TESTIMONY REGARDING VNRC/ANR BILL
PROPSOSED REVISIONS TO ACT 250
LIAM L. MURPHY
MSK ATTORNEYS

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

You may recall I testified last year. I was not compensated for any of my testimony preparation or appearance last year and have not and will not be compensated by any party for the present testimony. I appear as a practitioner seeking a fair, reasonable and rational process for all participants in the Act 250 process.

I have numerous concerns with the present proposal before the Committee. It is my hope that my testimony today will outline why the proposal being considered would not be practicable, as well as some reasonable changes the Committee could instead implement to better the permitting process.

PROCEDURAL CONCERNS:

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

I have serious concerns and reservations about reshaping the Natural Resources Board ("NRB") on the model of the Public Utility Commission ("PUC" f/k/a PSB). The PUC-Type NRB will not be cheaper, faster, fairer, or more inclusive.

There is a fundamental difference between utility regulation and land use regulation: utility regulation generally does not involve any parallel municipal regulation (which is preempted by relevant law) or real estate issues (because the projects occur on utility properties, which is often obtained by condemnation). Normal land use projects include real estate issues, local zoning and other state permits.

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: these more "traditional" property issues are related to things such as property boundaries, easements, water/noise trespasses or nuisance. As presently organized, the Superior Court, Civil Division has jurisdiction over these matters.
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> Municipal Issues: this is a municipality's zoning regime. Appeals may be taken from a municipal zoning administrator's decision to a Development Review Board ("DRB") or Planning Commission. The Superior Court, Environmental Division has jurisdiction over these matters on appeal.
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> Act 250: matters first are heard by the relevant District Commission, then area appealed to the Environmental Division.
>
> Agency Permitting: applications are submitted to the Agency, then appeals are taken to the Environmental Division.

Any land use matter may contain all of these issues or some combination of them. Currently, three of the four appeals are taken to the Environmental Division. If there is more than one appeal involving a matter, they can be 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.

Therefore, the fact that this proposal creates further fragmentation in the appeals process will only serve to slow the process down, and create the potential for inconsistent or conflicting decisions related to a project.

II. <u>THE CREATION OF PUC TYPE-NRB WILL CREATE A MORE EXPENSIVE AND LESS INCLUSIVE INITIAL HEARING AND APPEAL PROCESS</u>

The bill proposes that all the current Act 250 local District Commissions be eliminated and the initial hearings be held by PUC-Type NRB. The PUC-Type NRB is authorized ("may" not "shall") to delegate to the District Coordinators the power to classify projects as "major" or "minor", be the fact finder on the "minor" application and issue permits for them and for amendments to applications, and to issue jurisdictional opinions.

The PUC-Type NRB is then supposed to hear and decide all applications for major projects, appeals of the minor/major determinations, appeals of minor permits, appeals of jurisdictional opinions, as well are appeals of certain regional planning commission decisions.

However, the new Board is also authorized to establish hearing officers to initially hear appeals. Given the PUC model, a hearing officer holds the hearing, listens to the witnesses, takes the evidence and then issues findings of fact and a decision. The findings of fact and decision are then further argued before the PUC-Type NRB.

As written, the legislation provides that the "Regional Members" will participate with the new Board in evaluating the facts. However, as drafted, the "Regional Members," who are supposed to operate like 'side-judges" providing local knowledge, are not contemplated to sit with the hearing officer when the witnesses and evidence is presented. Therefore, the Regional Members will have little input into the process, resulting in a new absence of regional knowledge.

Moreover, a hearing officer process will be as formal as a court proceeding but without the protections offered by the courts, 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 PUC. The preparation of pre-filed testimony and rebuttal testimony is very expensive 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. Therefore, the new process creates significant burdens on participation. 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 their decision, then that decision is further argued before the PUC-Type NRB, creating another delay in the decision-making process and increasing expenses. 3 VSA §811 provides that when a board must vote on a decision that it has not heard directly "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 [NRB] who are to render the decision." This adds another expensive and time-consuming hearing to the process.

III. <u>THE LACK OF AN APPEAL TO THE ENVIRONMENTAL DIVISION WILL CREATE MUCH GREATER POTENTIAL FOR INCONSISTENT DECISIONS.</u>

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 and state permit issues and the new Board (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.

IV. <u>PUC-TYPE NRB IS GUARANTEED TO BECOME A HUGE EXPENSIVE BUREAUCRACY.</u>

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

If the VERB is created and granted all the duties listed in the proposed legislation, 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 Division, the land use approval process could be significantly accelerated. The Environmental Division currently hears all the appeals formerly heard by the Environmental Board plus additional matters with significantly less staff than the former 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 or allocate the costs in a more reasonable manner.

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 Hearings on Major Permits with Act 250 having a much wider jurisdiction, as discussed below
- Appeals of District Coordinator determinations (Major/Minor), decisions on minor permits, jurisdictional opinions.

The current NRB budget is approximately $3.2 million, most of which is personnel, which will not be reduced by the elimination of the local District Commissions. A breakdown of the NRB's budget is provided in the graphic below. None of the current functions are being eliminated.

Natural Resources Board

Budget Summary

Fund Type		FY 2018 Actual	FY 2019 Budget as Passed	FY 2020 Governor Recommended
General Funds		$606,998	$608,163	$637,074
Special Fund		$2,238,346	$2,531,305	$2,645,953
	Total	$2,845,344	$3,139,468	$3,283,027

Position Detail

Position Number	Classification	FTE	Count	Salary	Benefits Total	Statutory Total	Total
700002	001300 - Natural Resources Board Tech	1.0	1.0	55,316	12,335	4,232	71,883
700003	552300 - Natural Res Bd Legal Technicia	1.0	1.0	58,731	13,043	4,493	76,267
700004	079000 - Natural Resrcs Bd Dist Coord	1.0	1.0	78,737	25,524	6,024	110,285
700005	552300 - Natural Res Bd Legal Technicia	1.0	1.0	45,450	22,039	3,477	70,966
700006	079000 - Natural Resrcs Bd Dist Coord	1.0	1.0	71,401	24,005	5,462	100,868
700007	001300 - Natural Resources Board Tech	1.0	1.0	60,439	21,736	4,623	86,798
700009	001300 - Natural Resources Board Tech	1.0	1.0	63,896	37,048	4,888	105,832
700010	079000 - Natural Resrcs Bd Dist Coord	1.0	1.0	97,499	48,473	7,459	153,431
700011	001300 - Natural Resources Board Tech	1.0	1.0	62,209	30,444	4,759	97,412
700012	079000 - Natural Resrcs Bd Dist Coord	1.0	1.0	84,070	41,224	6,431	131,725
700015	079000 - Natural Resrcs Bd Dist Coord	1.0	1.0	68,681	23,443	5,254	97,378
700016	089290 - Administrative Srvcs Dir I	1.0	1.0	71,401	32,346	5,462	109,209
700017	001300 - Natural Resources Board Tech	1.0	1.0	63,896	34,043	4,888	102,827
700018	079100 - Natural Resources Bd Admin	1.0	1.0	95,749	43,862	7,324	146,935
700019	471000 - NRB Enforcement Officer	1.0	1.0	78,315	44,681	5,992	128,988
700022	079400 - Natural ResourceBd State Coord	1.0	1.0	76,207	39,597	5,830	121,634
700023	079000 - Natural Resrcs Bd Dist Coord	1.0	1.0	76,291	39,614	5,836	121,741
700024	079000 - Natural Resrcs Bd Dist Coord	1.0	1.0	84,070	26,628	6,431	117,129
700025	079000 - Natural Resrcs Bd Dist Coord	0.8	1.0	69,533	38,214	5,319	113,066
700029	001300 - Natural Resources Board Tech	1.0	1.0	45,450	18,633	3,477	67,560
700034	551400 - Nat Res Board Project Coord	1.0	1.0	50,847	19,751	3,890	74,488
700035	079500 - Natural Resrcs Bd Act 250 Spec	1.0	1.0	61,704	23,623	4,721	90,048
707001	94930A - Natural Resources Board Chair	1.0	1.0	110,614	34,004	8,462	153,080
707003	95868E - Staff Attorney III	1.0	1.0	79,414	34,188	6,076	119,678
707004	95870E - General Counsel I	1.0	1.0	87,235	42,080	6,674	135,989
	Total	24.8	25.0	1,797,155	770,578	137,484	2,705,217

Budget Detail

The PUC budget is almost $15 million. How much in additional funds will be required for the PUC-Type NRB?

PROPOSAL:

GIVE THE ENVIRONMENTAL DIVISION JURISDICATION OVER ALL ACT 250, AGENCY, AND MUNICIPAL PERMITS AS WELL AS RELATED REAL ESTATE MATTERS.

Instead of further dividing the jurisdiction over appeals between PUC-Type NRB, the Environmental Division and the Civil Division, all the permit appeals and related real estate matters should be under the jurisdiction of one tribunal so as to promote efficient litigation of land use matters. Given the interrelated nature of these matters, this tribunal should be the Environmental Division. This approach improves efficiency in the state's land use manners, and will be less expensive and timelier than the expanding bureaucracy proposed.

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. This will be substantially less expensive than creating the new Board as proposed.

SUBSTANTIVE CONCERNS:

I. NEW DRIVEWAY AND ROAD RULE:

(xii) The construction of a road or roads and any associated driveways to provide access to or within a tract of land of more than one acre owned or controlled by a person. For the purposes of determining jurisdiction under this subdivision, any new development or subdivision on parcel of land that will be provided access by the road and associated driveways is land involved in the construction of the road. Jurisdiction under this subdivision shall not apply unless the length of road and any associated driveways, in combination, is greater than 2,000 feet. As used in this subdivision, "roads" shall include any new road or improvement to a Class IV road by a private person for the purpose of accessing a development or subdivision, including roads that will be transferred to or maintained by a municipality after their construction or improvement. For the purpose of determining the length of any road and associated driveways, the length of all other roads and driveways within the tract of land constructed within any continuous period of ten years commencing after July 1, 2020 shall be included. This subdivision shall not apply to a state or municipal road or a road used exclusively for agricultural or forestry purposes.

Under this new rule, it is unclear what a "road" is. It includes Class IV roads, but does not further define the term. Will both public and private roads be subject to jurisdiction? If private roads are included, how many homes need to be served in order to be deemed a "road" for Act 250 purposes.

Further, if access is provided for one home, or a hunting or recreational camp, is that access a "driveway" subject to Act 250? Is a clearing in the woods a "driveway?" Would unimproved paths that provide access by ATVs or snowmobiles be subject to Act 250?

Finally, the 10-year look-back would mean a newcomer to a road or driveway could subject every person on that road or driveway to Act 250 without the person undertaking any proscribed action. For example, say a person owns property on the end of 1,500' road or driveway built after 2020.

A totally unrelated person who has the right to cross that road or driveway then builds a 501' driveway at the end of the road. The entire road and all lots off the road are now subject to Act 250 without the owners of the road or lot engaging in any activity to trigger Act 250.

II. EXPANDED JURISDICTION TO DEVELOPMENT NEAR INTERSTATE INTERCHANGES.

There's an inconsistency between this interstate provision and other new standards. In particular, in many instances, a project may be 2000 feet of an interstate exit but also be located in a designated downtown area. Is such a project exempt?

III. 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 held:

> *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… .*

Similarly, the proposed bill contains a number of provisions that authorize the application of standardless discretion and would therefore subject to a constitutional challenge. For example:

(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 is a "habitat?" What are "patches of habitat?" How big is a "patch?" What constitutes "wildlife," is it squirrels? What about "plants?" Are considerations made for invasive species? How is "ecological process" defined?

(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?"

§ 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:

(M) Climate adaptation. The development or subdivision will employ building orientation, site and landscape design, and building design that are sufficient to enable the improvements to be sited and constructed, including buildings, roads, and other infrastructure, to withstand and adapt to the effects of climate change, including extreme temperature events, wind, and precipitation reasonably projected at the time of application.

What objective standard will be used the new Board to adopt rules so as to measure whether the applicant has "employ[ed]... design...sufficient...to withstand and adapt to effects of climate change...reasonably projected?"

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

IV. ENHANCED PARTICIPATION / 30 DAY NOTICE REQUIREMENT

Vermont has a strong vested rights principal that an applicant submitting a complete application to a Board is entitled to be reviewed by the law and regulations in place on the date of the filings. This 30-day notice would allow a municipality or state agency to change the rules and regulations during the notice period thus providing no protection for vesting its application.

V. NOMINATIONS TO THE NEW BOARD

(A) The Chair of the Board shall be nominated, appointed, and confirmed in the manner of a Superior judge.

(B) With respect to the two permanent members of the board, whenever a vacancy occurs, public announcement of the vacancy shall be made. The Governor shall submit at least five names of potential nominees to the Judicial Nominating Board for review. The Judicial Nominating Board shall review the candidates in respect to judicial criteria and standards only and shall recommend to the Governor those candidates the Board considers qualified. The Governor shall make the appointment from the list of qualified candidates. The appointment shall be subject to the consent of the Senate.

These provisions are inconsistent. In the Judicial Nominating process, applicants apply to the committee, which then provides a list of all the names which the committee finds qualified to the Governor who selects from the qualified candidates. Section (B) would require the Governor to select 5 nominees and then send all those names to the committee for review.

However, if this process is adopted the hearing officers should also be selected in a similar manner.

VI. CHARGE BACKS AND AGENCY ENGAGED THIRD PARTY EXPERTS

(4)(A) authorize itself or the Agency of Agriculture, Food, and Markets, Agency of Commerce and Community Development, Agency of Natural Resources or Agency of Transportation to retain legal counsel, official stenographers, expert witnesses, advisors, temporary employees, and other research, scientific, or engineering services in addition to its regular personnel for a specific proceeding. With respect to the Agencies, additional personal may be retained only after approval of the Governor and after notice to the applicant. The Agency retaining the additional personnel shall fix the amount of compensation and expenses to be paid to the personnel retained under this subdivision. Costs of additional personnel obtained under this subdivision may be allocated to the applicant by the Agency or the Board.

(B) authorize the Agency of Agriculture, Food, and Markets, Agency of Commerce and Community Development, Agency of Natural Resources or Agency of Transportation to allocate the portion of its costs and expenses to the applicant of the costs of regular employees participating in the proceeding. The costs of regular employees shall be computed on the basis of working days within the salary period.

(C) with respect to costs and expenses allocated to an applicant under subdivisions (A) and (B) of this subdivision, the Board shall, upon petition of an applicant to which costs are proposed to be allocated, review and determine, after opportunity for hearing, having due regard for the size and complexity of the project, the necessity and reasonableness of such costs, and may amend or revise such allocations. Nothing in this section shall confer authority on the Board to select or decide the personnel, the expenses of whom are being allocated, unless such personnel are retained by the Board. Prior to allocating costs, the Board shall make a determination of the purpose and use of the funds to be raised hereunder, identify the recipient of the funds, provide for allocation of costs to the applicant, indicate an estimated duration of the retention of personnel whose costs are being allocated, and estimate the total costs to be imposed. With the approval of the Board, such estimates may be revised as necessary. From time to time during the progress of the work of such additional personnel, the agency retaining the personnel shall render to the applicant detailed statements showing the amount of money expended or contracted for in the work of such personnel,

which statements shall be paid by the applicant into the State Treasury at such time and in such manner as the agency may reasonably direct;

The current application fee is $7.40 per $1,000 of construction costs, including site preparation, utilities, buildings, and landscaping, for the first $15,000,000 of construction costs, and $3.12 per $1,000 of construction costs thereafter. In addition, a fee of $125 per lot is required for residential or commercial subdivisions. These charge backs and fees for Agency engaged third party experts would be in additional to the current application fees. More importantly, the fees would be unpredictable and unlimited.

If I have learned anything in 35 years of practice is that developers of all kind—whether building a single duplex or 100 units of rental housing—want and need predictability. Before any project is undertaken, estimates on costs must be made and evaluated as to whether those costs are worth the risk of the project.

Developers spend often tens, if not hundreds, of thousands of dollars designing and obtaining the necessary technical permits for a proposed project and make assumptions on the costs and risks of the project including obtaining permits. If a developer is subjected to unpredictable and unlimited "charge backs" of agency review costs and agency engaged third party experts, they will just not undertake the projects. If the Legislature really wants to create more housing, then this proposal almost guarantees that such effort will not be successful.

CONCLUSION

Overall, the current proposal does not achieve what it is stated to. To create a new, expensive appellate body will be expensive, timely, and will hinder public participation. There are much more streamlined and cost-effective ways to better Vermont's land use permitting processes. Further, as currently written, new standards are subject to constitutional challenges as they create standardless discretion.