House Natural Resources Fish and Wildlife Committee

TESTIMONY

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Presentation prepared
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Mr. Slason has been lead counsel for several major projects in Vermont including the development of Okemo Mountain as a year-round destination resort, the redevelopment and permitting of Rutland City's downtown plaza, permitting for Burr & Burton Academy's Mountain Campus in Peru, Vermont, and most recently, representation of South Face Village in connection with all local and state environmental permitting of a 208-unit recreational residential planned community in Southern Vermont.

Lawrence G. Slason is a member of the VT, NH and American Bar Associations and the Environmental Law Division of the Vermont Bar Association. He has participated in numerous environmental seminars and has provided training to municipalities in connection with environmental permit matters.

I. Proposed Legislation – Draft 19-0040

My comments are directed at the proposal to create an administrative *Vermont Environmental Review Board* to hear and decide Act 250 appeals and appeals of ANR Permits. As proposed, the Environmental Division of the Superior Court would continue to hear municipal land use appeals and enforcement matters.

A new Environmental Review Board will result in the creation of a dual track system in which major development projects would have Land Use Permits adjudicated in one Court – Environmental Division - while Act 250 Permits and ANR Permits would be determined by the new Environmental Review Board. My concerns, which I believe are shared by my collogues here today, is that the process may lead to inconsistent decisions, conflicting permit conditions, and unnecessary duplication of resources.

I am not convinced there are any advantages to a dual track system. I oppose the creation of the Vermont Environmental Board for Act 250 and ANR Appeals.

There is a certain nostalgia surrounding the original Environmental Board. It was staffed by incredibly dedicated, conscientious persons who were largely responsible for guiding the State through the early days of Act 250.

It may be helpful to consider some of the concerns that led to discontinuance of the former Environmental Board and replacement of that Board with an Environmental Court presided over by a law trained Judge. Three major concerns voiced by advocates of reform were that the Environmental Board system was inefficient, unpredictable and did not provide adequate due process protections.

<u>Efficiency</u>.
The Environmental Board had nine (9) members. Scheduling hearings was a challenge. It was not unusual for one or more members to be absent. The absent member would review documents and listen to the proceedings on tape. Almost all witness testimony was submitted to the Board by written pre-filed testimony. Pre-filed testimony was written by the lawyers on behalf of their clients, and written by staff for the various environmental advocacy groups. Pre-filed testimony was followed by another round of rebuttal testimony. Following rebuttal testimony there was a round of motions to strike some or all of the pre-filed testimony which had to be decided by the Board prior to hearing. Drafting of testimony was time consuming and very expensive for the litigants. Evidentiary issues, relevancy, and admissibility of expert witness testimony were also the subject of pre-hearing motions. These motions were decided by the Board with assistance from some legally trained staff. At hearing, parties were allowed to question each witness about their pre-filed testimony. Hearings could span consecutive days separated by weeks at a time.

Predictability. Matters tended to be decided on a case-by-case basis. The Board attempted to establish a body of legal principles but practitioners and litigants were often surprised by the legal outcomes. Project applicants and legal practitioners were looking for a reliable and predictable body of case law to help guide their decisions whether to invest in projects in Vermont.

Hearing Procedure - Due Process Protections.
Proceedings before the Board were less formal, which is favored by some. There were concerns that improper evidence was at times considered by the Board. The Board, as lay persons, found it difficult to act as gatekeeper to ensure that evidence was based on reliable data and that testimony was based on verifiable facts rather than personal opinions. The Environmental Board was more likely to allow wide ranging testimony and did not, in my judgment, view their role as gatekeepers of evidence.

II. Comparison with Environmental Division

Efficiency.
Appellant files a Statement of Questions that are intended to narrow the scope of appeal. The Court promptly schedules a pre-trial conference at which time the parties confer with the Court about the nature and scope of discovery and scheduling.

Predictability. Since the creation of the Environmental Court in 2004, the Court has issued a number of thoughtful and well reasoned Opinions. The Environmental Division Judges have crafted their Opinions to include carefully explained legal principles to help guide land use applicants and provide greater predictability in the outcome of the decision making process. There is now a strong body of case law in the Environmental Division.

Hearing Procedure - Due Process Protections.
The Court routinely conducts a site visit to assist the Court in understanding the testimony. Most evidence is received by witness testimony offered in open court under oath. Pre-filed testimony, in my experience, is rare but may be allowed if the Court finds that a hearing would be expedited and parties will not be prejudiced by use of pre-filed testimony. The Rules of Evidence are followed. Rules of Evidence may be relaxed in the discretion of the Court, if the evidence is of a type "commonly relied upon by reasonably prudent persons." The Judge makes rulings on admissibility of evidence which is largely fact based. The Judge acts as gatekeeper to ensure that expert opinion testimony is based on reliable and generally accepted methodology.

III. Judicial Independence

An independent judiciary is the cornerstone of due process. It was known that certain members of the Environmental Board had strong feelings about certain types of land development or specific Act 250 Criterion. Certain members of the panel held great influence. The Environmental Court is staffed by a single, law trained Judge who acts as an independent gatekeeper of all evidence and makes a determination of legal principles in a neutral and objective fashion.

A wonderful example of judicial independence is a series of decisions issued by the Court involving challenges to permits authorizing discharge of pollutants into streams and rivers which drain into Lake Champlain. See for example: *In re Montpelier WWTF Discharge Permit*, Vermont Environmental Court, Docket No. 22-2-08 Vtec (June 30, 2009).

In this case CLF appealed a permit granted by ANR to the City of Montpelier authorizing discharge from the wastewater treatment facility into the Winooski River. The ANR Permit was supported by the Water Resources Panel of the Vermont Natural Resources Board and the City of Montpelier. The Court overturned the permit stating "We conclude that federal laws and regulations require a more reasoned site-specific and time-specific analysis before a permit to discharge pollutants from the facility is granted." Id at 4. The Court expressly recognized that its decision could have significant financial consequences but went on to state "We are obligated to determine the applicable law and apply it to the undisputed material facts. Similarly, while we are very mindful of the significant monetary obligations that may follow our decision here, we cannot allow those monetary consequences to impact our legal analysis at this stage of the proceedings." Id at 21, quoting from *In re NPDES Stormwater Petition*, Docket No. 14-1-07, slip op. at 36 (Vt. Envtl. Ct. Aug. 28, 2008)

This is just one of the cases that were issued by the Environmental Division leading to renewed focus on compliance with the Clean Water Act and the cleanup of Lake Champlain.

IV. Citizen Participation

The Environmental Court process is more formal and may seem more intimidating to persons who are not represented by legal counsel. By the time an appeal is heard by the Environmental Division the parties have narrowed the issues, leaving for adjudication complex factual and legal matters which warrant a more formal process. At this point in the process the applicant and opponents have likely expended significant financial resources and require a carefully crafted deliberative decision supported by facts properly in evidence and expert testimony based on reliable data and methodology.

Under our present system, citizen participation in a more relaxed atmosphere is provided at the local level in municipal DRB hearings and by the District Commission in Act 250 Proceedings. Act 250 Rules also provide for citizen participation as a "Friend of the Commission" – 10 V.S.A. § 6085(c)(5). Non-parties may participate as a Friend of the Commission even though they do not meet the formal party status requirements.

V. Advantages of Present System

All land use permit issues regarding a single project can be litigated and determined in the Environmental Division. The present Rules expressly authorize the Environmental Division to consolidate and coordinate different appeals which relate to the same project in a manner which will achieve the greatest efficiency and most expeditious use of judicial resources. The Environmental Division is presided over by law trained Judges with substantial legal and environmental experience.

VI. Disadvantages of Proposed System

Creation of a new administrative *Environmental Review Board* is unnecessary. Creation of a dual track system will result in additional delays, expense, and duplication of judicial resources. If the Environmental Board determines an Act 250 issue and the Environmental Court determines a municipal land use issue, there is risk of conflicting decisions and conditions. Sorting that out involves more litigation, more time and more money. A lay Board will have to rely on legal support staff for guidance on a wide range of complex legal issues. This has a tendency to separate the persons making the factual determinations from the persons making the legal decisions.

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