

***KILLINGTON MOUNTAIN RESORT:
A CASE STUDY OF 'GREEN' EXPANSION IN VERMONT¹***

Jonathan Isham and Jeff Polubinski

Middlebury College

Forthcoming in

The Vermont Law Review

This draft: June 17, 2002.

Keywords: environmental law, stakeholder participation, institutions.

JEL Codes: K32, Q26, Q28

¹ This paper was prepared for 'Mountain Resorts: Ecology and the Law,' a conference at the Vermont Law School on November 2, 2001. We thank Janet Milne and Eric Miller for their invitation to participate in this conference; Jennifer Feeley and Kara Sweeney for their leadership in organizing the conference; and many conference participants for their helpful comments on an earlier draft of this paper.

INTRODUCTION

In the 1950s, a young skier named Preston Leete Smith envisioned a unique ski area - an immense mountain resort that would attract people from all over the United States to a new recreational experience at Killington Peak in Vermont's Green Mountains.² Prior to the 1950s, lift-serviced skiing was rare. Most ski enthusiasts hiked to mountain summits to ski only one or two runs in a day.³ The few existing lifts were mostly surface lifts that slowly dragged skiers up long, steep slopes, and ski area operation included limited grooming and no snowmaking.⁴ As a result, skiing had a relatively small effect on the mountain ecologies, or on local economies in the mountainous regions of Vermont.

² KAREN D. LORENZ, KILLINGTON: A STORY OF MOUNTAIN AND MEN 27 (1990).

³ SKI MAGAZINE'S ENCYCLOPEDIA OF SKIING 9-45 (Robert Scharff ed., 1974).

⁴ LORENZ, *supra* note 2, at 43-43.

In 1956, Smith registered the Sherburne Corporation in Vermont.⁵ On Killington Ski Area's opening day in 1958, it had seven trails, serviced by four lifts. This was unprecedented by any ski area in its first season of operation.⁶ Since the beginning, the owners of Killington's ski area have continued to follow business plans that emphasize scale. Killington management has strived to create more trails, build more lifts and develop a four-season base area to attract more customers.⁷

During the expansion of the ski area from the late 1950s to the late 1960s, the owners faced few environmental regulatory constraints.⁸ At that time, municipalities in Vermont were generally responsible for land use planning.⁹ In the late 1960s, Interstate Routes 89 and 91 were extended into the state, increasing tourism from major metropolitan areas in New England.¹⁰ Visitors began to build second homes –many in the Killington area— and the pressure on communities to manage these developments became too great in high tourism areas.¹¹

In 1970, with the support of Governor Dean Davis, the Vermont General Assembly passed Act 250, Vermont's Land Use and Development Law.¹² As documented by

⁵ LORENTZ, *supra* note_ at 258-262. In 1972, the Sherburne Corporation acquired Sunday River in Bethel, ME and in 1977 purchased Mt. Snow in Dover, VT. In 1985 the Sherburne Corporation restructured to become S-K-I Ltd. with a public stock offering. *Id.* Need dates on Sugarloaf, Attitash, etc.

⁶ *Id.* at 43.

⁷ *d.* at 69, 102-03, 111-12. Killington conducts tens of thousands of customer surveys on site and online to determine its guests' wants. Pursuant to these surveys, management has concluded that additional amenities and variety will increase customer satisfaction. Personal Communication with Rich McGarry, Killington General Manager (Mar. 8, 2002).

⁸ *See id.* at 105-07.

⁹ *See* CINDY CORLETT ARGENTINE, VERMONT ACT 250 HANDBOOK, A GUIDE TO STATE AND REGIONAL LAND USE REGULATION 2 (2d ed. 1998) [hereinafter *Act 250 Handbook*].

¹⁰ Robert F. Gruenig, *Killington Mountain and Act 250: An Ecological Perspective*, __VT. L. REV. __, __ n.7 (2002).

¹¹ *Act 250 Handbook*, *supra* note 8, at 2.

¹² Act of Apr. 4, 1970, Pub. L. No. 250 (codified as amended at VT. STAT. ANN. tit. 10, §§ 6001-6086 (1999 & Supp. 2001)).

Robert Gruenig,¹³ the law attempts “to protect and conserve the lands and the environment of the state and to insure that these lands and environment are devoted to uses which are not detrimental to the public welfare and interests.”¹⁴ A novel component of Act 250 was to give local stakeholders the opportunity to have party status in the hearing process.¹⁵

Since the American Skiing Company (ASC) purchased Killington Ski Area from S-K-I in 1996,¹⁶ the management of ASC has attempted to continue Killington’s expansion, despite large costs associated with meeting the requirements of Act 250.¹⁷ An examination of the economic expansions of the resort under Act 250 provides insight into how Killington’s management and ecologically-minded stakeholders have negotiated terms that protect the ecology while permitting economic growth.

I. VISITORS TO KILLINGTON

In 1987, skier visits¹⁸ in Vermont reached a record high of 5.2 million,¹⁹ but by 1991 they had slumped to 4.1 million.²⁰ Warmer and relatively snowless winters over these four years may have partially caused this rapid loss of interest in Vermont skiing. Yet,

Gruenig, *supra* note 9, at ___n.43.

¹⁴ Findings and Declaration of Intent, 1969, No. 250 (Adj. Sess.), § 1, Eff. Apr. 4, 1970, *available at* http://www.state.vt.us/envboard/statute.htm#dec_of_intent (last visited, Feb. 11, 2002).

¹⁵ VT. STAT. ANN. tit. 10, § 6085(c) (1999); *see also Act 250 Handbook, supra* note 8, at 36-42.

¹⁶ American Skiing Company, *A Brief History of the American Skiing Company, at* <http://www.peaks.com/html1/presskit/history.html> (last visited Feb. 2, 2002).

¹⁷ LORENZ, *supra* note 2, at 105-107; *see also Re: Killington, Ltd., Master Plan Application*, No. 1R0835, Finding of Fact, Conclusion of Law and Order (Vt. Dis. Env. Comm. #1, Apr. 11, 1999) [hereinafter *Permit No. 1R0835, Finding of Fact, Dis. Env. Comm.*].

¹⁸ Bob Sachs, *National Perspective on Mountain Resorts and Ecology*, __ VT. L. REV. __ (2002). Skier visits is defined as the number of people who skied or snowboarded for some part of the day or night. *Id.* Although ski resorts often aim to attract a wide variety of business including those who do not ski or snowboard, ski areas still use skier visits (which incidentally does count snowboarders) as a measure of success. *Id.*

¹⁹ *See id.* *Id.* is referring to articles within this journal (other articles within the book we are working on now).

²⁰ *See id.* *see above* (again, *see above*).

through the recession of the early 1990s and the thriving economy of the mid and late 1990s, skier visits have remained at about 4 million,²¹ even with many substantial snow years.²²

Today, skiers tend to seek a destination resort containing a resort village, more amenities, real estate possibilities and an area that caters to activities in other seasons.²³ Convenience is another key factor in skiing today, as skiers expect detachable quads and heated gondolas that take them to restaurants atop the mountain summits.²⁴ Skiers also expect significant snow in December and early January—when a ski resort can expect to earn as much as one quarter of its annual revenues.²⁵ Since there is little natural snow during this time,²⁶ ski areas across Vermont and elsewhere have sought to expand their snowmaking systems.²⁷

²¹ TBA

²² The University of Vermont tracks annual snowfall amounts from the summit of Mt. Mansfield, Vermont's highest peak. Records indicate that at the Mt. Mansfield Summit Station, snowfall in 1981 was three times the amount in 1990. See Mount Mansfield Summit Station data, available at www.uvm.edu/ski/vt-1/depths.html. Importantly, snowfall is very localized in the Green Mountains and snowfall at Mt. Mansfield may not have been the same on Killington Peak; however, these totals provide general trend information on winter weather patterns in Vermont. In 1994 and 2001 snowfall totals were up again. *Id.*

²³ *Permit No. 1R0835*, Finding of Fact, Dis. Env. Comm., *supra* note 16, , Land Use Permit Exhibit #71 [K-CLH], at 1. Killington regularly reaches out to guests for feedback; from Nov. 2001 to Mar 2002, Killington took over 7,000 surveys. Personal communication with Allen Wilson, Killington Managing Director (Mar. 8, 2002).

²⁴ Personal Communication with Rich McGarry, Killington General Manager (Mar. 8, 2002); see also *Vermont Week in Review-Stowe Still Seeks OK for Project*, THE RUTLAND HERALD, Jul. 15, 2001, available at www.rutlandherald.nybor.com (last visited on Mar. 16, 2002) (reporting that Stowe officials justify dramatic resort expansion “because the public expects 100 percent snowmaking, a wide variety of trails, speedy lifts, lodges with plenty of elbow room and slope-side accommodations.”). *Id.*

²⁵ Leslie Wright, *Snow Blesses Ski Areas*, THE BURLINGTON FREE PRESS, Dec. 19, 2001, at 1A.

²⁶ See, Mount Mansfield Summit Station Data, available at www.uvm.edu/ski/vt-1/depths.htm. (last visited on Apr. 6, 2002).

²⁷ See, e.g. Heather R. Burke, *The Deeper Story*, The Burlington Free Press.com, Oct. 14, 2002 available at www.visitmaine.net/BFPOct00deep.htm (last visited on Mar. 4, 2002)(describing a \$2 million snowmaking expansion project at Smuggler's Notch in northern Vermont, and a \$1 million project at Stratton and a \$750,000 project at Bromley, both in Southern Vermont, for the 2000 winter season). See also, Laurie Lynn Fischer, *There's No Business Like Snow Business*, THE RUTLAND HERALD, Jan. 8, 2001. “Seventy percent of the Green Mountain State's total skiable terrain can be covered with manmade snow. Every resort makes snow, ranging from Mad River Glen, which only has snowmaking on 16 percent of its trails, to Ascutny and Okemo mountain resorts, both boasting 95 percent snowmaking coverage.” *Id.* (quoting Jon

In the 1980s, Killington generally marketed towards a young crowd of advanced skiers, dubbing itself the “the Beast of the East.”²⁸ Killington supplied these skiers with a large amount of challenging terrain as well as nightlife that catered to the ‘Baby Boomer’ generation.²⁹ This marketing effort appeared to pay off, as the 1987-88 season was Killington’s most successful season in terms of skier visits.³⁰

Killington’s marketing scheme has recently changed. Now ‘Baby Boomers’ are not as attracted to advanced skiing and a booming nightlife; they prefer luxury products, a more family oriented destination and more alternatives to skiing.³¹ Killington now advertises its softer side, stressing its appeal as a destination resort.³² This change is also evident in Killington’s future development plans that emphasize family housing and shopping rather than nightlife and advanced skiing.³³

Currently, Killington strives to meet all the needs of the twenty-first century skier. With the addition of a resort village, increased snowmaking and other conveniences, the resort hopes to increase skier numbers easily.³⁴ However, development in Vermont

Stebbins, marketing coordinator of the Vermont Ski Areas Association), *available at* www.rutlandherald.nybor.com (last visited on Mar. 16, 2002).

²⁸ *Permit No. 1R0835*, Finding of Fact, Dis. Env. Comm., *supra* note 16, Exhibit #71 [K-CLH], at 1.

²⁹ *Id.*

³⁰ *Permit No. 1R0835*, Finding of Fact, Dis. Env. Comm., *supra* note 16, Exhibit #8 [K-CGS], at 52; *see also* Killington Resort Village Master Plan at 12.

³¹ *Permit No. 1R0835*, Finding of Fact, Dis. Env. Comm., *supra* note 16, Exhibit #71[K-CLH], at 1; *see also*, Killington Chamber of Commerce, Vermont available at www.killingtonchamber.com (last visited on Mar. 10, 2002). The Killington Road, which accesses Killington Resort from State Highway 4 is home to numerous bars, fine restaurants and nightclubs with dancing and live music. *Id.*

³² This change is evidenced by their new slogan: “New England’s Premier Ski Week Destination.” Killington Resort Website, *available at* www.killington.com/ (last modified, Feb. 2, 2002).

³³ *See Part II infra* (discussing *Permit No. 1R0835*, Finding of Fact, Dis. Env. Comm., *supra* note 16, Exhibit #71 [K-CLH], at 5); *see also* Killington Resort Village Master Plan at 12.

The mission of Killington’s updated master plan is to create a framework for a vibrant year-round mountain destination resort, one offering visitors to the Killington region a well-rounded and high quality vacation setting and leisure time lifestyle which encourages personal investment in the resort community and a natural commitment to come back again.

Id.

³⁴ Personal Communication with Allen Wilson, Killington Managing Director (Mar. 8, 2002).

presents unique regulatory challenges that make the changes Killington desires difficult.³⁵ Mountain development, such as that which Killington proposes, is often met with opposition from public interest groups, governmental entities and public citizens for several reasons. First, relatively few acres of land exist for viable ski resort development in Vermont. Only five mountains in Vermont rise above 4,000 feet, and three of these are already marked with ski trails.³⁶ Second, many identify Vermont with a certain quaint New England feel, which a sprawling modern resort village might spoil.³⁷ The type of resort village that Killington desires will continue to draw significant opposition from those who aim to protect the character of older villages in Vermont. Consequently, as Killington tries to capture the skier numbers it enjoyed in the late 1980s by expanding to meet the needs of the modern skier and vacationer, it will continue to cause controversy among various stakeholders.³⁸

II. OVERVIEW OF RECENT PERMIT CHRONOLOGY AT KILLINGTON

In hopes of attracting more visitors, Killington recently has devised a new business plan based on data identifying current customer trends and expectations.³⁹ Accordingly, Killington has drafted a “master plan” that includes trail improvements, increased snowmaking, and additional lodging and lift service.⁴⁰ To implement these changes and to facilitate the Act 250 process, Killington has worked with local, state and

³⁵ Personal Communication with Tim Clapp, Killington Director of Planning (Mar. 15, 2002).

³⁶ Mt. Mansfield at 4,393 feet is home to Stowe Mountain Resort; Killington Mountain at 4,235 feet is home to Killington Mountain Resort; Mt. Ellen at 4,083 feet is home to Sugarbush Resort’s “North” mountain. Camel’s Hump at 4,083 feet and Mt. Abraham at 4,006 feet are undeveloped. In contrast, only two of the forty-eight mountains in New Hampshire that rise above 4,000 feet, Wildcat Mountain and Cannon Mountain, have working ski areas.

³⁷ One of the major battles that non-government organizations (NGOs), such as the Conservation Law Foundation (CLF) and the Vermont Natural Resources Council (VNRC), continue to fight is the expansion of sprawl. **AUTHORITY? Perhaps cite appeal of 9H and 9L?**

³⁸ See, e.g. find articles covering controversy

federal agencies and NGOs to craft development plans to protect the environmental resources on Killington Mountain and the surrounding areas.⁴¹ This costly and time-consuming process continues to present difficulties for all stakeholders; however, Killington management believes that “improvements” at the Resort can be both economic and ecological successes, due to the cooperative efforts of all the involved parties.⁴²

Extensive negotiations between Killington and other stakeholders have thus far culminated in an Act 250 Master Development Permit as well as Act 250 construction permits for increased snowmaking and an interconnect lift between Killington Mountain and Pico.⁴³ Killington’s first step in acquiring these, and hopefully additional, permits was the execution of a Memorandum of Agreement between Killington (ASC), the Vermont Agency of Natural Resources (ANR) and the Farm and Wilderness Foundation, Inc⁴⁴ in 1996. Additionally, the Conservation Law Foundation (CLF), the Vermont Natural Resources Council (VNRC), the Green Mountain Club (GMC), the Appalachian Trail Club (ATC), the City of Rutland (Rutland), the National Park Service (NPS) and the Sierra Club indicated, by signature, that they support the agreement, and that they promise to work to resolve outstanding issues as the Killington development process progresses.⁴⁵

The signed memorandum stands as a conceptual agreement among the parties and covers three separate areas: water, land and “other.”⁴⁶ With respect to water, Killington

³⁹ Personal Communication with Rich McGarry, Killington General Manager (Mar. 8, 2002).

⁴⁰ *Id.*; see also, Killington Resort Village Master Plan exhibit in permit?.

⁴¹ See, e.g.

⁴² Personal Communication with Carl Spangler, V.P. ASC Planning (Mar. 8, 2002).

⁴³ Cite Permits; see section ___ infra.

⁴⁴ explain what Farm and Wilderness is

⁴⁵ Memorandum of Agreement, 1996, exhibit ? at para III.

⁴⁶ See *id.* at para I-III.

agreed to bring all of its water withdrawals⁴⁷ to February Medium Flow (FMF) standards⁴⁸ by the 1997-98 ski season. In exchange, ANR agreed to expedite required permitting reviews and approvals as appropriate.⁴⁹ Additionally, all of the parties acknowledged an understanding that to improve the flows on intake streams and to provide for additional snowmaking coverage, Killington needed an additional water source.⁵⁰ Accordingly, the parties agreed to permit water use from Woodward Reservoir, provided Killington minimized biological impact to the greatest extent possible after a careful “needs and alternatives” analysis.⁵¹ Further, ANR agreed to assist Killington in implementing its snowmaking construction plans and in increasing waste disposal capacity, “which is both economically reasonable and environmentally sound.”⁵²

With respect to land issues, the parties agreed that a growth center concept, “where development is concentrated and large areas of open space protected from future development for conservation purposes” should direct the planning process.⁵³ With these ideals in mind, and to mitigate future concerns over the anticipated resort village,⁵⁴ Killington exchanged approximately 3,000 acres of land owned by ASC above 2,500 feet, known as Parker’s Gore, for 1,073 acres of land owned by the State below 2,500 feet

⁴⁷ Water withdrawals are areas on brooks, ponds, reservoirs, etc., where ski areas intake water for snowmaking. At Killington, the withdrawals include Falls River, Roaring Brook, and the Ottauquechee River, and since 2001, Woodward Reservoir. *Id.*

⁴⁸ In February, rivers in Vermont are typically at their lowest levels. The February Medium Flow (FMF) is a specific water level in a particular river, below which fish and other organisms cannot survive. In November of each year, the State of Vermont calculates the FMF for specific rivers. Ski resorts that withdraw water from these bodies are required to halt all withdrawals below the FMF—unless “grand-fathered” withdrawal permits apply. The resorts affected by FMF requirements must report stream flow data to the State on a monthly basis as part of the compliance procedure. Generally, the resorts not bound by FMF have not applied for water withdrawal permits since the 1950s and 1960s, when standards were more lenient. Personal Communication with Ted Williamson, snowmaking manager, Sugarbush Resort (Mar. 26, 2002).

⁴⁹ *Id.* at I.A.

⁵⁰ *Id.* at I.B.

⁵¹ *Id.*

⁵² *Id.* at ID-E.

near the base of Killington Peak.⁵⁵ Additionally, Killington (ASC) contributed \$375,000 towards the purchase of additional conservation lands protecting the “Western Bear Corridor”⁵⁶ to the State of Vermont.⁵⁷ As a result of the “land swap,” ANR agreed to generally support future development of Killington-owned lands within a defined growth-center area.⁵⁸ Significantly, in consideration of the bear habitat protection gained through the agreement, ANR asserted a position that future development in the designated growth center area will not imperil necessary wildlife habitat for black bears.⁵⁹

All the parties agreed on the necessity of an easement and forestry management plan for the newly protected areas, and accordingly, Killington took efforts to work with Rutland,⁶⁰ and the NPS to obtain a 900 acre scenic and wildlife easement as part of the agreement. Further, Killington agreed to limit its annual use of the one and only ski trail⁶¹ near the protected area to Dec. 1 through April 1, and along with ANR, developed a plan to restrict access to Parker’s Gore over the trail for the rest of the year.⁶²

With legislative approval and the support of Governor Howard Dean, the land exchange between Killington and the State took place on December 1, 1997.⁶³ Thereafter, Killington moved to obtain permits from the local, state and federal governments to add snowmaking capacity through Woodward Reservoir, to make on-

⁵³ *Id.* at II.

⁵⁴ Personal Communication with Tim Clapp, Director of Planning, Killington Resort (Mar. 15, 2002).

⁵⁵ Explain/define land swap.

⁵⁶ EXPLAIN/define BEAR CORRIDOR

⁵⁷ Personal Communication with Carl Spangler, ASC VP Planning (Mar. 8, 2002); see also Memorandum of Agreement, supra note__ at para. II B.

⁵⁸ *Id.*

⁵⁹ Memorandum of Agreement, supra note_ at para. II D.

⁶⁰ NEED INFO ON RUTLAND

⁶¹ Juggernaut trail, one of the older beginner trails at Killington, winds down near the edges of Parker’s Gore. See Killington Trail map.

⁶² Memorandum of Agreement, supra note__ at para. II F.

⁶³ Personal Communication with Carl Spangler, VP ASC Planning (Mar. 8, 2002); see also

mountain trail improvements, to connect Killington and Pico with an interconnect chairlift and to build a resort village at the base of Killington Peak.

In 1999, Killington acquired the necessary permits to withdraw water from Woodward Reservoir, located to the south-east of Killington in nearby Plymouth, VT.⁶⁴ According to Killington management, the approval process was relatively smooth, excepting a failed challenge in the Windsor Superior Court by a private resident living near Woodward Reservoir.⁶⁵ Finally, in 2000, Killington increased snowmaking capacity by 30 percent, when it completed the six-mile, \$4 million pipeline from the reservoir in Plymouth to the ski area.⁶⁶

During the Woodward project, Killington simultaneously worked to acquire an Act 250 permit to construct the Interconnect between Killington and Pico,⁶⁷ and hired IBI Group of Vancouver, a consulting firm in British Columbia, to develop a master plan for its resort village.⁶⁸ Killington cooperated with the surrounding communities to devise the master plan,⁶⁹ and in November, 1999, 76% of the voters in the town of Killington approved an amendment to the town zoning which granted Planned Urban Development

⁶⁴ Necessary permits included the following: Act 250 construction permit. *See* 8113; an Army Corps of Engineers §404 permit, pursuant to the Clean Water Act and under Vermont Agency of Natural Resources water quality standards. *See* CITE; an easement from the state to construct the pipeline across a public right of way. *See* ?Need these permit numbers

⁶⁵ Personal Communication with Carl Spangler, ASC VP Planning (Mar. 8, 2002). ___ challenged the Army Corps of Engineers §404 Clean Water Act Permit, which was one of the many approvals required to commence the project. *Id.*

⁶⁶ Laurie Lynn Fisher, *There's No Business like Snow Business*, *supra* note __.

⁶⁷ 8135—act 250 permit granting permission to

⁶⁸ IBI Group, the lead consultant, developed the land use and architectural plan. Additional consultants included: the Fransen Company, Santa Monica, CA—retail planning; Sno Engineering, Littleton, NH—mountain improvements planning and the economic analysis; Landworks, Middlebury, VT—natural resources inventory, energy consultation and preparation for local planning amendments; Clean Energy Group, Montpelier, VT—energy consultants; Pioneer Environmental Associates, Middlebury, VT—water quality analysis; Resource Systems Group, Inc., Norwich, VT—traffic analysis; Wilbur Smith Associates, Montpelier, VT—transit plan, and other. *See* Killington Resort Village Master Plan at 62.

⁶⁹ Killington Resort Village Master Plan at 54-59. Killington conducted over a dozen Open Houses between December 16, 1997 and April 23, 1998. They involved over 1,000 participants, including residents,

(PUD) status to an area near the Killington base. In 2000, the town of Killington rezoned the area as “Ski Village II.”⁷⁰

Finally, in June 2000, the State granted Killington an Act 250 master development permit for the resort village and for on-mountain improvements.⁷¹ Like other Act 250 master development permits granted throughout Vermont,⁷² Killington’s permit represents the State’s general acceptance of Killington’s long-term development goals.⁷³ In granting the permit, the State gave guidance to Killington and the other stakeholders with respect to the ten Act 250 criteria including impact on wildlife habitat, primary agricultural soils, traffic, aesthetics and headwaters.⁷⁴ Importantly, the master development permit does not grant Killington explicit permission to plow ahead with construction on the resort village or mountain improvements, rather it is general approval for Killington’s overall plan. When Killington obtains the necessary financing to move forward, Killington again will apply for Act 250 construction permits for each project phase, which the Act 250 District Commission will again consider under each of the respective Act 250 criteria.⁷⁵ The master development plan process and subsequent approval has given Killington and the other stakeholders forewarning on the State’s concerns, as well as a plan of action for mitigating potential problems within each

vacation home owners, representatives from public interest groups, local business owners, Killington staff, regional officials, state/local officials, regional opinion leaders and others. *Id.* at 55..

⁷⁰ Personal Communication with Carl Spangler, VP ASC Planning (Mar. 8, 2002). PUD status allows for higher density and additional uses. *Id.*

⁷¹

⁷² See, e.g. Maple Tree Place, a retail complex in Williston, Vermont; the Town of Stowe sewer line, a quadrupling of the town sewer plant with extensions of sewer lines up the Mountain Road in Stowe (cited by Marcy Harding, chairperson of the Vermont Act 250 Environmental Board in Bruce Edwards, *Act 250: A View from the Top*, THE RUTLAND HERALD, Jul. 3, 2000 at www.rutlandherald.com/nybor (last visited on Mar. 9, 2002).

⁷³ Personal Communication with Tim Clapp, Killington Planning Director (Mar. 15, 2002).

⁷⁴ See Bruce Edwards, *Act 250: a View from the Top*, RUTLAND HERALD, Jul. 3, 2000, *supra* note [redacted] (interviewing Marcy Harding, chairperson of the state environmental board).

⁷⁵ See part [redacted], *infra*.

construction phase.⁷⁶ Additionally, the master development permit affords Killington's potential investment partners with a level of security in knowing that indeed the project will move forward with hard work and compromise with local communities, interest groups and the state and federal agencies.⁷⁷

III. STAKEHOLDERS AND THEIR EFFECT ON LAW AND ECOLOGY

As it seeks to expand, Killington's size, location and reputation have attracted significant interest from a broad ranging group of other stakeholders. While the American Skiing Company (ASC) began in western Maine at the Sunday River Ski Resort,⁷⁸ Killington is arguably its most important and high profile holding. Although its western resorts are significantly larger in acreage, Killington is by far the largest area in the eastern U.S, and attracts more skiers than any other area east of the Mississippi.⁷⁹ Killington's very public and central goal is to profitably manage the resort so that it may expand in accordance with the Master Development Plan⁸⁰ and the Interconnect,⁸¹ when capital becomes available.⁸² Killington contends that these improvements will increase the number of seasonal skier visits as well as other year-round visits, which ultimately

⁷⁶ Personal Communication with Tim Clapp, Director Killington Planning Dept. (Mar. 15, 2002).

⁷⁷ *Id.* Some large-scale developers favor the master permit concept because it provides certainty as to what the State will permit as well as early notice regarding interest group concerns. Moreover, the process enables all parties to propose and subsequently analyze appropriate mitigation techniques. These efforts, however, contribute significantly to overall development costs, and some developers feel that the process provides little benefit—with the exception of providing the State with environmental data that it could not otherwise afford to obtain. *Id.*

⁷⁸ Press Release, Skip King, Vice President Communications, American Ski Company, A Brief History of the American Skiing Company, at <http://www.peaks.com/html1/presskit/history.html> (last visited, Feb. 9, 2002); see also Paul J. McArthur, *Les is No More: The Rise and Fall of Les Otten's Ski Empire*, VERMONT MAGAZINE, Feb. 2002, at 37.

⁷⁹ Personal Communication with Rich McGarry, Killington General Manager (Mar. 7, 2002).

⁸⁰ *Permit No. 1R0835*, Finding of Fact, Dis. Env. Comm., *supra* note 16. Exhibit #12 [K-CGS-4], at 1.

⁸¹ *Re: Killington, Ltd.*, No. 1R0813-2, Findings of Fact and Conclusions of Law and Order (Vt. Dis. Env. Comm. #1, Nov. 24, 1997) [hereinafter *Permit No. 1R0813-2*, Finding of Fact, Dis. Env. Comm.].

will increase profit.⁸³ Resulting from its sheer size, as well as its aggressive development plans, Killington has attracted attention from a range of stakeholders, in addition to local, state and federal regulatory agencies,⁸⁴ who continue to participate in the process in varying degrees.

Killington, the largest employer in the town of Killington⁸⁵ and one of the largest employers in the state, has a huge economic impact on the surrounding community.⁸⁶ In fact, during the peak ski season, Killington employs approximately 2,100 seasonal and year-round workers.⁸⁷ Jobs include food and beverage workers, housekeepers, groomers, desk clerks, ski instructors and marketing, administrative and management personnel.⁸⁸ For seasonal and hourly workers, pay ranges from \$7 to \$12 per hour, and benefits include ski passes, discounts at the resort's restaurants and shops and free transportation between Killington and Rutland, a small city to the west of the resort.⁸⁹ Additionally, some seasonal workers and all year-round employees are eligible for health insurance and a 401K program.⁹⁰

Not only does the ski resort employ many workers, but also the surrounding communities are dependent on visitors to the ski area. Accordingly, the success or failure of the Killington Ski Resort can greatly influence the economic survival of the

⁸² Personal Communication with Carl Spangler, ASC VP Planning (Mar. 7, 2002).

⁸³ *Id.*

⁸⁴ Of course, the planning commission and the voters in Killington, the Vermont Agency of Natural Resources, and the Army Corps of Engineers, among others responsible to grant development permits, have a strong interest in what happens at Killington.

⁸⁵ Killington was previously known as the town of Sherburne. In 1999? Town voters elected to again call the town, Killington—which was renamed Sherburne in _____. See get cite.

⁸⁶ *Permit No. 1R0835*, Finding of Fact, Dis. Env. Comm., *supra* note 16, Exhibit # 108 [K-NEC-1], at 7 (reporting findings of Richard M. Heaps, economist).

⁸⁷ Bruce Edwards, *Ski Areas Expect to Fill All Jobs*, RUTLAND HERALD, Oct. 15, 2001 at ____.

⁸⁸ *Id.*; see also, personal communication with Jolan Ippolito, VP ASC Human Resources (Apr. 2, 2002).

⁸⁹ *Id.*

⁹⁰ Personal Communication with Jolan Ippolito, VP ASC Human Resource (Apr. 2, 2002).

surrounding communities of Killington,⁹¹ Rutland,⁹² and Woodstock,⁹³ among other smaller towns and villages in the area that provide housing and services to tourists and resort employees.⁹⁴

In addition to local business, the skiers and snowboarders who are loyal patrons of Killington also exert influence over the resort's approach to the Act 250 process. That influence, however, is not always unified. Local skiers, for example, look for the quality of the skiing terrain and snow conditions and place less weight on lodging and other non-ski activities.⁹⁵ Non-local skiers consider additional factors. Lodging and non-ski related activities play important roles in where a non-local skier decides to vacation.⁹⁶ Like local skiers, visitors value convenience. For example, many non-local skiers desire a place to stay directly on the mountain to facilitate access to the skiing and related activities.⁹⁷ Beyond these practical considerations, skiers deeply value aesthetics.⁹⁸ The surrounding environment is an intricate part of the skiing experience, and many skiers think environmentally. They potentially make their decision of where to ski based on how environmentally friendly they think a resort is. While resort "environmentalism" may be difficult to judge, the National Ski Area Association and the Vermont Ski Area Association both award honors annually to resorts that show commitment to conservation

⁹¹ Get population data on these communities.

⁹²

⁹³

⁹⁴ For example, the communities of Pittsfield, Stockbridge, Bethel, Pittsford, Plymouth, Bridgewater, Chittenden and Mendon all offer lodging facilities, which house both visitors to the region and employees of the resort; *see also*, *Permit No. 1R0835*, Finding of Fact, Dis. Env. Comm., *supra* note 16, Exhibit # 108 [K-NEC-1], at 7 (reporting findings of Richard M. Heaps, economist) at 5.

⁹⁵ Personal communication with Heather Atwell, Killington, Vermont resident and local skier (Mar. 11, 2002).

⁹⁶ Personal communication with Rich McGarry, Killington General Manager (Mar. 8, 2002).

⁹⁷ *Id.*

⁹⁸ Personal communication with Heather Atwell, Killington, Vermont resident and local skier (Mar. 11, 2002).

and environmental awareness.⁹⁹ With enough research, an environmentally conscience skier could make some determination of the environmental record of a ski resort and decide accordingly where to spend his or her money. Interestingly, however, skiers' views towards the protection of the environment are paradoxical. Skiers want clean, aesthetically pleasing surroundings in which to ski, but they also want more skiing terrain, more snowmaking and more resort amenities.¹⁰⁰ Consequently, while skiers, as stakeholders, could potentially work to strengthen Act 250, their interests may also lead them to weaken it.

In addition to skiers and snowboarders, hikers and others who recreate in Vermont's central Green Mountains have much at stake as Killington expands. While many outdoor activities are under the auspices of Killington such as mountain biking and the alpine slide, there are many more activities available that are independent of Killington's resort.¹⁰¹ The Long Trail and Appalachian Trail both run west of the ski trails on Killington and Pico. As part of the Memorandum of Agreement¹⁰² Killington and the State of Vermont took the land bordering these trails within Killington out of the Resort's lease,¹⁰³ insuring that neither trail would be crossed or adversely influenced by the Interconnect between Pico and Killington. Still, hikers are concerned with future development at Killington.¹⁰⁴ Already, a large restaurant, a Gondola station, and several

⁹⁹ Killington received an environmental award from the Vermont Ski Area Association in January of 2002. *see* [_VSAA web address_](#) *see also* [NSAA eagle awards](#) *_cite???*

¹⁰⁰ Personal communication with Peter Oliver, contributing writer, *SKIING MAGAZINE* (Apr. 2, 2002). One of the most blatant examples of these paradoxical characteristics is helicopter skiing. Skiers pay nearly \$500 or more in a single day to ride in helicopters to "out of bounds" mountain summits, away from ski area development and crowded slopes. *Id.*

¹⁰¹ *See* Killington Region Chamber of Commerce, available at www.killingtonchamber.com *last visited on* (Mar. 8, 2002). Snowmobile and horseback tours, x-c skiing, golf, tennis, and theater are all available in the Killington region. *Id.*

¹⁰² *See* part __, *supra*.

¹⁰³ *Permit No. 1R0813-2, Finding of Fact, Dis. Env. Comm., supra* note 37, Exhibit #11, at 1.

¹⁰⁴ [Personal communication with](#) __? Need authority_.

trails sit at the summit of Killington, and some feel that the Interconnect will only further reduce the wilderness feel of the area.¹⁰⁵

Those who participate in water-oriented recreation such as fishing and kayaking also have much at stake, as the amount of water a resort uses for snowmaking levels often affects the water level of surrounding rivers and streams. Some fear that snowmaking will adversely affect local aquatic ecosystems by drawing from water sources in the winter when water is historically low, and accordingly increase runoff in the spring.¹⁰⁶ Because of these fears, fishermen and others who use local waters may play an active role in the Act 250 process.¹⁰⁷

The final stakeholders in the development of Killington are the local NGOs, known as the stewards of Vermont's environment.¹⁰⁸ NGOs have often taken part in the Act 250 process.¹⁰⁹ Groups such as the Green Mountain Club (GMC), Vermont Natural Resources Council (VNRC), Farm and Wilderness Camps and the Conservation Law Foundation (CLF) have all played influential roles in previous Act 250 permitting processes often representing the interests of the environment.¹¹⁰

GMC is a Vermont based organization whose primary concern is the preservation and upkeep of Vermont hiking trails with a special emphasis on the Long Trail.¹¹¹ It has been active in many of the Act 250 processes.¹¹² In particular, GMC has been involved

¹⁰⁵ Personal communication with Jean Rosenberg, Farm and Wilderness (Apr. 1, 2001).

¹⁰⁶ *Id.*

¹⁰⁷ *See* VT. STAT. ANN. tit. 10, § 6085(c) (1999); *see also* *Act 250 Handbook*, *supra* note 8, at 36-42.

¹⁰⁸ **CITE?**

¹⁰⁹ *See* *Permit No. 1R0813-2*, Finding of Fact, Dis. Env. Comm., *supra* note 37, at 2.

¹¹⁰ *See, e.g., id.*

¹¹¹ The Green Mountain Club, *available at* <http://www.greenmountainclub.org/headqt.htm> (last visited Feb. 7, 2002).

¹¹² *See, e.g., Permit No. 1R0813-2*, Finding of Fact, Dis. Env. Comm., *supra* note 37, at 2.

in the approval of the Interconnect project, as it required the relocation of the Long Trail.¹¹³

VNRC, created in 1963 by Vermonters to preserve Vermont's "working landscape,"¹¹⁴ has played a big role in many of Killington's expansion plans, and has often opposed expansion efforts similar to those presented by the current Master Plan.¹¹⁵ Further, VNRC participated in negotiations that led to Killington's expansion, such as the activity of Friends of Parker's Gore leading to the land swap of Parker's Gore.¹¹⁶

CLF, an environmental advocacy organization that works to minimize environmental threats to the entire New England region,¹¹⁷ CLF took part in Killington's Master Plan process by offering advice on matters regarding Phase One development as well as other environmental matters.¹¹⁸

Fortunately, these stakeholders have had the opportunity to participate in decisions leading to Killington's past and future expansion. These dynamics are attributable to the transparency and open participation that Vermont's Act 250 allows. Without the framework to bring all stakeholders to the negotiation table, the Killington Region might appear very differently today and in the future. Through Act 250, the development process continues to be a true product of compromise. Whether these concessions will effectively protect both the environment and the economic viability of the region, at this point, is unknown.

¹¹³ *Id.*, Exhibit #11, at 1.

¹¹⁴ Vt. Natural Res. Council, *About VNRC*, at <http://www.vnrc.org/aboutvnrc.htm> (last visited Feb. 7, 2002).

¹¹⁵ This opposition will be discussed further in Part III.

¹¹⁶ *Permit No. 1R0813-2*, Finding of Fact, Dis. Env. Comm., *supra* note 37, at 1-2.

¹¹⁷ Conservation Law Foundation, *About CLF*, at <http://www.clf.org/aboutclf/home.htm> (last visited Feb 7, 2002).

IV. ACT 250 AND DEBATES OVER KILLINGTON'S RECENT EXPANSIONS

A. Act 250: A Brief History and Explanation

Act 250, created in the spring of 1970, is Vermont's land use and development law that requires a permit for many types of development and subdivisions.¹¹⁹ The Act aims to regulate and control the development of Vermont lands in the interest of maintaining the general welfare in the state.¹²⁰ Under the Act, ten criteria establish a framework that the District Environmental Commission and Environmental Board use as a basis for evaluating land use permits.¹²¹ Together, these ten criteria aim to protect of natural resources, environmental quality, and scenic beauty while working to ensure that development plans can be absorbed by Vermont communities without unnecessary damage.¹²² Stakeholders, such as those above mentioned, including local governments, businesses and NGOs, play a significant role in the Act 250 permitting process. The District Environmental Commission,¹²³ responsible for issuing or denying permits, bases its decisions on information and exhibits, which impart all material facts concerning how a proposal will affect the surroundings, provided by the applicant, state agencies and other stakeholders.¹²⁴

¹¹⁸ Press Release, American Skiing Company, State of Vermont Gives Green Light to Killington Resort Village Planning Process, at <http://www.peaks.shareholder.com/news/19990428-8047.cfm> (last visited Feb. 7, 2002).

¹¹⁹ STATE OF VERMONT ENVIRONMENTAL BOARD, ACT 250: A GUIDE TO VERMONT'S LAND USE LAW 6 (2000), available at <http://www.state.vt.us/envboard/publications/act250.pdf> (last visited Feb. 7, 2002) [hereinafter *Act 250 Guide*].

¹²⁰ Gruenig, *supra* note 9, at 3; see also *Act 250 Guide*, *supra* note 54, at 6. this.

¹²¹ *Act 250 Handbook*, *supra* note 8, at 6. The ten criteria to be evaluated are: (1) water and air pollution; (2) evidence of existing water supply; (3) burden on water supply; (4) soil erosion; (5) traffic; (6) educational services; (7) municipal or government services; (8) aesthetics, historic sites, or rare and irreplaceable areas; (9) capability and development plan; and (10) local and regional plans. *Id.* at 73-76.

¹²² See *Act 250 Guide*, *supra* note 54, at 6.

¹²³ Define DC. After the District Commission issues or denies permits, parties may appeal the decision to the Vermont Environmental Board, whose decisions are reviewed by the Vermont Supreme Court. See VSAA § GET CITE ____

¹²⁴ See *id.*

Within the context of Killington's on-going expansion efforts, Act 250 continues to play a major role. As outlined in Part II, *supra*, Killington has concentrated on three major projects over the last five years: the Woodward Reservoir,¹²⁵ the Interconnect,¹²⁶ and the Resort Village.¹²⁷ Killington believes that these improvements will increase skier numbers.¹²⁸ The District Commission has evaluated each of these projects under Act 250's ten criteria.¹²⁹ In each case, stakeholders have focused the debate on several contentious issues including air and water pollution, soil erosion, and impacts on wildlife, among others.¹³⁰ An examination of these three expansion efforts and of the issues raised by each provides insight into how developers, such as Killington, and local stakeholders negotiate terms that protect the environment of the Green Mountains without sacrificing economic growth.

B. Environmental Compliance to Date

Since the inception of Act 250, the State has granted Killington numerous permits.¹³¹ According to a Killington official, the resort has amassed a flawless compliance record.¹³² In addition to Act 250 compliance, Killington ensures that it abides with requirements of permits granted by other state, local and federal agencies.¹³³ Namely, the Memorandum of Agreement (MOA),¹³⁴ signed in 1996, binds Killington to maintain the required February Medium Flow (FMF) in the brooks from which Killington draws

¹²⁵ *Re: Killington, Ltd.*, No. 1R0813-5, Findings of Fact and Conclusions of Law and Order (Vt. Dis. Env. Comm. #1, Aug. 25, 1997) [hereinafter *Permit No. 1R0813-5*, Finding of Fact, Dis. Env. Comm.].

¹²⁶ *Permit No. 1R0813-2*, Finding of Fact, Dis. Env. Comm., *supra* note 37.

¹²⁷ *Permit No. 1R0835*, Finding of Fact, Dis. Env. Comm., *supra* note 16.

¹²⁸ Personal communication with Carl Spangler, ASC VP planning (Mar. 8, 2002). See note ___ and accompanying text.

¹²⁹ CITE

¹³⁰ See article ?

¹³¹ See *e.g.*

¹³² Personal Communications with Carl Spangler, ASC VP Planning (Sept. 28, 2001).

¹³³ See *e.g.*???

¹³⁴ See part II *supra*

water. Pursuant to the agreement between Killington and ANR, the ski area operates several gauging systems; if the water level is too low, it ceases drawing water from the particular source.¹³⁵ Further, Killington reports flow data to the State on a monthly basis.¹³⁶ Also, in accordance with the MOA, Killington has established a wildlife management plan that looks to balance the ecological needs of the mountain with the economic needs of the ski area with the assistance of one of its environmental consulting firms, Pioneer Environmental Associates.¹³⁷

Arguably, it has been Killington's good faith efforts to comply with the directives of the MOA, as well as other private negotiations, that have affected the Act 250 outcome for the master development permit and other applications. The District Environmental Commissions consider past relations between applicants, such as Killington, and stakeholders, including many of the local NGOs and look favorably on affirmative efforts to work with concerned parties.¹³⁸

C. *The Interconnect*

The most high profile Killington expansion project among skiers and other local stakeholders is the approved proposal to connect Killington to Pico, a ski area that lies northwest of Killington, with the construction of a chairlift between the two mountains.¹³⁹ S-K-I, Ltd., the previous owner of Killington, acquired Pico in 1984.¹⁴⁰ When ASC purchased the two mountains in 1996, it immediately began plans on an inter-connect

¹³⁵ **Personal Communication** with Rich McGarry, Killington General Manager (Apr. 1, 2002). Sources to which FMF applies are Roaring Brook, Falls Brook and the Otachuahee River. *Id.*

¹³⁶ *Id.*

¹³⁷ Needs support.

¹³⁸ *See, e.g., Permit No. 1R0813-2, Finding of Fact, Dis. Env. Comm., supra* note 37, at 11-13.

¹³⁹ *See note, __ and accompanying text.*

¹⁴⁰ LORENZ at ____.

chairlift.¹⁴¹ Through the Interconnect, Killington sought to create a corridor in which skiers could access Killington's trail network from Pico and vice versa.¹⁴² Presently, the only way to get from the Killington base area to Pico is to drive seven miles along the Killington access road and Vermont Route 4.

Stakeholder apprehension concerning the Interconnect included its potential impact on high elevation ecosystems. Bear habitat and migration, as well as the habitat for the Bicknell's Thrush and Squash berry plant, were (and continue to be) a large concern for some citizens and biologists.¹⁴³ Others highlight the potential for increased erosion associated with the construction.

As Killington has proposed to expand, one of the greatest ecological concerns as stated above has been bear habitat. The proposed Interconnect includes areas that many identify as prime bear habitat,¹⁴⁴ and many citizens who formed NGOs, such as the Friends of Parker's Gore,¹⁴⁵ objected to the plan because of its impacts.¹⁴⁶ In December 1996, Killington made a land swap with the State of Vermont where Killington gave up 3,000 acres of high elevation terrain in return for an area of land of lower elevation near the resorts base.¹⁴⁷ Killington held this terrain, known as Parker's Gore, for twenty years as a potential location for snowmaking withdrawal, and in the past had attempted to use the area's resources.¹⁴⁸ Notwithstanding the strong opposition from Friends of Parker's

¹⁴¹ American Skiing Company, *supra* note 15.

¹⁴² *Permit No. 1R0835*, Finding of Fact, Dis. Env. Comm., *supra* note 16, Exhibit #72 [K-CLH-1], at 4.

¹⁴³ *Id.* at 9.

¹⁴⁴ *Bear Habitat Saved in Ski Resort Swap* (Jan. 21, 1998), available at <http://csmonitor.com/durable/1998/01/21/us/us.8.html>.

¹⁴⁵ explain group

¹⁴⁶ Cite

¹⁴⁷ *Permit No. 1R0813-2*, Finding of Fact, Dis. Env. Comm., *supra* note 37, Exhibit 40, at 1.

¹⁴⁸ *Bear Habitat Saved in Ski Resort Swap* *supra* note 80; see also, *In re: Killington, Ltd., CITE* (upholding the Environmental Board's decision to limit Killington's use of the land in Parker's Gore for snowmaking.)

Gore¹⁴⁹ and others, Killington was able to appease supporters of bear habitat protection and obtain land that will prove valuable for resort expansion through the land swap.¹⁵⁰

The debate over what to do with the copious amounts of sewage that Killington produces, provides yet another example of Killington's willingness to work with stakeholders in the interest of the Interconnect project. At the time of the debate, a modern treatment plant on the other side of the mountains, in Rutland, had the capacity to handle Killington's wastewater needs. Although it was expensive and not necessarily essential to build a pipe that connected Killington's sewage system to Rutland, Otten opted to construct what is now known as the "alpine pipeline." Many deemed it a more environmentally conscious option.¹⁵¹ This extra step not only caused many environmentalists to look favorably upon Killington's actions, but it also provided the route for one of the trails in planned the Interconnect.¹⁵²

In addition to these effective compromises, the Act 250 permit issued by the District Environmental Commission requires mitigation measures during construction.¹⁵³ These measures include implementing "erosion control procedures" as well as halting construction during certain parts of the year to avoid impact on the mating season of the Bicknell's Thrush.¹⁵⁴ Also included in the permit is a condition to narrow many of the ski trails by 15 to 20 feet to keep more of the Bicknell's' Thrush's habitat intact.

Although Killington long considered the Interconnect plan, it was under the leadership of Les Otten, the former CEO of ASC, when Killington finally received

¹⁴⁹ define

¹⁵⁰ *Id.*

¹⁵¹ See *supra* note 14.(Not supported by *Permit No. IR0835 - Need support*).

¹⁵² Currently mountain operations personnel use the pipeline trail to travel quickly between Killington and Pico when necessary. The route is not skiable; personnel can travel either by foot or snowmobile or ATV (in summer).

¹⁵³ Cite.

approval.¹⁵⁵ On July 22, 1997, Killington applied for an Act 250 permit. Months later on November 24, 1997 after reviewing ninety-eight exhibits, the District Environmental a Land Use Permit.¹⁵⁶ With Otten's experience, vision, and a fresh approach that focused on compromise, Killington successfully obtained an Act 250 permit.

According to the initial construction plans, ASC intended to add four lifts and 110 acres of trails to the space between Killington and Pico.¹⁵⁷ As a result of Act 250 compromises, however, the approved plan now calls for just two lifts and 35 acres of trails.¹⁵⁸ According to Carl Spangler, Vice President of Planning and Development at Killington, it was Otten's willingness to work with stakeholders, which put Killington in a position to receive its permit. Killington took on an exceptional financial burden in working with the State and concerned NGOs during the permitting processes.¹⁵⁹ Now, although Killington has obtained all required permits for the Interconnect, it does not plan to begin until it acquires more capital to actually fund the project.¹⁶⁰ Last August, Killington extended its land use permit to 2004 to maintain eligibility to build under its context.¹⁶¹

D. The Woodward Reservoir

The proposal and now the completion of Killington's plan to draw water from the Woodward Reservoir is associated with the Interconnect plan in many ways. While the land use permit granting the use of the Woodward Reservoir to Killington was

¹⁵⁴ *Permit No. 1R0813-5*, Finding of Fact, Dis. Env. Comm., *supra* note 60, at 8-9.

¹⁵⁵

¹⁵⁶ *Permit No. 1R0813-2*, Finding of Fact, Dis. Env. Comm., *supra* note 37, at 13.

¹⁵⁷ Findings of Fact #1R0813-5, pg. 1.(NOT SUPPORTED)

¹⁵⁸ *Permit No. 1R0835*, Finding of Fact, Dis. Env. Comm., *supra* note 16, (DOES NOT SUPPORT)

¹⁵⁹ Personal Communication with Rich McGarry

¹⁶⁰ Personal Communication with Rich McGarry, Killington General Manager (Mar. 7, 2002).

technically a different permit, the District Commission used many of the exhibits from Interconnect proposal. Additionally, many of the steps Killington took as it prepared the Act 250 application for the Interconnect had bearing on Woodward, such as the land trade of Parker's Gore.¹⁶² Located south of Killington's ski trails, Woodward Reservoir lies on the property of Farm and Wilderness Camps, a series of six Quaker summer camps.¹⁶³ For several years, owners of Killington considered Woodward as a potential source for snowmaking withdrawals.¹⁶⁴ Yet, Farm and Wilderness was reluctant to give its neighbor the easement to draw water from their property. Further, to build a pipeline, Killington and Farm and Wilderness needed legislation enabling the construction of a private waterline across the public right of way—State Highway, 100.¹⁶⁵

When ASC bought Killington, Farm and Wilderness watched Killington work with other local stakeholders to negotiate compromises, such as the transfer of Parker's Gore.¹⁶⁶ Farm and Wilderness reassessed its position after a team of hydrogeologists¹⁶⁷ looked at the impacts of water withdrawal from the reservoir and saw little possibility for harm to ecology.¹⁶⁸ Based on these results, Farm and Wilderness gave Killington an easement, in exchange for an annual payment and the promise to implement monitoring techniques for environmental protection.¹⁶⁹ Snowmaking withdrawals from Woodward Reservoir have increased Killington's snowmaking capacity by thirty percent.¹⁷⁰

¹⁶¹ Personal Communication with Tim Clapp—ask for permit extension # B??Findings of Fact Land Use Permit 1R0835-02-B (Extension)(According to the District Commission an extension was never issued on this permit – 1R0835-02 does not exist)

¹⁶² see supra note__and accompanying text.

¹⁶³ Testimony of Gene Rosenberg (Apr. 1, 2001).

¹⁶⁴ Personal Communication?

¹⁶⁵ Personal Communication Carl Spangler, VP ASC Planning (Mar. 7, 2002). Explain more about this.

¹⁶⁶ Personal Communication with Jean Rosenberg, Farm and Wilderness (Apr. 1, 2001).

¹⁶⁷ Pioneer Environmental Associates, Middlebury, VT.

¹⁶⁸ Findings of Fact #1R0835-2, exhibit 85. (HOPE - Again, 835-2 does not exist.)

¹⁶⁹ See *id.*(Again, Does not exist)

¹⁷⁰ Findings of Fact, Land Use Permit No. 1R0813.

Significantly, many believe that the use of the reservoir poses little risk to the ecology surrounding the reservoir, as it is manmade and overflows annually.¹⁷¹

D. The Resort Village

Vital in Killington's efforts to restore skier numbers is the plan to build additional off-mountain facilities and services such as lodging and non-skiing activities. On September 23, 1999, Killington applied for the largest Act 250 application the State has ever considered,¹⁷² Killington's Master Development Plan for the resort village.

Killington aims to implement the master plan in three phases, although the State has approved only Phase I.¹⁷³ In the end, all three phases could add as many as 4,541 units of housing, 230,000 square feet of commercial space, 118,000 square feet of public assembly and indoor sports facilities as well as widespread on-mountain improvements.¹⁷⁴ Because of the scope of the plan, Killington included only Phase I in the September 1999 land use permit application.¹⁷⁵

Phase I could add as many as 700 hotel suites, 520 hotel rooms, 160 town houses, 20 single family homes, 180,000 square feet of retail and restaurant space, 50,000 square feet of public assembly and indoor sports facility space and 119 acres of new ski terrain.¹⁷⁶ This project now has an estimated price tag of over \$231,728,000.¹⁷⁷ Most of the development will take place in what is called the 408 Planned Unit Development

¹⁷¹ Personal Communication with Jean Rosenberg, Farm and Wilderness (Apr. 1, 2001).

¹⁷² *Permit No. 1R0835*, Finding of Fact, Dis. Env. Comm., *supra* note 16.

¹⁷³ *Permit No. 1R0835*, Finding of Fact, Dis. Env. Comm., *supra* note 16, at 1.

¹⁷⁴ *Permit No. 1R0835*, Finding of Fact, Dis. Env. Comm., *supra* note 16, Exhibit #107 [K-NEC-1], at i.

¹⁷⁵ Authority?

¹⁷⁶ Press Release, American Skiing Company, *supra* note 53.

¹⁷⁷ *Permit No. 1R0835*, Finding of Fact, Dis. Env. Comm., *supra* note 16, Exhibit #107 [K-NEC-1], at 2

(PUD), which is located on the parcel of land that was swapped for Parker's Gore.¹⁷⁸

Currently, much of this land is part of a parking lot servicing Killington Base Area.¹⁷⁹

Killington met a great number of opponents before submitting the Act 250 proposal. Representatives of the ski resort consulted with local officials 30 times in the 18 months preceding the application for the permit.¹⁸⁰ Members of the Killington staff met with members of the town of Killington, CLF, and other groups to come to a consensus concerning the massive expansion.¹⁸¹ Significantly, in the Permit's findings of fact, little evidence showed that this plan would harm the mountain ecology of the region.¹⁸² Instead, a great cause for concern was the uncertainty of how the area around Killington and other major byways to Killington would react to the increased traffic going to and from the resort.¹⁸³ A study included in the Act 250 documentation suggested that traffic would not be a problem and that present roadways could easily handle any additional travel.¹⁸⁴ In addition to traffic concerns, organizations such as VNRC opposed the resort master plan over concern that expansion will unfavorably affect local communities around the ski resort.¹⁸⁵

As with the Interconnect plan, little has been done toward the execution of the master development plan's resort village. Killington has not yet attracted investors to provide

¹⁷⁸ *Permit No. 1R0835, Finding of Fact, Dis. Env. Comm., supra note 16, Exhibit #14 [K-CGS-6].*

¹⁷⁹ Authority

¹⁸⁰ See *supra* note 14.(HOPE - NOT SUPPORTED BY *Permit No. 1R0835, Finding of Fact, Dis. Env. Comm., supra note 16 – NEED SUPPORT*).

¹⁸¹ See *id.* (HOPE -NEED SUPPORT)

¹⁸² See *Permit No. 1R0835, Finding of Fact, Dis. Env. Comm., supra note 16,at 10-75.*

¹⁸³ See *id.*, at 30-38.

¹⁸⁴ See *id.*

¹⁸⁵ See *supra* note 14.(HOPE - NOT SUPPORTED BY *Permit No. 1R0835, Finding of Fact, Dis. Env. Comm., supra note 16 – NEED SUPPORT*). VNRC appealed the District Commission's permit on two sub-criteria: scattered growth and urban development. Notwithstanding the appeal, the MDP was affirmed by the environmental board. Undoubtedly, when Killington eventually applies to begin construction, VNRC will again challenge these, if not additional, criteria.

the financing needed for the project.¹⁸⁶ When the capital does come, Killington will spend it on the resort village, as Killington believes that the attractions of a village will draw more visitors to the area and accordingly provide a new source of profits to fund the other projects.¹⁸⁷ According to Carl Spangler, construction of townhouses and single-family homes has not occurred since 1991, and this project will take priority over the others for the time being.¹⁸⁸

Both supporters and opponents of the resort village believe that the project will have a large impact on the community.¹⁸⁹ As part of the permit application process, Killington hired a consultant, Northern Economic Consulting Inc. (NEC), to analyze the economic impacts of phase one of the Master Plan.¹⁹⁰ NEC used an econometric model developed by Regional Economic Models, Inc. (REMI),¹⁹¹ to study the possible effects of the expansion across the four county area of southern Vermont.¹⁹² This study was based on the areas in which current Killington employees reside, as well as the likely patterns of the new employees of Phase I.¹⁹³

According to the consultant's model, jobs would increase by 3,063 due to the construction and initial operation of Phase I.¹⁹⁴ According to the model, only half of these jobs would occur at the site of expansion. The other half would spread across the region. This theory is known as the "multiplier process."¹⁹⁵ The VNRC estimate of

¹⁸⁶ See *supra* note 14. (HOPE - NOT SUPPORTED BY Permit No. 1R0835, Finding of Fact, Dis. Env. Comm., *supra* note 16 – NEED SUPPORT).

¹⁸⁷ Personal Communication with Tim Clapp, Director, Killington Planning (Mar. 15, 2002).

¹⁸⁸ Personal Communication with Carl Spangler, ASC VP Planning (Mar. 7, 2002).

¹⁸⁹ Permit No. 1R0835, Finding of Fact, Dis. Env. Comm., *supra* note 16, Exhibit # 108 [K-NEC-1], at 7. Phase One of the Master Plan could increase annual visits to Killington by as much as 40.5%. *Id.*

¹⁹⁰ Permit No. 1R0835, Finding of Fact, Dis. Env. Comm., *supra* note 16, Exhibit # 108 [K-NEC-1].

¹⁹¹ Permit No. 1R0835, Finding of Fact, Dis. Env. Comm., *supra* note 16, at 38

¹⁹² These counties include Rutland, Windsor, Bennington and Windham. *Id.*

¹⁹³ Permit No. 1R0835, Finding of Fact, Dis. Env. Comm., *supra* note 16, at 54

¹⁹⁴ Permit No. 1R0835, Finding of Fact, Dis. Env. Comm., *supra* note 16, Exhibit 108 [K-NEC-1], at 5

¹⁹⁵ *Id.*

population growth due to Phase I, however, differed considerably from NEC's model. VNRC argued that population expansion would be much greater than NEC's estimate. When it rendered its decision, however, the State concluded that NEC's estimates were more accurate.¹⁹⁶

NEC also determined that an increase in jobs would also cause an increase in population of the four county region.¹⁹⁷ By the end of Phase I, the project would bring a net increase of 1,268 people to the area.¹⁹⁸ As in the case of VNRC again offered a much different estimate as they projected a growth of over 6,000 during the first several years of Phase I.¹⁹⁹ Again, the state sided with Killington and NEC and concluded the lower estimate was more accurate.²⁰⁰ It is unclear, however, how this increase in population will distribute itself across the region. The District Environmental Commission noted that local impacts are "commonly overestimated by project opponents and sometimes underestimated by applicants."²⁰¹ On the other hand, the State found that Killington's increased lodging would pose too much competition for 189 other lodging establishments in the area.²⁰²

According to NEC, the influx of new households from Phase I would raise Sherburne's municipal expenditure by \$22,673 while these residences would pay an estimated \$24,149 in municipal taxes.²⁰³ As a result, the net Municipal Revenues from Phase I would be an estimated \$1,476. Additionally, NEC asserted that there would be no demand for municipal services arising from the Phase I development, and due to the

¹⁹⁶ *Permit No. 1R0835*, Finding of Fact, Dis. Env. Comm., *supra* note 16, at 54-55.

¹⁹⁷ *Permit No. 1R0835*, Finding of Fact, Dis. Env. Comm., *supra* note 16, Exhibit 108 [K-NEC-1], at 9

¹⁹⁸ *See id.*

¹⁹⁹ **Authority**

²⁰⁰ *Permit No. 1R0835*, Finding of Fact, Dis. Env. Comm., *supra* note 16, at 54-55.

²⁰¹ *Id.*

²⁰² *Id.* at 57.

increase of \$892,775 in municipal taxes, budgets for several municipal services, such as police, library and recreational, would go up as much as 41.1%.²⁰⁴

NEC's study paints an optimistic picture concerning the economic and fiscal impacts of Phase I on the region. VNRC argued that there are several inconsistencies with the model.²⁰⁵ VNRC contended that the scope of the study, which covered four counties, equal to one-third of Vermont, was too large, and that a study should include a smaller area.²⁰⁶ Although VNRC argued, logically, that the immense area of the NEC's study site could dilute impacts on communities closest to Killington, the State concluded that "different definitions of region are not fatal to the applicant's analysis of impacts."²⁰⁷

All estimates concerning the Phase I impacts on the region were in 1998 dollars and included employment and growth rates indicative of that year.²⁰⁸ According to the models created for the master development Act 250 application, Killington planned to begin construction in 2000.²⁰⁹ But currently—two years past the estimated start date, Killington has no definite time-frame in which to break ground. One obvious reason is that ASC is now over \$400 million²¹⁰ in debt.²¹¹ It is unclear how the impacts on the region would change considering what has happened in the last four years economically and demographically. Thus, the relevancy of NEC's and other studies could be called

²⁰³ *Permit No. 1R0835*, Finding of Fact, Dis. Env. Comm., *supra* note 16, at 42

²⁰⁴ *Id.*

²⁰⁵ *Permit No. 1R0835*, Finding of Fact, Dis. Env. Comm., *supra* note 16, at 54

²⁰⁶ *Id.* VNRC suggested either limiting the study to the Town of Killington, or to a 30-mile radius of the area. *Id.*

²⁰⁷ *Id.*

²⁰⁸ *See supra* note 81.

²⁰⁹ *Permit No. 1R0835*, Finding of Fact, Dis. Env. Comm., *supra* note 16, Exhibit #107 [K-NEC], at 1.

²¹⁰ As of November 2001.

²¹¹ *See* Bruce Edwards, *American Skiing Company Optimistic*, Rutland Herald, Nov. 21, 2001, available at http://www.rutlandherald.nybor.com/To_Print/37886.htm. ("American Skiing Co. Has been mired in a sea of red ink for several years.")

into question. Accordingly, Killington and the other stakeholders might need to repeat analyses or supply new data when construction on Phase I actually begins.

NGOs, notably VNRC, have been extremely vocal and have offered alternative views concerning Phase I development.²¹² Elizabeth Courtney, executive director of the VNRC, has fought Killington's expansion for years.²¹³ She claims that it is imperative to address the quality of upland streams in and around Killington as well as issues concerning the resort village²¹⁴ before construction begins. After the State provided its Finding of Facts, which included many guidelines for Killington to follow when construction commences, VNRC, under the leadership of Courtney, appealed the decision.²¹⁵ It cited prior Vermont Supreme Court rulings, which conclude that "jurisdiction does not attach until construction is about to commence."²¹⁶ In considering the appeal, the State Environmental Board sided with Killington. The Board concluded that the applicant submitted the master development plan application voluntarily and that the "underlying purpose of the Master Plan planning process...[is to give] guidance and a degree of assurance as to some aspects of its proposal even if ... construction [is not ready to commence] on the entire project."²¹⁷

Courtney and VNRC have also opposed the way Killington approached the preliminary stages of the Master Plan. In a commentary in the Rutland Herald, Courtney

²¹² John Dillon, *In Person: Elizabeth Courtney*, RUTLAND HERALD, May 6, 2001, available at <http://rutlandherald.nybor.com/Archive/Articles/Article/25692>.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ need cite for this appeal.

²¹⁶ *Re: Killington, Ltd., (Master Plan), Application*, No. 1R0835-EB, Memorandum of Decision and Order, 1999 WL 1027239 (Vt. Env. Bd., Oct. 22, 1999).

²¹⁷ *See id.*

called for an open planning process, which would include *any and all* parties.²¹⁸

According to Killington executives who wrote a response to Courtney's commentary, they did have an open planning process that included up to 1,000 people representing interested local stakeholders.²¹⁹ In their response, the executives further explained that VNRC was indeed invited and chose not to attend.²²⁰ Notwithstanding the master development permit approval of Phase I, Killington and the VNRC undoubtedly will wrestle over each step of the construction process, including mitigation measures the Resort should take to protect water quality, wildlife habitat and other elements outlined in the Act 250 criteria.²²¹

CONCLUSION: FUTURE CONCERNS ABOUT THE ECOLOGY AND THE LAW AT KILLINGTON

With the Woodward Reservoir project completed, and plans to build the Resort Village and Interconnect on the short-term horizon,²²² Killington presently has few concerns over whether it can ultimately obtain the required permits, pursuant to Act 250. Most of the conflicts with NGOs are resolved, and several building permits are already in hand. Now the following questions arise: Will NGOs such as VNRC and CLF come back to the table with new concerns or demands? If so, how will they affect Killington's economic ability to execute the permits it has already received? If Killington receives enough funding to obtain building permits and to actually begin construction, when will these expansions take place? And finally, when construction is completed, can and *will*

²¹⁸ Elizabeth Courtney, *Killington Project Should Not Have an Early Review*, RUTLAND HERALD, March 2, 2000, p.9.

²¹⁹ Allen Wilson & Carl Spangler, Letter to the Editor, *VNRC Refused to Cooperate*, RUTLAND HERALD, Mar. 10, 2000, available at <http://rutlandherald.nybor.com/archive/Articles/Article/4932>.

²²⁰ *See id.*

Killington service the larger skier numbers by operating in accordance with its original promises under Act 250?

In the ski industry generally, and at Killington specifically, lack of capital (aside from environmental regulation) is the main obstacle to expansion, and perhaps to operating in the “greenest” manner possible. In light of its debt load, Killington naturally will seek options that lower expansion cost. Importantly, however, Act 250 aims to ensure that cost cutting does not affect the environmental integrity of the development process.

Thus far, keeping costs low has proved difficult for Killington. Act 250 has clearly increased expenses by requiring copious scientific and economic data, and by instituting mitigation requirements, and special restrictions on building.²²³ While it is reasonable to assume that Act 250 adds cost, the extent of the increase is unclear. Moreover, it is unclear whether Killington would have been able to undertake the expansion, even without the requirements of Act 250, as ASC’s debt arose independently of expansion plans.

Many NGOs such as Farm and Wilderness and Friends of Parker’s Gore have been pleased with the steps Killington has taken to protect mountain ecology within the boundaries of Act 250 and independently. As discussed above, Killington has complied with all agreements. These NGOs have good reason to be content.²²⁴ However, in the coming years, the possibility for additional environmental impacts could arise, as these

²²¹ See STATE OF VERMONT ENVIRONMENTAL BOARD, ACT 250: A GUIDE TO VERMONT’S LAND USE LAW 6 (2000), available at <http://www.state.vt.us/envboard/publications/act250.pdf> (last visited Feb. 7, 2002) [hereinafter *Act 250 Guide*].

²²² Assuming that Killington finds financing.

²²³ See *supra* note 14 (NEED SUPPORT)

²²⁴ Farm and Wilderness and Friends of Parker’s Gore both received exactly what they wanted while Killington attained what they sought, but with supplementary costs. See Part __, *supra*.

projects go forward. Additionally, upon the completion of expansion comes the possibility of increased skier numbers and consequently increased demand for resources.²²⁵ Hopefully, the extra costs associated with the Act 250 process will have been worthwhile, as the State and stakeholders use the economic and scientific data to require proper compliance and mitigation of future impacts to balance and protect the economic viability and ecological sustainability of the Killington region well into the future.

²²⁵ McArthur, *supra* note 33.