aid to education to the City of St. Albans and the Towns of Enosburg and Swanton.” *Id.* at 45. On the cost side, the Board gave a detailed, itemized accounting:

The annual costs to governments caused by the proposed project will include, in 1995 dollars:

(a) approximately \$61,000 in state aid to education which the Town will lose;

(b) approximately \$25,000 in operating costs caused by the addition of six students to the school system;

(c) as much as approximately \$110,000, representing lost revenue to the relevant municipalities due to changes in the Grand Lists caused by competition from the proposed project;

(d) as much as approximately \$19,000, representing lost revenue because of job loss in the region;

(e) approximately \$11,500, representing the cost to the Town of direct services to the proposed project;

(f) approximately \$88,000, representing the public funds which have been invested in the City’s historic downtown. This investment is likely to be lost if the proposed project has the projected negative impact on the City.

Id. at 46.

172. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 46 (Vt. Env’tl. Bd. Dec. 23, 1994).

173. *Id.* at 48. The Board stated, “[s]uch information is necessary not only to reach a positive finding under Criterion 9(A) [addressing impact of growth], but is also necessary to reach a positive finding under Criterion 9(H) [addressing costs of scattered development], which addresses both direct and *indirect* costs.” *Id.*

174. *Id.* at 49. The Board commented that it had considered the possibility of imposing conditions to secure compliance with the criterion addressing costs of scattered development, but that:

because of the absence of information concerning the public costs and benefits associated with the secondary growth discussed above, and because the present record contains little focus on such remedies by the parties, the Board is not persuaded that it can arrive at an amount for an impact fee or a bond with sufficient precision to ensure that the impacts of the proposed project will actually be ameliorated.

The Board concluded that “the ratio is approximately three dollars of public cost for each dollar of public benefit.”¹⁷⁵ Drawing such a conclusion, the Board had no choice but to deny the permit application under the criterion addressing costs of scattered development.¹⁷⁶

Next, the Board revealed its conclusions regarding compliance of the St. Albans Wal-Mart with the criterion addressing impact on schools.¹⁷⁷ The burden of proof on this criterion is placed on the parties opposing the project.¹⁷⁸

Reviewing the permit application under this criterion, the Board found that the project would add six children to the school system, which already lacked “the physical capacity to accommodate the projected six additional school children.”¹⁷⁹ Financially, the proposed project would directly add an additional \$25,000 in annual operating costs to the relevant municipalities, and again, insufficient figures regarding secondary growth precluded imposing mitigating conditions.¹⁸⁰ As a result of the increase in the an-

Id. Thus, the St. Albans Wal-Mart permit application was unconditionally denied under this criterion. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 49 (Vt. Envtl. Bd. Dec. 23, 1994).

175. *Id.* at 47.

176. *Id.* at 49.

177. *Id.* at 23-24, 49-52. This criterion involves a determination by the body reviewing the permit application that the project “[w]ill not cause an unreasonable burden on the ability of a municipality to provide educational services.” VT. STAT. ANN. § 6086(a)(6).

178. *Id.* § 6088(d). Although not outcome-determinative in the present case, a permit may not be denied solely for failure to comply with this criterion. *Id.* § 6087(b). The same is true of the criterion addressing public investments and facilities, under which the application in the present case was also reviewed by the Board. *Id.*

179. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 50 (Vt. Envtl. Bd. Dec. 23, 1994).

180. *Id.* at 50-51. The Board commented on the insufficiency of data, concluding “if, as concluded above, insufficient information has been provided concerning the impact of secondary growth on the area governments, then the Board cannot reach a conclusion concerning how such growth may affect the ability of those governments to provide educational services.” *Id.* at 51. Regarding the possibility of imposing mitigating conditions, the Board commented that due to the lack of sufficient information concerning secondary growth, “the Board is unable to fashion a reasonable permit condition to alleviate the burden to be caused by the proposed project.” *Id.* After noting that it could not deny the permit application on the basis of this criterion alone, the Board stated, “[i]f the Board did not find, as it does elsewhere in this decision, that the application must be denied under other criteria, the Board would consider re-opening the hearing to take evidence regarding permit conditions under [this] Criterion . . . designed to mitigate the burden created on the relevant educational systems.” *Id.* Thus, the question of permit conditions under this criterion became moot by the Board’s conclusion regarding other fiscal criteria.

nual operating costs, the Board found against the applicants on this criterion.¹⁸¹

Next under review was the criterion addressing local government services.¹⁸² Incorporating its relevant findings of fact concerning the other previously discussed fiscal criteria, the Board denied the permit application on the basis of this particular criterion.¹⁸³

The last fiscal criterion under which the permit was reviewed was that addressing public investments and facilities.¹⁸⁴ A significant historic district, containing over one hundred buildings on the United States Department of the Interior's National Register of Historic Places, is located within the city of St. Albans.¹⁸⁵ Although most of the buildings in the historic district are in private use, millions of dollars in public money have been invested for their preservation.¹⁸⁶ The permit opponents argued that due to these public investments, the city's historic district was a relevant

181. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 51 (Vt. Env'tl. Bd. Dec. 23, 1994).

182. *Id.* Review under this criterion requires that before granting a permit the issuing body be convinced that a proposed project "[w]ill not place an unreasonable burden on the ability of the local governments to provide municipal or governmental services." VT. STAT. ANN. § 6086(a)(7).

183. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 52 (Vt. Env'tl. Bd. Dec. 23, 1994).

184. *Id.* at 52-54. This criterion dictates that:

A permit will be granted for the development or subdivision of lands adjacent to governmental and public utility facilities, services, and lands, including, but not limited to, highways, airports, waste disposal facilities, office and maintenance buildings, fire and police stations, universities, schools, hospitals, prisons, jails, electric generating and transmission facilities, oil and gas pipe lines, parks, hiking trails and forest and game lands, when it is demonstrated that, in addition to all other applicable criteria, the development or subdivision will not unnecessarily or unreasonably endanger the public or quasi-public investment in the facility, service, or lands, or materially jeopardize or interfere with the function, efficiency, or safety of, the public's use or enjoyment of or access to the facility, service, or lands.

VT. STAT. ANN. § 6086(a)(9)(K).

185. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 24-25 (Vt. Env'tl. Bd. Dec. 23, 1994). Also considered by the Board under this criterion was the question "whether the traffic impacts of the proposed project will materially jeopardize or interfere with the function, safety, or efficiency of Route 7." *Id.* at 53. This question and the concerns relevant to both this criterion and that addressing traffic were addressed in the Board's written opinion in the portion discussing the criterion addressing traffic. *See id.*

186. *Id.* at 24-25, 53.

consideration for review under this criterion.¹⁸⁷ The Board disagreed on this point, and found overall that the project complied with this criterion.¹⁸⁸

Thus, the St. Albans Wal-Mart permit application was denied on all but one of the fiscal criteria under which review was conducted by the Board. The Board acknowledged that the effect of retail competition from the proposed St. Albans Wal-Mart was an issue common to its deliberations under all these fiscal criteria.¹⁸⁹ However, the Board distinguished between the protection of existing businesses from new competition and protection of the tax base of the relevant governments:

[W]e wish to make clear that our concern under Act 250's criteria is exclusively with the economic impact of a proposed development on public, not private entities. A proposed development may have a direct and substantial adverse economic impact on one or more existing businesses; however, that impact on competing private entities is irrelevant to our analysis under Act 250 unless it can also be shown that there is a resultant material adverse economic impact on the ability or capacity of a municipality or other governmental entity to provide public services.¹⁹⁰

Whether the Board felt it was protecting governments, businesses, or both, the result was the same for Wal-Mart—no store in St. Albans, Vermont.

E. *Other Issues*

The Board also considered the St. Albans Wal-Mart project in light of the criteria addressing conformity with the relevant local plan and traffic.¹⁹¹ The criterion addressing conformance with the local plan was not

187. *Id.* at 53.

188. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 53 (Vt. Envtl. Bd. Dec. 23, 1994). Here, the Board commented that “[p]ublic funds, however, potentially may be invested in many private structures or enterprises.” *Id.* However, the expected public costs associated with detrimental effects to the city’s historic district were considered by the Board in its review of the project under the criterion addressing costs of scattered development, and estimated at \$88,000 of annual costs in 1995 dollars. See *supra* note 184 and accompanying text.

189. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 26-29 (Vt. Envtl. Bd. Dec. 23, 1994).

190. *Id.* at 29 (citing *In re Pyramid Co. of Burlington*, No. 4C0821, Findings of Fact, Conclusions of Law, and Order at 8 (ENVTL. COMM’N OCT. 12, 1978)).

191. *Id.* at 4-5, 16-17, 21-22, 54-57.

applicable to the permit application for want of a town or regional plan with which to conform.¹⁹² Regarding the criterion addressing traffic, the Board would have issued the permit with mitigating conditions if it were not denying the permit application for lack of compliance with other Act 250 criteria.¹⁹³

IV. THE PENDING APPEAL IN THE SUPREME COURT OF VERMONT

The applicants have taken appeal of the Board's decision to the Supreme Court of Vermont.¹⁹⁴ The case has been completely briefed, and as of the printing of this note, the case has not been scheduled for argument before the court.¹⁹⁵ Among other things, the applicants are arguing on appeal that the Board erred in basing its decision on the anticipated effects the proposed development would have on local retail industry competition and that the alleged secondary impacts of competition are too speculative for consideration.¹⁹⁶

Regarding effects on retail competition, the applicants allege that "[b]y its actions, the Board is regulating market competition."¹⁹⁷ The applicants urge that such considerations are outside the scope of Act 250, which

192. *Id.* at 16-17, 54. The criterion addressing conformance with the local plan dictates that to obtain a permit a project must be "in conformance with any duly adopted local or regional plan or capital program under chapter 117 of Title 24." VT. STAT. ANN. § 6086(a)(10). No such plans were in effect at the time the application was filed. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 17, 54 (Vt. Envtl. Bd. Dec. 23, 1994). The town of St. Albans' plan took effect only eight days after the filing date, a fact which most likely influenced the decision to file sooner rather than later. *Id.* at 17.

193. *Id.* at 54-57. The criterion addressing traffic requires a finding before permit issuance that the project "[w]ill not cause unreasonable congestion or unsafe conditions with respect to use of the highways, waterways, railways, airports and airways, and other means of transportation existing or proposed." VT. STAT. ANN. § 6086(a)(5). Interestingly, the applicants proposed to pay for several improvements to U.S. Route 7 near the project, including installing a traffic signal at the intersection of routes U.S. 7 and Vermont 207, and the construction of an additional lane of traffic. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 54-55 (Vt. Envtl. Bd. Dec. 23, 1994).

194. Telephone Interview with Peter M. Collins, Appellate Counsel for Wal-Mart and the St. Albans Group (Nov. 19, 1995).

195. Telephone Interview with Jane Fitzpatrick, Docket Clerk for the Supreme Court of Vermont (Feb. 11, 1996). Oral argument was requested by Mark G. Hall, counsel for the appellants. *Id.*

196. Appellants' Brief at 5-17, *In re Wal-Mart, Inc.*, No. 6F0471-EB (Vt. Envtl. Bd. Dec. 23, 1994) (No. 95-398).

197. *Id.* at 5.

focuses on and is triggered by changes in the use of land and the accompanying effects on the environment.¹⁹⁸ In support of this position, the applicants note that were Wal-Mart to move into an existing retail site, the same economic factors which concerned the Board would be present, yet no permit would be required because no change in the use of the land had occurred.¹⁹⁹ The applicants accuse the Board of creating "an anomalous situation in which Wal-Mart cannot obtain a permit due to impacts that would not, in themselves, trigger Act 250 review. . . . To the contrary, free market competition, being divorced from actual physical changes in the use of land, does not warrant consideration under Act 250."²⁰⁰

The applicants have also argued that the Board erred in relying on "impacts arising from market competition [which] are too speculative and inherently inaccurate to provide the degree of certainty necessary to adjudicative action."²⁰¹ The applicants have cited expert studies which conclude that studies of secondary impacts are not reliable.²⁰² Such speculative evidence, it is argued, is inappropriate for consideration under the Act 250 process, which "is a highly adversarial process in which evidence is presented and credibility determinations are made by a quasi-judicial tribunal. If a permit is denied, fairness dictates that there be some degree of certainty that an alleged impact will in fact occur."²⁰³

V. PROPOSAL

Wal-Mart has experienced opposition to its plans to enter many communities in the northeastern United States.²⁰⁴ The St. Albans, Vermont case is just one example of this opposition. As the St. Albans case illustrates, much of the motivation for this opposition is protectionist fear for the local retail industry. The Vermont Environmental Board was candid in basing its denial of the St. Albans Wal-Mart Act 250 permit application on the motivation of pure and simple economic protectionism.

198. *Id.* at 6-7.

199. *Id.* at 7.

200. *Id.* (citations omitted).

201. Appellants' Brief at 13, *In re Wal-Mart, Inc.* (No. 95-398).

202. *Id.* at 13-17 (citing ROBERT W. BURCHELL & DAVID LISTOKIN, *THE FISCAL IMPACT HANDBOOK 2* (1980); JOHN M. LEVY, *ECONOMIC DEVELOPMENT PROGRAMS FOR CITIES & TOWNS 137* (1990); Ervin G. Schuster & E. Lee Medema, *Accuracy of Economic Impact Analyses*, J. FORESTRY SERVS., Aug. 1989, at 29).

203. Appellants' Brief at 17, *In re Wal-Mart, Inc.* (No. 95-398).

204. *See* Donker, *supra* note 3, at E1.

Wal-Mart's motivation for placing its superstores in small-town business communities has been criticized as predatory. The popular CBS television news magazine *60 Minutes* recently presented a report on the opposition to Wal-Mart.²⁰⁵ In that piece, Mr. Glenn Falgoust, a former store owner, criticized the retailer, stating "[t]hey moved into towns all across the South because the easiest person they could put out of business was mom and pop."²⁰⁶

It is axiomatic that our nation's strength, our position of world leadership, and our status as the richest nation in the history of the world are the fruits of a capitalist economy driven by the market forces of competition. Our capitalist roots are as much a reason for the existence of the proverb declaring America to be "the land of opportunity" as any other fiber in our social fabric. However, our experience as such a nation has also demonstrated that market forces, left unchecked, can and often do produce unfair, inefficient economic conditions.

Addressing these concerns, Congress and many states, including Vermont, have enacted laws to guard against monopolies, predatory pricing, price fixing, and other inefficient economic conditions and practice.²⁰⁷ These laws, in part, were created for the protection of *the consumer, not the tax base*.²⁰⁸ These laws, like all human creations, are imperfect. However, many afford remedies to those who can allege and prove in a court of law, not in the media, that they have been unlawfully wronged.²⁰⁹ If Wal-

205. *60 Minutes: Profile: Up against the Wal-Mart; citizen grass-roots activists fight movement of Wal-Mart chain into small town areas* (CBS television broadcast, Apr. 30, 1995), available in WL, ALLNEWS Directory, 1995 WL 2729677. This interview was conducted by 60 Minutes co-host Morley Safer.

206. *Id.* Safer did not disguise the implication that Wal-Mart was responsible for Falgoust's status as a *former* store owner when he told the audience that:

Angela and Glenn Falgoust once owned a store in Donaldsville, Louisiana, population 8,000. They sold a bit of everything: bikes, toys, lawn mowers. Business was thriving until Wal-Mart arrived in 1983 The bitter fact was the Falgousts couldn't buy bikes wholesale for what Wal-Mart was selling them retail. Wal-Mart's enormous purchasing power is the reason. Also, the Falgousts say, they reduce prices to purposely put competitors like themselves out of business.

Id. When asked if he and his family shopped at Wal-Mart, Falgoust replied "Yes. We have to—not that we like to." *Id.*

207. See generally WILLIAM J. HAYNES, JR., STATE ANTITRUST LAW 75, 78 (1989); WILLIAM C. HOLMES, ANTITRUST LAW HANDBOOK 1995 EDITION §§ 2.03, .05, .07 (1995).

208. See generally MORRIS D. FORKOSCH, ANTITRUST AND THE CONSUMER (ENFORCEMENT) 57-58 (1956).

209. See generally HOLMES, *supra* note 207, § 8.10.

Mart, or any other business entity, operates in violation of these laws to the injury of any persons, let it be for the wronged to advocate their own rights and protect their own interests. Otherwise, let American consumers choose how best to protect their interests by spending their own money wherever they lawfully elect.

The notion of state and local governments protecting their economies as a means of protecting their own tax bases (as the Vermont Environmental Board candidly admitted to doing in denying an Act 250 permit to the St. Albans Wal-Mart project) should alarm the people and lawmakers of the United States as well as Vermont. Domestic economic protectionism of this sort presents a threat to the very fabric of which our Union is woven. The words of Justice Cardozo are as profound now as in 1935: “[t]he Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.”²¹⁰

The Vermont Legislature should examine decisions of the Vermont Environmental Board, such as in the St. Albans’ Wal-Mart case, closely and consider if the responsibilities and powers of that body and the several district environmental commissions should be modified. If they are unwilling to do so, parties such as Wal-Mart should consider challenging the constitutional validity of these state-imposed commercial restrictions.

VI. CONCLUSION

Wal-Mart’s struggle in St. Albans, Vermont supports the conclusion that the “Vermont barrier” has been constructed from protectionist fears for the local economy. The Board found that the St. Albans project complied with *all* of the ecologically-related criteria under which the application was reviewed.²¹¹ Ironically, Wal-Mart’s strong record in the retail industry proved to be the firm’s undoing before the Board.²¹² This barrier constitutes economic protectionism of the local economy in a manner which should concern the people of Vermont as well as the rest of the United States. The Board candidly announced its protectionist fears for the local

210. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935); *see also C & A Carbone, Inc. v. Town of Clarkson*, 114 S. Ct. 1677, 1683 (“The Commerce Clause presumes a national market free from local legislation that discriminates in favor of local interests.”).

211. *In re Wal-Mart Stores, Inc.*, No. 6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 11-16 (Vt. Env’tl. Bd. Dec. 23, 1994).

212. *Id.* at 26-53.

economy as a common factor in its denial of the application on several fiscal criteria.²¹³

One is left to ponder the veracity of that headline announcing “Wal-Mart breaks Vermont barrier.”²¹⁴ Inasmuch as Act 250 is that barrier, Wal-Mart cannot break it by taking over existing retail space as it did in Bennington, Vermont, because such a maneuver does not require an Act 250 permit.²¹⁵ The final chapter to the tale of Wal-Mart’s struggles to break the Vermont barrier has yet to be written.

Michael A. Schneider

213. *Id.*

214. *See Wal-Mart, supra* note 6 and accompanying text.

215. *See* VT. STAT. ANN. § 6081(a) (requiring permits to “commence construction on a subdivision or development”).