TESTIMONY REGARDING COMMITTEE BILL 19-004
REVISIONS TO ACT 250
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March 13, 2019

I am Liam L. Murphy of MSK Attorneys, a law firm which focuses on real estate, law use, environmental and commercial law. I have practiced in Vermont for over 35 years. I and my firm represent a wide range of clients in the real estate and law use matters: individuals, homeowners, developers, opponents to developments, banks and municipalities. I have represented parties in literally hundreds of land use cases throughout the state and have appeared before every Act 250 District Commission, the former Environmental Board and am currently actively practicing in the Environmental and Civil Divisions of Vermont Superior Court and the Vermont Supreme Court.

I frequently appeared before the former Environmental Board until jurisdiction was transferred to the Environmental Court now the Environmental Division. Most of my cases before the Environmental Board were complex and highly contested—in some I represented the applicant but in others I represented opponents to the project. I currently parties in similar matters in the Environmental and Civil Divisions of Vermont Superior Court.

PROCEDURAL CONCERNS:

THE APPEAL PROCESS PROPOSED WILL BE LESS EFFICIENT, MORE EXPENSIVE AND LESS TIMELY.

I strongly oppose the creation of the Vermont Environmental Review Board ("VERB") for the purpose of hearing Act 250 and Agency permit appeals.

I do not believe that VERB will be more efficient, less expensive, or faster than the current appeal process in the Environmental Court.

First, the Commission on Act 250 acknowledges that the time frames for case disposition by the Environmental Division "are not significantly different from the average set forth above for the former Environmental Board". *Final Report at 74*. I would note the Commission in fact excluded some data which may have indicated the Environmental Division disposition timeframe was even shorter. *Final Report at 73-74*. More importantly, it is my experience that the Environmental Division has been more diligent in applying its disposition guidelines, resulting in much faster case disposition. *Disposition Guidelines attached*.

I firmly believe that the creation of VERB will only result in a less efficient, more expensive and less timely appeal process.

It is important for the Committee to recognize that in many land use matters there are often four separate categories of issues:

Real Estate Issues—boundary, easement, water/noise trespass or nuisance—Superior Court

Municipal Issues—zoning—Zoning/DRB/Planning/ then appeals to Environmental Division

Act 250—District Commission/then appeal to Environmental Division

Agency Permit—Agency/Secretary/appeal to Environmental Division

Currently, three of the four appeals are with the Environmental Division and if there is more than one appeal involving a matter they can be consolidated or coordinated by the Court to make the process more streamlined and to avoid conflicting decisions.

Unfortunately, even now, the fact that real estate matters are separately appealed to the Civil Division often results in significant delay while the Environmental Division must wait until the Civil Division makes a determination on the real estate issues.

THE CREATION OF VERB WILL CREATE A MORE EXPENSIVE TWO STEP APPEAL PROCESS

The bill proposes that all Act 250 and Agency appeals be within VERB jurisdiction. It authorizes VERB to create hearing officers to initial hear appeals. If the Public Service Board ("PSB") process is a model, such a hearing process is as formal as a court proceeding but without the protections of a court proceeding, such as the Rules of Evidence. Moreover, it is likely that the hearing officer will require pre-filed testimony as used to be required by the Environmental Board and now required by the PSB. The preparation of pre-filed testimony and rebuttal testimony is very expensive to prepare and does not save substantial time in the hearings to off-set such costs. Moreover, pre-filed testimony is a significant deterrent to pro-se parties. Importantly, the legislation does not proscribe the qualifications for the hearing officer in terms of legal or other appropriate training.

Of course, once the hearing officer issues his/her decision, then that decision is further argued before the full VERB, creating another delay in the decision making process and increasing litigation expense. 3 VSA §811 provides that when a board must vote on a decision that it has not heard directly that "an opportunity is afforded to each party adversely affected [by the hearing officer's decision] to file exceptions and present briefs and oral argument to the officials [VERB] who are to render the decision". This adds another expensive and time consuming hearing to the process.

THE APPEAL TO VERB WILL CREATE MUCH GREATER POTENTIAL FOR INCONSISTENT DECISIONS.

As discussed above, now three of the four typical issues that come up in a land use dispute are adjudicated on appeal in the Environmental Division. The fact that related real estate issues are already decided by a different court often causes delays and sometimes inconsistent decisions. Having three different appeal bodies—Civil Division for real estate issues, Environmental Division for municipal land use issues and VERB (hearing officer and then Board) for Act 250 appeals will makes land use approvals much more expensive and creates a much greater opportunity for inconsistent decisions based upon different standards of review.

VERB IS GUARANTEED TO BECOME A HUGE EXPENSIVE BUREAUCRACY.

In 2005, while the former Environmental Board was still hearing appeals, it had a Chair, Executive Director, General Counsel, 5 Associate General Counsels and 6 other staff members. *See attached*. At the time the Board was hearing only Act 250 and Water Resources Board appeals (of which there were few). The current Natural Resources Board has the same number of staff members, although 4 fewer attorneys.

If VERB is created and granted all the duties listed in the next paragraph, the size of the staff will grow enormously and will require a huge budget. If this same amount of additional funding was directed to the Environmental Court, the land use approval process could be significantly accelerated. The Environmental Court currently hears all the appeals formerly heard by the Environmental Board plus additional matters with significantly less staff than the Environmental Board used to have when it oversaw a more limited docket. The current staffing for the NRB is hard to justify in light of its current, extremely limited mandate, but nonetheless, no proposal has been made to reduce those costs.

Proposed Duties of VERB:

Act 250 Administration
-Act 250 Rulemaking
-Act 250 Enforcement
-Review of Enhanced Designation
-Review of Regional Plans
-Review of Mapping
-Act 250 Appeals with Act 250 having a much wider jurisdiction as discussed below

-Agency Appeals of the following Agency Permits

TITLE 10:
Chapter 23 (air pollution control)
Chapter 50 (aquatic nuisance control)
Chapter 41 (regulation of stream flow)
Chapter 43 (dams)
Chapter 47 (water pollution control)
Chapter 48 (groundwater protection)
Chapter 53 (beverage containers; deposit-redemption system)
Chapter 55 (water supply and pollution abatement and control)

Chapter 56 (public water supply);
Chapter 59 (underground and aboveground liquid storage tanks);
Chapter 64 (potable water supply and wastewater system permit);
Section 2625 (regulation of heavy cutting);
Chapter 123 (protection of endangered species);
Chapter 159 (waste management);
Chapter 37 (wetlands protection and water resources 1 management)
Chapter 166 (collection and recycling of electronic devices); 3
Chapter 164A (collection and disposal of mercury-containing 4 lamps);
Chapter 32 (flood hazard areas); 6
Chapter 49A (lake shoreland protection standards);
Chapter 83, subchapter 8 (importation of firewood);
Chapter 168 (product stewardship for batteries);
29 V.S.A. chapter 11 (management of lakes and ponds);

PROPOSAL: GIVE THE ENVIRONMENTAL DIVISION JURISDICATION OVER ALL ACT 250, AGENCY PERMITS, MUNICIPAL PERMIT AND RELATED REAL ESTATE MATTERS.

Instead of further dividing the jurisdiction over appeals between VERB, the Environmental Division and the Civil Division, all the permits appeals and related real estate matters should be under the jurisdiction of one tribunal so as to promote efficient litigation of land use matters.

Issues regarding timing and disposition of the current case load and the addition of jurisdiction over related real estate matters could be handled by budgeting one additional judge, law clerk and support staff for the Environmental Division.

Such an approach would result in more efficient, less expensive, and more timely appeal process than currently proposed in this bill.

SUBSTANTIVE CONCERNS:

BILL WILL EXPAND JURISDICTION TO MORE THAN 75% OF ALL VERMONT LANDS!

The most troubling aspect of the proposed expansion of Act 250 jurisdiction is that the bill proposes extending Act 250 jurisdiction <u>any</u> commercial or industrial development over 1 acre or an undefined number of subdivisions if the project is outside an “existing settlement”—which is totally undefined.

According to the Vermont Woodlands Association, Vermont is 78% forested with 4.46 million acres of forest. Caledonia and Essex Counties are 82% and 94% forested, Connecticut River Valley counties are 85% forested and the rest of Vermont counties are 73% forested.

http://www.vermontwoodlands.org/forestry-facts.asp. Adding to those forested areas, there are many farms and fields outside of "existing settlements'.

It is likely that least three-quarters of the State will be deemed to be "rural or working landscape" and the subdivision of a potentially small number of lot in such areas anywhere in the State will require an Act 250 permit.

If wastewater permits can be used as a guide (any subdivision of land requires a WW permit), the number of subdivisions requiring a permit will be enormous. ANR's Department of Environmental Conservation reported in its FY 19 Performance report that it has "processed approximately 2,400 permits every year for the last four years". *https://dec.vermont.gov/sites/dec/files/co/documents/DEC-FY19-Performance-Report-Final.pdf at 26*. Many of those permits may have been minor or not for subdivision but many are for projects with multiple lots.

VERB and the District Commission would be overwhelmed with what could be hundreds if not thousands of permit matters every year.

Another troubling expansion of jurisdiction is over any subdivision (even a 2 lot subdivision) or any commercial or industrial development over 1 acre if such is within a "critical resource area". "Critical resource area" means a river corridor, a significant wetland as defined under section 902 of this title, land at or above 2,000 feet, a ridgeline, and land characterized by slopes greater than 15 percent and shallow depth to bedrock.

The definition creates a host of questions.

What is a "river corridor"? Should there be a reference to 10 VSA §1422?

Are River Corridors in enhanced designation areas subject to jurisdiction?

Which lands are characterized by slopes greater than 15 percent or shallow to bedrock?

How is slope measured? 1', 2', 5' 10', 20' 50' contours?

How shallow is "shallow"

How big an area in order to be "characterized by slope" or characterized by being "shallow to bedrock"? 5 sf, 100 sf, % of acre, % of entire tract?

The bill would create some exemptions for subdivisions in so-called enhanced designation areas; however, it is unclear how many areas in the State would qualify and whether the municipalities will have the resources to obtain the designation. It is also unclear whether a "critical resource area" within an enhanced designation area is exempt or not.

BILL RAISES SERIOUS CONCERNS ABOUT CREATING STANDARDLESS DISCRETION

The Vermont Supreme Court has held statutes and regulations which provide no objective standards to guide a board's or appellate body's decision when those statutes or regulations are applied to be unconstitutional. In re Appeal of JAM Golf, LLC, 2008 VT 110, ¶¶ 13-14, 17-19, (citations omitted). In that case, the Court found:

> *Unfortunately, the ordinance as written is essentially standardless. Although applicant challenges the court's interpretation of the ordinance, rather than attacking the ordinance itself, § 26.151 is flawed, since it provides no standards for the court to apply in determining what would constitute a failure to "protect" the listed resources. Zoning ordinances must "specify sufficient conditions and safeguards" to guide applicants and decisionmakers. We will not uphold a statute that " fail[s] to provide adequate guidance," thus leading to "unbridled discrimination" by the court and the planning board charged with its interpretation.*
>
> *Protect," as defined in § 26.151, cannot be the equivalent of total preservation, because the same regulations allow for development, which, by necessity, must reduce wildlife habitat and affect scenic views. How much less than total preservation qualifies as sufficient protection, however, we cannot know, because the regulations do not say. Even had the trial court endeavored to apply a "reasonableness" measure to this term, § 26.151 would be unworkable. The language of the regulations offers no guidance as to what degree of preservation short of destruction is acceptable under the statute. From a regulatory standpoint, therefore, § 26.151(g) provides no guidance as to what may be fairly expected from landowners who own a parcel containing wildlife habitat or scenic views -- both common situations in Vermont -- and who wish to develop their property into a PRD. Such standardless discretion violates property owners' due process rights. We thus strike this provision of the ordinance… .*

The proposed bill contains a number of provisions that authorize the application of standardless discretion.

(38) "Connecting habitat" refers to land or water, or both, that links patches of habitat within a landscape, allowing the movement, migration, and dispersal of wildlife and plants and the functioning of ecological processes. A connecting habitat may include recreational trails and improvements constructed for farming, logging, or forestry purposes.

What are "patches of habitat?" How big is a "patch"?

What wildlife? Squirrels?

What plants?

What ecological process?

(39) “Forest block” means a contiguous area of forest in any stage of succession and not currently developed for nonforest use. A forest block may include recreational trails, wetlands, or other natural features that do not themselves possess tree cover and improvements constructed for farming, logging, or forestry purposes.

How big an area of contiguous area of forest constitutes a “block”?

What is a non-forest use?

(41) “Habitat” means the physical and biological environment in which a particular species of plant or wildlife lives.

Any plant? Any species of wildlife? As written this would include the front lawn of every home in the State.

(45) “Critical resource area” means a river corridor, a significant wetland as defined under section 902 of this title, land at or above 2,000 feet, a ridgeline, and land characterized by slopes greater than 15 percent and shallow depth to bedrock.

Which lands are characterized by slopes greater than 15 percent or shallow to bedrock?

How is slope measured? 1’, 2’, 5’ 10’, 20’ 50’ contours?

How shallow is “shallow”

How big an area in order to be “characterized by slope” or characterized by being “shallow to bedrock”? 5 sf, 100 sf, % of acre, % of entire tract?

(47) “Interchange area” means the land within a 3,000-foot radius of an interstate interchange, except for land within an existing settlement. The 13 radius shall be measured from the midpoint of the interconnecting roadways within the interchange.

(48) “Rural and working lands area” means an area that is not an existing settlement or a critical resource area.

What is an “existing settlement”?

(50) “Ridgeline” means a long narrow section of the earth’s surface, such as a chain of mountains or hills that forms a continuous crest at or above 1,500 feet in elevation

How long?
How far from the top is considered to be part of the “ridgeline”?

§ 6031. ETHICAL STANDARDS

(3) In the case of the Board, no person who receives or has received during the previous two years a significant portion of his or her income directly or indirectly from permit holders or applicants for a permit under chapter 47 of 17 this title may hear appeals from acts or decisions of the Secretary relating to permits issued under chapter 47.

Chapter 47 is water pollution control? Why not other permits which are proposed to be considered by the Board listed below:
TITLE 10:
Chapter 23 (air pollution control)
Chapter 50 (aquatic nuisance control)
Chapter 41 (regulation of stream flow)
Chapter 43 (dams)
Chapter 48 (groundwater protection)
Chapter 53 (beverage containers; deposit-redemption system)
Chapter 55 (aid to municipalities for water supply and water pollution abatement and control)
Chapter 56 (public water supply);
Chapter 59 (underground and aboveground liquid storage tanks);
Chapter 64 (potable water supply and wastewater system permit);
Section 2625 (regulation of heavy cutting);
Chapter 123 (protection of endangered species);
Chapter 159 (waste management);
Chapter 37 (wetlands protection and water resources 1 management)
Chapter 166 (collection and recycling of electronic devices); 3
Chapter 164A (collection and disposal of mercury-containing 4 lamps);
Chapter 32 (flood hazard areas); 6
Chapter 49A (lake shoreland protection standards);
Chapter 83, subchapter 8 (importation of firewood);
Chapter 168 (product stewardship for primary batteries and 9 rechargeable batteries);

29 V.S.A. chapter 11 (management of lakes and ponds);

24 V.S.A. chapter 61, subchapter 10 (salvage yards).

Also why not a restriction on persons receiving compensation from project opponents?
§ 6086. ISSUANCE OF PERMIT; CONDITIONS AND CRITERIA
(B) Greenhouse gas emissions; climate change

A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other applicable criteria:

(i) The construction, use, operation, and maintenance of the development or subdivision will:

(I) **avoid** the emission of greenhouse gases, including greenhouse gases from the vehicular traffic to be generated by the development or subdivision;
(II) if it is not feasible to avoid such emissions, will **minimize** them; or

(III) if it is not feasible to avoid or minimize such emissions, will **mitigate** them in accordance with rules adopted by the Board.

What objective standard will be used the Board to adopt rules so as to measure whether the applicant has avoided or minimized or mitigated emissions?

What vehicular traffic will be attributed to a project? If a tourist attraction, will the presumption be that all visitors to the project traveled to Vermont for that sole purpose? A portion? None? If a subdivision, what assumptions will be made about the residents commutes? Are they to be attributed entirely to the project? Partially? Not at all?

If there are no objective standards, the provision will be challenged as creating unconstitutional standardless discretion.

(8) Ecosystem protection; scenic beauty; historic sites.
(A) Necessary wildlife habitat and endangered species. A permit will not be granted unless it is demonstrated by the applicant that a development or subdivision will not destroy or significantly imperil necessary wildlife habitat or any endangered species or if such destruction or imperilment will occur:

What if such destruction or imperilment will occur but not as a result of the proposed project?

…

(C) Connecting habitat.
(i) A permit will not be granted for a development or subdivision unless the applicant demonstrates that:
(I) the development or subdivision will **avoid** fragmentation of the forest block through the design of the project or the location of project improvements, or both;
(II) it is not feasible to avoid fragmentation of the forest block and the design of the development or subdivision **minimizes** fragmentation of the forest block; or
(III) it is not feasible to avoid or minimize fragmentation of the forest block and the applicant will **mitigate** the fragmentation in accordance with section 6094 of this title.

What objective standard will be used the Board to adopt rules so as to measure whether the applicant has avoided, minimized or mitigated fragmentation?

If there are no objective standards, the provision will be challenged as creating unconstitutional standardless discretion.