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House Committee on Natural Resources and Energy
State House
Montpelier, Vermont

Subject: H.492 the structure of the Natural Resources Board

Dear Committee:

Thank you for this bill giving the Natural Resources Board the ability to play a meaningful role in Act 250. Thank you also for retaining the ability of individuals to participate meaningfully in Act 250.

Please consider the following issues and my recommendations when working on the bill.

Nomination of Board members

The use of the Judicial Nominating Board to screen nominees to the Board is not apolitical. As written in the bill, all candidates are nominated by the governor. That means the governor can totally influence the nature of the Board by only nominating individuals who agree with the governor's position. I acknowledge that once appointed, the governor loses direct control by not being able to remove them except for cause.

Recommendation: Explore the possibility of the Judicial Nominating Board also receiving nominations directly from individuals interested in being on the Environmental Review Board. If feasible, put that into the bill.

Hearing officers

Why allow hearing officers? As proposed the Board will have five members. You have had testimony that there are perhaps ten or a dozen appeals each year. It seems that the Board will be able to hear all the appeals without needing to resort to hearing officers. If the full Board cannot sit on each case, then there might be something wrong with the concept of the Board.

Sending a hearing officer sends the message that the Board isn't interested in the case or can't be bothered to travel to the municipality.

Where is the hearing officer going to come from? What job will be eliminated in order to make room for the hearing officer? What function now performed will be left undone?

In my limited experience with hearings and appeals, I equate hearing officers with the PUC. You have had testimony that the PUC is not a model because it is not comparable to the proposed ERB.

I do not see that Act 250 will benefit from the use of a hearing officer.

Recommendation: Remove the provisions for hearing officers from the bill.

Supervisory authority

I support strongly that Act 250 needs supervisory authority.

The Supreme Court has ruled that Act 250 has supervisory authority. I believe that means that district commissions must determine whether a project meets the criteria independently of determinations made by other permits.

Moving that decision into statute gives the legislature the ability to weaken or eliminate supervisory authority.

The "notwithstanding" idea presented by Sabina Haskell is in conflict with the concept of supervisory authority. As you know and have been told, the criteria for other permits are not the same as the act 250 criteria. I do not see how a district commission can find that a project meets all the criteria without knowing the conditions and contents of the other permits. Yes, Act 250 permits often contain conditions that require compliance with other permits. Those conditions can be imposed because the district commission knows what is in those permits and that those permits support the criteria of Act 250.

I do not see how a district commission can issue an Act 250 permit that is conditioned on unissued permits. If the other permits have not been issued, the district commission does not know that those other permits support the Act 250 criteria. In my experience, other permits are issued that conflict with the Act 250 criteria. One cannot claim that a project will meet the criteria unless one knows that all other permits support the Act 250 criteria.

Recommendations:
Do not accept the "notwithstanding" concept.

Leave the supervisory authority as a decision of the Supreme Court, as being more protective of the environment. Do not put it into statute.

Number and location of offices of district commissions
The nine district environmental commissions have the same boundaries as the State's eight administrative districts. (Act 250's district 9 contains the towns in Addison County that are in State administrative district 4.)

Right now the offices of the district commissions are in the same building as the ANR staff. I would think there are major benefits to Act 250 and ANR that result from the two agencies being in the same building. Those benefits will be lost if the four district commissions are forced to move out while the ANR offices stay behind.

That separation of offices has actually happened to the Barre district office. The district co-ordinators and staff were pulled into the NRB's building near the State House in Montpelier. ANR regional staff were pulled into the ANR headquarters a mile away in Montpelier.

As written, the use of regional is confusing (p. 7, lines 6 and 9). The nine Act 250 districts are already in regional offices (multiple districts in one location). The intent on page 7 seems to be to move the district offices out of the regional offices and into new district offices.

If there is a benefit to having the Act 250 districts in the same building with the ANR regional offices, that benefit will be lost when four districts are moved out of the five existing regional offices. And a benefit will be gained by having the district offices within their districts.

When the districts were first set up, their boundaries were county lines. They were in nine offices, each with an address in care of some other agency, mostly a regional planning commission or a regional development agency. The State's administrative districts were created the following year. The district commissions moved into the five regional offices shortly thereafter. Except for the district commissions housed in Barre, they have stayed in regional offices in those same towns or cities ever since.

Recommendation:
Either leave the district commissions co-located with ANR in the five regional offices (for the benefits of that co-location), or begin the process of requiring all State agencies to move into joint offices in each administrative region (to continue the benefits of co-location and to gain the benefits of reduced transportation miles for individuals needing to travel to the State offices).

Eliminate the confusion resulting from the use of "regional office" (existing and proposed) in §6027(c), p. 7.

Powers of Board relating to revoking permits (§6027, p. 8, lines 4 through 9)
The proposed amendment of (g) can use some additional work. It seems odd that the Board would initiate a petition. Petitions are normally something brought to the Board, right?
As proposed, it will read
"The Board . . . may initiate and hear petitions for revocation of land use permits issued under this chapter."

Recommendation: I suggest something like the following instead. This will allow the Board to initiate action to revoke a permit and also to receive petitions that are brought by outside parties.
"The Board . . . may initiate proceedings or hear petitions for revocation of land use permits issued under this chapter."

Typo: Powers of Board relating to hearing appeals of refund requests (§6027, p. 9, line 5)
Perhaps it should read "appeals **of** decisions made by".

This typo was noted at one of your hearings. The then proposed solution was to have it read "appeal decisions". In that case the sentence would read""The Board may hear appeals of fee refund requests . . . and appeal decisions made by District Commissions or district coordinators." That then means that the Board may initiate appeals and lacks the power to hear appeals. That seems contrary to what I heard in the hearings as the intent of the bill.

Recommendation: Adopt my correction of the typo.

Preapplication process
1. I do not see how the pre-application process save time. Instead, it seems to add time to the process. And it adds time to all projects, not just the few projects that might benefit from the process.

2. The pre-application process requires submission only of the "plans for construction". In engineering, a broad definition of "Plans for construction" means all the drawings issued as part of a construction contract. A narrow definition means only a portion of those drawings.

It is impossible to make comprehensive, substantive comments on the Act 250 criteria using only the plans for construction. Such comments require all the documents submitted with an application. One needs a host of other documents to make meaningful, substantive comments. Those other documents include: flood maps, wetlands locations, smart growth designation maps, soils maps and lots more.

When the pre-application package lacks those other documents, each recipient needs to look them up individually. It seems it would be more efficient to have those other documents in the pre-application package.

It is likely that most adjoining landowners lack access to other documents to help them make substantive comments.

3. It appears that, if the planning commissions and State agencies waive the requirement, landowners will not get the pre-application package, either..

4. The decision to hold a hearing is solely at the discretion of the district commission. The problem with this occurs later in the bill. The later portion (6089 (e), p. 16) prevents an appeal from the district commission when no preliminary hearing was requested.

Recommendations:
Make the pre-application process optional and resolve the issues raised in points 3 and 4.

Require the potential applicant to submit more documents than just the construction drawings.

Discovery
I have not yet been able to review the Rules of Civil Procedure and Rules of Evidence incorporated into the bill.

After I have reviewed them, I may submit comments. I have a feeling that district co-ordinators and others will need to provide a lot of assistance and guidance to parties on how to comply with the rules of civil procedure and of evidence.

Appeals without a preliminary hearing.
The bill proposes to prevent an appeal from the district commission "when an application has been granted and no preliminary hearing requested". The meaning and intent of this is not clear.

What is a "preliminary hearing"? That term is used neither in chapter 151 nor elsewhere in the bill.

What does it mean to grant an application? Is it intended to mean "when a permit has been issued . . ."?

How does one request a preliminary hearing?

Chapter 151 uses "prehearing conference". This bill uses "meeting on the proposed plans" in the section on the pre-application process. That meeting is held at the sole discretion of the district commission.

Recommendation: Clarify the language on appeals and allow sufficient time for your committee to receive comments on the amended language.

Merging H.509 into H.492
H.509, Act 250 jurisdiction in one-acre towns, is a simple, clean bill. If it is essential to pass it, do it now as a separate bill. SNRE has already done a combination in S.234. I'd hate to see the Snowstone correction got bogged down in an end of the session conference committee that might not be able to reach agreement. (I have separately submitted comments to you on H.509.)

Recommendation: Do not delay or lose a correction to Snowstone by combining it with another bill.

I hope that you find my recommendations worthwhile and that you incorporate them into H.492.

Thank your for taking the time to read this letter.

Sincerely,
Thomas Weiss, P. E.