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March 20, 2019

Hon. Amy Sheldon
Chair
House Committee on Natural Resources, Fish and Wildlife
State House
Montpelier, VT

Re: Act 250 Reform Bill and the VERB

Dear Chair Sheldon and members of the Committee:

I write to share with you some context which you may wish to consider in evaluating the testimony you have received in opposition to the creation of the VERB. I also write to suggest proposed resolution of the concerns that have been expressed.

The Efficiency, Fairness and Expertise Arguments Strongly Support a VERB

The gist of the argument against the VERB is that it would be inefficient and unfair. The argument that has been submitted alleges that there are already 3 forums that address developments, and this would lead to 4th forum, that this would result in inconsistent rulings, and that the VERB process would be unguided by the Rules of Evidence, unfair, time-consuming and expensive. Opponents also argue that Act 250 requires legal expertise, not scientific or policy expertise.

Each component of these arguments is inaccurate.

1. Most development applications never go through the first of the 4 forums, Superior Court, because there is no dispute over ownership of the real estate.

2. Most applications also don't go through a 4th forum, ANR, since there are no hearings on ANR permits. Under the ANR permit process, most of the time the public's only input is to submit comments. The burden imposed on an applicant is, basically, just to read or listen to the comments. Sometimes applicant respond to the agency in writing after comments have been received.

3. The PUC hearing process, which was raised as the terrible example not to follow, is far removed from what was described. (I have represented litigants before the PUC consistently from 1989 to the present, under 4 different Chairs.)

    a. Hearing Officer trials are not the first of two trials. In major cases, the full board hears the case. In minor cases, the Hearing Officer hears the

testimony and makes a proposed decision, which the PUC then adopts, modifies or rejects after receiving comments on the proposed decision.

b. Prefiled testimony is routinely used, because it is much less expensive and much easier both for citizens to use and for the decision-maker to read and understand. If prefiled testimony is not used, the participants have no choice but to take the depositions of each expert. Depositions are very expensive. You have to pay the court reporter and the witness (a typical deposition of an expert will cost $500 to $1000 per expert). And then the tribunal's time is taken up by all of the direct examination, followed by the cross. With prefiled, you go straight to cross.

c. The rules of evidence are followed by Hearing Officers and the PUC. The Vermont Administrative Procedure Act explicitly requires that the rules of evidence used in the Superior Courts be used in administrative hearings. The only exception (evidence admitted if it is of the type that a prudent person would normally use in the conduct of their own personal affairs, even if not otherwise admissible) is already also in use in the Environmental Court, so the rules are the same.

4. There is no risk of "inconsistent decisions" with the Superior Courts. The real estate ownership issues decided in Superior Court cannot, by law, be decided I the Environmental Court, so by law there cannot be any inconsistency with the Superior Courts, now or under a VERB.

5. There is minimal risk of inconsistent decisions with zoning. Zoning issues are distinct from Act 250 with one exception but the exception does not lead to inconsistent outcomes. Under Act 250 Criterion 10, *consistency with a town plan and with the regional plan* must be shown. In zoning, however, it is the zoning ordinance and not the town plan (and never the regional plan) that controls. In zoning cases, the town plan is used to interpret the zoning ordinance, but rarely is proof of compliance with a town plan an enforceable zoning standard.

6. It is incorrect that Act 250 now requires only legal expertise and not scientific or policy expertise; existing and new criteria need to be fleshed out based on science and policy as well as law. Lawyers and judges are good at ensuring that every "i" is dotted and every "t" is crossed. Lawyers are trained to act as adversaries; judges are trained to act as fair umpires. We aren't trained to develop and apply scientific and policy issues, such as the new criteria on climate change. The Quechee test, so important to preserving Vermont and the success of Act 250 thus far, was not the product of legal training or legal reasoning so much as it was the result of expertise submitted by the Board's retained experts and the Board's policy judgment.

7. A VERB will expedite zoning appeals, making the zoning process more efficient. Most applicants do not file for Act 250 permitting until after they have obtained their zoning permit. The zoning permit is appealed within 30 days to the

Environmental Court. The applicant then usually asks the Court to put the zoning appeal on hold until the District Commission has held its hearings and issued its permit, which then can be appealed to the Environmental Court. As a result, the citizens involved have to wait for months, sometimes more than a year, for their day in court. This may be useful to applicants, but not to anyone else. If Act 250 has a separate track, zoning cases can be concluded long before there is an Act 250 decision by the District Commission.

Proposed Resolution of the Efficiency and Fairness Concerns

1) A VERB that handles only Act 250 and ANR permits, resulting in expedited zoning appeals in the Environmental Court, as noted above. The result would be development of the new criteria of Act 250 by the new VERB, consolidated with appeal of all ANR permits, and quicker zoning review in the Environmental Court.

2) Granting the VERB the authority to hear zoning appeals too. If the risk of inconsistent rulings is perceived as significant, this would solve that problem. This approach also would eliminate the need for two trials. There would be only one trial, before the VERB, and it would address ANR permits, Act 250 and zoning.

3) Granting the VERB the authority to hear zoning appeals unless the applicant chooses de novo review in Environmental Court. This would accomplish the same as #2, but if there are cases in which the applicant believes it wants the more legalistic protections of de novo review in the Environmental Court, the applicant can file a notice to transfer the zoning appeal to the Environmental Court. (An example of an existing transfer process is the automatic transfer of cases from superior court to federal court upon filing of a "notice of removal.")

Thank you for your attention in this matter.

Sincerely,
James A. Dumont
James A. Dumont, Esq.