



October 2, 2016

Dear Act 174 PSB Working Group,

Thank you for the invitation to provide information to the Act 174 PSB Working Group charged with making recommendations to the legislature for improving public participation at the Public Service Board. I have attended or watched videos<sup>1</sup> of your meetings. This information is offered in advance of the Oct. 6, 2016 meeting to provide time to review materials and prepare questions for the 20 minute time slot you have allotted to VCE beginning at 1:25 p.m.

### **Background on PSB Working Group**

The PSB Working Group was created in legislation the day after I testified to the Vt. Senate Finance Committee on March 22, 2016. I requested time to testify to the committee of jurisdiction over the PSB after Vermont's Attorney General's office brought a criminal investigation of me, alleging I was practicing law without a license by helping members of the public and towns participate at the Public Service Board (PSB). While the investigation had been closed and found to be without merit, the fact that it was brought at all raises significant issues with regard to public participation at the PSB.

Summary of my testimony to the Senate Finance Committee: The AG investigation proved that the PSB is a legal process. People need to be represented by legal counsel in order to participate. There is no public participation component as part of the PSB process. People can attend pre-hearing conferences, site visits and public hearings, but the Board tells the public at those events that what they say is for the benefit of Board members and nothing anyone says is part of the record on which the decision is based. People can move to intervene *pro se*, but they are not participating as a member of the public. They are representing themselves as their own attorney when they intervene at the PSB. Having assisted a number of people with the PSB process on a variety of technologies and sizes, through all the various types of procedures from Pre-hearing Conferences, Site Visits, Public Hearings, Prefiled Testimony, Discovery and responding to Discovery, Technical Hearings, Briefs, Reply Briefs, comments on Proposals for Decision, Motions for Reconsideration and Oral Argument, I have observed that people give up rights<sup>2</sup> the

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<sup>1</sup>#1 [https://youtu.be/hRLVrgYdB\\_k](https://youtu.be/hRLVrgYdB_k)  
#1 part 2 <https://youtu.be/fkzuBZapPco>  
#2 [https://youtu.be/R0XMfDY\\_N0o](https://youtu.be/R0XMfDY_N0o)  
#3 <https://youtu.be/zFnmRAXmmVg>  
#4 <https://youtu.be/Qn4XENYNa0A>

<sup>2</sup>When attorneys represent parties, they know, for example, how to protect the rights of their clients by objecting in order to preserve appeal rights, by understanding the rules of evidence and how to introduce exhibits and use cross exhibits, by knowing how to respond to discovery questions and how to serve discovery on other parties. PSB *pro se* parties have to learn all this and more in order to participate effectively.

instant they engage in the process. I do not see how it is possible to teach people how to be a lawyer in order to participate effectively in PSB proceedings. The PSB is a legal process where the public does not have “access to court”.

### **Background on Vermonters for a Clean Environment, Inc.**

Since 1999, I have been executive director of Vermonters for a Clean Environment, Inc., a grassroots organization founded in response to a large energy project that would have gone through the PSB had it moved forward. VCE has assisted members of the public in participation in all types of environmental regulatory proceedings, including Act 250, Agriculture permits, and Agency of Natural Resources permits. When renewable energy siting became active at the PSB, it was a normal part of VCE’s work to assist the public in participation in the process for the siting of energy projects. VCE also has experience with cases that have been litigated in Environmental Court, Superior Court, the Vermont Supreme Court and Federal Court.

VCE has been involved in the many discussions about changing Act 250 – 2001, 2003, 2005, 2007 – and also ANR restructuring. VCE participated in the Electric Generation Siting Commission, where we facilitated the citizen’s presentation.<sup>3</sup> We also gave a presentation<sup>4</sup> that was invited by Department of Public Service (DPS) Commissioner Liz Miller and Dept. Commissioner Sarah Hofmann who asked us to present the process we would like to see. We recorded and I watched all of the Solar Siting Task Force meetings. VCE has recorded many PSB pre-hearing conferences, public hearings, site visits, technical hearings and oral arguments to develop case studies that will serve to assist in improving the process [*See Exhibit 1*]. I serve on my town’s planning commission and represent my town at the Rutland Regional Planning Commission (RRPC) where I serve on the ad hoc Energy Committee and on the Regional Issues Committee which reviews Act 250 and Section 248 applications.

## **THE PROBLEMS**

1. The PSB is unique in the country in doing **land use siting**. It is my opinion that the PSB is not the appropriate regulatory venue to address the numerous issues associated with the siting of wind turbines, solar panels, and other energy projects that have major land use components that were never envisioned when the PSB was created.
2. There is **no citizen participation component** at the PSB. The PSB process is one of the most legalistic processes in existence, moreso even than courts.
3. **No assistance** is provided to citizens faced with a brand new regulatory process. The PSB Clerk is doing more than in the past, but does not provide the kind of extensive assistance the public needs. It says something that the “Citizens Guide to the PSB Section 248 process”<sup>5</sup> is 24 pages long and written from a legal perspective rather than in layman’s language.

<sup>3</sup><https://vimeo.com/54658854>. Citizens presentation begins at 1 hour 58 minutes.

<sup>4</sup><https://vimeo.com/57294940>

<sup>5</sup><http://psb.vermont.gov/sites/psb/files/publications/Citizens%20Guide%20to%20248%20February%2014%202012.pdf>

4. Vermonters are unfamiliar with the PSB and how it operates. The general public does not understand the **difference between the PSB and DPS**<sup>6</sup> and the different roles they play. The title “Office of Public Advocate” within DPS further confuses the public who thinks that there is an entity that advocates for them.
5. Few **attorneys** are familiar with the PSB’s rules, which are in addition to the Vermont Rules of Civil Procedure. Only a handful of attorneys practice before the Board representing the public. The least expensive hourly rate I have heard of recently is \$175/hour. It is not unusual for attorneys to charge \$250/hour for PSB proceedings. These rates are a major bar to the public’s representation by legal counsel.
6. The **Board has denied** only a few of the thousands of applications that have come before it. The experience of attorneys representing the public and the experience of citizens participating *pro se* is the same: “It’s as though we weren’t even there.” The Board’s track record of approving almost all projects is a disincentive to participation. “Why bother” because “you are going to lose anyway.” Some attorneys refuse to take PSB cases because of the high cost to potential clients who are guaranteed to lose.
7. Examples of **costs to participate** when the public hires attorneys and experts:
  - a. VELCO NRP, total for towns and intervenors, \$900,000+
  - b. Sheffield Vermont Wind, total for town and intervenors, \$700,000
  - c. GMP Lowell Wind, total for towns and intervenors, \$200,000
  - d. Georgia Mountain Wind, setbacks only, \$35,000
  - e. Charlotte Solar, \$30,000
  - f. Cold River Road Solar, total for town and intervenors \$125,000+
  - g. North Springfield Biomass, total for intervenors, \$90,000
8. When members of the public do **participate *pro se***, they have a steep learning curve. This committee is taking months to learn about the PSB process. The public has nowhere near that much time. Citizens have told me they learned more talking to me in an hour than they had in the previous month trying to understand what to do. The public must learn how to file a motion to intervene, notice of appearance, a certificate of service and cover letter according to the Board’s rules and time frames. Solar projects have presented a major challenge for the public, as different size projects have different processes. I was developing a website to help guide the public<sup>7</sup> but was interrupted by the AG investigation and did not finish adding templates and examples of documents. With the new net metering rules, some of the overly-complicated different processes are being eliminated, but the Board will still have different procedures depending on the type and size of project. Access to filings has been a major issue that presumably will be resolved with ePSB.

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<sup>6</sup>Commissioner Miller changed DPS to PSD. VCE strongly advised against the name change, as we noticed the public was already confused by the difference between PSB and DPS, and changing it to PSD would only increase the confusion.

<sup>7</sup><https://vtpsbparticipation.net/>

9. **The legal process** and its complexity are a bar to participation. When members of the public learn what is involved in participating at the PSB, few choose to intervene. The Board should provide the Act 174 Working Group with a list of all solar dockets (excluding net-metered projects < 15 kW) it has reviewed to date and note the ones in which the public has intervened, the extent of the intervention, and the outcome. The PSB Working Group might be surprised by how few Vermonters have chosen to intervene at the PSB over solar projects.
10. **The language of the PSB** is not the language of the public. In one case, members of the public successfully intervened without assistance, but missed their deadline for pre-filed testimony. When asked why they missed the deadline, they said “all the time we were intervenors. On the schedule it said ‘non-petitioning parties’ file pre-filed testimony. We didn’t know that meant us.” In another case, the public was required to file a Notice of Appearance. Several members of the public did not understand the phrase and thought that meant they had to appear in person somewhere.
11. **Understanding how the Board operates** is a challenge even for attorneys. One example is understanding what the process is for responding to **Motions**. Neither the Vermont Rules of Civil Procedure nor the Vermont PSB rules establish a definitive time for filing a response to Motions. There are strict times established for responses to pleadings, and all Motions related to a hearing must be filed a certain number of days prior to that hearing. When there is a scheduling order, the Board sets deadlines. When there is not a scheduling order, traditionally parties respond to Motions within ten days. Otherwise the rules referencing Motions state that the parties shall have a “reasonable time” to respond or present evidence. Sometimes the Board issues an order after receiving a Motion, setting a deadline for response. Sometimes the Board does not issue an order after receiving a Motion, and it is up to the parties to figure out whether they should wait to see if the Board is going to issue an order setting a deadline for responding to a motion, or if they should file a response. The Board has been inconsistent in how it addresses Motions filed when circumstances are not covered by the rules. VCE has found this to be a very confusing aspect of how a party interacts with the Board and other parties.
12. **Deadlines and getting extensions** from deadlines are an ongoing challenges. Often the extension is requested in a timely manner, but the Board does not make a decision until the day before or the day of the deadline. VCE has observed a lot of stress for the public as they struggle to meet deadlines and seek extensions from the Board that are not responded to until the last minute.
13. **Site visits** are for the benefit of the Board and are not part of the record, unlike other regulatory site visits where observations are recorded and made part of the record. VCE has found it challenging to identify when and where site visits are going to occur.
14. **Public hearings** are held for the benefit of the Board. This is a strange concept for Vermonters to absorb. The Board has encountered Select Board members who become angry at public hearings when they are informed that their comments do not become part

of the record of decision. VCE had a disturbing experience with the PSB's treatment of the public during the Docket 8167 Sound Standard Investigation workshop, where the public's presentation was cancelled by the Board a few hours before the public hearing. Instead, the public was required to stand at a microphone and was cut off at three minutes. The hearing was supposed to be a "workshop" to hear from neighbors with issues with noise from energy projects. The Board's choice to cancel the public's presentation and use the typical public hearing format meant that the very people the Board most needed to hear from were diminished in their input, especially in making recommendations for future projects. It also resulted in the recruitment by wind developers of people with an economic interest in wind energy who used up time claiming they heard no noise from wind turbines. We have witnessed legislative hearings about solar siting dominated by employees of the solar industry. DPS public hearings on the energy plan have been dominated by proponents of the carbon tax. VCE will no longer participate in turning out members of the public for a public hearing.

15. **Prefiled testimony** is not a term most Vermonters are familiar with. In one case, the *pro se* parties had done an excellent job of finding half a dozen expert witnesses. The day before the prefiled testimony was due, they sent it to VCE to review. It was entirely in the form of letters. We educated the parties about the rules requiring Q&A with question and answer numbers and line numbers, double spaced, single sided. Somehow they managed to convert it to the proper format and submit it in time.
16. Citizens must respond to **discovery** and serve discovery. Attorneys for developers have abused *pro se* parties by serving excessive numbers of discovery questions. In one case, a couple who lived next to a proposed solar project was served with 290 discovery questions. The Board denied the couple's Motion for Protection from the excessive number of discovery questions. In our experience, many members of the public do not understand the purpose of discovery and do not make good use of the opportunity to serve discovery questions on the applicant. The rules for the format are confusing, as attorneys routinely use one page for each question and answer, however upon inquiry VCE has determined that is not a requirement of the Board and numerous questions and answers per page may be submitted in response.
17. There is no public **parking**. The public is greeted by a sign on the door of the entrance to the PSB hearing room saying if you park in the bank parking lot, your car will be towed.
18. Though the Board says that the hearing room is **handicap accessible**, there is no designated handicapped parking for the PSB. The handicapped driver must risk having their car towed if they park in the bank parking lot.
19. The distance the public must **travel** is a problem and a deterrent to participation. For instance, residents of Bennington must drive six hours for a PSB hearing.
20. Participation in **technical hearings** by *pro se* parties places the public at an automatic disadvantage. A relatively small number of highly skilled and well-paid attorneys represent developers at the PSB. The same attorneys for DPS and the Agency of Natural Resources (ANR) routinely appear before the Board. A Vermont citizen who happens to

live near a proposed energy project enters an intimidating legal process facing experienced attorneys. *Pro se* parties must know how to ask questions that will elicit answers that can be used to support their position in their Brief, when to object, how to respond to objections to their testimony or questions, how to use cross exhibits, when to file post-hearing motions to bring in new information on issues raised at a hearing, and all the rules that apply to being a lawyer in a legal proceeding. VCE has observed few Vermonters who are capable of participating in the PSB's process in a manner consistent with the requirements of *pro se* parties.

21. ***Pro se* participants** have been treated badly in hearings by applicant's counsel and the PSB does not stop it. In one hearing, the attorney for the applicant repeatedly said throughout the proceeding that the neighbors had "no right to be there, they are just here to stop the project." It was not until very late in the day when the hearing officer finally said that the neighbors were granted intervention and they did have a right to be there. In another case, during a break, attorneys for DPS and ANR told the *pro se* party they were amazed by how well the opposing counsel was treating him, as they had seen that attorney be brutal towards *pro se* parties. Although we understand that courts are supposed to be helpful to *pro se* parties, we have seen no special accommodations for members of the public who choose to participate at the PSB. In one enforcement/investigation, a *pro se* intervenor was served with a subpoena and was advised by the PSB Clerk to hire an attorney in response. When that intervenor's party status was appealed to the Vermont Supreme Court, DPS' counsel advised the intervenor three times to hire an attorney (estimated to cost \$10,000). VCE has reported instances where we have observed developer's legal counsel lying to the Board, where developer's legal counsel has inappropriately attacked VCE's director in filings in cases where VCE is not a party, yet we have never seen the Board respond or address or sanction inappropriate behavior by developer's attorneys.
22. **Contested Case.** The PSB process is a litigious process. There is no opportunity for people to sit down and talk. The need to plant trees to screen solar projects starts out with a fight. Given that Vermonters want renewable energy, this is especially unnecessary. For example, there have been two 150 kW solar projects with technical hearings on aesthetics.<sup>8</sup> We estimate the cost of each of those cases to be over \$50,000 – just to decide where to plant trees to screen solar panels. The PSB process is an inefficient and expensive way to site solar panels. We do not understand why the development community and legislators want the siting process to stay at the PSB.
23. *Pro se* parties find it is a challenge to hire qualified **experts** to testify before the PSB. Experts can cost thousands of dollars. Experts have been reluctant to be hired by PSB intervenors because of the high likelihood of failure, and therefore experts have shown an unwillingness to take money for what is perceived to be a futile exercise. Developer's attorneys can be aggressive in attacking intervenors' experts and narrowing the areas on which they can speak.

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<sup>8</sup><https://youtu.be/5e9DIj0l6zc> and [https://youtu.be/7jtw6aEW\\_Cc](https://youtu.be/7jtw6aEW_Cc)

24. **Deference to the ANR** has led to a lack of due process on environmental issues. It is rare that environmental issues come before the Board for cross-examination, as it is nearly impossible for the public to get party status on environmental issues. When no permit is required, ANR enters into a Memorandum of Understanding (MOU) and resolves its concerns outside of any public process. When a permit is required, there is no public process at ANR aside from filing written comments which in our experience are almost entirely ignored. Those permits then come to the PSB as a done deal.
25. **DPS enters into MOUs** that subvert the PSB's review when no other parties intervene. For example, one technical hearing for a 2 MW solar project<sup>9</sup> took less than an hour. About 17 minutes into the hearing, the Hearing Officer notes that the MOU has no substance and the applicant/attorney says they had a deadline to meet so they put in boilerplate language and "substantively there's not a lot in there." From the outside looking in, the PSB, DPS and ANR's process becomes more like "Let's Make a Deal" than a legitimate review of the issues by independent regulators.
26. **Enforcement/Investigation** dockets do not lead to resolutions for the public. At best, the Board's enforcement dockets may result in a fine paid to the general fund. Hundreds of complaints about wind turbine noise have resulted in several ongoing investigations at the PSB where lawyers for the developer and the DPS exchange paperwork that take years and will never result in neighbors being able to sleep. An example of one enforcement docket<sup>10</sup> reveals how skilled, well-paid attorneys can drag out the case for more than a year. In another case, a noise complaint filed in Sept. 2015 has seen extensive exchanges of paperwork with no end in sight.
27. The **cost** of participating in an enforcement proceeding where the public is the victim is high, as it requires paper filings with copies to all parties. For just one enforcement hearing<sup>11</sup>, it cost the couple \$300 for the paper filing, plus taking time and gas money to drive to Montpelier. In another enforcement case, the people whose property was damaged would have had to file a motion to intervene and notice of appearance and take time off work to attend the hearing. In their absence, the developer made inappropriate remarks about them which the neighbors were unable to refute.<sup>12</sup>
28. The PSB is, by statute, unable to address **property issues**. Impacts on property values are often the first issue raised by the public and towns. In addition, VCE has seen cases with property issues such as deed restrictions prohibiting commercial development, private roads, water rights, and landowners who feel duped into signing leases. In all cases, the public is advised they must protect their rights through litigation in Superior Court. However, when the PSB does address property rights, it shifts the burden of proof to property owners who must prove the developer's project will trespass on their property, will devalue private property, will affect the property with noise, and neighbors must prove they will be burdened with visual blight and denied the peaceful enjoyment of

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<sup>9</sup><https://youtu.be/xHcmyt67qAk>

<sup>10</sup><https://swantonwindvt.org/met-tower-psb-process/>

<sup>11</sup><https://vimeo.com/72081767>

<sup>12</sup><https://youtu.be/4pe0n60Hozc>



their properties as protected under the U.S. and Vt. Constitutions. The PSB's overall approach to the rights of neighbors' private property rights has been to ignore those rights rather than address and protect them.

29. Compensation for landowners in **eminent domain/condemnation** proceedings and other cases where private property is taken for the "public good" have an unpleasant track record at the PSB. In wind cases, the PSB has allowed noise pollution to trespass onto private property, without compensation, which is a violation of Article Two of the Vermont Constitution. Private property has been taken by Green Mountain Power for Lowell Wind and by David Blittersdorf for Georgia Mountain Wind for blasting zones, without compensation. In gas pipeline cases, Vermont landowners have been subjected to land acquisition agents who took advantage of some members of the public. In a tower case where the PSB found that landowners should be compensated \$25,000, a Superior Court jury found the appropriate amount was \$1 million.
30. The PSB has developed its own interpretation of **Act 250's aesthetics criterion**. Despite correctly utilizing Act 250 precedent in a 2001 case called "Halnon" which included the interests of neighbors and considered zoning for the clear written community standard, and despite decades of legal precedent by the Environmental Board, Environmental Court and Vermont Supreme Court regarding the interpretation of the Quechee Analysis as it relates to neighbors<sup>13</sup> and zoning language the Board has chosen to rely on the opinion of two GMP experts in an uncontested 1996 wind case to discard the interests of neighbors. The Board appears to be correcting this problem with the new net metering rule, but that does not extend to the rest of the Board's dockets.

It is troubling to note that the Board has never denied a solar project using a finding that it would be "shocking and offensive to the average person" or, in the Board's rewrite of that component of the Quechee Analysis, would "offend the sensibilities of the average person." VCE can point to specific solar projects that meet that standard. One example is the 2 MW Sudbury Solar array which was constructed too close to the road in an extremely beautiful setting with open fields and long views of the Green Mountains along scenic Route 30, with no way to screen the project from views from neighboring homes. VCE has received numerous unsolicited complaints about the aesthetic impact of the project. Several homes fairly far away that look out to the west with a view of the Adirondacks now also see what appears at times to be a lake, and one of the homeowners has complained about blinding glare from the solar project in their upstairs bedroom. Another example is the 1.89 MW Barton Solar project built on a Class 2 wetland very close to the road which has generated numerous complaints. The Board's failure to apply this aesthetics standard has, in our opinion, led to some of the worst solar projects that are generating increasing opposition to solar development.

The Board continues to diverge from Act 250 precedent by failing to consider zoning for language that creates a clear written community standard.

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<sup>13</sup>[http://vce.org/NM-1646\\_MammolitiObjtoPFD\\_011615.pdf](http://vce.org/NM-1646_MammolitiObjtoPFD_011615.pdf)



The Board has ignored or failed to apply well-established legal precedent regarding the use of the LMax (a maximum level) for noise as an aesthetic issue,<sup>14</sup> and has substituted its own Leq (averaged over an hour) standard that is impossible to enforce.

**Pro se participation in the PSB process** is an all-consuming, life-absorbing experience that robs Vermonters of time and money that they cannot afford. Because the outcome is largely pre-determined based on the PSB's record of approving almost all projects that come before the Board, the public is left feeling helpless, hopeless and disempowered. Over the years that VCE has been following PSB proceedings, we have observed one citizen, Robbin Clark of Lowell, who has interacted with the Board on three occasions, in 2011, 2013 and 2014. She expresses the frustrations many Vermonters feel about the PSB process.<sup>15</sup>

In response to Robbin Clark, Chair Volz and Board Member Burke advised the public to take their concerns to **the legislature**. Efforts to get the legislature to address siting issues during the past seven years have been met with a steadfast defense of the PSB as the only venue which can address the siting of energy projects. The Shumlin Administration has insisted that there must be a state level process for energy projects, and has assured that the conversation about alternatives does not happen. The legislature has supported the industry's demand that energy developers need one venue to hear their issues. This has not stopped wind developers from twice suing landowners in Superior Court to take private property without compensation for blasting zones rather than using the temporary condemnation powers available to them at the PSB.

The public has been put through two extensive siting commission/task force initiatives, neither of which included a member of the public. The **Electric Generation Siting Policy Commission** was made up of people with no direct experience with the PSB. VCE made every effort to be a constructive contributor to the group's work, but our input was not considered. The commission never talked about the PSB process or what it takes to participate, never considered Act 250 as an alternative, and never looked in detail into the different technologies to determine what might be appropriate.

As a result, we chose to observe the work of the **Solar Siting Task Force** but did not ask to testify or present, nor were we invited. We would have gladly offered testimony had our input been requested. VCE has developed what may be the most extensive set of photographs of solar projects in Vermont which we put into a presentation called "Good and Bad Solar". It is presented without judgment, and gives the audience the opportunity to share their opinions and experiences. Students at Vermont Law School were the first audience for the presentation, and they found it to be very useful in understanding what makes a good solar site and a bad solar site. We regret that the Solar Siting Task Force never took the opportunity to share the experience of actually discussing specific sites in Vermont and the public's reaction to them. VCE has researched how other states site solar projects, a topic the Solar Siting Task Force never discussed until the final meeting when one member noted that they never looked at how other states site solar. VCE did submit comments near the end of Solar Siting Task Force's work, however as with the Electric Generation Siting Policy Commission, the PSB Sound Standard

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<sup>14</sup><http://psb.vermont.gov/sites/psb/files/rules/proposed/temporarysound/July6Comments/Stephanie%20Kaplans%20reply%20comments%20to%20PSB%20on%20noise%20rule.pdf>

<sup>15</sup><https://vimeo.com/85038340>

Investigation, and the PSB's Temporary Rulemaking for Wind Turbine Sound Standards, and legislative testimony in recent years, our input appears to have been a waste of time.

Both the **Solar Siting Task Force and the Electric Generation Policy Siting Commission** came up with recommendations to do siting through **planning**. As a member of regional and town planning commissions, I do not support this initiative, as it requires planners to make decisions about private property along the lines of zoning and is antithetical to the traditional role of visionary planning. The assumption that Town and Regional Plans are somehow the problem has sidelined honest discussions about the current process and how it is and is not working, and has assured that alternatives are never discussed.

**Solar development** in Vermont has been especially painful to witness. VCE has recorded public hearings where Vermonters say the same thing: "we want solar, we want to be a part of it, we want it to serve us and our communities, but not this site, not this way." We compiled comments from several public hearings into one video<sup>16</sup> that captures the typical sentiment of Vermonters faced with poorly sited solar projects that provide no community benefits, sell the Renewable Energy Credits out of state, do not count towards the state's energy goals, and cannot legally be called solar power for Vermont.

**Wind development** in Vermont impacts hundreds of people around a project site. The Board's approval of all wind projects except one where the applicant refused to do the ANR-required bird and bat studies, along with the Board's track record of discarding almost all expert witness testimony other than that submitted by the applicant and disregarding neighbors' interests and failing to respond in any meaningful way to noise complaints for existing projects sets a frightening stage for the next participants at the PSB for a wind project.

**Gas pipelines** are long linear projects that disrupt landowners' lives and, as with wind projects, create sacrificial zones where people feel victimized. More than six homeowners along the VGS pipeline have been forced to sell their homes to the gas company. VCE attempted to teach Vermont Gas Systems how to use a community-based stakeholder process for its gas pipeline extension, but VGS chose to ignore our advice.

**Transmission lines** are also long linear projects with major impacts to landowners. VELCO learned from the NRP and created a new engagement process for the Southern Loop, and a Transmission Planning group that meets quarterly. There are better models for developing energy projects than are currently being utilized by renewable and fossil fuel developers.

[See *Exhibit 2* for a Resolution that summarizes the problems with the PSB process].

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<sup>16</sup><https://youtu.be/80934E18Giw>

## I. THE SOLUTION

*“Pursuant to Act 174, the Vermont Legislature has directed the formation of a working group to review the current processes for citizen participation in Vermont Public Service Board proceedings. The mission of the Act 174 Working Group is to make recommendations to promote increased ease of citizen participation in those proceedings.”*

### **Recommendations to promote ease of citizen participation in PSB proceedings**

1. Improve public notice and information; mail the new and improved Citizens Guide in hard copy to all parties on Certificate of Service with first notice to potential parties
2. Write Citizens Guide in layman’s language, and include text of all Rules that apply at the PSB
3. Explain the difference between the PSB and DPS in the beginning of the new Citizens Guide
4. Create a searchable database of decisions similar to the Environmental Board’s “notes” to enable the public to understand the Board’s prior decision-making
5. Provide clear guidance on secretarial requirements, including line spacing, single or double sided, page numbers, service list requirements, number of copies, deadlines, for all the variety of processes, all in one place in the Citizens Guide.
6. Explain all the requirements of *pro se* parties in layman’s terms
7. Create clear guidance on Motion practice
8. Create a PSB staff person dedicated to answering questions from all parties and facilitating informal discussions about scheduling and other matters
9. Assure public access to all documents filed in all cases as soon as possible (ePSB is eagerly awaited), while maintaining the ability for Vermonters without computers to access case files
10. Reduce paper filings and track progress of paper reduction
11. Require state agency staff with expertise to attend site visits, not just attorneys
12. Create a method by which oral comments at a hearing and written public comment submitted to the PSB can be considered as part of the decision
13. Hold all hearings in the county in which the project is located
14. Enable remote access to hearings and video and phone testimony
15. Provide information for the public about parking, including handicapped parking, for hearings held in the Susan Hudson hearing room in Montpelier
16. Expand and/or utilize existing authority to hire independent counsel and experts, billed to the applicant
17. Create a Counsel for the Public with the ability to hire experts
18. Work with the Vermont Bar Association to fulfill the *pro bono* donations of time for attorneys practicing in Vermont. Provide citizens with a list of attorneys on the Bar Association’s *pro bono* list who will assist in filing motions, responding to discovery, assisting in hearing preparation, and briefs
19. Create a process for Intervenor Funding so citizen participants can hire lawyers and experts<sup>17, 18, 19</sup>

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<sup>17</sup>[https://www3.dps.ny.gov/W/PSCWeb.nsf/96f0fec0b45a3c6485257688006a701a/6fd11ce8db088a2785257e200054a99b/\\$FILE/02420356.pdf/Guide%20to%20Intervenor%20Funding%202-14-13.pdf](https://www3.dps.ny.gov/W/PSCWeb.nsf/96f0fec0b45a3c6485257688006a701a/6fd11ce8db088a2785257e200054a99b/$FILE/02420356.pdf/Guide%20to%20Intervenor%20Funding%202-14-13.pdf)

20. Seek legislative changes to enable the PSB to address property issues
21. Eliminate the use of MOUs from ANR and DPS or create a public process around the development of MOUs
22. Apply PSB's standards outside of political influence
23. Develop a review system to evaluate whether the Board is operating independently or is operating in a manner that gives the appearance of "regulatory capture"
24. Address the public perception that the Board is approving virtually every project that is applied for, and deny projects that do not meet the substantive criteria
25. Require the Board's decisions on aesthetics (visual and noise) to be consistent with Environmental Board, Environmental Court and Vermont Supreme Court legal precedent
26. Eliminate the use of post-CPG compliance filings and require all permits and conditions to be final prior to issuance of CPG.
27. Create a new division of enforcement and eliminate the use of "investigation" dockets for enforcement purposes.
28. Utilize NOAVs and create the opportunity for "citizens suits".
29. Actively advocate to the legislature to change the model from one that is developer-driven to a model that is community-driven and provides real benefits to Vermonters.
30. Create an option for facilitated community-based stakeholder processes prior to litigated contested cases at the PSB.<sup>20</sup>

## II. THE SOLUTION

1. **Move land use siting to Act 250**, while leaving typical PUC issues such as rates, need, interconnection, etc. with the PSB. Act 250 has many benefits, in addition to being a good land use law, especially for solar siting. Act 250
  - a. is staffed by regional district coordinators trained to be responsive to all parties, a real person to answer questions
  - b. has regional offices accessible to the public, with parking
  - c. has a state level and regional structure that enables state level accountability while respecting the specific characteristics of each region, which are unique
  - d. has excellent public notice practices
  - e. is effective in identifying stakeholders and administering party status
  - f. has the ability to convene informal stakeholder meetings as allowed for in 10 VSA § 6085 (e) where parties can come together to develop solar the right way, rather than starting with a contested case
  - g. is possible for citizens to participate in without attorneys
  - h. has a document and database system that is easy to use and searchable and where all documents are available
  - i. has enforcement
  - j. acts as a clearinghouse for permits and it is a normal course of business to do so. One of the Act 174 Working Group members said that it would be a challenge to

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<sup>18</sup> <http://www.watertowndailytimes.com/news03/additional-intervenor-funding-awarded-to-hounsfield-sackets-harbor-20160829>

<sup>19</sup> <http://www.exec.gov.nl.ca/exec/interfunding/guidelines.intervenorfunding.PDF>

<sup>20</sup> <http://www.cbuilding.org/courses/advanced-land-use-dispute-resolution>

have several different entities. But this is already happening with the PSB, where ANR brings in its permits and MOUs, DPS brings in its MOUs, other entities bring in their approvals such as the utilities, and also other parts of state government bring in theirs, such as Vermont Division of Historic Preservation. Soon the Agency of Agriculture will hopefully begin to participate. This is exactly what Act 250 is already designed to handle. And unlike the PSB, which is issuing CPGs with a lot of unresolved issues, leading to post-CPG compliance filings (that drive attorneys crazy from what they have told me), you do not get your permit from Act 250 until everything else is in order.

- k. has capacity. The PSB is doing too much work of the sort it was never designed to handle. The sheer volume of work being submitted to the PSB is unsustainable, and is not being done well. Based on the cases I am following there appears to be a backlog and the Board has a lot of trouble getting decisions out. I believe that the core work of a traditional Public Utilities Commission is suffering because of the distraction of the land use siting work. I also see this happening with the Department of Public Service, which is incapable of keeping up with the volume of applications being submitted and frequently seeks extensions of deadline, and on which they are supplying aesthetics and other expertise never envisioned or planned for when Section 248 was created.

#### **What would moving land use siting to Act 250 do?**

- Wetlands, floodways, soil erosion, stormwater permits, impacts to groundwater and surface water, air pollution would be reviewed under Criteria 1 through 4
- Would address traffic and delivery issues, which have been issues with Lowell Wind and Barton Solar with Criterion 5
- Provides the opportunity for discussion about impacts to the municipal grand list fire suppression issues which are addressed in Criterion 7
- The aesthetics analysis used in Criterion 8 would be applied correctly, including using zoning by-laws for the clear written community standard portion of the Quechee Analysis, and considering the interests of neighboring landowners as an “average person”. Mitigation in the form of adequate screening and setbacks from the travelled roadways would be addressed
- Would be more open to local discussions about the wildlife under Criterion 8(A) and likely result in better protections.
- Ag soil impacts would be considered under Criterion 9(B) and would require offsite mitigation
- Town plans would carry full weight under Criterion 10

The NRB’s two-pager that they hand out at hearings is here and details the criteria:

<http://www.nrb.state.vt.us/lup/publications/nrb1.pdf>

2. It is not possible to talk about the PSB process, public participation, and energy siting generically. **Each technology** has different challenges. Act 250 is the appropriate place for solar siting. Long linear projects like transmission lines and pipelines have different challenges. Wind projects impacting large areas are similarly challenging. In those cases, we recommend adoption of the community-based stakeholder process. In our experience, it is much easier to get the citizens to the table than it is the businesses, but once everyone comes together to address the issues the whole dynamic can change.


3. VCE's **proposal for regulatory reform** can go beyond the PSB process and the problems we see with it. We have listened over the years to the complaints from the business community regarding Act 250 and ANR, we have listened to ANR's complaints, and we are recommending an overhaul of the entire regulatory system to create a land use panel that hears all appeals of all land use permits, so there is one place where land use decisions are being made on a consistent basis. This proposal is based on our years of experience with Vermont's regulatory system. Our proposal is meant to be a starting place, not a fully baked plan, and could be taken a step at a time. [See *Exhibit 3*].

The first step, one that we believe will work and is realistic, is to create a place at the Act 250 District Commissions where people can sit down and talk utilizing a **community-based stakeholder process**. We are not talking about using the existing District Commission process as a starting place, because that is also a contested case. Instead, we suggest using District Coordinators as facilitators, so that when an application comes in, a meeting is called where all parties sit around the table and discuss the issues. If they choose to work together, the land use issues can be resolved. If they choose to fight, then move to the **contested case model with intervenor funding** provided to parties for lawyers and experts.

4. **Planning.** As a planner, I do not see the current initiative passed in Act 174 as a solution. It will require plans to make specific decisions about where and where not to site renewable energy, and what that amounts to is spot zoning. It will pretty quickly degenerate into fights about property rights. The requirement for towns to not exclude any technology is a non-starter for many areas that have become educated about the harm from wind turbine noise. The mapping tools being developed are an important addition for planners to use. Town and regional plans can play an important role in energy siting, but the planning initiative by itself is not a solution. If a town or region will not agree to knowingly causing harm to its citizens by identifying sites for big wind turbines, the plans will not receive certification and will not be accorded Substantial Deference by the Board.
5. The public's response to the **helter skelter development** of renewable energy, coupled with the approval of all but three projects in the last decade (the East Haven Wind project the Bennington Chelsea Solar project and the North Springfield Biomass project) is doing great harm to Vermont. The attitude that we can't give towns veto power or we can't let anyone other than the PSB and the state decide how and where to develop renewable energy is now working against the state's goals. It is a parental, dictatorial, dismissive attitude that Vermonters find insulting.

Thank you for this opportunity to present this information to you based on 17 years' experience working with Vermonters on contentious issues involving the interface of industrial and residential areas. I am available to answer questions.

Sincerely,



Annette Smith, Executive Director



## VIDEOS OF ENERGY AND PSB MEETINGS AND HEARINGS

### Electric Generation Siting Policy Commission Information Meeting Videos

Oct. 31, 2012 through Jan. 11, 2013

- #1 <https://vimeo.com/52605432>
- #2 <https://vimeo.com/53672205>
- #3 <https://vimeo.com/54658854>
- #4 <https://vimeo.com/55135478>
- #5 <https://vimeo.com/56073156>
- #6 <https://vimeo.com/57341440> Part 1  
<https://vimeo.com/57294940> Part 2  
<https://vimeo.com/57299560> Part 3

Public Hearing #1 <https://vimeo.com/58268759>

Public Hearing, Lowell <https://vimeo.com/59684535>

Public Hearing #4 <https://vimeo.com/63448105>

Electric Generation Siting Policy Commission's Publications Page with Transcripts of Deliberative Sessions through April 25, 2013 <http://sitingcommission.vermont.gov/publications>

Joint Legislative Hearing on Siting Commission, Public Comment and Committee Discussion, Sept. 25, 2013 <https://vimeo.com/75956920>

### Solar Siting Task Force Meeting Videos

July 28, 2015 through Jan. 21, 2016

- #1 <https://youtu.be/FF7Z9-TJRw8>
- #2 [https://youtu.be/9\\_r5uI0Wxks](https://youtu.be/9_r5uI0Wxks)
- #3 <https://youtu.be/K9RcYzVUxRg>
- #4 <https://youtu.be/qXKBhpIsgX8>
- #5 <https://youtu.be/7SYAXN3IR2o>
- #6 <https://youtu.be/xf4sLmVPUcE>
- #7 [https://youtu.be/-\\_GfP5IHISk](https://youtu.be/-_GfP5IHISk)
- #8 <https://youtu.be/qqcnYx9YHGU>
- #9 <https://youtu.be/0wqeW2teeqY>
- #10 <https://youtu.be/25zqetw28p0>

Solar Siting Task Force Website

<http://solartaskforce.vermont.gov/>



**PSB Pre-Hearing Conferences**

Swanton Met Tower Investigation, Aug. 25, 2015 [https://youtu.be/q1t\\_9GIjri8](https://youtu.be/q1t_9GIjri8)  
 Blittersdorf Irasburg Met Tower Investigation, Oct. 7, 2015 <https://youtu.be/jboQWZP1oS8>  
 Georgia Mountain Wind Noise Complaint, November 30, 2015 <https://youtu.be/iPZs3eosYjY>  
 Green Lantern Solar Cambridge two 500 kW, December 17, 2016  
<https://youtu.be/qOpPLMVlu34>  
 Vermont Wind Investigation, January 17, 2016 <https://youtu.be/zvNOoOL71zs>  
 AllEarth Ferrisburgh 150 kW, March 24, 2016, [https://youtu.be/yos\\_2vLxOf4](https://youtu.be/yos_2vLxOf4)  
 SunCommon Addison 150 kW, April 29, 2016 [https://youtu.be/\\_k\\_iFUT4xAM](https://youtu.be/_k_iFUT4xAM)  
 Blittersdorf Irasburg Small Turbine Investigation, July 29, 2016 <https://youtu.be/bn9oGFzLJgI>

**PSB Site Visits**

VELCO Tower, Wells, Sept. 29, 2011 <https://vimeo.com/29819547>  
 North Springfield Biomass, 25-35 MW, Feb. 28, 2012 <https://vimeo.com/37714092>  
 VELCO Tower, Wells, Nov. 27, 2012 <https://vimeo.com/54400696>  
 groSolar Cold River Road Rutland Town 2.3 MW, April 18, 2014 <https://youtu.be/sl4ei-cwsVc>  
 Allco/Ecos Energy Sudbury Solar 2 MW, May 20, 2014 <https://youtu.be/BAKhe2y0S6w>  
 groSolar Cold River Road Rutland Town 2.3 MW, Jan. 6, 2015, <https://youtu.be/xHtKXuce190>  
 GMP NPS 100 kW Wind Turbine Vergennes, Feb. 24, 2015 <https://youtu.be/9Sjj8ygkdfM>  
 Vermont Solar Farmers Bondville 2.2 MW, March 6, 2015 <https://youtu.be/QaTr-YI8Exw>  
 Next Generation Solar, New Haven 2.2 MW, July 15, 2015 <https://youtu.be/xKLGtj7dgwc>  
 Allco/Ecos Energy Chelsea and Apple Hill Solar, Bennington two 2 MW, Nov. 13, 2015  
<https://youtu.be/luN5PjFq2ow>

**PSB Public Hearings**

Georgia Mountain Wind 10 MW, Georgia, May 2009 <https://youtu.be/wwrkcOIiYlk> (one person speaking, to show the circumstances when a large group attends in a gymnasium with bad acoustics)  
 Georgia Mountain Wind 10 MW, Milton, Nov. 10, 2009 <https://youtu.be/SX1L-Dxh3j8> (Part 1, other parts can be found on the same youtube channel)  
 North Springfield Biomass, 25-35 MW, Feb. 28, 2012 <https://vimeo.com/37659799>  
 Derby Line Wind, March 26, 2012 <https://vimeo.com/39410491>  
 Eolian Wind Met Towers Newark, July 17, 2012 <https://vimeo.com/46055717>  
 groSolar Cold River Road Rutland Town 2.3 MW, March 26, 2014  
<https://youtu.be/zY0fkoASvh8>  
 Charter Hill Solar Rutland City 1 MW, April 3, 2014 <https://youtu.be/nV-7Pb0Enr0>  
 NextSun North Main Street Rutland 1.89 MW, April 17, 2014 [https://youtu.be/NIUI\\_9bNuVQ](https://youtu.be/NIUI_9bNuVQ)  
 NextSun Park Street Rutland 1.89 MW, April 17, 2014 <https://youtu.be/gkQ8Lxf4Pa0>  
 Allco/Ecos Energy Sudbury Solar 2 MW, May 20, 2014 <https://youtu.be/nJQx2eHIhos>  
 Allco/Ecos Energy Apple Hill Solar 2 MW, May 7, 2015 <https://youtu.be/gtJEGSRXpuo>  
 Next Generation Solar New Haven 2.2 MW, July 15, 2015 [https://youtu.be/ZzRWuu\\_W9G8](https://youtu.be/ZzRWuu_W9G8)  
 GMP Richmond Solar 4.99 MW, Sept. 24, 2015 [https://youtu.be/IBxKUu\\_CrZ0](https://youtu.be/IBxKUu_CrZ0)  
 Ranger Solar Ludlow 20 MW, March 17, 2016 <https://youtu.be/wjPGzgKHjcY>

### **PSB Status Conferences, Special Hearings**

GMP Lowell Wind Habitat Fragmentation 63 MW, May 1, 2016 <https://vimeo.com/41702819>  
Barton Solar Show Cause, 2 MW, Jan. 29, 2015 <https://youtu.be/4pe0n60Hozc>  
Georgia Mountain Wind Noise Complaint Investigation, Jan. 20, 2016  
[https://youtu.be/pq\\_WQh\\_154](https://youtu.be/pq_WQh_154)  
Deerfield Wind Bear Mitigation, 30 MW, July 6, 2016 <https://youtu.be/IHED6byDgN8>

### **PSB Technical Hearings**

Allco/Ecos Energy Sudbury Solar 2 MW, July 14, 2015 <https://youtu.be/xHcmyt67qAk>  
Allco/Ecos Energy Chelsea Solar Bennington 2 MW, July 16, 2015  
<https://youtu.be/zqD849AykQ>  
Vermont Solar Farmers Bondville 2.2 MW, July 27, 2015 [https://youtu.be/vs61\\_XKOy3o](https://youtu.be/vs61_XKOy3o)  
Allco/Ecos Energy Apple Hill Solar Bennington 2 MW, Aug. 25, 2015  
<https://youtu.be/dDcANd0bQ2Y>  
GMP Hartford Solar 4.99 MW, December 15, 2015 <https://youtu.be/w5DBYuuJZS8>  
GMP Richmond Solar 4.99 MW, January 8, 2016 <https://youtu.be/fiARMfp0Pk4>  
New Haven 350 kW, January 12, 2016 [https://youtu.be/0lYA\\_ZDtBSE](https://youtu.be/0lYA_ZDtBSE) (partial)  
SunCommon New Haven 150 kW, January 14, 2016 <https://youtu.be/5e9DIj0l6zc>  
Green Lantern Solar Cambridge two 500 kW, February 8, 2016 <https://youtu.be/1n-sG5kS6GE>  
(Part 1, other parts can be found on the same youtube channel)  
AllEarth/VERA Charlotte 500 kW, April 1, 2016 <https://youtu.be/0jKLX1r1798>  
South Forty Solar Burlington 2.2 MW, May 26, 2016 <https://youtu.be/tJD3zTFH-yw>, Part 1  
<https://youtu.be/wSt66z1IdFA>, Part 2  
SunCommon Addison 150 kW, July 7, 2016 [https://youtu.be/7jtw6aEW\\_Cc](https://youtu.be/7jtw6aEW_Cc)

### **PSB Oral Arguments**

Seneca Mount Wind Met Towers, May 29, 2013 <https://vimeo.com/67295822>  
groSolar Cold River Road Rutland Town 2.3 MW, Jan. 7, 2015 [https://youtu.be/9VF\\_fCTw6-4](https://youtu.be/9VF_fCTw6-4)  
SunCommon New Haven 150 kW, June 10, 2016 <https://youtu.be/wmikPKuZNhQ>  
NextGen Solar New Haven 2.2 MW, August 17, 2016 <https://youtu.be/ZecVWciO-Bs>

# PROBLEMS WITH THE PSB PROCESS

## RESOLUTION IN SUPPORT OF COMMUNITY INVOLVEMENT IN ENERGY SITING

### Whereas

- The Vermont Public Service Board was created to address issues associated with centralized baseload power plants owned and operated by utilities
- The role of the PSB has changed as technologies, policies and markets are rapidly changing to decentralized power owned and operated by both utilities and merchant generators
- The PSB process is a legal process accessible only to attorneys or people who participate as *pro se* parties representing themselves in a courtroom situation with all the rules and legal requirements of an attorney
- There is no place in the PSB process for parties to sit down and talk
- The PSB process is litigated as a contested case, with lawyers and experts, pre-filed testimony, discovery, technical hearings with cross-examination, and briefs
- Participants in the PSB process must become experts on rules and the laws that govern the proceedings, in addition to the specific issues raised by the proposal
- Participants in the PSB process must spend money on printing and postage, even in enforcement cases where the participant is the complainant
- Costs to participate in some limited cases before the PSB have frequently run \$30,000 to \$50,000
- Costs to participate in larger cases before the PSB have frequently run \$200,000 to \$700,000
- In every instance where opposing parties have participated with lawyers and experts on renewable energy projects, they have come away saying “it is as though we weren’t even there.” This is true for towns as well as individuals.
- Very few attorneys are willing to take cases from people who want to participate in the PSB process
- Attorneys who will take the cases cost \$175 - \$250 an hour
- The cost of participation in the PSB process is out of range of Vermont’s citizens and towns
- Those who do participate in the PSB process cannot recommend to other people that they hire lawyers and experts because no results have been seen
- The PSB has denied only one solar project on the substantive criteria.
- The PSB has failed to respond in a meaningful way to noise complaints from wind projects for four years (Georgia Mountain, Lowell) and five years (Sheffield)
- The PSB is losing credibility with Vermonters who are witnessing what has happened in recent history
- There is no public process as part of the PSB. Site visits, public hearings and public comment are entirely for the benefit of the Board or Hearing Officer to understand the issues better from the local perspective; nothing said or written in public comment is considered as part of the record on which the decision is made

**Resolved**, that the Vermont Public Service Board’s functions should continue to be in the areas of typical utility regulation, while the land use siting portions of the Board’s current functions move to Act 250, utilizing the District Commission infrastructure and statutory provision Title 10, §6085(e) that grants the authority to “promote expeditious, informal, and nonadversarial resolution of issues, require the timely exchange of information concerning the application, and encourage participants to settle differences,” where developers, community members and town governments can work together to develop energy that respects Vermonters and protects the environment & the state’s natural beauty.

# A NEW PROCESS FOR ENERGY SITING

VCE is proposing a new process for siting energy projects, one that encourages people to work together rather than fight. The current “contested case” has no place for cooperation and collaboration. VCE proposes to change that. There is no reason why community members, planners, town government, developers, utilities and regulators cannot work together to site the energy that Vermonters consistently say we want. Vermonters want to be a part of the process and we want to see clear benefits.

## Plan A = Collaboration

Using the Act 250 infrastructure, stakeholders meet to discuss whether to work together or fight. If collaboration is chosen, the rules of stakeholder processes come into play, with joint fact finding and mutual gains negotiations.

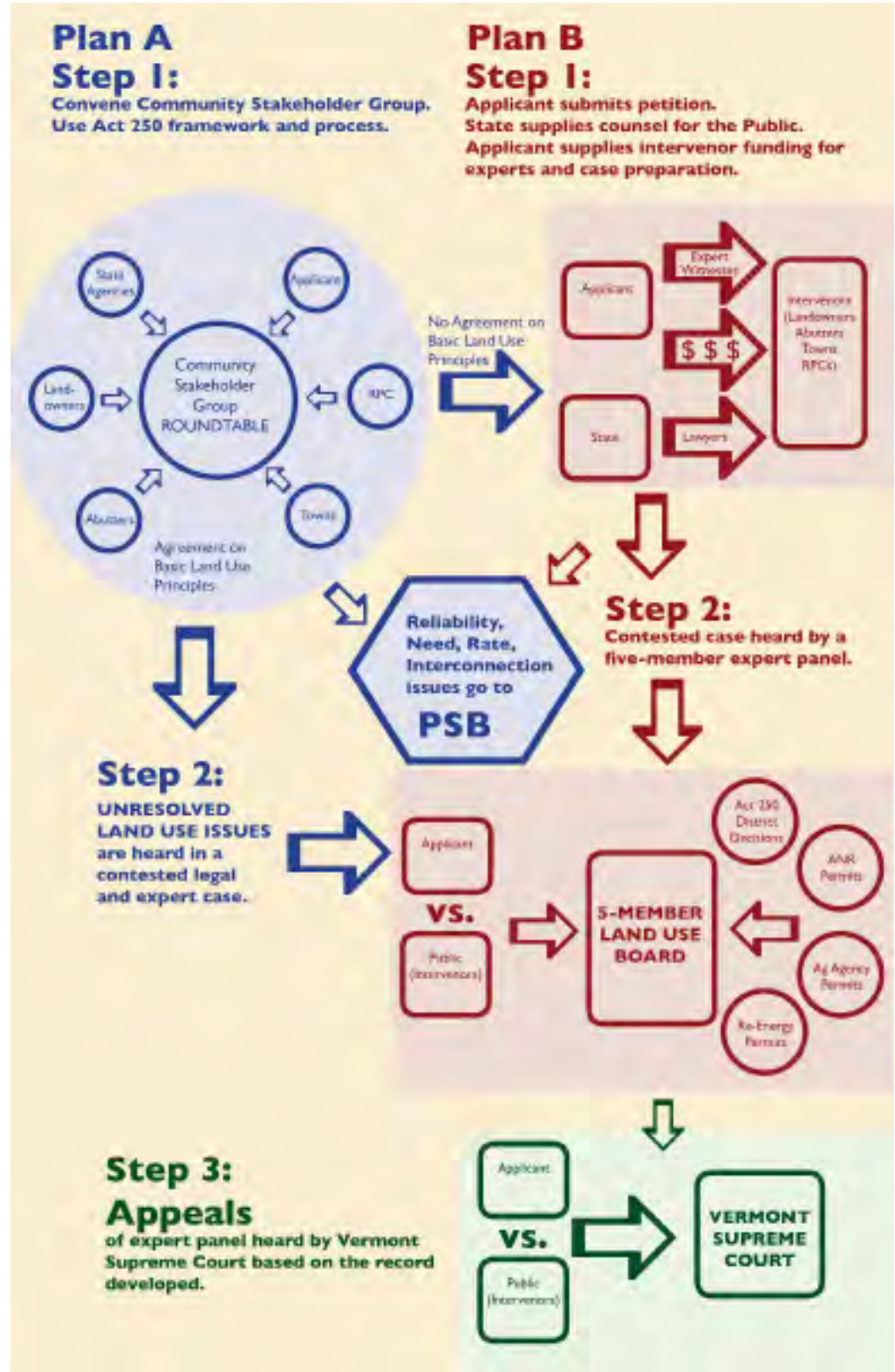
## Plan B = Contested Case

If parties choose to fight, the state and applicants put up Intervenor Funding shared among parties for lawyers and experts.

A new 5 member land use panel is created and hears all contested cases including appeals of ANR, Agriculture, and Act 250 permits. In all cases, the state’s and applicant’s Intervenor Funding assures that the issues receive fair and full consideration.

This “carrot and stick” approach uses Intervenor Funding to encourage developers to come up with good proposals and collaborate on the local and regional level to assure good siting, community benefits, in compliance with the state’s goals.

The Public Service Board retains the duties of utility regulation including rates, interconnection, and need.



There is one de novo contested case, with one on-the-record appeal to the Vermont Supreme Court.