Testimony of Jon Groveman, Policy and Water Program Director,
Vermont Natural Resources Council
House Natural Resources and Wildlife Committee
on Draft Bill Addressing Act 250 Administration and Appeals
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My name is Jon Groveman. I am the Policy and Water Program Director for the Vermont Natural Resources Council (VNRC). Thank you for the opportunity to testify on Act 250 Governance.

My background relevant to my testimony today includes that I have worked on and participated in Act 250 since 1995. I served as the Act 250 Attorney for ANR from 1995-1999. In that capacity I represented ANR and other state agencies before every Act 250 District Commission and before the former Environmental Board. I was the Executive Director of the former Water Resources Board in 2003 when the Water Resources Board was eliminated along with the Environmental Board. Accordingly, I had a front row seat for the permit reform bill of 2002/2003 that eliminated the Environmental Board and can provide insight into why the change in the appeals process was made. Since the Environmental Division was expanded to hear Act 250 and ANR appeals I have participated in numerous appeals before the Court representing ANR, VNRC and citizen groups concerned about the impacts of a project. I am currently involved in two appeals of ANR permits in the Environmental Division. I also represented VNRC on the NRB Steering Committee. All of these experiences inform my testimony.

I have listened to the testimony on Act 250 governance. What you have heard is there is a clear disagreement about what is needed to have effective governance of Act 250. I have been involved in this debate over Act 250 governance for decades and the parameters of the debate have not changed.

On one hand you have experienced Act 250 practitioners who believe that it is good to have a court make decisions on Act 250 appeals that resolve disputes about a project without setting direction on how an Act 250 criteria should be interpreted and applied. The argument here is that we don't want an Act 250 appellate body to set policy like the former Environmental Board did through its decisions. We want a court to allow parties to use all the tools that are part of litigation, including procedural motions and

discovery, to work through the issues in a case and a court will decide whether a permit will be issued or not and what the conditions of the permit will be.

On the other hand you have experienced Act 250 practitioners who believe that since the Environmental Board was eliminated we have lost a key policy setting function of Act 250 where the Board was able to explain to applicants and Vermonters who participate in Act 250 through its decisions what is required to obtain an Act 250 permit. These Act 250 experts believe that the issuance of decisions that fleshed out what the criteria of Act 250 require created clarity and consistency in Act 250 decisions that we do not have today.

I am in the latter camp and I am of the opinion that in order to improve Act 250 we need to create a professional board to set policy on how the Act 250 criteria and jurisdictional rules - importantly including the new criteria and jurisdictional rules being discussed in H.687 - are implemented to create clarity, better consistency in how District Commissions implement Act 250 and to make Act 250 more effective.

In addition to the important policy setting function that would be restored by creating an expert Board to hear appeals and propose Act 250 rules, the new board would make decisions more quickly than a court and would have more tools at its disposal to resolve appeals.

I will review each of these issues with the Committee.

Policy Setting

Until 2004, through its decision on appeals the Environmental Board was able to address questions about how various criteria should be interpreted and implemented. The clarity and depth of the Environmental Board decisions was able to communicate to District Commissions, applicants and parties to Act 250 how a criterion worked.

Take for example the aesthetic criterion of Act 250. The Act 250 statute states that to obtain a permit, a proposed project may not have an undue adverse effect on aesthetics. How should a District Commission judge what an undue adverse effect on aesthetics is? What does it mean to have an undue adverse effect on aesthetics?

To answer these questions and provide clarity about how to implement this criterion for future projects the Environmental Board set forth the meaning of the aesthetic criterion in a case involving a residential development in Quechee, Vermont. The test, known famously as the Quechee analysis, details how a District Commission should go about determining if a project meets this criterion. The Board adopted a test that examines whether a project is adverse or undue adverse based on set factors like whether a project violates a clear community standard or is shocking or offensive to the average person and whether impacts have been adequately mitigated in order to meet this standard.

My point is not to get you to know the Quechee analysis, but to convey how the Board breathed life in a criterion that simply said a project may not have an undue adverse impact on aesthetics by creating a reasoned test for addressing the criteria.

Creating these type of tests for a number of criteria (e.g. necessary wildlife habitat, scattered development, traffic - all criteria that do not convey how to evaluate whether there an impact that violates Act 250 and how to effectively mitigate impacts) is something administrative boards are set up to do, where courts are not.

A court is structured to examine expert testimony and evidence and determine how an application should be processed. It is not an expert in a permitting program that is set up to address technical issues like the Board did in the Quechee case and so many others.

I am attaching a link to the E-Note index. It is a recitation of the major decisions that the Environmental Board made over the years to explain how Act 250 issues should be addressed. See https://nrb.vermont.gov/documents/e-notes. In the absence of a board that can provide direction to parties and the Act 250 program, it is very difficult to address issues that arise about how the criteria should be interpreted.

In 2003, the Legislature smartly directed the court to treat Environmental Board decisions as precedent in its proceedings. This has allowed the court and parties to look to decisions like the *Quechee* decision to guide it in reviewing applications. However, what we have lost is the ability for these decisions to evolve and for new ways of interpreting and implementing criteria to address questions that arise in the course of appeals. The court

has not provided the type of policy direction that the former E-Board provided, as demonstrated by reviewing the E-Note index.

Policy Guidance through Rulemaking

You have heard that a board can address policy issues and provide clarity through rulemaking without hearing appeals. Rulemaking is a slow process that does not allow the Act 250 program to react to issues before it in a nimble and efficient way.

The rulemaking process takes a minimum of 9 months and often can take more than one year to complete. This means a significant amount of time can pass between an issue about how to apply Act 250 being raised and a rule being adopted to address the issue.

Having a board hear appeals allows it to address questions about how to interpret and implement a criterion in real time, like the E-Board did when it set the test for aesthetics, mitigating wildlife habitat and many other issues. Under this approach, a board can both address a dispute over what is required to address criteria in an appeal, set precedent through the decision that tells District Commissions how to apply the criteria and then, if need be, further clarify this precedent by proposing a rule.

Legal Advice to District Commissions

There was a theory that what Act 250 lost in having a strong board making decisions to address issues in an appeal could be made up by having NRB attorneys provide advice to Commissions on legal issues. The problem with this theory is that advice is just advice – it is not a decision that sets guidance through case precedent. Rather, it is the opinion of one attorney that District Commissions can take or leave. District Commissions are independent decision making bodies that are not required to take advice from the NRB. Only statutes, rules or case precedent can require Commissions to apply Act 250 in a certain way.

The NRB can Set Policy as a Party of Appeals in Court

Another adverse consequence of eliminating the Environmental Board is the tension created by having a board as a party to an appeal being able to reverse District Commission decisions, often through settlement. District Commission can work for months on a permit only to have the decision

appealed and the NRB settling the case and nullifying the District Commission's work. A settlement is not transparent like an appeal that takes place in public and is based on an open review of evidence. Settlements can feel like they undermine Commissions who work very hard for little compensation to review a permit only to see their work undone. The tensions created between the NRB and Commissions when this happens makes the Commissions less open to NRB input when the Commission is reviewing an application and to seek advice from the NRB.

A related issue with settlements is that a court is set up so that if parties agree to settle a matter a court will accept the settlement as resolving the dispute. There were settlements before the E-Board, but the Board would review the settlement to ensure that a project actually met all the Act 250 criteria and could request that settlements be altered to ensure it could approve a project. This is a good example of how an administrative board's role is different than a court - an administrative board does not just resolve disputes but it its role is to ensure that the program is properly implemented.

Appeals and Administrative Functions of the Board Must be Separate

Part of the debate about an Act 250 board hearing appeals has been whether a board can both hear appeals and provide guidance to District Commissions through legal advice and rules. The E-Board carried out both of these roles from 1970 until 2004 when it was eliminated without a problem. As discussed previously, the Board was able to both issue decisions on appeals that set out how to apply a criteria and then adopt its ruling in a rule. In addition, the Board was able to discuss its ruling in an appeal with District Commissions after the appeal was completed to further explain how the ruling should be applied. There was no conflict in engaging in both the appellate and administrative role.

Data on Appeals Processing and Consolidated Appeals

As I noted when I briefly testified on Act 250 governance earlier in the session, VNRC has analyzed the record of the former Environmental Board and the Environmental Division with regard to time to resolve appeals and how many appeals are consolidated or coordinated.

I have provided to the Committee links to data and analysis that VNRC has compiled since 2012 on the time it took the former Environmental Board took to process Act 250 appeals and the amount of time it takes the Environmental Divisions to process Act 250 appeals. The spreadsheets also analyze how many Act 250 appeals to the Environmental Division are consolidated or combined when there are multiple appeals of a project.

VNRC's data is presented in two spreadsheets. The first is a spreadsheet with three tabs. The first tab addresses how many appeals are consolidated at the Environmental Division. The second tab lists all the appeals the Environmental Division has processed between 2012 and 2022 - this includes Act 250, ANR and municipal zoning appeals. The third tab lists the Environmental Division processing times for Act 250 appeals only from 2017 - 2022. VNRC chose 2017-2022 for processing times of Act 250 appeals at the Environmental Division to show appeals in a 5 year period as compared to the last five years that the Environmental Board was in existence. Here is the spreadsheet: https://docs.google.com/spreadsheets/d/1tRq4OLc3rsijZ2znUFAAozNQmb5NvZRo/edit?usp=sharing&ouid=110277810741642129994&rtpof=true&sd=true.

The second spreadsheet lists the permit and JO appeals processed by the E-Board from 1999-2005 - as noted roughly the last five years of the Environmental Board's existence, and the processing times for these appeals. The spreadsheet also includes processing times for Act 250 appeals in the Environmental Division between 2012 and 2017 (another five year period). Here is the spreadsheet https://docs.google.com/spreadsheets/d/15ikjaoK97-FevHrDJnaOdXp3PmKYrLzK/edit?usp=sharing&ouid=110277810741642129994&rtpof=true&sd=true

The first spreadsheet shows that from **2012 to 2022** there were **198** appeals processed by the Environmental Division (Act 250, Zoning, and ANR appeals). Of these **198** appeals, **7** Act 250 appeals were consolidated with other permit appeals. Breaking this down further, **3** Act 250 appeals were consolidated between **2019 and 2020** and **zero** Act 250 appeals were consolidated in 2021 or 2022.

In terms of how long the former Environmental Board took to process appeal, the second spreadsheet shows that during the last five plus years

of its existence (**1999-2005**), it took the Board on average approximately **264** days to process a permit appeal and approximately **285** days to process appeals of Jurisdictional Opinions (JO). Over the last five years (**2017-2022**) it took the Environmental Division, on average, **426** days to process Act 250 appeals (both permit appeals and JO appeals).

The second spreadsheet also indicate that the average time it took the Environmental Division to process Act 250 permit appeals from **2012-2017** was approximately **523** days.

VNRC believes that a main reason for the faster Act 250 processing times for the Environmental Board in processing appeals is because the Board was only focused on Act 250. The Environmental Division is responsible for Act 250 appeals, ANR appeals, zoning appeals and enforcement related appeals across all of these programs. The Environmental Division has two judges dedicated to hearing all of these matters and several staff members to support their work. It is logical that given its work load and responsibilities the Environmental Division is not able to focus on resolving Act 250 appeals in the manner that the Environmental Division could.

The bottom line is creating a professional board to hear appeals as set forth in H.687 would result in Act 250 decisions that are faster and provide greater guidance to District Commissions, applicants and other parties on how to meet the Act 250 criteria and jurisdictional rules improving the program overall.

Housing Board of Appeals and Agreement that Improvement is Needed

VNRC is struck that the Scott Administration is supporting creating a Housing Board of appeals to hear appeals of zoning decisions on housing projects because a Housing Board would be expert in the issues, be able to more nimbly process these appeals, and avoid the procedural maneuvering that can bog down appeals in court.

These are the very same reasons that VNRC supports a board to hear Act 250 appeals. You would have an expert administrative board that can use staff as hearing officers to help move appeals through the process. You could limit motion practice and discovery to allow for due process but not

abuse of process that VNRC has seen in the court system and have a board that focuses on Act 250.

Finally, I did hear a lot of agreement among all of the people who have testified on Act 250 governance before your Committee. There appears to be agreement that we should have a professionalized NRB to better administer the Act 250 program and that the court does not have the resources necessary to address appeals given its broad docket (two judges and a law clerk to process zoning appeals, Act 250 appeals, ANR appeals and enforcement of each program).

Clearly changes and improvements are needed to Act 250 governance and appeals. The dispute is over the pros and cons of having a board hear appeals and administer Act 250. For all of the reasons set out in my testimony and in the testimony that you heard from Rob Woolmington and Ron Shems, VNRC urges the Committee to adopt the professional board model in H.687 to improve Act 250 governance and appeals.