

TESTIMONY

HOUSE COMMITTEE ON NATURAL RESOURCES, FISH, AND WILDLIFE

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Chair Sheldon, members of the Committee, good afternoon.

I am Kinvin Wroth, Professor of Law Emeritus at Vermont Law School.

I have been asked to testify on land use planning aspects of the bill that you are considering that would enact An Act Relating to Changes in Act 250, originally drafted by the Legislature's Commission on Act 250: The Next 50 Years.

In a prior life in Maine, I served for 14 years as a member and chair of a local planning board that doubled as a land use regulatory board. At Vermont Law School, after completing my sentence as President and Dean that ran from 1996 until 2004, I taught Land Use Regulation and cofounded the Land Use Institute, which ultimately was absorbed in the Law School's Environmental and Natural Resources Law Clinic. Both in my teaching and in my work through the Institute, I have tried to emphasize that a land use plan is not only an essential guide to future growth and development that is both economically and environmentally sound but a legal instrument that defines the scope and limits of land use regulation.

From that perspective, I will present a brief history of the concept of state land use planning under Act 250 and the development of regional and local land use planning and offer comments on how the present bill addresses those matters.

Act 250 and the State Land Use Plan.

In this brief treatment, I must acknowledge the indispensable work of my colleague Professor Richard Brooks (retired) and my former student (at Maine), Paul Gillies, Esquire.

A state land use plan was a critical component of the Gibb Commission report that laid the foundation for the enactment of Act 250 in 1970. A complex process for its development and adoption was provided in sections 18-24 of the Act as passed, codified as 10 V.S.A, §§ 6041-6047. After the Environmental Board created under the Act had adopted Interim and final Capability and Development plans as provided in §§6041 and 6042, section 6043 required the Board to

... adopt a land use plan based on the capability and development plan which shall consist of a map and statements of present and prospective land uses based on the capability and development plan, which determines in broad categories the proper use of lands in the state whether for forestry, recreation, agriculture or urban purposes, the plans

to be further implemented at the local level by authorized land use controls such as subdivision regulations and zoning.

After solicitation of comments through public hearings and submission to regional and local planning commissions under §§ 6044 and 6045, and approval by the Board, section 6046 provided that the Plan, if approved by the Governor, was to be submitted to the General Assembly for final approval. Attempts to obtain legislative approval of state land use plans approved by the Board and Governor failed in 1974 and 1975

The following summary of proposed 10 VSA ch.151, subchapter 3A, which would have been added by H.529 (1974), illustrates the potential scope of a state land use plan Proposed section 6061 provided that a land use map approved by the Board and Governor and submitted to the legislature would be an integral part of the land use plan. The map was to delineate the key areas, the characteristics of which were spelled out in section 6062 along with the criteria which would apply in each area to municipal and regional plans, to decisions under 10 V.S.A. § 6086(a)(9), and to property tax appraisal and listing.

Section 6062(b) began with a general statement that it was in the public interest to conserve resources that are the basis of the tourist industries, outdoor recreation opportunities, and the economy of the state. The specific areas listed were conservation, natural resources, roadside, shoreline, rural, village, and urban. For each area, section 6062 set out the purpose of the area, described in general terms the lands that it included, and specified criteria that applied or did not apply to it.

H. 383 (1975), apparently in response to criticisms of the prior bill, reduced the number of areas to conservation, resource, rural, agricultural, and urban-village; incorporated the basic plan and criteria provisions in amended 10 V.S.A., ch. 151, §§ 6043, 6044; provided different approval procedures; and gave more leeway to property owners.

After these successive efforts failed in the legislature, section 6043 was repealed and most other references to the land use plan in sections 6041-6043 were stricken by legislation passed in 1983. The only vestiges of the concept remaining—presumably an oversight—are the definition in 10 V.S.A. § 6001(10)—“ ‘Land use plan’ means the plan prepared pursuant to section 6043 of this title” and the requirement in the first sentence of 10 V.S.A. § 6086(a)(9) that for approval a subdivision or development must be “in conformance with a duly adopted capability and development plan and land use plan when adopted.”

Meanwhile, the Capability and Development Plan, called for in 10 V.S.A. § 6042, was prepared by the Board, approved by Governor Deane Davis, the “father” of Act 250, and submitted by him to the Legislature on the eve of his departure from office in January 1973. The Legislature adopted the plan in modified form in April 1973. It contains 19 “findings,” the first eight of which are focused on economic development. The next six call for striking a balance between economic initiatives and conservation of natural resources. The final four findings similarly seek to strike a balance between governmental initiatives necessary for growth and their effect on natural resources. The treatment of the Plan in Act 250 is ambivalent. Finding 19 identifies specific provisions among the Act 250 criteria, the principles of which should be recognized in

consideration of development, and, as noted above, criterion (9) provides that for approval a subdivision or development must be “in conformance with a duly adopted capability and development plan and land use plan when adopted.” However, that criterion also specifies that the criteria of the Plan “shall not be used as criteria in the consideration of applications by a District Commission” The Plan is set out in full in the “History” following 10 V.S.A. § 6042.

Meanwhile, in the administration of Governor Kunin, Act 200, effective in 1989, provided a major planning component to 24 V.S.A. 4302 and many other sections of 24 V.S.A. ch.117, which governs municipal and regional planning and development. Local and regional land use planning and regulation have enjoyed robust growth and expansion in the intervening years.

Efforts to restore a state land use planning component to Act 250 were made periodically and unsuccessfully in subsequent years. Bills introduced by Senator Lyons in 2008 and 2009, with the support of the VLS Land Use Institute and a group of other relevant agencies and organizations, would have established an Office of Planning Coordination charged with coordinating the planning efforts of all state agencies and overseeing the plans of regional planning commissions and their review of municipal planning efforts. In 2013, then-Representative Tony Klein sponsored a bill that would have restored updated versions of 10 V.S.A. §§ 6043, 6045, providing for a state land use plan. None of these bills made it out of committee.

Comments on Pending Act 250 Bill.

I have reviewed Draft 5.2 of An Act Relating to Changes in Act 250 (hereinafter Draft Act) and have the following specific comments.

Capability and Development Plan. I propose that the Capability and Development Plan, modified as I suggest below, be incorporated directly in Act 250. While the goal of a state land use plan remains a tempting prospect, the more than 40 years since the demise of the initial efforts, the failure of subsequent efforts to revive the idea, and the increasingly robust development of municipal and regional planning in law and practice counsel against pursuing it at this time. Instead, I propose making as effective and strong as possible what I understand to be the overall intent of the Draft Act—to identify a set of policies or goals, now contained in the Capability and Development Plan, which all regional and municipal plans must incorporate and to make clear that regulation and implementation under both Act 250 and municipal land use regulations must conform to those goals both as set forth in the Act and incorporated in municipal regulations.

More specifically, I suggest that 10 V.S.A. § 6000 as included in the Draft Act be expanded along these lines:

§ 6000. Purposes; Policies and Goals; Construction

(a) The purposes of this chapter are to protect and conserve the environment of the State by setting forth specific policies and goals to achieve those purposes.

(b) To achieve the purposes set forth in (a), land use plans and regulations adopted and implemented under this Act, by other state agencies, or by regional and municipal land use planning and regulatory commissions and boards shall act in accordance with the following policies and goals:

[updated, revised and reordered provisions from the Capability and Development Plan and from 24 VSA § 4302(b) and (c). Conforming amendments to those sections].

(c) This chapter shall be construed broadly to achieve the policies and goals set forth in (b).

§ 6001(2). See preceding comment.

§ 6021. Is there a discrepancy between (a)(1) providing for the chair to be appointed with advice and consent and (c) under which the chair serves at the pleasure of the Governor?

§ 6025(a). Are “procedural” rules also subject to LCAR review if the Board is a court of record? Cf. 12 VSA § 1 re court rules.

§ 6027(a). Should “supervisory authority” be defined?

§ 6030 Title and (a). See initial comment.

§ 6086(a)(8)(A). Refer to goals suggested re §6000?

§ 6086(a)(9). See comment re proposed § 6000. Delete “and land use pan when adopted”?

§ 6086(a)(10). First sentence : Should it be approved under local and regional? In (B), what is the evil to be fixed here? Leave to discretion of Commissions and later Board review? Revise to reflect *Molgano*, etc., more clearly?

§ 6089(a). Chapter 220 is repealed by section 10 of the Act and District appeals go to the Board.

24 VSA § 4348(f). Paragraphs (1) and (2) appear to be inconsistent.

24 VSA § 4348a. Also refer to proposed § 6000 goals as suggested above?

24 VSA § 4382. Also refer to proposed § 6000 goals as suggested above?

10 VSA ch. 219, § 8401(1). Suggest that the jurisdiction be established under § 6027 and this paragraph say something like “It is the purpose of this chapter to provide standards and procedure for the exercise of appellate jurisdiction for the Vermont Environmental Review Board.”