September 7, 2020

Dear Senate Natural Resources & Energy Committee Members,

I am writing to you now because I understand you will be discussing Criterion 8 of Act 250 at your meetings this week and I am hoping that you will take into account my comments about the proposed legislation.

I have a deep and long-standing familiarity with Act 250 as former executive officer and legal counsel to the Act 250 program from 1986-1994 and then legal counsel to numerous community groups and neighbors involved in the Act 250 process as well as zoning for the next twenty years. I have watched with growing dismay the attempts by so-called environmentalists and well meaning legislators to dismantle or undermine many of the natural resource protections afforded by Act 250.

Thus it was with great relief that I learned that your Committee has struck some of the worst provisions of H.926. I never understood the rush to adopt some very complicated and not thoroughly understood proposals being promoted by the VNRC and other lobbyists.

I have watched and listened to some of your recent meetings about Act 250 on Youtube and I have read what I believe is the latest draft (dated 9/3/2020, 4:35 p.m.).

There is still some language that I believe is quite problematic in the existing Criterion (8)(B) and the proposed addition of (C) to Criterion 8.

Criterion 8(B) currently puts the burden of proving that a development or subdivision will destroy or significantly imperil necessary wildlife habitat or any endangered species, as well as the following three subcriteria, upon opposing parties. This is contrary to most of the other Act 250 criteria that protect natural resources, where the developer has the burden of proof. Having the burden of proof on the proponent of an application is consistent with all other environmental permit processes of which I am aware. It's the applicant's project, the applicant wants a permit, and the applicant possesses (or should possess) the information necessary to prove that its project will not harm necessary wildlife or any endangered species. Placing the burden of proof onto opponents who often face serious obstacles in coming up with the information needed to address this criterion severely undermines one of the primary purposes of Act 250: to protect natural resources such as wildlife habitat and endangered species. And it also raises the question of what happens if there is no "party opposing the applicant"? Does that mean the developer gets a pass to destroy or significantly imperil necessary wildlife habitat and endangered species?

A simple language revision consistent with the language of Criterion 8(A) and the proposed (C) would place the burden of proof on the developer where it belongs:
"(B) Will not destroy or significantly imperil necessary wildlife habitat or any endangered species; and….."

With respect to the proposed Criterion 8(C), the Committee should be aware that allowing the granting of a permit "only if impacts are avoided, minimized, and mitigated. . ." will without a doubt result in harmful impacts on forest blocks and connecting habitat. Years of Act 250 decisions - and the resulting major development that has taken place in Vermont during the time that Act 250 has been in effect (e.g. in Chittenden County) - are living proof that "minimizing" and particularly "mitigating" mostly results in the permits being granted, the habitat (or scenic and natural beauty under Criterion 8(A)) destroyed, and the regulators feeling good because there will be some other land purchased and protected by the developer so not all would be lost if they grant a permit.

I started working at the former Environmental Board shortly after the issuance of the "Quechee Standards" in a decision in which the Board attempted to define an undue adverse effect on aesthetics and scenic and natural beauty in order to impose some degree of objectivity on the difficult and inherently subjective evaluation of the visual effects of development. Those standards have been applied in countless decisions over the years by the former Environmental Board, the Act 250 District Commissions, and since 2004 by the Environmental Division of Superior Court.

The definition of "adverse" in the context of aesthetics involves evaluating the context of the area and whether the proposed development would "fit." In reading it over, it's clear that the "adverse" Board's analysis really only applies to aesthetics. But I think the plain meaning of the word "adverse" is commonly understood.

The Board then developed three criteria to evaluate for determining whether an "adverse" effect was "undue." All three had to be satisfied for the Board to make a positive finding that there would not be an undue adverse effect.:

The Board must conclude that adverse effect is "undue" if it reaches a positive finding with respect to any one of the following factors:

Does the Project violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area?

Does the Project offend the sensibilities of the average person? Is it offensive or shocking because it is out of character with its surroundings or significantly diminishes the scenic qualities of the area?

Has the Applicant failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the Project with its surroundings?

The last criterion for whether a project is unduly adverse is the most significant in the context of the language of proposed Criterion 8(C). It's important to understand that over the years, the

third standard that developers had to meet to satisfy the aesthetics criterion was significantly changed from the original language that provided that the **developer** was required to have taken "generally available mitigating steps which a reasonable person would take to improve the harmony of the Project with its surroundings" in designing its project.

In order to accommodate development and not have to say "no" to development that really did not comply with the Quechee standards (that is, really did create an undue adverse effect on aesthetics or scenic and natural beauty), regulators increasingly perverted the original intent. Over and over this is what regulators have done: First they find that the project would cause an "adverse" effect. Then they make up some conditions, or in the case of agricultural land or wildlife habitat tell the developer to purchase some other "mitigation" land, and this allows them to decide that the "adverse" effect is not "undue." And everyone feels good, especially the developer who only has to pay whatever "mitigation" is required as a cost of doing business.

In the context of the proposed Criterion 8(C), if your goal is to protect forest blocks and important connecting habitat, why would you allow a permit to be granted for a project that would harm these critical resources? Why even include the words "minimize" or "mitigate"? Development that fragments forest blocks or connecting habitat should not be allowed, period. Isn't that the purpose of the new legislation?

If you are serious about wanting to protect forest blocks and connecting habitat, I urge you to eliminate the words "minimize" and "mitigate" from Criterion 8(C) and simply not allow development that cannot avoid fragmenting forest blocks or connecting habitat. These words should also be deleted from Criterion 8(C) RULEMAKING for all of the same reasons, if you still believe you need to give rule making authority on these issues to the Natural Resources Board.

Thank you for considering my thoughts about this important legislation.

Sincerely,

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