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April 12, 2024

Senate Committee on Natural Resources and Energy
State House
Montpelier, Vermont

Subject: H.687 (community resilience and biodiversity protection through land use), and S.311 SEDHGA's 2024 housing bill

Dear Committee:

This letter is written testimony on H.687, incorporating comments on S.311 as appropriate. I have viewed all the hearings you have held on H.687 and S.311.

My experience with Act 250 includes evaluating effects of projects on the environment, serving as an expert witness in an Act 250 case, and researching many of the allegations against Act 250. I also have experience in design of water and wastewater systems.

This letter provides recommendations on specific provisions of H.687 and on whether or not to transfer sections of S.311 into H.687. The attachment includes specific text language relating to the provisions to transfer conditions of Act 250 permits to municipal permits.

Recommendations on H.687 new to this letter.

If you wish to learn my rationale for making these recommendation, please see the attachment.

Recommendations

Based on the example of the Environmental Board, the implementation schedule of H.687 can and should be maintained as in H.687, including having the Environmental Review Board hearing appeals beginning January 1, 2027.

Do not add any provision for appeals on the record. There was a pilot program, 2001 through September 1, 2004, under the Environmental Board, which would have heard the appeals, that had no takers. (The Natural Resources Board commenced operations on February 1, 2005 after the pilot program ended.)

Require that provisions for transferring conditions of Act 250 permits protect the rights of all parties to those permits. The attachment contains specific language for revising this section in H.687. The better solution is to have the district commissions determine which conditions are to be transferred using the procedures of the district commissions and as outlined in the attachment below if the municipality is to transfer those conditions.

Remove "including forest blocks and habitat connectors" from section 22. Create a new section 22a to use session law to require the mapping of forest blocks and habitat connectors and to provide a date by which the layers must be available.

Delay appointing stakeholder groups until the Environmental Review Board can make the appointments.

Recommendations from previous comments made on S.311

These recommendations are from my letter of April 2, 2024. If you wish to see my rationale for these recommendations, please see that letter, posted on your site on April 3.

Recommendations
Require that zoning and subdivision bylaws be robust in order to qualify for the benefits proposed by S.311. These benefits are proposed in sections 2 and 24 of S.311. Being robust includes:
: - inviting active participation by interested parties in zoning and subdivision hearings
- expanding municipal jurisdiction to include the facilities over which municipalities now have limited jurisdiction
- requiring that bylaws include provisions to evaluate a project's effects on the Act 250 criteria
- requiring conservation of primary agricultural soils outside designations to compensate for those in them

Require a municipal water or sewage system to meet the following criteria in order to qualify for the benefits that are proposed under S.311. These benefits are proposed in sections 2, 10, 13, 18, and 24 of S.311.
- A municipal sewage system must have an up-to-date discharge permit or indirect discharge permit.
- A municipal sewage system must not be under a 1272 order.
- A municipal water system must have all of its permits up to date.
- A municipal sewage system must not have had any unauthorized discharges within some specified period. I suggest two years for purposes of starting this discussion.

Supervisory authority. District commissions need to have all relevant permits in order to issue an Act 250 permit. Leave section 5 of S.311 on the cutting room floor. Retain section 6 of H.687.

Report on mitigation ratios of primary agricultural soils
- Identify and appoint for the development of the report an organization with an expressed purpose to increase food production and food security, and with a track record of inclusive experience with facilitating stakeholder groups. This might be the Vermont Sustainable Jobs Fund's Farm to Plate Program or the Council on Rural Development.
- Expand the list of those to be consulted to include farmers' organizations and those whose mission is to support farming and food supply (Rural Vermont, NOFA Vermont, the dairy farmers, the farmers' market association) and members of the public.
- Transfer the Department of Commerce and Community Development to a consultative role in this report.
- Include opportunities for significant public input at all phases of the development of this report: from the beginning of the report's preparation, during the preparation, and before the report is completed.

Appeals of municipal permits and decisions. Leave section 18 of S.311 on the cutting room floor.

Require that the three tiers be implemented simultaneously. If tiers 1A and 1B are implemented first, it is possible that Tier 3 and amendments to Tier 2 will never be implemented.

Recommendations on whether or not to transfer each section of S.311 into H.687

These recommendations are based on S.311, draft 3.1 as recommended by SEDHGA.

"Leave on the cutting room floor" means that those sections of S.311 should not be transferred into H.687.

Recommendations on sections in S.311 This is based on H.687 being the base bill and portions of S.311 being left out of H.687 or moved into H.687.	
Sec. no.	Recommendation on the section.
Sec. 1	Leave on the cutting room floor. A bill making such massive changes to Act 250 and land use planning should not be given a short title limited to housing.
Sec. 2	Accept the removal of priority housing projects from Act 250. Priority housing projects as expressed in Act 250 have become too complicated. Leave the rest of sec. 2 on the cutting room floor. The NRB failed to report on whether increasing jurisdictional thresholds for housing development under Act 250 would affect housing affordability and availability as required under Act 47 (2023). Thus there is no evidence that increasing jurisdictional thresholds will make housing either more available or more affordable.
Sec. 3	Leave on the cutting room floor. Allowing accessory dwelling units will allow a density of 8 units per acre: four as already required plus one ADU for each of the four. The exemptions in (aa) and (bb) are better addressed using the similar provisions in H.687.
Sec. 4	Accept the posting of signs. This is similar to zoning. Please amend to require that the sign be posted close enough to the most traveled public right of way that passersby can actually read the sign.
Sec. 5	Leave on the cutting room floor. Use sec. 6 of H.687 instead. This deprives the district commission from using its supervisory authority to look at all aspects of a project together. State permits have different criteria than Act 250. Act 250 has intentionally been given jurisdiction, including differing criteria than State permits. Often Act 250 criterion and the State permit, with differing conditions, were enacted at the same time. Because of those differences, Act 250 must allow parties to rebut those other permits.
Sec. 6	Leave on the cutting room floor. District commissions already have this authority.
Sec. 7	Accept this section and remove sec. 23 of H.687. One can make the argument that the mitigation ratios that are now in Act 250 are too low. The pandemic showed that we should be producing more of our food locally. The increasing use of land for housing (and the resulting population increase) envisioned by the housing provisions of H.687 and S.311, and the 30x30 statute, mean that we need to preserve more of our farmland. Section 7 needs to be amended to include "consultation with agricultural organizations, food security organizations, and other interested parties".
Sec. 8	Leave (d) on the cutting room floor. Accept (a) through (c) repealing priority housing projects.
Secs. 9 through 11	No recommendation.
Sec. 12	Leave on the cutting room floor. If this sec. is moved to H.687, the provision of parking on adjacent lots by valid legal agreement is problematic. When the legal agreement is terminated, residents using those lots will have no parking space. If moved to H.687, there should be some provision for the building owner to secure other parking before the legal agreement is terminated.
Secs. 13 through 17	No recommendation

Recommendations on sections in S.311 This is based on H.687 being the base bill and portions of S.311 being left out of H.687 or moved into H.687.	
Sec. no.	Recommendation on the section.
Section 18	Leave on the cutting room floor. This section also applies to appeals of decisions of administrative officials. The only ones who know of those decisions are the ones who requested the decision. Those individuals should not be forced to collect signatures from 3 percent of the population, something like 6% of adults (because it is unlikely that signatures of minors would be valid). Also, it is inappropriate to prohibit appeals in general.
Secs. 19 through 21	Leave on the cutting room floor. Appeals will be heard by the ERB not the environmental division.
Sec. 22	No recommendation
Sec. 23	Leave on the cutting room floor. The text of Sec. 24 in H.687 could be revised to have a layout that is easier to follow, such as the layout in S.311. The definitions of tiers in S.311 do not fit the tiers as proposed in H.687.
Sec. 24	Leave on the cutting room floor. The process proposed by this section leaves more that is to be determined later than does H.687. S.311 requires the Natural Resources Board to submit a report and adopt guidance; something that the two studies from Act 185 (2022) have shown the board is poor at. The process was developed by a committee concerned about economic development and not about land use issues.
Sec. 25	No recommendation
Sec. 26	Leave on the cutting room floor. The exemption from Act 250 of transportation corridors seems to encourage sprawl.
Secs. 27 through 55	No recommendation
Secs 56 through 59	Accept these sections for inclusion in H.687. A potential renter or buyer needs this information as part of making an informed decision as to whether to rent or buy a particular property.
Secs. 60 through 68	No recommendation

These are my recommendations on H.687. I ask that you consider these recommendations carefully. I hope that you use these recommendations to create a better bill.

Sincerely,

Thomas Weiss

Att.: Explanations of recommendations of H.687 new to this letter

Explanations of recommendations on H.687 new to the letter of April 12, 2024
Thomas Weiss

This document provides recommendations and their explanations based on testimony provided to Senate Natural Resources and Energy during hearings on H.687.

Have appeals heard by Environmental Review Board as scheduled in H.687 (or earlier)

Recommendation Based on the example of the Environmental Board, the implementation schedule of H.687 can and should be maintained as in H.687, including having the Environmental Review Board hearing appeals beginning January 1, 2027.

Explanation
The Environmental Review Board should begin hearing appeals of decisions of district commissions and of district co-ordinators on the schedule in H.687.

The chair of the Natural Resources Board and the Secretary of Natural Resources asked you to postpone several years having the ERB hear those appeals. I counter with H.417 (1970) otherwise known as Act 250 and the example of. the Environmental Board. The Environmental Board had a more extensive task ahead of it when it was created than will the proposed Environmental Review Board. The Environmental Board performed admirably. That Board had to set up everything: district commissions and their offices; rules; appeals processes. All that was done with the first permit appeal decided within seven months of Act 250 going into effect (September 16, 1970).

The Environmental Board had to develop an interim land capability plan, the capability and development plan, and the land use plan. This is similar to what the Environmental Review Board will be asked to do relating to the future land use maps and designations. (The EB created the interim land use plan (adopted March 8, 1972) and the capability and development plan (sometime in 1972 and included in Act 85 (1973)). The requirement for the land use plan was repealed by Act 85 (1973).

On-the-record appeals had no takers

Recommendation Do not add any provision for appeals on the record. There was a pilot program, 2001 through September 1, 2004, under the Environmental Board, which would have heard the appeals, that had no takers. (The Natural Resources Board commenced operations on February 1, 2005 after the pilot program ended.)

Explanation
The Secretary of Natural Resources proposed to you to have appeals of Act 250 permits be on the record, or at least setting up a pilot program.

I counter with the pilot program established in 2001 by Act 40. This was in §6085a. It became effective June 13, 2001. The section 6085a was repealed in Subsection (l) of 6085a repealed 6085a on September 1, 2004. This pilot program took effect under the Environmental Board. The Environmental Board was required to submit interim reports on March 15, 2002 and January 15, 2003 and a final report after the completion of all appeals on the record. I have been unable to find any of these reports on line or at the Vermont State Archives. William Burke (district commissioner) and Thomas Walsh (associate general counsel of the Environmental Board) created the rules for on-the-record appeals. Mr. Burke in 2020 wrote the House Committee on Natural Resources, Fish, and Wildlife that there were no takers for the pilot program, no request for appeals to be heard on the record.

Transferring conditions of Act 250 permits to municipal permits

Recommendation Require that provisions for transferring conditions of Act 250 permits protect the rights of all parties to those permits. The better solution is to have the district commissions determine which conditions are to be transferred using the procedures of the district commissions and as outlined below if the municipality is to transfer those conditions.

Explanation
H.687 (sec. 33) does not protect the rights of those parties whose testimony resulted in conditions being placed in an Act 250 permit. In order to protect those rights, sec. 31 should be amended to require
- all parties to the Act 250 permit be notified of the pending removal of conditions and encouraged to attend.
- require that the hearing process for transfer of conditions use the Act 250 procedures for hearings and not the standard hearing process of the DRB (or other appropriate municipal panel). The parties need to have the ability to make their case the same as they had that ability in the original Act 250 proceedings.
- require that all conditions resulting from a court order by retained, even if those conditions meet the criteria of §4460(g)(2). A municipality should not be able to modify a court order.

Subsection (h) requires municipalities to enforce any existing Act 250 permits within Tier 1A. Decisions on enforcement actions are subject to appeal. Those appeals should go to the Environmental Review Board as being better qualified than the DRB to determine the significance of the conditions requiring enforcement.

This is all predicated on §6081(z) remaining intact as presented in section 32.

The following is recommended text that will protect the rights of all parties to the Act 250 proceedings. Underlines and strikethroughs are based on changes from the text proposed in H.687. (I have not adjusted the numbering of the subsections.

Sec. 33. 24 V.S.A. § 4460 is amended to read:
§ 4460. APPROPRIATE MUNICIPAL PANELS

* * *

(g)(1) This subsection shall apply to a subdivision or development that:
(A) was previously permitted pursuant to 10 V.S.A. chapter 151;
(B) is located in a Tier 1A area pursuant to 10 V.S.A. § 6034; and
(C) has applied for a permit or permit amendment required by zoning regulations or bylaws adopted pursuant to this subchapter.

(2) The appropriate municipal panel reviewing a municipal permit or permit amendment pursuant to this subsection shall create a list of all conditions contained in the Act 250 permit. The list shall indicate the source of each condition (*e.g.*, court order, previous enforcement action, testimony by a party).

(4) The appropriate municipal panel reviewing a municipal permit or permit amendment pursuant to this subsection shall comply with the notice and hearing requirements provided in subdivision 4464(a)(1) of this title. In addition, notice shall be provided to those persons requiring notice under 10 V.S.A. § 6084(b) and shall explicitly reference the existing Act 250 permit. In addition, the panel shall notify all other parties that participated in the original Act 250 proceedings of the hearing to consider transferring conditions of an Act 250 permit to a municipal permit. The notice shall include encouragement to attend and a notice that the municipal permit might remove conditions that resulted from the party's participation in the Act 250 hearings. The notice shall contain the list of all conditions in the Act 250 permit.

(2) The appropriate municipal panel reviewing a municipal permit or permit amendment pursuant to this subsection shall ~~include~~ transfer all conditions contained within a permit previously issued pursuant to 10 V.S.A. chapter 151, unless otherwise specified in this section. The panel shall transfer conditions required by a court order or a previous enforcement action. The panel may consider not transferring other permit conditions that ~~unless the panel determines that the permit condition~~ pertains to any of the following:

(A) the construction phase of the project that has already been constructed;
(B) compliance with another State permit that has independent jurisdiction;
(C) federal or State law that is no longer in effect or applicable;
(D) an issue that is addressed by municipal regulation and the project will meet the municipal standards; or
(E) a physical or use condition that is no longer in effect or applicable or that will no longer be in effect or applicable once the new project is approved.

(5) The decision by the appropriate municipal panel shall include a revised list of all conditions and the action taken by the panel. The decision shall list for each condition not transferred the reason why the condition was not transferred.

(3) After issuing or amending a permit containing conditions pursuant to this subsection, the appropriate municipal panel shall provide notice and a copy of the permit to the Environmental Review Board.

(5) The appropriate municipal panel's decision shall be issued in accordance with subsection 4464(b) of this title and shall include ~~specific findings with respect to its determinations pursuant to subdivision (2) of this subsection.~~ a revised list of all conditions and the action taken by the panel. The decision shall list for each condition not transferred the reason why the condition was not transferred.

(6) Any final action by the appropriate municipal panel affecting a condition of a permit previously issued pursuant to 10 V.S.A. chapter 151 shall be recorded in the municipal land records.

(h) Within a designated Tier 1A area, the appropriate municipal panel shall enforce any existing permits issued under 10 V.S.A. chapter 151 that has not had its permit conditions transferred to a municipal permit pursuant to subsection (g). Appeals of decisions by the appropriate municipal panel regarding enforcement shall be made to the Environmental Review Board.

Resource mapping

Recommendation Remove "including forest blocks and habitat connectors" from section 22. Create a new section 22a to use session law to require the mapping of forest blocks and habitat connectors and to provide a date by which the layers must be available.

Explanation The Agency of Natural Resources has probably hundreds of layers that it has completed and is maintaining already. None of them are listed in 10 V.S.A. §127. By listing forest blocks and habitat connectors in §127, it is starting what will eventually be a long list of layers. Also, adding forest blocks and habitat connectors to §127, you are stating that ANR is not required to identify any other natural resources. In session law, you can also give the Agency a date by which to complete the mapping, that date to be suitable for the creation of the rules regarding implementation of forest blocks and habitat connectors.

Who should make appointments to stakeholder groups

Recommendation Delay appointing stakeholder groups until the Environmental Review Board can make the appointments.

Explanation It seems odd that one board, the NRB, will appoint members and begin actions that will be completed by the successor ERB. Also, experience shows that the Natural Resources Board fails to carry out its obligations regarding rules and studies. I use as examples the reports on Accessory On-Farm Businesses and on Necessary Updates to Act 250, both of which were required by Act 182 (2022) sections 39 and 41.

The report on Necessary Updates to Act 250 failed to address most of the charge. The charge has seven elements, including the one added by Act 47(2023) I pointed out these failures to the NRB when the draft

final report was released. None of the failures was corrected. These comments, along with the other written comments on the draft report, are in volume 2 of the report.

I find that the draft report is at most only 1/5 complete. It lacks discussion and recommendations on much of the charge.

First element. The report fails to address the maintenance of intact rural lands; fails to address protection of biodiversity; fails to address the threshold for jurisdiction based on the characteristics of the location; and fails to address developing the recommendations and tiers of jurisdiction as recommended by the Report of the Commission on Act 250.

Second element: Fails to address how to use the Capability and Development Plan to meet the statewide planning goals, because the report appears to confuse the Capability and Development Plan with either the Interim Land Capability Plan or various drafts of the State Land Use Plan.

Third element. Provides no assessment of current staffing against the needs and fails to make a recommendation on whether there should be a district co-ordinator in every district.

Fourth element. Fails to recommend a source of revenue to supplement the Act 250 fees.

Fifth element. Fails to address whether the permit fees are effective in providing appropriate incentives.

Sixth element. Fails to address whether the Board should be able to assess its costs on applicants.

Seventh element. Fails to address whether exempting more housing units from Act 250 would affect housing affordability; and what the potential impact of increasing the exemption to 25 units would have on natural and community resources addressed under the Act 250 criteria.

The report on Accessory On-Farm businesses also fails to address much of its charge. The charge has four required elements.

First element. The report fails to recommend how Act 250 jurisdiction should be applied to agricultural businesses in general. The report considers only on-farm agricultural businesses. It provides considerations for determining jurisdiction while recommending nothing.

Second element. The report fails to recommend how to clarify what is and is not an accessory on-farm business. Instead, the report provides options and asks the legislature to resolve them.

Third element. The report fails to address any planning requirements for farms and farms with accessory on-farm businesses. The report does not even mention any planning requirements.

Fourth element. The report fails to address whether different types of businesses associated with farms and farming require different levels of review.