



House Committee on
Natural Resources, Fish, and Wildlife

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Potential Changes to Act 250

Administration and Appeals

Christopher D. Roy, Esq.
Vermont Bar Association

Where I'm Coming From

- Born and raised in Barre
- Father born and raised in Barre in a family of granite workers
- Mother born and raised in Derby on a dairy farm
- Former member of Burlington Planning Commission (1991-93)
- Former member of Vermont Environmental Board (2003-06)
- Former member of Williston Selectboard (2008-16)
- Member and current chair of Chittenden County RPC (2012-present)
- Practicing lawyer with Downs Rachlin Martin PLLC since 1990
- Have represented clients with respect to zoning permits, land use and environmental permits, and Act 250 permits before local boards and commissions, Environmental Court/Division, and Vermont Supreme Court for nearly three decades

Appeals During Early Years of Act 250

- Relatively small number of towns had implemented local zoning
- Neither federal government nor state had enacted robust environmental permitting
- This created the need for Act 250 to step in and provide oversight
- Zoning and state environmental appeals went to the former Superior Court (general civil court)
- Act 250 appeals went to a 9-member lay Environmental Board
- Eventually, a judge with environmental expertise handled Superior Court permit appeals
- This eventually became formalized as the Environmental Court, which handled zoning and state environmental appeals, with Act 250 appeals remaining with the Environmental Board

Concerns Leading to Permit Reform

- In the early 2000s, the General Assembly began exploring ways to reform the state permit process
- Recurring themes related to ***timeliness, predictability*** and ***consistency***
- Major projects increasingly followed dual appeal tracks – the ***Environmental Court*** for zoning and environmental permits, and the ***Environmental Board*** for Act 250 permits
- Difficulties arose from the sequencing of applications and appeals, and inconsistent outcomes
- Comprehensive reform in 2004 (Act 115) consolidated all environmental and land use appeals before the Environmental Court

Benefits of Consolidated Appeals

- After consolidation of appeals in 2004, there were a number of benefits
- With all appeals shepherded through the Environmental Court, the court (now with two judges) had the ability to **coordinate appeals** for purposes of discovery, merits hearings, and decisions
- A robust body of readily-available **precedent** led to the development of caselaw guiding applicants, citizens, agencies and municipalities
- This precedent created greater **predictability**, aiding stakeholders and the lawyers attempting to advise them on projects and process
- Appellate permit decisions were made by an **independent judiciary** as opposed to appointed boards
- Since the now-Natural Resources Board was no longer a quasi-judicial appeals board, it could more directly manage and advise district commissions and coordinators on Act 250 issues

Recent Problems That Have Arisen

- Over time, land use and environmental regulation in Vermont has become more **comprehensive**, and increasingly **technical** and **legal** in nature
- This has generated broader permit requirements, more potential for a wider variety of permit appeals, and greater docket pressure
- More appeals has led to greater delays as multiple appeals wend their way through the process
- The evolution of permitting has also led to an increased focus on technical agency staff with **scientific** expertise, and judges and lawyers with **legal** expertise
- But aesthetic and other land use and public policy issues are **not** necessarily scientific or legal in nature
- Interested parties generally lack relevant scientific or legal expertise

Current Proposal in Draft Bill

- The 2/25/19 draft of the committee bill contemplates (re)creation of an ***Environmental Review Board*** handling not only ***Act 250*** appeals, but also ***state environmental permit appeals***
- Going forward, the now-Environmental Division would handle only municipal zoning appeals and enforcement actions
- This would return to a process involving ***dual appeal tracks***, creating the ***sequencing, consistency*** and ***timeliness*** issues that gave rise to permit reform in 2004
- Going beyond just Act 250 appeals, the draft bill would further shift appeals of complex regulatory, scientific and legal environmental permits to a lay board for decision
- By definition, a lay board would necessarily rely upon technical and legal staff to advise them on scientific and legal matters that pervade complex regulations

Concerns Regarding Draft Process

- **Dual appeal tracks** would regenerate the old problem of different decisionmakers reaching **inconsistent** conclusions about the **same project**
- This creates a morass of **procedural uncertainty** – how does an applicant get to a final, unitary decision?
- This process would also create additional impediments to **negotiated, compromise solutions**
- **Unpredictability** and potentially **inconsistent outcomes** will inevitably lead either to **abandonment** of projects because of the tortuous process, or **sequencing** of applications that will **significantly lengthen the time** it takes for appeals to be processed with respect to major projects involving multiple permits
- Redirecting appeals to the EAB would undermine the ability of the NRB to **directly advise** district commissions and coordinators

Alternative Ways to Address

- Placing the appellate burden of proof on **all** appellants – whether an applicant or opponent – would create greater deference for lay board decisions, especially non-legal, non-scientific judgments
- **Eliminating duplication** of environmental review within Act 250 would allow district commissions to focus on their areas of expertise – broader aesthetic and land use policy matters – while vesting ANR with exclusive authority over scientific and technical matters
- **Investing more resources** in the Environmental Division would allow for more timely decisionmaking (as opposed to the significant investment required to fully staff a new, appellate EAB)

Questions?

Christopher D. Roy, Esq.

Downs Rachlin Martin PLLC

199 Main Street

P.O. Box 190

Burlington, VT 0-56402-0190

(802) 863-2375

Email: croy@drm.com