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THE ADIRONDACK PARK LAND USE AND DEVELOPMENT PLAN AND VERMONT'S ACT 250 AFTER FORTY YEARS

JOHN S. BANTA, ESQ.*

I. INTRODUCTION

*The Quiet Revolution in Land Use Control*¹ reported two neighboring northeastern state land use initiatives in its 1971 publication. Strikingly different in context, New York's Adirondack Park and the state of Vermont nonetheless were similar in size, rural character, and mixture of public and private land in the 1960s. Vermont's Act 250² and New York's Adirondack Park Agency Act³ began with similar initial development permitting and planning objectives. The full Adirondack Park Land Use and Development plan, adopted in 1973,⁴ provides for a complex spectrum of development permits keyed to complementary public and private land use plans; Vermont pulled back in 1974 from the similarly prescriptive plan originally contemplated in Act 250,⁵ but has continued to refine the state's Act 250 oversight over larger development and subdivision.

Forty years later, the two states' land use programs, neighbors across Lake Champlain, persist relatively unchanged. Both engage a suite of state interests. These include inter-municipal spillovers, clashes among different interests in the landscape and environment, rural lands not subject to effective local zoning and subdivision review, and the protection and implementation of state policies and investments.⁶ Both have proved durable, remaining vigorous into the twenty-first century,

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1. FRED BOSSELMAN & DAVID CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (President's Council on Environmental Quality, 1971).

2. Land Use and Development Law, Pub. L. No. 250 (codified as amended at VT. STAT. ANN. tit. 10, §§ 6001-86 (2011)).

3. Adirondack Park Agency Act, N.Y. EXEC. LAW §§ 800-20 (McKinney 2011).

4. *Id.*

5. ROBERT G. HEALY & JOHN S. ROSENBERG, *LAND USE AND THE STATES* 61 (Johns Hopkins Univ. Press, 2d ed. 1979).

6. *Id.* at 7-13.

using different approaches to the conundrum of rural landscape protection within the traditions and tenure patterns of the Northeastern United States.

Vermont has systematically implemented incremental adjustments to Act 250 procedures and jurisdiction in an ongoing effort to maintain effectiveness and reduce burdens of the process.⁷ A relatively brief review may be instructive as New York considers ways to make the Adirondack Park Plan simpler, more effective, and better integrated with local planning.

II. VERMONT'S ACT 250

In 1970, the Vermont Environmental Control Act⁸ established state-level oversight for new subdivision and development.⁹ At that time, Act 250 created seven (now nine) district commissions to administer the state permit process. An Act 250 permit is now required for:

1. Commercial or industrial construction on more than ten acres (one acre in towns without local land use regulation or which request the lower threshold).¹⁰
2. Construction of ten or more housing units within a radius of five miles from each other and within a continuous period of five years.¹¹
3. Subdivision into ten or more lots of any size within a five mile radius of each other, or within the jurisdiction of one District Commission, during a continuous five-year period.¹²
4. Construction of a road incidental to the sale or lease of land, if the road will provide access to more than five lots, or is more than eight hundred feet long and will provide access to two or more lots.¹³
5. Any construction above 2500 feet in elevation.¹⁴
6. Any construction that would substantially change or expand a pre-1970 development that would require a

7. See, e.g., Thomas R. McKeon, *State Regulation of Subdivisions: Defining the Boundary Between State and Local Land Use Jurisdiction in Vermont, Maine, and Florida*, 19 B.C. ENVTL. AFF. L. REV. 385, 396 (1991) (discussing the changes made to Act 250).

8. Vermont Environmental Control Act, VT. STAT. ANN. tit. 10, §§ 6001-91 (West 1970).

9. *Id.*

10. STATE OF VT. ENVTL. BD., ACT 250: A GUIDE TO VERMONT'S LAND USE LAW 7 (Nov. 2000) [hereinafter ACT 250 GUIDE], available at <http://www.nrb.state.vt.us/lup/publications/Act250.pdf>.

11. *Id.*

12. *Id.*

13. *Id.* at 8.

14. *Id.*

permit if built today.¹⁵

7. Construction for a governmental purpose if the project involves more than ten acres, or is part of a larger project that will involve more than ten acres of land.¹⁶
8. The construction of a support structure, twenty feet tall or higher, primarily for communication or broadcast purposes.¹⁷
9. The exploration, beyond the reconnaissance phase, or the extraction or processing of fissionable source materials.¹⁸
10. The drilling of an oil or gas well.¹⁹

Farming and forestry uses are specifically exempt unless they occur above the elevation of 2500 feet.²⁰

Permits are administered through the District Commissions.²¹ Parties include the applicant, municipality, the regional planning commission, and affected state agencies. The District Commission may also grant party status to adjoining property owners, and to other persons or groups who qualify.²² Party status may be limited to one or more of the specific decision criteria listed below. Permit decisions can be appealed to the Superior Court, Environmental Division.²³

The Act 250 permit addresses ten criteria specified in the statute:²⁴

1. Air and Water Quality (with seven specific sub elements);²⁵
2. Water Supply;²⁶
3. Impact on Existing Water Supplies;²⁷
4. Soil Erosion;²⁸
5. Traffic;²⁹
6. Educational Services;³⁰

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 6.

22. *Id.*; VT. STAT. ANN. tit. 10, § 6085(c)(1) (2010).

23. See STATE OF VT. PERMIT AND LICENSE INFO., NATURAL RESOURCES BD. SHEET #47 - ACT 250 2 (Oct. 2010), available at http://www.anr.state.vt.us/dec/permit_hb/sheet47.pdf (explaining that “[a]ny party may appeal a decision of the District Commission to the Superior Court, Environmental Division within 30 days, in accordance with 10 V.S.A Chapter 220.”).

24. ACT 250 GUIDE, *supra* note 10, at 11-15.

25. *Id.* at 11-12.

26. *Id.* at 12.

27. *Id.* at 13.

28. *Id.*

29. *Id.*

7. Municipal or Government Services;³¹
8. Scenic and Natural Beauty, Aesthetics, Natural Areas, Historic Sites;³²
9. Conformance with Capability and Development Plan;³³ and
10. Local and Regional Plans.³⁴

An applicant that has presented a complete application then bears the burden of proof for criteria 1-4, 9, and 10; opposing parties bear the burden for the other four.³⁵ Current permit procedures also provide that certain other permits for the proposed activity that are held by the applicant will establish a presumption of compliance with the related Act 250 criteria.³⁶ Numerous reforms have adjusted jurisdiction, in response to litigation and practical concerns. The “road rule,” which asserted jurisdiction over roads serving certain subdivisions, diminished the significance of legal details of the aggregation thresholds leaving the issues of subdivision jurisdiction largely settled by the 1990s.³⁷ More recently, there has been change in the state oversight and appellate structure with the elimination of the Vermont Environmental Board as a state-level appeals body, tighter integration of the Act 250 process in the state’s overall environmental permit structure, and some restructuring of party status criteria.³⁸

In its beginnings, Act 250 directed the preparation of three different plans for submission to the legislature. The Interim Land Capability Plan was adopted in 1972. It was followed by the Land Capability and Development Plan in 1973. This Plan began a process of fine-tuning of the Act 250’s ten permit criteria coupled with some broad legislative policies. This reflects what has been consistent support for the core Act 250 permit administered by the District Commissions.

In 1974, a land use plan was presented to the legislature as provided in Act 250. The plan bore some similarities to the private land plan adopted for New York’s Adirondack Park the year before. It addressed land uses and the intensity of development

30. *Id.*

31. *Id.*

32. *Id.* at 13-14.

33. *Id.* at 14-15.

34. *Id.* at 15.

35. Julia LeMense & Jonathan Isham, *Can a Mountain Ecosystem be Protected When the Law Protects its Parts? The Case of Act 250 and Killington Resort*, in MOUNTAIN RESORTS, ECOLOGY AND THE LAW 271, 287 (Janet E. Milne et al. eds., 2009).

36. *Id.*

37. McKeon, *supra* note 7, at 420.

38. Natural Resources Bd., *Summary of Act No. 115 (H. 175)*, VERMONT.GOV (Jan. 31, 2005), <http://www.state.vt.us/nrb/act115.htm>.

with “urban,” “village,” “rural,” “natural resource,” “conservation,” “shoreline,” or “roadside” classifications, with a map that proposed classifications for all lands within the state.³⁹ Growth was to be concentrated in urban and village areas. Rural areas were assigned densities of five acres per building, natural resource areas twenty-five acres or more, and conservation areas one building on one hundred acres or more.⁴⁰

The land use plan emerged in different legislative forms in 1974, 1975, and 1976 without success. Its debate did not diminish broad bipartisan support for the permit components of Act 250 administered by the District Commissions. As the plan faded from memory and the state permit program became an accepted environmental backstop for the developed landscape, the Adirondack example has been a sometimes foil and counterpoint as Vermont and New York cooperated in planning objectives for the Lake Champlain Basin.⁴¹ That joint effort scrupulously avoids any implication that there might be binding regulatory outcomes, like the Adirondack Park Agency (“APA”) or Act 250. The fractious interaction of local interests and New York’s Adirondack Park Agency and the Vermont’s highly independent and contrasting style of state and local government have obscured the many similarities between the permit program for the Park’s private land plan and Act 250 as both were set in motion forty years ago.

III. THE ADIRONDACK PARK

This large rural area, within a day’s drive of fifty million people, fills the space between Albany, New York, and Montreal, Quebec, and stretches over one hundred miles from Vermont and Lake Champlain to the Mohawk and Black River valleys to the west.⁴² It is a mix of lakes, rivers, and mountains dramatically different in geology and hydrology from the Appalachian Mountains to the south and the Green Mountains and Green Mountain National Forest in neighboring Vermont.⁴³ It shares

39. CHARLES I. ZINSER, *THE ECONOMIC IMPACT OF THE ADIRONDACK PARK PRIVATE LAND USE AND DEVELOPMENT PLAN* 20 (1980).

40. HEALY & ROSENBERG, *supra* note 5, at 62.

41. See 33 U.S.C. § 1270 (2011) (establishing the Lake Champlain Basin Program). See generally LAKE CHAMPLAIN STEERING COMM., *OPPORTUNITIES FOR ACTION: AN EVOLVING PLAN FOR THE FUTURE OF THE LAKE CHAMPLAIN BASIN* (Nov. 2010), available at <http://www.lcbp.org/PDFs/OpportunitiesForAction2010.pdf> (highlighting continuing and emerging environmental challenges and how to overcome them in the Lake Champlain Basin).

42. ADIRONDACK PARK REGIONAL ASSESSMENT PROJECT iv (May 2009), available at <http://www.aatvny.org/content/Generic/View/1:field=documents;/content/Documents/File/16.pdf>.

43. See generally MOUNTAIN RESORTS, *ECOLOGY AND THE LAW* (Milne et al. eds., 2009) (analyzing the negative impacts mountain resorts can have on the

community structure with rural New England. Adirondack hamlets are small diverse settlements with compact nineteenth and early twentieth century form and service infrastructure dating from the same period. However, the bulk of the private Adirondack landscape is owned by nonresidents, with large private forest tracts more like Northern Maine than Vermont, and areas of significant second home ownership.⁴⁴

New York's six million acre Adirondack Park is a "park" more on the English model with interspersed public and private lands unlike other familiar U.S. state and national parks. It is best known for its public land forest preserve. The public lands form only half of the Park's area, declared "forever wild" by NYS Constitutional fiat in 1895.⁴⁵

The Park is comparable in size to the State of Vermont and larger in size than any of the National Parks in the lower forty-eight states; larger than Yellowstone, Yosemite, Glacier, the Grand Canyon, and the Great Smokies National Park combined.⁴⁶

In 1971, the Adirondack Park Agency Act⁴⁷ directed preparation of public and private land plans by a new state agency, the Adirondack Park Agency, or APA. For the first time, New York targeted the protection of the Park's less developed private forests and farm lands, and created a land use safety net for the vast areas of the Park without local government zoning or subdivision controls.⁴⁸

The APA is an independent Agency with an authorized staff of fifty-six (recently seventy-two) attached to the Governor's office and overseen by an eleven member bipartisan board appointed by the Governor with the advice and consent of the state Senate.⁴⁹ New York's Department of Environmental Conservation ("DEC") is a separate Agency whose Commissioner also sits in the

ecosystem).

44. ADIRONDACK PARK REGIONAL ASSESSMENT PROJECT, *supra* note 42, at 88. See generally THE GREAT EXPERIMENT IN CONSERVATION: VOICES FROM THE ADIRONDACK PARK (William F. Porter et al. eds., Syracuse Univ. Press 2009) (discussing the establishment of the Adirondack Park).

45. N.Y. CONST. art. XIV, § 1.

46. JERRY JENKINS & ANDY KEAL, THE ADIRONDACK ATLAS: A GEOGRAPHIC PORTRAIT OF THE ADIRONDACK PARK 3 (Syracuse Univ. Press 2004).

47. Adirondack Park Agency Act, 1971 N.Y. Sess. Laws 1853 (ensuring optimum conservation of the Adirondack park).

48. FRANK GRAHAM, JR., THE ADIRONDACK PARK: A POLITICAL HISTORY 230-31 (Knopf 1978); see also *Temporary Study Commission on the Future of the Adirondacks Overview of the Records*, NYSED.GOV, http://iarchives.nysed.gov/xtf/view?docId=MS_72-21.xml;query=&brand=default#overview (summarizing the history of TSCFA and noting that it created the APA).

49. *Welcome to the Adirondack Park Agency*, ADIRONDACK PARK AGENCY, <http://apa.ny.gov/>.

Governor's cabinet and ex-officio on the Agency board.⁵⁰ The State's Commissioner of Economic Development and the Secretary of State (who represent local government interests among others) also sit on the APA board in an ex-officio capacity filling three of the eleven board positions.⁵¹ Eight citizen members are distributed among five of the twelve counties in the Park, and three from the state at-large.⁵²

This Quiet Revolution provided definitions and a regulatory framework to identify "regional projects" on private lands which require a state permit within the twelve county area encompassed within the Park.⁵³ The framework is deliberately graduated to provide more restrictions on subdivision and new land use and development in forested and agricultural areas to protect working forests and farmlands (about eighty percent of the private land)⁵⁴ from subdivision and is significantly less restrictive within existing settlements and for already developed lake and river shorelines.⁵⁵

The Adirondack Park Land Use and Development Plan and Map provide a framework for development on private land in the Adirondack Park intended to shape the pattern of development and prevent environmental impacts. Approved by the legislature in 1973, the Plan and Map form the core of the Adirondack Park Agency Act, and technically, the legislature's words and the map are the "Plan."⁵⁶

The Plan uses four primary mechanisms to guide growth. First, the Adirondack Park Agency administers "intensity guidelines," which govern the average density of development when a state permit is required.⁵⁷ The guidelines are viewed as establishing development rights by the regulated public, though they are hard to "transfer" under the current statutory scheme.⁵⁸ Second, the Agency administers shoreline setbacks for structures

50. *About DEC*, DEP'T OF ENVTL. CONSERVATION, <http://www.dec.ny.gov/24.html>; *Adirondack Park Agency Board Members*, ADIRONDACK PARK AGENCY, http://apa.ny.gov/about_agency/commissioners.htm.

51. *Adirondack Park Agency Board Members*, *supra* note 50.

52. N.Y. EXEC. LAW § 803 (Consol. 1971).

53. N.Y. EXEC. LAW §§ 802, 810 (Consol. 1971).

54. *Adirondack Park Land Use Classification Statistics*, ADIRONDACK PARK AGENCY (Aug. 2, 2011), <http://apa.ny.gov/gis/stats/colc1108.htm>.

55. *See generally* N.Y. STATE ADIRONDACK PARK AGENCY, CITIZEN'S GUIDE TO ADIRONDACK PARK AGENCY LAND USE REGULATIONS [hereinafter CITIZEN'S GUIDE], available at <http://apa.ny.gov/Documents/Guidelines/CitizensGuide.pdf> (familiarizing visitors with Adirondack land use regulations).

56. *See* N.Y. EXEC. LAW § 802(29) (defining the term "[l]and use and development plan" or "plan" to be the official map as contained in Sections 805(1), 805(3), 805(4), and 806 of the Adirondack Park Agency Act).

57. N.Y. EXEC. LAW § 805(3) (McKinney 1980).

58. *Id.*

and sanitary waste and related shoreline criteria that apply across the board as performance standards for all new subdivision and development, not just regional projects requiring permits under the Park's private land plan.⁵⁹ Third, the Agency issues state permits intended to prevent "undue adverse impacts" to the natural and cultural resources of the region, and only required for subdivision and development characterized as "regional" by the Act.⁶⁰ Compared to Vermont's ten criteria, there are thirty-seven brief statutory "development considerations" to frame the impact assessment.⁶¹ As in the Act 250 program, there is no state "use" zoning in the Private Land Plan. Fourth, the Act contemplates local government land use programs which, if adopted and linked to the state program at the initiative of the local government, implement a local plan with conventional use zoning, including standards and conditions for all new uses and existing development, not just "regional" actions identified in the state plan.⁶² Such a program transfers most residential development and smaller commercial approvals from the state to local government.

In the 1973 Plan, the legislature gave a new identity to the Adirondack Park with vivid official map graphics⁶³ and a Plan framed in spare legislative language, to be fleshed out one transaction at a time by the Adirondack Park Agency (or by local governments that volunteered to cooperate). Unlike its New England neighbors, the vast private forest lands were largely held by industrial forest managers with little public road access or other infrastructure. However, the gulf between "upstate" and "downstate" (read metro New York City) erased any similarity to the bipartisan effort in Vermont.⁶⁴ A Master Plan for the state-owned lands in the Park had been adopted by Governor Rockefeller a year earlier, providing a complementary framework that integrated the prior eighty plus years of forest preserve management with a coherent spectrum of recreational opportunity, ranging from intensive use (plan speak for boat

59. N.Y. EXEC. LAW § 806 (McKinney 1979).

60. See N.Y. EXEC. LAW § 810 (setting up a jurisdictional structure specifying "regional" projects for each of the six different plan classifications on the map).

61. N.Y. EXEC. LAW § 805(4); See N.Y. EXEC. LAW § 809(e) (McKinney 1979) (requiring the consideration of these factors as one of the five findings necessary for the issuance of a regional project permit).

62. N.Y. EXEC. LAW § 807 (McKinney 1986).

63. The Act actually specifies the colors to be used for each private land zoning classification. See, e.g., N.Y. EXEC. LAW § 805(3)(d)(1) ("Moderate intensity use areas, delineated in red on the plan map . . .").

64. See GRAHAM, JR., *supra* note 48, at 242-44 (explaining the opposition of upstate politicians towards the proposed bill that would create the Adirondack Park Agency).

launches, ski areas, and campgrounds) to wilderness.⁶⁵

IV. TARGETS FOR REFORM IN THE ADIRONDACK PARK PLAN

The state plan for the private lands in the Park seeks strict protection in zones for the vast private forests and farm land, standards for shorelines, and a somewhat laissez faire approach to existing settlements exempting most new land use and development from state permits in the existing hamlet areas. The Plan uses six separate zoning categories to create a spectrum of protection, ranging from across the board regulation of all but agriculture and forestry uses in about half the private land, to deference to local institutions for development not including wetlands, structures greater than forty feet in height, or more than one hundred residential units at the core of existing settlements.⁶⁶ Respecting the New York Constitution's home rule protections, the zoning plan provides local deference for more settled areas regardless of the presence of local planning and zoning institutions. About twenty-eight percent of the communities in the Park have not adopted zoning or subdivision controls.⁶⁷

Evidence suggests that the land use and environmental safety net is porous, with about half of new land use and development occurring within the local permit sphere of influence distributed among 103 local jurisdictions.⁶⁸

The matrix of regional project jurisdiction administered by the Agency has hundreds of permutations. There are general rules

65. See generally ADIRONDACK PARK AGENCY, ADIRONDACK PARK STATE LAND MASTER PLAN (Oct. 2011), available at http://apa.ny.gov/Documents/Laws_Regs/SLMP-20120201-Web.pdf (providing a framework for the use, management, and preservation of all state lands within the Adirondack Park). The Master Plan provided its own controversies, as it translated the "forever wild" mandate that applies to state-owned lands within the Park. See N.Y. CONST. art. XIV, § 1 (prohibiting any commercial cutting or exploitation of the trees on state-owned lands). The resulting public land management framework is distinctively different from the US Forest Service management of the Green Mountain National Forest, for example, in neighboring Vermont.

66. CITIZEN'S GUIDE, *supra* note 55, at 2.

67. See generally ADIRONDACK PARK AGENCY, LOCAL LAND USE CONTROLS IN THE ADIRONDACK PARK (Sept. 2011) [hereinafter LOCAL LAND USE CONTROLS], available at http://apa.ny.gov/Local_Government/LGS/Local_Land_Use_Controls_inAdkPark.pdf (listing twenty-nine towns and villages without subdivision or zoning regulations).

68. PETER BAUER ET AL., RESIDENTS COMMITTEE TO PROTECT THE ADIRONDACKS, GROWTH IN THE ADIRONDACK PARK: ANALYSIS OF RATES AND PATTERNS OF DEVELOPMENT (2001); D. McGough & K. Mellander, *The Adirondack Park Agency Act: Implementation and Compliance, Technical Report 34*, in 2 THE ADIRONDACK PARK IN THE TWENTY-FIRST CENTURY: TECHNICAL REPORTS 194-95 (1990).

applying to vast areas of the park that can be stated simply, like the Act 250 criteria, such as all new commercial development needs a state permit outside hamlet zoned locations.⁶⁹ Similarly, certain “critical environmental areas” like wetlands and areas above 2500 feet in elevation require a permit for all new land use and development under the Plan, though the specific areas vary somewhat from one zoning classification to another.⁷⁰ However, garden variety residential development of single family homes, though often exempt from regional jurisdiction, can be subject to a confounding number of different jurisdictional criteria, such as locations like “critical environmental areas,” or a property’s subdivision history. That history may trigger jurisdiction over subsequent subdivisions, or over subsequent new land use and development because jurisdictional subdivision also results in jurisdiction over subsequent residential development that may follow years later.⁷¹

Subdivision jurisdiction is central to the protection of the open space areas of the Park, and is based on the parent parcel as it existed in 1973 in most land use classifications oriented toward growth. It requires an analysis of the number of subsequent lots created in all title lines emanating from the 1973 parent parcel. Regional project jurisdiction attaches to the creation of the 5th, 9th, or 15th lot in the Rural Use, Low Intensity Use, or Moderate Intensity Use land use areas respectively. The 1973 act of legislative generosity gave most landowners an early reprieve (if creating lots large enough to satisfy intensity rules) before requiring a state subdivision permit. It also provided more certainty early in the process than Vermont’s focus on a five mile neighborhood within which “persons” were undertaking certain subdivisions. Today it’s a complex maze, requiring not just a deed search up the chain of title, but also down sibling chains of title to determine APA subdivision jurisdiction and the concurrent state permit requirement for subsequent residential development.

The 1990 report, *THE ADIRONDACK PARK IN THE TWENTY-FIRST CENTURY*, proposed sweeping changes to the Park’s plans and administration, but was greeted with such hostility that it was promptly abandoned by both the administration and the legislature. In an act of self-help, the Park Agency and Governor Mario Cuomo followed this with a Task Force that laid the

69. See *CITIZEN’S GUIDE*, *supra* note 55, at 11 (stating that a permit is needed for all new commercial uses in all land areas except Hamlet areas).

70. N.Y. EXEC. LAW §§ 810(1)(b)(1), (c)(1), (d)(1), (e)(1), (f)(1).

71. See, e.g., N.Y. EXEC. LAW § 810(2)(a)(1) (stating that “[s]ubdivisions of land (and all land uses and development related thereto) . . .” is part of the statute’s jurisdictional rule for subdivisions in the Moderate Intensity Use land use classification).

foundation for a decade of regulatory reform.⁷² Updated Rules and Regulations improved permit and enforcement procedures for instance, creating a process for General Permits that speed simple decisions. But the 1994 Task Force also made recommendations related to statutory reform that were difficult to engage in the wake of public controversy following the TWENTY-FIRST CENTURY COMMISSION REPORT five years earlier. That dialogue did not seriously reengage until nine years later, in 2003, at the thirtieth anniversary of the Private Land Plan. In a major forum, the Agency invited comment that renewed attention to statutory shortcomings and the potential for reform.⁷³

This led to an Agency proposal to reform subdivision jurisdiction by substituting a fixed threshold for state jurisdiction that would be uniform and based on the size of the parent parcel on the effective date of the legislation, coupled with a limited amnesty to effectively extinguish date-based lot counting.⁷⁴ As Donald Rumsfeld famously said: “There are known knowns. These are things we know that we know. There are known unknowns. That is to say, there are things that we know we don’t know. But there are also unknown unknowns. There are things we don’t know we don’t know.”⁷⁵

A simplified set of rules anchored in the present, easily understood by any landowner as they would apply to his or her ownership, creates visible winners and losers for the new system. However, the new rule is virtually impossible to compare to the unknown variables of history, ownership, or development activity over the last thirty years that presently determine lawfulness of what exists, or permit requirements for what may be proposed. As with the Vermont plan thirty-five years earlier,⁷⁶ the known knowns trumped the unknown unknowns. That is, those unaware of the jurisdiction embedded in the lot counting knew exactly how a new proposal would operate and opted for the status quo. The

72. See generally DANIEL T. SMITH ET AL., REPORT OF THE TASK FORCE ON EXPEDITING ADIRONDACK PARK AGENCY OPERATIONS AND SIMPLIFYING ITS PROCEDURES: FINDINGS AND RECOMMENDATIONS (Ray Brook 1994) (recommending revisions to the Agency’s regulations).

73. *Adirondack Land Use and Development Plan: 30th Anniversary Tribute*, ADIRONDACK PARK AGENCY (May 22, 2003), http://www.apa.ny.gov/About_Agency/Anniversary30years.htm.

74. The Agency proposal was accepted by the Governor’s Legislative Counsel in the fall of 2006, and a draft bill was prepared and its essential elements discussed with both environmental and local government constituencies, but the bill failed to find a sponsor in either the state Assembly or Senate. Changes in Administration have since shifted legislative priorities.

75. *Donald Rumsfeld Quotes*, BRAINYQUOTE, <http://www.brainyquote.com/quotes/quotes/d/donaldrums148142.html#ixzz1fVUF4cHv> (last visited Dec. 3, 2011).

76. See *supra* notes 2, 6 and accompanying text.

concept failed to gain a sponsor in either house of the legislature and has yet to reemerge in any formal proposal.⁷⁷

For nearly two decades, prompt personalized advice based on advanced mapping technologies has mitigated the complexity, but the date-based counting rule continues to create mystery for landowners that compounds every year. Conversely, the basic dynamics of intensity zoning are widely understood. Real estate professionals in the Adirondacks know that five hundred units per square mile is equivalent to an average density of 1.3 acres per dwelling unit (Moderate Intensity Use zoning in the Adirondack Park)⁷⁸ and that similar rules apply in the balance of the six state zoning categories.⁷⁹

In this slow-moving rural environment many pre-1973 owners and parcels remain. And given the broad understanding of a more robust Adirondack Park enforcement program, many purchasers of lots created ten or twenty years ago now check on jurisdiction only to be surprised to find there was no state authorization for their lot when it exceeded the post-1973 limit when the lot was initially subdivided many years before. New York's title examination works within a forty-year window⁸⁰ that is fast closing for this arcane aspect of the Private Land Plan. It is time for reforms that were accomplished by Vermont decades earlier.

V. THE ROLE OF LOCAL GOVERNMENT

The 1970s saw a lavish (by today's funding standards) effort to draft and implement zoning and subdivision regulations among Park local governments. However, in the early years only a handful of towns volunteered to link their local zoning to the state program even though doing so returned most residential development decisions to the locality.⁸¹

Populations for these 103 local governments range from a few hundred residents to several thousand, scarcely over 100,000 total—occupying about twenty percent of New York State.⁸²

The local economies range from severe contraction as post

77. ADIRONDACK PARK AGENCY, MINUTES OF THE ECONOMICS AFFAIRS COMMITTEE (Feb. 13, 2009), *available at* <http://www.apa.ny.gov/Mailing/0904/Economic/Econ%20Committee%20Draft%20Minutes%2021309a.pdf>; *see generally* ESSEX COUNTY DESTINATION MASTER PLAN (Nov. 2009), *available at* <http://www.egret.us/essex/essex%20county%20dmp%20v10.pdf> (outlining the plan for growth of tourism in Essex County, New York).

78. *See* N.Y. EXEC. LAW § 805(3)(d)(3) (providing guidelines for overall intensity of development).

79. CITIZEN'S GUIDE, *supra* note 55, at 2.

80. N.Y. REAL PROP. § 379 (McKinney 1974).

81. *See supra* note 53 and accompanying text.

82. SPENCER BANTZAF ET AL., VALUATION OF NATURAL RESOURCE IMPROVEMENTS IN THE ADIRONDACKS 4 (Sept. 2004), *available at* <http://www.rff.org/rff/Documents/RFF-RPT-Adirondacks.pdf>.

WWII iron and other mines have closed down,⁸³ to the 1980 Winter Olympics in Lake Placid and associated development, to emerging green economies from high tech research and ecotourism. A majority of jobs in the Park are in the public sector—local government, health services, schools, roads and transportation, state prisons (from the early nineteenth century), and other state services for the Park. However, significant private sector employers, from International Paper in Ticonderoga, New York, to the Trudeau Institute, in Saranac Lake, New York,⁸⁴ play critical roles in the vitality of the Park and its communities.

The resistance to partnership in the state's zoning program for the Park remains widespread among local governments in the Park regardless of circumstance.⁸⁵ In short, the partnership with the APA, while not a total failure, is drastically stunted. Only eighteen of 103 municipalities have signed on⁸⁶ and many larger communities like the Olympic Village of Lake Placid and Town of North Elba decline to integrate their robust local zoning with the state program.⁸⁷ Other communities may accept legal and technical advice only to remain without an adopted comprehensive plan or any local development regulation beyond the mandatory New York State building code. This leaves many, if not most, of the land use decisions in the hands of the APA, which was not the original model.⁸⁸

In a town that otherwise accepts zoning, the complexity of the state "regional project" jurisdiction and cloning it into a local zoning program is a significant obstacle to linking up with the state zoning. What is needed is the addition of a simple statutory template to empower local decision making by experienced local planning and zoning boards without rewriting the local law.

This statutory template would also help correct the misconception that the state has a plan for each Park community. The state framework is effectively neutral with respect to the spatial allocation of uses—it allows any activity, anywhere in the private lands of the Adirondack Park if compliance with intensity guidelines is assured, shoreline performance standards are

83. *Historic Tahawus Tract*, ADIRONDACK PARK AGENCY, http://apa.ny.gov/press/OSI_Tahawus.htm.

84. TRUDEAU INST., <http://www.trudeauinstitute.org/> (last visited Mar. 15, 2012).

85. See ADIRONDACK PARK AGENCY, TOWNS WITH AGENCY APPROVED LAND USE PROGRAMS 1 (Dec. 2007), available at http://apa.ny.gov/Local_Government/LGS/ALLUPs_Map_2007.pdf (providing a map of eighteen towns with approved land use programs in Adirondack, New York).

86. *Id.*

87. See LOCAL LAND USE CONTROLS, *supra* note 67 (providing a map and chart detailing local land use controls in Adirondack Park, New York).

88. See CITIZEN'S GUIDE, *supra* note 55, at 4 (stating that the APA intended local governments to create their own land use programs).

respected, and there is a demonstration of “no undue adverse environmental impact” taking into account an array of statutory considerations similar to those engaged in determining whether to prepare an environmental impact statement.⁸⁹ The APA permit can accommodate job opportunities more quickly than many suburban zoning programs outside the Park,⁹⁰ though that fact is widely contested among APA critics. The state permit has mandatory response times (forty-five days for a minor project and sixty days for a major project)⁹¹ for which the default is permit approval after ninety days.⁹²

The state’s permit-by-permit Plan, on the other hand, excuses the lack of conventional comprehensive plans at the local, county, and state levels that are necessary for sustained economic growth in these communities. Inaction or uncoordinated action among capable local governments is wasted in a chorus of criticism of the state. And in those rural communities historically opposed to planning and zoning, the APA is a convenient rallying point for those whose agenda includes unwinding well-intentioned citizen planning efforts with local volunteer boards.⁹³

VI. ADIRONDACK SUCCESS – PERMIT COMPLIANCE AND ENFORCEMENT

For the first thirty years, the Adirondack Park revolution kept its public employees engaged in administering a revolutionary regional land use program, with few staff or legal tools for enforcement, and noisy, ardent, opponents charging every manner of injustice attributed to the new law and plan. Within three years of adoption, the APA lost the authority to charge violations in local justice courts. Hence, the actual authority

89. N.Y. EXEC. LAW § 809(10).

90. See, e.g., Jessica Collier, *APA Permits Resort*, ADIRONDACK DAILY ENTER., Jan. 21, 2012, <http://www.adirondackdailyenterprise.com/page/content.detail/id/528883.html> (discussing how the APA’s action in approving the permit for a resort in Tupper Lake will provide needed job opportunities in the area).

91. N.Y. COMP. CODES R. & REGS. tit. 9, § 580.2 (2005). Similar terminology has different meanings in Vermont and New York. Vermont’s Act 250 sends a “major project” permit to a required hearing. VT. STAT. ANN. tit. 10, § 6084(b). New York has a different processing timeframe, but the determination to hold an adjudicatory hearing is separate. N.Y. COMP. CODES R. & REGS. tit. 9, § 581-4.1 (2003). The statute prohibits permit denial without an adjudicatory hearing, and implementing regulations specify other reasons for hearing including project scale and degree of public interest in a proposal. *Id.*

92. N.Y. EXEC. LAW § 809.

93. See Nathan Brown, *Franklin Repeals Subdivision Law but Plans Land-Use Inventory*, ADIRONDACK DAILY ENTER., May 13, 2010, <http://www.adirondackdailyenterprise.com/page/content.detail/id/513041/Franklin-repeals-subdivision-law-but-plans-land-use-inventory.html> (concluding one recent planning cycle in a Park town).

exercised by the Agency is administrative compromise and settlement, or referral of a matter to the New York Supreme Court for judicial enforcement represented by a small, though supportive, unit of New York's Attorney General.⁹⁴

During its early years, the APA enforcement program consisted of one or two individuals responding to landowner complaints anywhere in the six million acre Park.⁹⁵ A series of high profile court cases secured the legal integrity of the state's private land plan.⁹⁶ However, the 1990 TWENTY-FIRST CENTURY COMMISSION REPORT on implementation and compliance with the Park Plan concluded that there were high rates of noncompliance with both subdivision jurisdiction and with permit conditions where new development received a permit.⁹⁷

The Agency was remarkably successful in defending its Plan in court, but persistent landowners bent on prolonging an unauthorized activity, or on embarrassing the institution, had many opportunities to do so and the enforcement program was widely viewed as ineffective or worse.⁹⁸

This chapter of the Agency's history effectively closed in the early 2000s with an overhaul of enforcement regulations to eliminate the opportunity to reargue defenses before the Agency Board and, at the same time, to beef up the due process administrative record necessary for judicial enforcement with a well-documented opportunity for one landowner appearance before the Board.⁹⁹ The program received additional staffing to credibly mount pro-active prevention and rapid response to violations, engaging many while underway and relatively less expensive to remedy.¹⁰⁰

Technology has played a big part in this. The APA has had a robust Geographic Information Systems capacity since the 1980s, and now has the ability to inexpensively inventory shoreline development with geo-referenced digital photography; on-line cadastral tax records providing detailed property descriptions;

94. N.Y. COMP. CODES R. & REGS. tit. 9, § 581-2.8 (2012).

95. *About the Adirondack Park*, ADIRONDACK PARK AGENCY, http://apa.ny.gov/about_park/index.html.

96. See *Adirondack Park Agency v. Ton-Da-Lay Ass'n*, 61 A.D.2d 107, 112 (N.Y. App. Div. 1978) (upholding the constitutionality of article 27). See also *Horizon Adirondack Corp. v State of N.Y.*, 88 Misc. 2d 619, 632 (N.Y. Ct. Cl. 1976) (dismissing the claim that chapter 348 constituted a "taking").

97. McGough & Mellander, *supra* note 68, at 194-95.

98. THE ADIRONDACK COUNCIL, *AFTER THE FACT: THE TRUTH ABOUT ENVIRONMENTAL ENFORCEMENT IN THE ADIRONDACK PARK* 11-16 (Nov. 1999), available at <http://www.adirondackcouncil.org/atfrpt.pdf>.

99. N.Y. COMP. CODES R. & REGS. tit 9 § 581.

100. ADIRONDACK PARK AGENCY, 2010 ANNUAL REPORT 15 (2010) [hereinafter 2010 ANNUAL REPORT], available at <http://apa.ny.gov/Documents/Reports/2010APAnnualReport.pdf>.

Google™ maps and its kin with high resolution, free air photography. Technology now provides improved internal transaction referencing so that the Agency knows the advice or conditions previously provided to virtually any parcel of land in the park since the Quiet Revolution.¹⁰¹ The use of technology provides credibility to an enforcement and compliance program. At the same time, it answers landowner questions relatively quickly and efficiently. Information systems (and knowledgeable staff) now tailor advice to specific parcels of land without time consuming research. These landowner services help to explain the rules for any particular parcel of land in the Park to individual applicants, often informally during a first telephone inquiry, which is another reason for improved compliance.

When the issue of permit compliance was revisited between 2006 and 2008 as part of an EPA study of the Agency's freshwater wetland protection efforts, the documented compliance rates were 92% with about half of the noncompliance issues considered minor, resolved informally, and a handful referred to the Agency's enforcement team.¹⁰² Similarly revised techniques for monitoring subdivisions of land through real property transaction data bases has progressively reduced current noncompliance with subdivision jurisdiction to zero for newly created subdivisions within the Park, notwithstanding the complex jurisdictional rules applying to subdivisions.¹⁰³

With the new enforcement program in the early 2000s, the Agency also turned around its enforcement priorities to prevent current or ongoing environmental damage and closed many stale and poorly documented cases. This has not quieted a local demand for a "statute of limitations" for Agency land use violations.¹⁰⁴ Such a legislative action would only introduce new dates and compound the complexity of the administrative process.

The Agency no longer treats the second or third generation purchaser of a lot lacking a required state subdivision permit as a violator. In such cases, new residential proposals for such lots typically move into a "minor permit" process to account for the residual jurisdiction over new residential development associated

101. See, e.g., *Maps and Geographic Information Systems (GIS)*, ADIRONDACK PARK AGENCY, <http://apa.ny.gov/gis/> (identifying how the Agency uses maps to analyze the natural resources of the park).

102. ADIRONDACK PARK AGENCY, 2008 ANNUAL REPORT 24 (2008), available at <http://apa.ny.gov/Documents/Reports/2008APAannualreport.pdf>.

103. See 2010 ANNUAL REPORT, *supra* note 100, at 13 (discussing how the Resource Analysis and Scientific Services unit of the APA uses technology to analyze Agency transactions).

104. Chris Knight, *Senate Approves APA Statute of Limitations Bill*, ADIRONDACK DAILY ENTER., June 28, 2010, <http://www.adirondackdailyenterprise.com/page/content.detail/id/514028.html>.

with a jurisdictional subdivision.¹⁰⁵ In most cases the Agency can address other existing development on such lots through letters of advice rather than more formal enforcement.

A side benefit of improved enforcement is enhanced working relationships between the Agency and local government code enforcement officials. In part, this is old-fashioned outreach. But there is a growing professional relationship among a tight and professional community responsible for public and environmental safety through code compliance.

VII. WHAT CAN NEW YORK LEARN FROM VERMONT?

For both Vermont and the Park, compelling reasons remain for the state programs that provide a rural land use safety net where small local governments may be either unwilling or unable to provide such professional services, as well as to enshrine policy direction that adds to the distinctive character of each region. Vermont asserts broad, long-term economic benefits from the constancy of this direction¹⁰⁶ at the same time many Adirondack Park residents see only negative consequences of the Park plans.

However, for the Adirondack Park, today, the whole is greater than the sum of the parts that existed in the 1960s. In the noisy debate about the Park plans, it is easy to forget that in 1971 the Park was a blue line on a map without a distinct identity in state government or among the state's residents, much less Park residents. Today, the folks responsible for marketing Lake Placid as the "Olympic Village" know that the "Adirondack Park" has greater national and international brand identity than "Lake Placid," notwithstanding two winter Olympics and serious marketing investments in the latter.

There is growing interest in spreading this synergy to benefit local communities throughout the Park. An uncharacteristically respectful dialogue among all stakeholders, titled "Common Ground,"¹⁰⁷ has formalized this movement. There lies opportunity in looking at how the Act 250 program matured in Vermont. If genuine statutory reform could also emerge, the Park plan could play a far more effective role in building the dynamic between settlements and the surrounding landscape that is critical to sustaining the communities and economy of the Park.

The APA survives with integrity, intellectual capacity, and a vigorous regulatory presence. If little has changed in the core

105. See *supra* note 74 and accompanying text.

106. See ACT 250 GUIDE, *supra* note 10, at 6-8 (describing which land uses require a permit).

107. *Finding Common Ground on Region's Future*, ADIRONDACK N. COUNTRY ASS'N, <http://www.adirondack.org/2011-common-ground-alliance/> (last updated Jan. 21, 2011).

legislative structure, there have been vast changes in the application of technology, administrative and regulatory reform, and an emerging holistic approach to the ecosystems and the economy of the region. The Agency accomplished its first legislative change in twenty-five years with the addition of a community housing incentive provision to its statute in the 2011 session. At Albany's direction, the Agency privatized its one "feel good" program providing Adirondack Park Visitor Interpretive Centers in two separate locations, conserving resources for its planning and regulatory functions. The promise of "Common Ground" is incremental change to benefit both the Park's environment and its human communities.

The Cuomo administration has committed to regional economic councils that will break down the silos of state and local government to shake loose economic opportunity that makes sense on the ground in very different areas of the state. The APA is integrally involved in this process. The North Country Regional Council is one of the winners in the first round of this competition to reshape the image and the infrastructure of the region.¹⁰⁸ Perhaps the old policy rules and Agency turf have been buffeted beyond resistance by the dire fiscal times.

The Park persists as a multi-generational covenant involving communities of people and nature. We can continue to clean our own house and improve the Plans, but both people and nature in the Park are threatened by forces that are now beyond the control of the residents, the state, and perhaps, the nation. The changing climate is intimidating for what is the largest island of protected temperate deciduous forest in the world. But, the sky is dark at night over thousands of square miles of mountains and forests, just a few hours from millions in the eastern metro areas of Canada and the U.S.

Vermont's systematic clarification of jurisdiction, focus on party status, and tighter integration of related state interests provide models for the next generation's statutory reforms of the private land use plan in the Adirondack Park Agency Act.

108. *Regional Economic Development Councils*, N.Y. STATE, <http://nyworks.ny.gov/content/north-country> (last visited Dec. 10, 2011).