

**X. PROPOSED CONCLUSION OF LAW: THE COURT SHOULD ADMIT EXHIBIT N.27 BECAUSE IT IS RELEVANT ADMISSIBLE EVIDENCE OF THE PROPOSED QUARRY'S FAILURE TO COMPLY WITH CRITERION 9(E)(I)**

At trial the Neighbors offered Exhibit N. 27 for admission into evidence. Exhibit N.27 is the February 12, 2005 State Appraisal decision relative to the appeal by Arthur and Linda Hendrickson from the assessment of their property at 495 Old Route 100, Moretown for the 2004 grand list. The Court deferred a ruling on the offer of Exhibit N.27, and asked the parties to brief the admissibility issue.

**A. Exhibit N.27 is an objective measurement of how Rivers' proposal has had an unduly harmful impact upon surrounding land uses and development.**

The Neighbors offer Exhibit N.27 as relevant evidence under V.R.E. 401 with respect to the Court's adjudication of whether the proposed quarry complies with Criterion 9(E)(i).

Criterion 9(E)(i) states, in relevant part:

A permit will be granted for the extraction or processing of mineral and earth resources, including fissionable source material:

(i) when it is demonstrated by the applicant that, in addition to all other applicable criteria, the extraction or processing operation and the disposal of waste will not have an unduly harmful impact upon the environment or surrounding land uses and development[.]

Exhibit N.27 is evidence of the proposed quarry's unduly harmful impact upon surrounding land uses, including the property owned by Mr. and Mrs. Hendrickson. As found by State Appraiser Merle R. Van Gieson, just the mere *proposal* of the quarry reduced the fair market value of the Hendrickson's property from \$129,300 as set by the listers and BCA to the State Appraiser's valuation of \$116,700. Exhibit N.27 at 4. Exhibit N.27 at page 3 states:

(a) If there is a public perception that a desirable aspect of real estate will be diminished in the future, potential buyers tend to either not purchase, or they purchase for less. Historically, uncertainty has resulted in extended marketing times and lower selling prices of real estate and on April 1, 22004, and also at present, the outcome of the rock quarry application is uncertain. The basic economic principle of supply and demand states that the price of real property varies directly with demand and inversely with supply. It is reasonable to believe that the proposed quarry has reduced demand in the immediate area. A decrease in demand decreases property values. Extensive studies contained in Addenda C and D of the Friihauf report proves that undesirable traffic flow lowers property values as would the noise and other activities of a rock quarry mining operation.

(b) I find that the Fair Market Value of the Subject property is negatively affected by the proposed quarry . . . The proximity of the Subject to the proposed quarry in relation to the comparable sales, warrants a minimum adjustment of 10% to comparable Sale #1, and a 15% adjustment to Sales #2, #3, and #4. Higher adjustments result in an unreasonably low estimate of Fair Market Value for the Subject property. If the application is approved and the quarry does go into operation, it will be necessary for the Town to reexamine property values in the area of the quarry. If the quarry application is ultimately denied, it will be necessary for the Town to adjust the estimate of Fair Market Vale for the Subject property.

Exhibit N.27 is an objective measurement of how Rivers' proposal has had an unduly harmful impact upon surrounding land uses and development. Exhibit N.27 demonstrates that just the mere proposal of the quarry has caused a reduction in property values. Further, Exhibit N.27 is evidence that if the quarry is authorized, then there will be further reductions to surrounding property values.

The diminution of property values of surrounding development and land uses due to the proposed quarry is a cognizable impact under Criterion 9(E)(i). Criterion 9(E)(i) requires Rivers to demonstrate prospectively that the quarry will not have an unduly harmful impact upon the environment or surrounding land uses and development. The diminution of property values is an

“unduly harmful impact” which is directly attributable to the proposed quarry, and which would be attributable to the quarry if approved. Rivers cannot meet its burden of production and persuasion under Criterion 9(E)(i) because Rivers has failed to offer any affirmative evidence that the quarry will not have an unduly harmful impact upon surrounding land uses and development relative to the diminution of the value of those surrounding lands uses and development.

**B. There is no prohibition against the consideration of impact to property values under Criterion 9(E)(i).**

There is no prohibition against the Court’s consideration of impact to property values under Criterion 9(E)(i). The plain meaning of Criterion 9(E)(i) is that Rivers must demonstrate, and the Court must conclude, that “in addition to all other applicable criteria, the extraction or processing operation and the disposal of waste will not have an unduly harmful impact upon the environment or surrounding land uses and development.”

The plain language of Criterion 9(E)(i) is that it applies “*in addition to all other applicable criteria,*” that is, Criterion 9(E)(i) is *not* a compilation of impacts cognizable under all other criteria, but rather, is a sub-criterion which sweeps within its purview impacts from earth extraction projects that are not addressed by the remaining 28 criteria and sub-criteria of 10 V.S.A. § 6086(a), and which could “have an unduly harmful impact upon the environment or surrounding land uses and development.” See In Re Appeal of Jenness and Berrie, 2008 VT 117 ¶ 24 (statutes are to be construed to avoid rendering one part mere surplusage), citing to Robes v. Town of Hartford, 161 Vt. 187, 193, (1993); In re Audet, 2004 VT 30, ¶ 9 (mem.) (when examining the legislative grant of authority to the former Environmental Board, Supreme Court looked to the plain meaning of the statutory language and was guided by the Legislature’s intent as evidenced by the statutes themselves); In Re Wal\*Mart Stores, Inc., 167 Vt. 75, 81 (1997)

(former Environmental Board properly considered project's impact on market competition as a relevant factor under Criterion 9(A) based on plain language of the statute).

Accordingly, under the plain language of Criterion 9(E)(i), Exhibit N.27 is relevant, admissible evidence. Exhibit N. 27 demonstrates, by an objective measurement of a property's loss in value, how the proposed quarry would have an unduly harmful impact upon the environment and surrounding land uses and development.

The fact that there is no precedent regarding impact on property values under Criterion 9(E)(i) does not render Exhibit N.27 inadmissible. Rather, it only means that this Court will decide this issue as a matter of first impression.

For example, in Audet, the Supreme Court heard and decided an appeal, filed by neighboring landowners, of a former Environmental Board declaratory ruling reversing a jurisdictional opinion. When neighboring landowners did the same in a subsequent case, the Court denied a motion to dismiss the appeal for lack of standing because the Court ruled, as a matter of first impression, that "We now make explicit that which was left implicit by *In re Audet*: Section 6085(c)'s limitation on appellate standing applies only to Board decisions granting or denying Act 250 permits." In re Ochs, 2006 VT 34 ¶ 9.

Another example of why it is irrelevant that there is no precedent regarding impact on property values under Criterion 9(E)(i) is In Re Green Crow Corp., 2007 VT 137 where the Supreme Court reversed the former Environmental Board for the Board's failure to *follow the Board's own precedent*. The Court stated in Green Crow:

Here, the question is whether permit conditions for high-altitude logging can apply to related activities below 2,500 feet.

¶ 15. The one case cited by Green Crow and the Board in which the Board squarely faced this question is *In re Vermont Department of Forests, Parks & Recreation*, No. 1R0488-EB (Jan.

11, 1984). In Vermont Department, the Department proposed "to construct 700' of temporary . . . access road and to conduct tree thinning operations on an approximately 10 acre tract . . . all of which lies above 2,500' in elevation." *Id.*, slip op. at 3. "The project site [was] a portion of a 68 acre thinning operation," some of which was below 2,500'. The Town of Shrewsbury, in which the land was located, "asked that, by way of permit conditions, [the Board] impose uniform restrictions on all cutting by the Department adjacent to the [Shrewsbury Peak] trail, both above and below 2,500' in elevation." *Id.* at 8. The Board concluded, in light of the explicit statutory exclusion of sub-2,500-foot logging from the definition of "development," that it could not impose any permit conditions "relative to the Department's activities below 2,500 feet." *Id.*

¶ 16. In its two decisions in the instant case, the Board cited no decision since Vermont Department in which it had reached the contrary conclusion, but noted also that Vermont Department has not been cited or further analyzed by the Board since it issued more than twenty years ago. The Board declined to follow the bright-line rule announced in Vermont Department on that basis, and because "the decision did not discuss the elevation issue in detail and did not provide any further analysis." We agree with the dissenting Board members, however, that Vermont Department's analysis of the elevation issue was correct, if brief.

Green Crow Corp., 2007 VT 137 ¶¶ 14-16.

As Audet, Ochs, and Green Crow illustrate, the lack of precedent, or its existence, does not necessarily determine how an issue is adjudicated. Rather, precedent is an indicator of how an issue was decided in the past. However, precedent, or the lack thereof, cannot be used to eliminate a litigant's right to advance a theory of law not yet ruled upon by a court.

In this matter, the Court is asked to decide whether impact to property values is relevant admissible evidence under Criterion 9(E)(i). The Court must adjudicate this issue based on the plain language of Criterion 9(E)(i). The fact that there is no precedent on this issue merely means that it is a matter of first impression, nothing else.

Accordingly, the Court should admit Exhibit N.27 as evidence of the proposed quarry's unduly harmful impact upon the environment and surrounding land uses and development. Further, the Court should rely upon Exhibit N.27 to conclude that, if the quarry was to go into operation, it would cause significant diminution of property values to all of the Neighbors' properties. Lastly, Rivers cannot meet its burden of production and persuasion under Criterion 9(E)(i) because Rivers has failed to offer any affirmative evidence that the quarry will not have an unduly harmful impact upon surrounding land uses and development relative to the diminution of the value of Neighbors' surrounding lands uses and their developments, including, but not limited to, the substantial, pre-existing equine operations which are entitled to operate free of interference from the proposed quarry.

**XI. PROPOSED CONCLUSION OF LAW: READING THE TERM "UNDUE" INTO "ADVERSE EFFECT" IS NOT WARRANTED**

The MZR (2000) include five conditional use criteria at § 5.2(C). Conditional use approval can only be granted upon a finding by the DRB (or the Court on appeal) that the proposed development "will not adversely affect" any of the following: (1) the capacity of existing or planned community services or facilities, (2) the character of the area affected, (3) traffic on roads and highways in the vicinity, (4) bylaws in effect, and (5) the utilization of renewable energy resources.

Similar language appears at MZR § 4.10(A), which states that "[n]o land or structure in any zoning district shall be used or occupied in any manner so as to create dangerous, injurious or noxious conditions that adversely affect the reasonable use of adjoining or nearby properties."

Rivers would have this Court read the word "unduly" into §§ 5.2(C) and 4.10(A), so that § 5.2(C), instead of stating "will not adversely affect," would state "will not unduly adversely

affect” the five listed criteria. Likewise, under Rivers’ interpretation, § 4.10(A) would be rewritten to allow the creation of conditions that adversely affect the reasonable use of adjoining or nearby properties. That is a significant change in the meaning of those sections, which, as written, prohibit new uses from adversely affecting existing uses, whether or not those adverse effects rise to the level of “undue.”

Rivers presumably relies upon a line of cases beginning with In re Walker, 156 Vt. 639 (1991), which interpreted the language of former 24 V.S.A. § 4407(2),<sup>13</sup> which required that conditional uses “shall not adversely affect” certain standards. The Walker court noted in its single-page decision that “[a]ny conditional use will have some adverse effect” and held that the superior court did not err by applying a “materially-adverse effect standard.” Id. In In re Miller, 170 Vt. 64 (1999), the Supreme Court restated this adverse effects test as prohibiting “substantial and material adverse effects.” Id. at 6. In other words, the Court is not concerned with trifling or very small adverse effects. In order to be cognizable, the adverse effects must rise to the level of materiality. De minimis non curat lex: the law does not care for, or take notice of, very small or trifling matters. Black’s Law Dictionary 464 (8th ed. 1999).

Rivers’ proposed quarry would, if permitted, have substantial and material adverse effects on the character of the area affected, traffic on roads and highways in the vicinity, and the 2000 bylaws. MZR § 5.2(C). The proposed quarry would also create dangerous, injurious or noxious conditions that adversely affect the reasonable use of adjoining or nearby properties. MZR § 4.10(A). Furthermore, the proposed quarry’s adverse effects are “undue,” as that term is used in Act 250.<sup>14</sup>

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<sup>13</sup> Now codified at 24 V.S.A. § 4414(3)(A), with the word “undue” added.

<sup>14</sup> The word “undue” is a term of art in the context of Act 250. In Re: Quechee Lakes Corporation, #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law, and Order (Nov. 4, 1985), the former Environmental Board articulated a “process” for determining whether a project will have an undue adverse effect on

However, the impacts of the proposed quarry do not need to rise to the level of “undue” in order to fail the adverse impact test set out in the MZR. Undue adverse effects are necessarily significant and material, but not the other way around. In other words, a project can have substantial and material adverse impacts without those impacts being undue (although, again, Rivers’ quarry would have adverse effects that are material and undue). See, e.g., In re: Eastview at Middlebury, Inc. (Appeal of Act 250 Permit #9A0314), Docket No. 256-11-06 Vtec (Vt. Env’tl. Ct., Feb. 15, 2008), at 17 (project adverse, but not unduly so, “because of the mitigation steps, conformance with established community standards and absence of offense to an average person’s sensibilities.”).

Rivers seems to argue that because the “no adverse effect” language in the MZR and the statute has been interpreted as a “no materially adverse effect” standard, the adverse effects flowing from its proposed quarry must also be undue in order to violate the MZR.

Rivers argument fails for a simple reason: this Court must assume that the Town’s regulations were intended to mean what they in fact say. When interpreting zoning regulations, the Court’s “goal is to affect the intent of the drafters, as evidenced by the plain text of the regulation. Where the meaning is clear, [the Court] must enforce the Regulation according to its terms. . . . [The Court] must also avoid any construction that renders a regulation or portion thereof as superfluous.” In re: Miller Conditional Use Application (After Remand), Docket No. 59-3-07 Vtec (Vt. Env’tl. Ct., Nov. 5, 2007), at 8 (internal citation omitted), see also McDermott Conditional Use Application, Docket No. 11-1-06 Vtec (Vt. Env’tl. Ct., Dec. 21, 2006), at 4 (“when searching for the proper interpretation of a zoning regulation, we follow the first rule of

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aesthetics. Quechee Lakes at 17. A project’s adverse impacts on aesthetics are “undue” if the project violates any clearly written community standards, if the project appears shocking or offensive to the average person, or if the Applicant fails to take all available and reasonable steps to mitigate the identified adverse impacts of the project as proposed. Id. at 19–20.

statutory construction: look to the language of the very regulation we are seeking to define”) (citing *Wesco, Inc. v. City of Montpelier*, 169 Vt. 520, 525 (1999) (“Ordinances are to be interpreted according to the basic rules of statutory construction and enforced in accordance with their plain meaning.”). The Court “will not look beyond the plain meaning of the statutory language when that language is clear and unambiguous.” Appeal of Tepper, et al., Docket No. 225-12-04 Vtec (Vt. Env’tl. Ct., Feb. 8, 2006), at 6.

Had the Town intended to require no undue adverse affect in §§ 5.2(C) and 4.10, it certainly knew how to do so, as evidenced by its inclusion of the word “undue” in MZR § 3.5(C) (“undue adverse effect on”). See In re: Appeal of Potok (Rinker's Telecom Facility (Plainfield)), Docket No. 131-6-06 Vtec (Vt. Env’tl. Ct., September 1, 2008) (Pearson, J., specially assigned), at fn. 5 (“if the ordinance drafters knew how to expressly state such a limitation for one category, they could, would, and should have done so for other such limitations.”); Fraser v. Sleeper, 2007 VT 78, ¶ 10 (“We agree that where the Legislature includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that the Legislature did so advisedly.”) (internal quotation omitted); Hopkinton Scout Leaders Association v. Town of Guilford, 2004 VT 2, ¶ 8 (“Where the Legislature includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that the Legislature did so advisedly.”); In re: White Major Subdivision Application, Docket No. 237-11-07 Vtec (Vt. Env’tl. Ct., July 29, 2008) at \_\_ (“The regulations could easily have been written to so restrict the DRB, simply by adding the word “only.” The Court will not read in the word “only” where it does not appear, and especially without any evidence that the drafters intended [the effect that reading in the word “only” would have]”).

Reading in the word “undue” into those sections where the MZR only states “adversely affect” renders the word “undue” in § 3.5 mere surplusage, in violation of the established rules of statutory construction. See In re: Appeal of Kevin S. McCarthy and Kathleen M. Ballou, Docket No. 99-5-02 Vtec (Vt. Envtl. Ct., July 3, 2002), at \_\_\_ (“The Court must interpret the Zoning Regulations using the rules for statutory construction, including the obligation to give effect if possible to all portions of the regulations, and to avoid interpreting any portion as surplusage.”); In re Appeal of Jenness and Berrie, 2008 VT 117, ¶ 24 (“When possible we construe statutes to avoid rendering one part mere surplusage and we strive to read all parts of the statutory scheme in harmony.”) (internal citations omitted).

This Court, the Vermont Supreme Court, and the former Environmental Board have repeatedly and clearly held that where the drafters of a statute or zoning ordinance use particular language in one section and omit that language from another section, the drafters do so advisedly with the intent that their chosen language be given meaning and force.

This Court recently reaffirmed this point in In re: Kirschner Home Construction Application, Docket No. 226-10-07 Vtec (Vt. Envtl. Ct., Sept. 25, 2008), noting that the established rules of statutory construction apply to zoning regulations as well as to statutes:

The recognized canons of statutory construction are applicable to zoning ordinances as well as to statutory construction. In re: Kim Wong Notices of Violation, Docket Nos. 169-7-06 Vtec and 293-12-06 Vtec, slip op. at 2 (Vt. Envtl. Ct., Mar. 12, 2007). In either instance the court must give "effect to the whole and every part of the ordinance," In re Stowe Club Highlands, 164 Vt. 272, 279-80 (1995) (citation omitted), to "avoid rendering one part mere surplusage," In re Appeal of Jenness and Berrie, 2008 VT 117, ¶ 24, and so that the construction does not produce an absurd result. Wesco, Inc. v. Sorrell, 2004 VT 102, ¶14, 177 Vt. 287, 293.

In re: Kirschner Home Construction Application, Docket No. 226-10-07 Vtec (Vt. Envtl. Ct., Sept. 25, 2008), at \_\_\_.

In In re Munson Earth Moving Corporation, 169 Vt. 455 (1999), the Supreme Court directly addressed this issue, holding that where Act 250 Criterion 5 included “proposed” and Criterion 9(K) did not, the Court could not construe 9(K) to include proposed facilities:

[C]riterion 5 of Act 250 explicitly encompasses proposed highways whereas criterion 9(K) does not. Criterion 5 states that a development “[w]ill not cause unreasonable congestion or unsafe conditions with respect to use of the highways, ... *existing or proposed*.” 10 V.S.A. § 6086(a)(5) (emphasis added). Had the Legislature intended criterion 9(K) to apply to proposed as well as existing facilities, it could have mirrored the phrase from criterion 5 in criterion 9(K). For the Court to construe criterion 9(K) to include “proposed” facilities, when the Legislature itself declined to do so, would render the word surplusage in criterion 5. Where the Legislature includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that the Legislature did so advisedly. See *Payea v. Howard Bank*, 164 Vt. 106, 107, 663 A.2d 937, 938 (1995) (when construing statute, we presume language is inserted advisedly and did not intend to create surplusage); *Vermont State Colleges Faculty Fed'n v. Vermont State Colleges*, 138 Vt. 451, 455, 418 A.2d 34, 37 (1980) (presuming legislative language was inserted advisedly with intent that it be given meaning and force). Thus, we assume that the Legislature advisedly inserted the language “existing or proposed” in criterion 5 and just as advisedly omitted it from criterion 9(K).

In re Munson Earth Moving Corporation, 169 Vt. 455 (1999), at 465. The Supreme Court reaffirmed this application of the rules of statutory construction in Theresa Morin v. Essex Optical/The Hartford, 2005 VT 15, stating at ¶ 7 that when “interpreting a statute our overall goal is to give effect to the Legislature's intent. We do so by looking to the legislation's plain meaning, and we will not read terms into the statute unless necessary to make the statute effective.” (internal citation omitted). The Morin Court went on to fault the Commissioner of Labor and Industry for reading an unwritten term into the statute:

We cannot endorse the Commissioner's method of determining legislative intent. If the Legislature intended to retain a policy of applying caps to both temporary and permanent disability compensation, it would have amended both the statute governing permanent total disability compensation and that governing temporary compensation, or it would have amended neither arguably leaving the issue to the Commissioner's policy. By amending one statute, and not the other, it demonstrated that it intended that the two types of compensation be treated differently.

Theresa Morin v. Essex Optical/The Hartford, 2005 VT 15, at ¶ 12.

The former Environmental Board followed the same rules of statutory construction recognized by this Court and the Vermont Supreme Court. See RE: Catamount Slate, Inc., Declaratory Ruling #389 (Vt. Env'tl. Bd., Feb. 25, 2002), at \_\_\_ (“The Board cannot read its statute in a manner that results in the inclusion of useless surplusage. See State v. Stevens, 137 Vt. 473, 481 (1979) (in construing statute, every part must be considered, and every word, clause, and sentence given effect if possible); State v. Racine, 133 Vt. 111, 114 (1974) (presumption that all language is inserted in a statute advisedly).”).

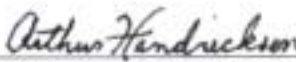
The Court must conclude that where the drafters of the Moretown Zoning Regulations (2000) used the phrase “undue adverse effect” in one section, but omitted the word “undue” in §§ 5.2(C) and 4.10(A), the omission was intentional and demonstrates the drafters’ intent: to ensure that new uses do not adversely affect the reasonable use of neighboring properties or the five listed conditional use criteria. If Rivers’ proposed quarry adversely affects the reasonable use of nearby properties, the capacity of existing or planned community services or facilities, the character of the area affected, traffic on roads and highways in the vicinity, bylaws in effect, or the utilization of renewable energy resources, then it violates the plain language of the applicable Moretown Zoning Regulations and cannot be permitted.

DATED at Montpelier this 27th day of March, 2009.


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