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## ENVIRONMENTAL ROUNDTABLE

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### Mediation and the Environmental Court

The Environmental Court has recently been requiring mediation in a significant percentage of cases. Given the recent expansion of the Environmental Court's jurisdiction, mediation has the potential to play a role in preventing a backlog in the Environmental Court's docket. The Environmental Court's updated list of approved mediators will soon be available at the court.

*Matt Strassberg is the director of Green Mountain Environmental Resolutions. He has over 20 years of environmental law and mediation experience. He has been trained and certified as a mediator through the Metropolitan Mediation Services program in Brookline, Massachusetts. Additionally, he received training in Advanced Mediation for Land Use Disputes through the Lincoln Institute of Land Policy and the Consensus Building Institute, both in Cambridge, Massachusetts.*

*Strassberg formerly served as an attorney with the Environmental Board where he advised the board and drafted opinions on Act 250 cases. Prior to the Environmental Board, he was an attorney with the Environmental Protection Agency. He can be reached at 802/496-3088.*

## Express Yourself!

The *Vermont Environmental Monitor* is seeking Guest View pieces to appear in its monthly newsletter. Opinions on policy issues, interpretations of law, and explanations of technical practices are the sorts of items we seek.

Our ultimate goal is to be helpful to our readers, and guest writers can help shed light on a variety of topics.

If you are interested in writing a Guest View, please E-mail Editor Jake Brown at [jfbrown@sover.net](mailto:jfbrown@sover.net) or give him a call at 802/223-0656.

Many thanks.

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## FOR THE RECORD

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*A summary of action on environmental matters taken by the Vermont Environmental Court, Environmental Board, and Vermont Supreme Court.*

*(Note: because of space constraints, it's likely that not all cases that have been decided in a given month are summarized in that month's issue. However, all cases from the three forums will be summarized over time. Also, since July 1, 2005, the Vermont Environmental Monitor has begun summarizing municipal zoning cases on appeal at the Environmental Court.)*

### Vermont Environmental Board

#### Re: Hale Mountain Fish and Game Club, Inc.—Declaratory Ruling #435

The Environmental Board ruled on August 4 that certain changes to a pre-existing fish and game club in Shaftsbury required an Act 250 permit.

At issue was whether the project is a preexisting development and if so, whether a substantial change has occurred since 1970 when Act 250 was passed.

The Board found that the project was a preexisting development, but that certain substantial changes to the project made since 1970 prevented it from being grandfathered, and therefore it required an Act 250 permit.

Those improvements included the installation of a new well and wastewater disposal system in 1983 without required health and environmental conservation approval; replacement of a garage and new, clay target storage trailer; and other improvements including pens, fencing, a culvert, and a portable toilet.

Three members of the Board dissented in the case, saying that they agreed a permit was necessary but that new and increased uses of the range also would have impacts on the area. Two other Board members dissented saying the range was grandfathered and does not need a permit.

Chair Patricia Moulton Powden, in her concurring opinion, said that "landowners with preexisting and post-1970 activities would be well advised to preserve and maintain records of pre- and post-1970 activities to avoid difficulties" like the one that arose in the case. "It may even be advisable for such persons to 'lock in' their preexisting status by requesting a jurisdictional opinion . . ."

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### Vermont Environmental Court

#### Appeal of Wilkins Properties, LLC - Docket No. 176-10-04 Vtec

The Environmental Court denied an appellants motion for summary judgment in a case relating to a proposed subdivision in Milton.

The principal weakness in the appellants' argument was that the environmental court had not received copies of the original development review board decision, the court said.

The appellants had argued there were several procedural defects in the way the development review board rendered the decision. The court said it could not grant summary judgment on that issue for two reasons: first, it had not received a copy of the decision, and second, the court said it was charged with determining whether this application is meritorious, not whether the DRB acted improperly in rendering its decision."

The appellant had also argued that the DRB actions were deficient to the point of being a non-decision. They then argued that since there was, in practical effect, no decision within the 45-day statutory limit, the application should be deemed approved.

The Environmental Court disagreed, saying that the Vermont Supreme Court has ruled that the "deemed approved" provision should be strictly construed and that its purpose is to avoid indecision and protracted deliberations. The court also noted that it was undisputed that DRB did issue a decision within 45 days. (Judge Durkin)

#### Appeal of Berezniak - Docket No. 171-9-03 Vtec

The Vermont Environmental Court on July 7 denied an application for an affordable housing project in Burlington in large part because of limited parking in the area.

The case involved the proposed modification of an existing building that houses an electrical supply business, Burgess Electric, and the construction on the same parcel of a 27-unit affordable housing apartment building. The building would be named Roosevelt Apartments.

The applicants appealed from a decision of the Burlington Development Review Board.

The applicants had proposed to provide 21 off-street parking spaces to serve the apartment building. They proposed that tenants of the building be authorized to use the 11 spaces at Burgess Electric when that business is closed. The plan also called for the lease of 10 spaces at the Burlington Housing Authority.

The court noted that absent any waivers, 46 spaces would be required for the