



## Interpreting and Applying Development Standards

### Overview

The Due Process Clause of the 5th and 14th Amendments of the United States Constitution requires fairness in the drafting, application, and implementation of local land use laws. The Due Process Clause is the primary influence on how legal proceedings, like development review, are conducted. This Due Process Clause has been interpreted by courts to require land use bylaws provide measurable standards for what property owners can and cannot do with their land. Additionally, measurable standards allow reviewing authorities to make consistent and fair decisions. Courts may not otherwise uphold a bylaw as constitutional. Another key requirement of the Due Process Clause is to clearly notify the regulated person or entity of what the measurable standards are. However, measurable standards are more easily talked about than accomplished.

Many municipalities prefer bylaw language broad enough to be flexible when dealing with unique land parcels and changing circumstances. This tension between specific language and flexibility in a town's bylaws may result in ambiguous bylaws that do not provide the requisite notice and guidance. Ambiguous bylaws may even result in violating the constitutionally guaranteed due process rights of applicants and other parties.

Development review officials generally have no authority to draft or approve municipal bylaws. However, they may have the difficult task of applying ambiguous development standards.

This paper strives to make that difficult task easier by clarifying what is and is not ambiguous and by discussing how to apply a potentially ambiguous standard in a manner that will survive a court's scrutiny.

#### Definition:

An *Appropriate Municipal Panel* (AMP) is a Planning Commission exercising development review, Zoning Board of Adjustment, or Development Review Board.

### Application

#### What is Ambiguous? What is Specific?

In general, bylaw language is ambiguous if it is not specific enough for the AMP to make consistent and fair decisions. The level of ambiguity can be ascertained by asking whether the applicable bylaws contain language stating that the AMP "shall", "should" or "may", consider certain factors. Ambiguity is a problem if the bylaw contains language stating that something is required "where appropriate", "where feasible", or "where reasonable." Ambiguity is a problem when the bylaw states that the AMP "may" require certain actions, without stronger guidance on the level of protection expected, provided elsewhere in the regulations or municipal plan.

The consistency and fairness of bylaw language can be ascertained by asking the following questions. Do applicable standards describe *if* and *how* development will be restricted? Do they provide the applicant with *notice* of

what will be required throughout the permitting and development process? Are the terms used and referenced *clearly defined*? Does the bylaw contain language such as "shall" or "must" rather than "encourage" or "promote"? Does the language contain a measurable objective?

Examples of measurable standards include:

- No development allowed on slopes of over 20 percent;
- A Planned Residential Development ("PRD") must have a minimum of 60 percent open space;
- Side-yard setbacks must be six feet.

Clearing up all the grey areas is not always simple. For example, the unambiguous side yard setback described above can be ambiguous when applied to three-sided lots, if the bylaw does not outline how to address this or other irregularly shaped lots. Further, the method for measuring setbacks should be specified; such as whether it is from building foundation or roof line.

Bylaws accompanied by explanatory illustrations aid the AMP in making consistent and fair decisions because they make the bylaws clearer and easier to implement.

## Reading Bylaws in Context

The AMP must remember that isolated language must be viewed in the context of the entire bylaw and municipal plan. A mix of general and specific standards in a bylaw is constitutional as long as the reviewing authority has sufficient overall standards to grant or deny the permits in a consistent and fair manner. Vague and ambiguous bylaw language may be made unambiguous when read in conjunction with the municipal plan. For example, a bylaw may state that development in scenic areas is restricted to a certain height and must meet certain design standards. This language appears ambiguous if the bylaw doesn't define what areas of the community qualify as scenic areas. The term "scenic" is subjective and could mean different things to different reviewing authorities. However, potential ambiguity may be resolved with a town plan that maps scenic areas. The same is true of bylaws that refer to protecting significant water bodies and wetlands. Importantly, a document should be *incorporated by reference* and clearly defined as being applicable with the regulations when municipalities use municipal plan policies and maps to interpret bylaws.

### Definition:

"Incorporation by reference" is when you make an outside document part of the document you are currently writing. You do this by writing that the outside document "should be treated as if it were contained within this document." *Black's Law Dictionary 7th Edition.*

Vermont courts have cited the following three principles in determining whether bylaw standards are unconstitutional due to ambiguity:

1. Delegation of legislative power to administrative officials without adequate standards violates the separation of powers between the different branches of government. AMP members are appointed administrative officials, making them members of the executive branch. Members of the executive branch are not allowed to make laws—members of an elected legislative body must do that. When AMP members are acting without adequate guidance and standards, they are considered to be impermissibly legislating.

2. The absence of standards denies applicants equal protection of law. Without measurable standards, a land use bylaw can become a tool for favoritism and discrimination. In the small town environment of Vermont, the people involved and affected by the development review process have frequent interactions with each other and those interactions can appear to be the basis of development review decisions when there are no clear objectives.

3. The absence of standards denies permit applicants due process because it does not give them notice of how they can develop property in accordance with the law. Essentially, applicants are entitled to know what uses are allowed and what facts they must present to the reviewing authority in order to obtain approval.

*See, In re Handy, 764 A.2d 1226 (Vt. 2000); In re Pierce Subdivision Application, 965 A.2d 468 (Vt. 2008).*

## Considerations

### Presumption of Validity for Local Bylaws

Municipal bylaws have a presumption of validity. A property owner challenging a municipal bylaw has the burden of proving to the reviewing court that the bylaw language is not valid. Consequently, it is not the role of municipal officials to invalidate bylaws during the local hearing process. Instead, a court must rule an ambiguity in a zoning or subdivision bylaw as unconstitutional. AMPs must deal with ambiguity without the power to invalidate. As discussed below, it may be helpful to bring ambiguities to the attention of bylaw drafters by emphasizing the risk of costly litigation and other factors.

### How to Interpret and Apply Potentially Ambiguous Standards

It is the AMP's responsibility to apply potentially ambiguous standards in a reasonable and consistent manner. Thus, if an AMP finds it difficult to interpret, apply, and make findings on a particular development application because of ambiguous language, it should consult with the municipal staff, regional planning commission staff, the Vermont League of Cities and Towns ("VLCT") and/or the town attorney. The AMP may gain guidance based on how the language has previously been interpreted in that municipality or elsewhere in Vermont.

There have been a number of decisions decided by the Vermont Supreme Court providing guidance on what bylaw language is sufficiently specific. Here is one example:

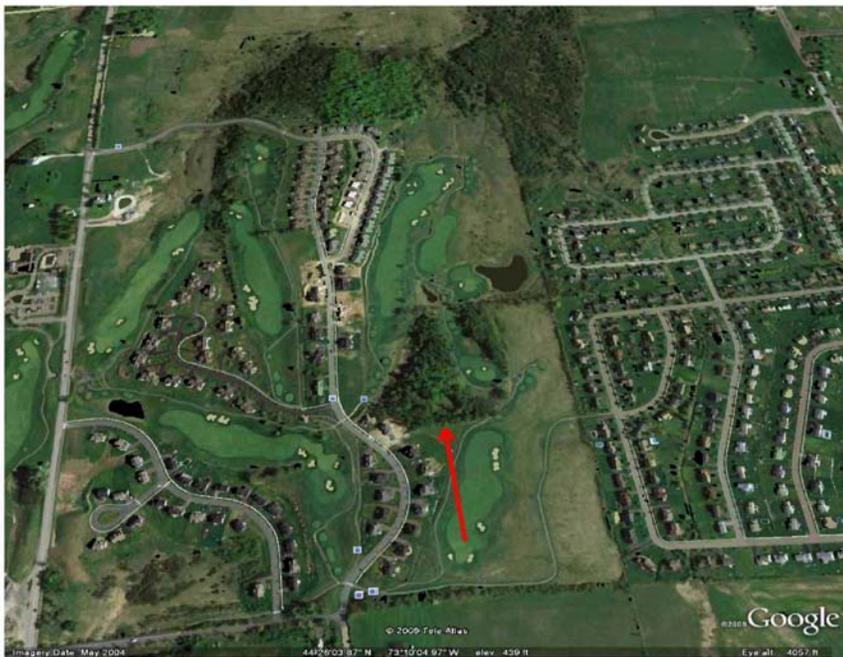
**Natural Resource Protection:** In the 2008 case, *In re Appeal of J.A.M. Golf LLC*, the Vermont Supreme Court ruled that two sections of a South Burlington zoning bylaw were unconstitutionally vague and therefore invalid. Specifically, the South Burlington bylaws that were not upheld required PRDs to “protect important natural resources including...scenic views” and “wildlife habitats,” and required all developments to “protect...wildlife habitat.” This case highlights the need to define all terms used.

Helpful Vermont Supreme Court decisions:

**Steep Slopes:** In the 1990 Act 250 case, *In re Green Peak Estates*, the Vermont Supreme Court found that Bennington County Town Plan language that did not permit residential development on slopes of greater than 20 percent was specific and thus could be applied to an Act 250 permit application. In contrast, in the 2000 case, *In re Kiesel*, (another Act 250 case) the Supreme Court found that Waitsfield’s steep slopes regulations were too abstract. The Waitsfield bylaw prevented the creation of parcels which would result in development on “steep slopes.” The difference between the two standards is that “steep slopes” were defined as greater than 20 percent in one case and not defined in the other.

In addition, AMP members should make note of potentially ambiguous language and suggest to their planning commissions that further specificity may be needed during a future bylaw update. Communication between those involved in development review and the drafters of the regulations is valuable and should be on-going. A bylaw that may seem clear when drafted may be found vague or confusing in its application. Planners do not necessarily have the benefit of applying bylaws, or foreseeing all possible ramifications, and thus may need guidance from those who do.

Finally, the AMP should maintain a written record of all previous decisions. The AMP should provide clear findings of facts with foundations in both the town plan and bylaws. Development conditions should be based solely on clear findings of fact. This will allow the AMP to have access to how its local bylaws have been interpreted historically and allow for consistent application of all bylaws, whether ambiguous or not. Further, quality record keeping and recorded explanation of the AMP’s reasoning will increase the chances that the decision will be upheld if appealed to the Environmental or Supreme Court.



Aerial photograph indicating location of J.A. McDonald Corp’s proposed development of a formerly “reserved” portion of a subdivision in South Burlington. Courtesy Steven F. Stitzel of Stitzel, Page & Fletcher, P.C.

**Density Restrictions:** In a 1994 Act 250 case, *In re Molgano*, the Vermont Supreme Court found that the town of Manchester’s density requirement that “zoning dimensional requirements should encourage a relatively low density of development while promoting open space preservation along the highways” was unenforceable due to being too vague. In contrast, in the 2009 municipal zoning case, *In re Pierce Subdivision Application*, the Supreme Court found a Ferrisburg bylaw that required “the minimum acreage for a planned rural development [to] be 25 acres and a minimum of 60 percent of the total parcel [to] remain undeveloped” met the specificity requirement.

## What if the Potentially Ambiguous Bylaw is Challenged by an Applicant?

If an applicant challenges the AMP's interpretation of the bylaw in question, AMP members can consult with their municipal attorney to receive guidance on the application. As mentioned above, local bylaws have a presumption of constitutionality. It's the AMP's responsibility to interpret and make findings on the bylaws as written as best they can, not to determine whether bylaws are valid. While some permit applicants may assert that a particular bylaw is so vague it must be considered void and thus not apply to their projects, it is the job of the courts, not AMP's and applicants, to determine the validity of local bylaws. Widespread invalidation of local bylaws has not occurred over the years and is not anticipated in the wake of recent State Supreme Court decisions on the matter.

**Conditional Use Permits:** In the 2008 case, *In re Times & Seasons LLC*, the Vermont Supreme Court found that a Royalton town plan requirement that commercial development be located close to town villages "where feasible" was too vague. The Court stated that it was unclear whether the town plan language intended the language to mean economic feasibility, physical feasibility, a combination of the two, or some other measure altogether. Thus, it did not give sufficient guidance on where commercial development should occur.

**"Development conditions should be based solely on clear findings of fact."**

### Planned Residential Developments:

In *Pierce*, the issue was whether a PRD bylaw that contained some general standards and some specific standards was invalid due to vagueness. The Vermont Supreme Court decided the standards were not too vague; pointing out that the legislature authorized PRDs to encourage flexibility of design in land development so that it could be used in the most appropriate manner. In order to achieve these goals, modification of zoning regulations may be permitted simultaneously with approval of a subdivision. Thus, the court said, the proper inquiry in whether a bylaw is valid or not is "whether the bylaw provides the Commission with sufficient overall standards to grant a PRD permit, and whether the waivers granted comply with these standards."

## Resources

Vermont League of Cities and Towns, 2009, "*What JAM Golf Decision Might Mean to Municipal Land Use Programs*," <http://resources.vlct.org/results/?s=JAM+&go=search+%C2%BB>.

Vermont League of Cities and Towns, 2008, "*VT Supreme Court: Zoning Bylaw Must Include Specific Standards to Ensure Property Owners' Due Process*," <http://resources.vlct.org/results/?s=JAM+&go=search+%C2%BB>.

Katherine Garvey; 2009, Vermont Journal of Environmental Law, "*Local Protection of Natural Resources After JAM Golf: Standards and Standard of Review*," [www.vjel.org/journal/pdf/VJEL10110.pdf](http://www.vjel.org/journal/pdf/VJEL10110.pdf).

### List of useful cases to review:

1. *In re Appeal of J.A.M. Golf LLC*, 969 A.2d 47 (Vt. 2008).
2. *In re Handy*, 764 A.2d 1226 (Vt. 2000).
3. *In re Green Peak Estates*, 577 A.2d 676 (Vt. 1990).
4. *In re Pierce Subdivision Application*, 965 A.2d 468 (Vt. 2008).
5. *In re Molgano*, 653 A.2d 772 (Vt. 1994).
6. *In re Times & Seasons LLC*, 950 A.2d 1189 (Vt. 2008).

## Credits

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