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Statement Submitted to the House Committee on Natural Resources, Fish, and Wildlife on the Subject of "On-the-Record" Act 250 Hearings

Chair Sheldon and members of the Committee, in reading yesterday's VT Digger Article, it appears that the Committee is considering or has already agreed to convert the District Commission proceeding into an On-the-Record ("OTR") process.

https://vtdigger.org/2020/01/29/house-committee-takes-act-250-district-commissions-off-the-chopping-block/

My comments below are my own and not intended to reflect any official policy or position of the Natural Resources Board.

For the following reasons, I urge to you shelve this idea.

19 years ago, the legislature passed into law a one-year OTR option available, with agreement of the applicant, an option to have their application heard on the record at the commission level. Then executive director Michael Zahner assigned me, along with then (now E-Court Judge) Environmental Board associate general counsel Thomas Walsh to draft the statutory and rule changes

necessary to create the process by which an OTR proceeding must occur, should one be requested. That pilot program was codified in 10 V.S.A. §6085b and certain Act 250 Rule changes were put in place (particularly Rule 16 as I recall) to implement the law.

As noted above, the Legislature wisely rolled this out as a one-year "Pilot Program".

So what happened? For a full year, the program waited to receive a request from any citizen or applicant for an OTR Commission hearing. Resulting Requests: 0

The legislators then, like you, have heard complaints about the length of the appeals process and the argument that time and money could be spared by reducing the scope of appellate review from "de novo" to a narrower "review on the record." A not-unreasonable goal. But no applicant or citizen requested that it be done while the option was available. Why not?

Executive Summary and Conclusion:

The benefits (shorter, more narrowed appeals) are outweighed by the expense, delay and time that would necessarily be incurred by the citizenry and applicants and Commissioners to run a record proceeding responsibly and in conformance with the law. When a proceeding is OTR, the burden is upon both applicant and parties to throw everything (every legal and factual argument) at the Commission

for fear of having been found by the appellate body to have "failed to preserve that issue for appeal." This would happen at the District Commission level of review when the Rules of Civil Procedure are made to legally apply in a more strictly formal sense in OTR proceedings.

So you need lawyers chairing District Commissions, a videographer or court reporter to "preserve the record", you need to extend the notice period for adjoiners to allow fair opportunity to prepare a formal case (adds delay), and you introduce the potential for failure if the Commission staffing and equipment is not substantially upgraded. The current E-Court experience in reviewing DRB decisions on the record would reveal that there are substantial procedural shortfalls requiring remand to the DRB's (more delay and expense).

Because of the infirmities above, and the fact that the substitution of the informal District Commission process with, effectively, a formal court-like proceeding would likely be chilling to citizen participation, I urge you to revisit an idea that was rejected completely 19 years ago.

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