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MEMORANDUM

TO: Members of the Senate Committee on Economic Development, Housing and General Affairs

FROM: Chris Roy
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DATE: February 7, 2024

RE: Thoughts on the Be Home Act and Potential Ways to Make the Permit Process More Predictable, Efficient and Timely

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I want to thank the members of the Committee once again for the opportunity to testify about the Be Home Act and how permit reform can advance the important goals of providing Vermonters with a greater supply of much-needed housing of every type in every part of the State. As I discussed, I have been evaluating and addressing housing needs and permit reform for years not only as a practicing attorney handling permitting matters around the State, but also as a former member of the Environmental Board, a former chair of the Chittenden County Regional Planning Commission, and a former member of the Williston Selectboard.

You invited me to supplement my previous testimony with a written submission. I have taken the opportunity to review Draft 7.2 of your Committee's draft bill, 24-0067, and offer my thoughts with respect to its various provisions relating to the permit process specifically. I do so on my own behalf and not on behalf of any client or organization. This Memorandum does not otherwise address jurisdictional thresholds and other substantive provisions in the draft bill.

Section 7: This provision allows environmental and other permits to constitute conclusive evidence regarding compliance under certain Act 250 criteria, as opposed to simply a rebuttable presumption. It also allows these other permits to be submitted after the issuance of an Act 250 permit as a condition subsequent. This provision would eliminate much of the delay occasioned when district coordinators or commissions suspend progress in a pending matter waiting for other agencies to issue their permits, and would eliminate duplication of effort on matters better handled by the Agency of Natural Resources and other specialized, technical agencies than in the Act 250 process.

Section 12: This provision would eliminate the ability of ten or more voters, residents or landowners in a community to collectively appeal a permit when they do not otherwise have individual standing to do so. The draft bill would replace the ten-person threshold with a number equal to ten percent of the community's population. While ten percent might not be the only population threshold that can be used, a higher threshold than the current ten persons is important to prevent a very small minority in a community who are not directly affected by a project to thwart a project that otherwise enjoys public support.

Section 13: This provision would require an appeal bond when permits are appealed. The bond would need to be sufficient to cover half of certain "reasonable associated costs" if the appeal fails, and all those costs if the appeal is deemed frivolous. As I mentioned during my testimony, further detail should likely be provided as to what constitutes "reasonable associated costs." I also mentioned that there likely ought to be mutuality so that an applicant who appeals is subject to the same bond requirement.

Finally, I am not certain that requiring a bond with respect to a good faith appeal that addresses an issue that is the legitimate subject of dispute ought to give rise to liability for costs. Such an approach would have an undue chilling effect on parties who are acting genuinely in good faith with reference to a project that will have a direct impact on them. A bond covering costs relating to a frivolous appeal, however, is worthy of consideration. Some additional definition regarding what is deemed to be "frivolous" might be advisable. Also, in a *de novo* review, the Environmental Division does not "affirm" the decision below, it issues a fresh ruling on every issue appealed, with all others determined below remaining unchanged. Therefore, the language in Section 8507(c) may need to be revised.

Section 22: This provision would require the Environmental Division to conduct its merits hearing within 60 days of when an appeal is filed from a municipal zoning decision, with a decision to be rendered within 90 days after the hearing. While the 90-day deadline for rendering a decision would be workable, the 60-day deadline for conducting the merits hearing may be unworkable given the jurisdiction and procedures applicable before the Environmental Division.

Currently, an appellant files a statement of questions defining the scope of the appeal 21 days after the notice of appeal. V.R.E.C.P. 5(f). Other parties then have 14 days to file their own cross-appeal. V.R.E.C.P. 5(b)(2). The Court typically schedules its initial conference shortly thereafter. Given the number of judges (two) and the need to try the case in the county where the project is located absent agreement of the parties (4 V.S.A. § 1001(e)), there would be substantial challenges in always trying to schedule a trial within 60 days after the filing of the appeal. The possibility of discovery and pretrial motions further makes this timeline challenging. Occasionally, parties also need to retain experts for trial.

Some ways to streamline the process in all permit appeals before the Environmental Division include the following:

- A municipal zoning hearing could be required within 45 days of when the application is filed, and that the resulting decision be issued within 45 days of when the hearing is ***commenced*** as opposed to concluded. This would address the concern of multiple requests for information before and after hearings, and the occasional practice of boards to continue hearings over several weeks to avoid triggering the "deemed approved" deadline. *See* 24 V.S.A. § 4464(b)(1).

- Identifying written disclosures relating to fundamentals of the parties' respective positions that the parties need to exchange within 14 days after the initial court

conference. This would be akin to the mandatory disclosures utilized in federal court. *See* Fed. R. Civ. P. 26(a)(1)(A). Then, perhaps within 30 days of the initial court conference, the parties would need to provide expert disclosures pursuant to V.R.C.P. 26(b)(5). Further discovery would be precluded absent a showing of good cause.

- Appointing a magistrate judge (possibly shared with another court division) to handle non-substantive pretrial motions relating to discovery, procedural matters, and the like.

- Requiring all substantive pretrial motions to be filed within 60 days of the initial conference. Absent the filing of pretrial motions, the trial could be commenced within 120 days after the initial court conference. If a pretrial motion is filed, trial would be conducted within 60 days after the Court's decision on the pretrial motion.

- As noted above, a decision on the merits would be issued within 90 days of the trial.

Section 23: This provision would require an "injury-in-fact" for standing to file an appeal. This requirement could also be applied with reference to Act 250 appeals. Further definition of "injury-in-fact" would be helpful.

While the Be Home Act focused predominantly on zoning appeal procedures as opposed to Act 250 appellate processes, there are similar provisions that could be applied to the Act 250 process to make it more efficient and timely while ensuring adequate time for all parties to present their issues. The following are some procedural improvements that could be made that would result in the more timely processing of Act 250 appeals:

- If the district coordinator deems a major Act 250 application to be incomplete, they may issue a ***single*** request for additional information within 7 days of the filing of the initial application. The merits hearing or a prehearing conference should then be scheduled within 40 days of the filing of the initial application or the provision of additional requested information, whichever is later. *See* 10 V.S.A. § 6084(d).

- If a prehearing conference takes place, the district commission may issue a ***single*** request for additional information within 7 days of the prehearing conference. The merits hearing should then be scheduled within 30 days of the prehearing conference or the provision of additional requested information, whichever is later.

- After the merits hearing, the district commission may issue a single request for additional information within 7 days of the hearing. A decision should be issued within 45 days of the completion of the hearing.

- The burden of proof on any issue could lie with the party appealing the criterion or approval at issue. This would result in greater deference to the original decision

below, while requiring those appealing an issue to satisfy the burden of proof that the decision below should be superseded on appeal.

- In the interest of statewide consistency and given the availability of legal counsel, jurisdictional opinions could be issued by the Natural Resources Board instead of the various district coordinators. *See* 10 V.S.A. § 6007(c). District coordinators could still handle project review sheets. This would free up time to process applications more efficiently. Appeals of jurisdictional opinions would still go to the Environmental Division.

There has also been substantial discussion about whether it is advisable to have Act 250 appeals diverted to a revived Environmental Board. As I mentioned before the Committee, I served on the former Environmental Board and was proud of the work that we did under the circumstances. I am very much opposed, however, to creating a separate appeal track for Act 250 appeals. Such an approach would return permit appeals to the "bad old days" when dual appeal tracks imposed greater costs and took more time, with the ever-present potential of irreconcilable, contradictory opinions being issued by the Environmental Division and the Act 250 appeal board. Moreover, the Natural Resources Board would be restrained in providing active assistance to district commissions and coordinators since it would have to act as a neutral, quasi-judicial board for any appeal from a district commission. Finally, given the scope and breadth of potential changes that are being proposed for Act 250, asking the Natural Resources Board to effectuate all those substantive changes and, at the same time, start handling appeals is too much to ask, in my estimation. Frankly, there time and resources would be better spent facilitating the jurisdictional and other changes to Act 250, and engaging in rulemaking to provide further predictability and timeliness to the process.

These thoughts are based upon more than two decades of work in this area. I hope that my comments are helpful and, if I can be of any further assistance, please do not hesitate to get in touch. Thank you again for the opportunity to present my thoughts on these important matters.