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Chair Sheldon and members of the Committee, thank you so much, once again, for the opportunity to testify on my 27 years in the trenches, probably on the order of two thousand Act 250 cases, to speak today on the role and the performance of the District Commissioners with whom I've had the privilege to serve. As with my prior testimony on April 2nd, I speak at your invitation and on my own behalf – my remarks are my own and are not intended to reflect any official policy of the Natural Resources Board. In summary, the Administration, along with the Agency of Natural Resources and the Vermont Natural Resources Council (VNRC), have joined in a proposal to eliminate the District Commissions as presently constituted – replacing them with a Montpelier based Board of three members along with two “Regional Commissioners” who would “sit on the Board to make factual findings” [hereinafter “the Administration bill”]. In other words, the two Regional Commissioners – those with presumably some local knowledge - would have no vote on the final legal decision on the merits.

After 50 years, I think it's fair to characterize Act 250 as a Vermont institution. Respect for institutions these days has been on the wane. Two short weeks ago, and at this late hour, you, and the working coordinators and commissioners, were

hit with a bombshell. If you smelled something wrong afoot, I urge you to trust your instincts. The administration bill you are considering today would eliminate the role of District Commissioners entirely – replacing them with two “Regional Commissioners” - with all hearings being conducted by the Montpelier panel or a duly assigned “hearing officer.” That grave step would, in my view, render Act 250 a hollow shell of the informal, citizen-friendly peer-reviewed local control model elegantly crafted by Gov. Deane Davis, Arthur Gibb and the Vermont Legislature 50 years ago. Governor Davis and the Vermont legislators demonstrated that they had the wisdom to start the Act 250 review with locally knowledgeable and respected peers in their communities – a three-member panel of proven leaders.

Exhibit 1 – VNRC Position in November, 2018

As you can see, fourteen months ago, VNRC clearly understood Act 250 and had a full understanding of the critical role currently played by District Commissioners. VNRC had ample time to think about how it wanted to publicly characterize the value of Act 250 before posting that language, which was recently scrubbed from their website. What changed?

The District Commissioners and the Public:

In the brief time that I have today, I’d like, for a moment, to bring you into the room – into the first minutes of an Act 250 hearing. I’ve been in that room, with these Commissioners at uncounted numbers of Act 250 public hearings.

Without fail, these hearing begin with what I would describe as an aura – a fleeting pause – where the parties and the Commissioners share a moment of mutual respect. That moment almost feels sacred, at least to me.

In that moment, the citizenry has gained access to a jury of its peers.

Commissioners who, the citizens sense, will listen closely to their concerns – and know that they will be heard.

I know, or think I know, that all of you on this Legislative Committee, as representative leaders in our state, have experienced that sacred moment – when, at formal or informal meetings – you have looked out upon the expectant faces of the citizenry, waiting to hear from you, and for you to hear them, in a civic exercise of good faith. You know the look; you know the feeling – a feeling of profound obligation.

I have observed District Commissioners over the years perform their sometimes-gut-wrenching duties with dignity – struggling mightily to administer a just and fair decision – based upon their good faith application of the law to the facts of any specific case.

There are those supporting the elimination of these District Commissioners and replacing them with a Montpelier-based and Montpelier-directed centralized board – with an ill-defined but non-voting role for two “regional members.” Five minus two is three – a quorum for all future decisions.

Why would the Administration, the Agency of Natural Resources and now, the Vermont Natural Resources Council, at this late hour, drop this radical idea upon the Committee? The principal stated rationale in the bill: “to create consistent review of Act 250 permits.”

Surely, they did the necessary due diligence to provide the Committee with statistical evidence that Commission decisions are detrimentally “inconsistent”?

Didn't they?

Exhibit 2 – Mr. Coster's Email

As you can see here, ANR's senior staff were trying as recently as two weeks ago to solicit examples from ANR employees of inconsistencies in the application of criteria by District Commissions. This “inconsistency”, the predominant attack employed by those who don't support Act 250 is, in my view, an unsupported pretext, a contrivance, a canard. Or better said: false.

Why does the logic of this rationale provide an inadequate foundation for eviscerating Act 250's existing District Commissioners?

Allow me to posit a single imperfect analogy: if 3 different individuals robbed 3 different convenience stores and were prosecuted by 3 different Vermont State's Attorneys before 3 different Vermont judges, the results in all three would arguably be “inconsistent”. Why is that? That is because, like our courts, the Act 250 Commissioners we ask to sit in judgment are asked to apply their local knowledge – and their judgment – and their discretion - to every different setting, under every different set of facts that are placed before them.

Like the courts, the fact that results in similar cases are “different” is not a sign of weakness, but one of strength. It supports the proposition that the Commission is applying its judgment on the facts of each case and is not simply a rubber stamp.

This exercise in judgment, unsullied by outside political influence, is not evidence of a harmful or unfair inconsistency but is, like differing outcomes in our courts, reflective of the fact that every case presents its own unique issues and problems to be solved.

If we were talking about allegations that the local commissions were routinely making incorrect rulings on the law, then that could be addressed with better training. VNRC seemed to understand this in its cited position from November of 2018.

No, that is not the charge. The implied charge is that Commission rulings are “inconsistent” or unpredictable for developers.

Unpredictable? I don’t think so. When year over year, Act 250 statistics demonstrate a 95% approval rate, with conditions deemed necessary to address the concerns of both the citizenry and the Agency of Natural Resources, conditions which reasonably mitigate undue impacts on the neighbors and upon Vermont’s natural resources, I suggest to you that the final outcomes in most cases are predictable on the principal question: will the project achieve a permit? The clear majority of those decisions are never appealed.

I, for one, find it troubling but not surprising that paid power brokers, lobbyists and political insiders would support a plan to further chill citizen participation in the informal proceedings before their local Commissioners. You have in the voluminous written record, a graph showing the sharp drop-off in citizen participation at the appellate level after the creation of the more formal two-judge Environmental Court. That Court, seemingly untroubled by the low level of participation by the NRB, has proven to be a high stakes generator of billable

hours for attorneys – with rulings on motions often outnumbering rulings on the merits.

So, what do I recommend that you do? As I testified on April 2nd, I urge you to preserve the time-tested role of the District Commissioners. Mandate additional training if you conclude that “inconsistency” is the problem. Arm the Commissioners with an express non-adversarial problem-solving tool to use in appropriate circumstances – the facilitator idea advanced by the Vermonters for a Clean Environment (VCE). Move appeals, not hearings in the first instance, to an enhanced VERB as proposed in the Committee Bill, one that, like the administration bill “is designed to be insulated from political interference” and which comes with “increased ethical standards.” Legislation that “[a]ll Act 250 applications would be filed with administrative districts” is a wise choice.

But please, do not destroy or substantially undermine the principle of an informal local process presided over by 3 local citizens honored with the title “Act 250 District Commissioner.”

Again, it has been my great privilege to testify in your Committee. Thank you. As I observe the sunset of my career as an Act 250 coordinator, I feel nothing but gratitude and wish you all the best in the difficult days ahead.