P. O. Box 512
Montpelier, Vermont 05601
February 11, 2020

House Committee on Natural Resources, Fish, and Wildlife
State House
Montpelier, Vermont

Re: Will non-applicant parties retain a meaningful role under our Land Use and Development Law?

Dear Committee:

These comments are based on draft 10.4 as it is being modified to hybrid #2 by the committee: a Central Board supplemented by district members would hold hearings and make decisions on the record for major applications. The Supreme Court would handle appeals of the decisions made by the Central Board.

The issue seems to me to be what role non-applicant parties will have in Act 250 proceedings. I urge this committee to craft a bill that retains a meaningful role for non-applicant parties. Neither the joint proposal nor the hybrid #2 bill being developed will allow non-applicant parties to have a meaningful role in Act 250.

Please provide a bill that maintains a meaningful role for non-applicant parties in hearings and in enforcement.
- Robust enforcement is essential to retaining a meaningful role for non-applicant parties.
- People who claim "We kept the district commissions" are and will be misleading the public.
- Hearing Officers and a Central Board are incompatible with Act 250 as we know it and as it needs to remain.
- Hearings by a court of record will exclude non-applicant parties.
- Don't mess up the transition.
- How many times does one have to say "No!"?

<u>Robust enforcement is essential to retaining a meaningful role for non-applicant parties.</u>
Whatever board the bill ends up with needs to have a robust enforcement requirement. Participation by non-applicant parties often leads to conditions in the permit. Weak enforcement means that an applicant can disregard those conditions with impunity. Weak enforcement of those conditions means that participation by those non-applicant parties was not meaningful.

The discussions on additional personnel for the board provide for no additional personnel for enforcement. Multiple witnesses have testified that the reductions in staff have stretched enforcement to almost non-existence. I have seen that in my own case.

Several other witnesses have testified that enforcement is inadequate: some in person and written testimony from others who can't be here.

<u>People who claim "We kept the district commissions" are and will be misleading the public.</u>
Making decisions on major applications is one of the most important responsibilities of district commissions. Proposals to strip that responsibility from them and give it to the Central Board will reduce the ability of non-applicant parties to participate in the applications that will most affect them, their town, and their district. Stripping that responsibility from district commissions will make them a shadow of their present selves.

According to the hybrid #2 proposal, "DC will oversee jurisdictional opinions and minors", with no explanation as to whether the "C" stands for commissioner or co-ordinator. By their nature, the two categories (j. o.'s and minors) have limited participation by non-applicant parties. And when a non-applicant party requests a hearing, the application probably will be moved to the Central Board and become an on-the-record hearing, with all the complexity of procedure described below.

The claim of "We have kept the district commissions", will be misleading to the public, because the public will think that the district commissions will remain intact and function as they now do. Instead, the district commissions will no longer be able to hear and decide the locally important major applications.

Hearing Officers and a Central Board are incompatible with Act 250 as we know it and as it needs to remain.
One of the strong points of Act 250, perhaps the strongest, is that decisions are made locally, by local people. Instead, the various proposals will have decisions made centrally by non-local people.

In either case (with a hearing officer or with a full board), only the hearing would be held locally. The conclusions of law and decision in both cases would be made distantly at the Central Office. The only difference between the two is how many people (one or five) would be hearing the parties (including any site visit) and developing the findings of fact. If the hearing is held by a hearing officer, only one person, the hearing officer, would develop the findings of fact. If the hearing officer gets any of the facts wrong, then too bad for any of the parties.

Once the hearing is held, those from the Central Office (either the hearing officer or the members from the Central Office) will withdraw back to the Central Office. It is at the non-local Central Office that the rest of the work will be done. Back at the Central Office, the conclusions of law and decision would be made by the Board, far from the project. If the hearing had been held by a hearing officer, the three Central Office members will have no feel for the project, the people involved, the site, or the area involved; only what they read on paper. In order to participate in developing the conclusions of law and findings of fact, the two district board members will have to travel from their homes to the Central Office.

Hearings by a court of record will exclude non-applicant parties.
The hybrid #2 proposal is to make the board a court of record, with appeals from decisions of the board going to the Supreme Court. Meaningful participation by non-applicant parties in Act 250 will be lost by under the hybrid #2 proposal. Meaningful participation by these non-applicant parties is most needed in the projects more likely to have impacts, which are the projects that will be heard by the proposed board. The hybrid #2 will have the board be a court of record. That means that individuals wishing to become parties will need to learn quickly the procedures needed to function effectively as a party without an attorney. As a court of record, the board will be using the Vermont Rules of Civil Procedure, which incorporate the Vermont Rules on Evidence and the Vermont Rules for Electronic Filing, a total of 1,000 pages in the green books; plus whatever rules the Board itself will develop. The Vermont Law School requires a J.D. candidate to take two semesters (totaling 5 credits) on civil procedure. It is impossible for a lay person to figure all that out without an attorney.

Don't mess up the transition.
Many witnesses have testified that there are issues with the functioning of the current Natural Resources Board. It seems from that testimony that the joint proposal fails to identify the NRB as the cause of many of these issues. Instead, the joint proposal erroneously identifies the district commissions as the cause. If members of the current board develop the rules for any new board, then those issues will still remain. I suggest that the existing board members not be allowed to shape whatever new board is proposed. The bill should be amended to prevent the current members or staff from serving on whatever new board is established or taking part in the development of the new board structure.

How many times does one have to say "No!"?
This committee has already said "No!" to AOT's two previous requests for exemptions from Act 250. On February 7, AOT made a third request for exemption, the same exemption that this committee rejected on January 29, 2020. The committee should not have to say "No!" more than once.

Summary
Please retain meaningful participation by non-applicant parties by retaining the district commissions in their current form, by providing sufficient resources for robust enforcement.

Thank you for this opportunity to share my thoughts on this subject with you.

Sincerely,

Thomas Weiss