House Natural Resources and Fish and Wildlife Committee
H.492 and H.509
Testimony of Ed Stanak
January 18, 2022

I am a resident of Barre City and was employed by the State of Vermont for 32 years as an Act 250 District Coordinator. While I served in all of the nine Act 250 districts, the bulk of my career was in District 5 consisting of 35 towns in Washington, Lamoille and Orange counties. I have appeared before this committee and filed written testimony during prior legislative sessions. I appear today to express strong support for the provisions of H.492 and H.509 and provide the following comments for the consideration of the committee.

H.492

Use of Hearing Officers

Section 1 – This section of the bill proposes the use of "hearing officers" by the Environmental Review Board (ERB) and indicates that this role may be assumed by either a member of the ERB or a staff person. The use of "hearing officers" appears to be modeled on the practice of the Public Utility Commission (PUC) and its predecessor Public Service Board (PSB). For reasons explained in more detail below under section 6 of the bill, I suggest that the ERB not be modeled on the PUC/PSB and instead rely upon the practice template of the former Environmental Board. At a minimum, any use of "hearing officers" should be limited to members of the ERB. And if hearing officers are used, there should be an opportunity for parties to respond in writing to the proposed decision (in addition to having oral argument).

Rulemaking

Section 2- Administrative rules help the public understand how a state agency operates. The use of rulemaking by the NRB has deteriorated over the years to become an insufficient opportunity for public comment and participation regarding process and procedure changes for the administration of Act 250. This failure by the executive branch's NRB is inconsistent with the purposes of the Administrative Procedure Act [See 3 VSA 800(5) and (6)]. One example of such disregard for rulemaking is the manner in which the NRB is moving to implement – at substantial expense- its new "online application portal" without an opportunity for public vetting and comment in the context of proposed amendment to existing Act 250 Rule 10. The point here is that the committee might consider further amending 10 VSA 6025 to explicitly require that the ERB must ensure adequate and timely opportunity for public participation relative to proposed procedural revisions to the administration of the Act 250 program.

Training of District Commissions and Coordinators

Section 3- This section of the bill addresses the "Powers" of the ERB. "Powers" imply a recognition of the responsibilities of the NRB and the proposed ERB. Over the course of the NRB's 16 year oversight of the administration of Act 250 by the district commissions and district coordinators, there has been a dismal collapse of training for commission members and staff – both for new commission members and staff and in terms of continuing education. The committee may want to strengthen the provisions of 10 VSA 6027 to explicitly state that the NRB shall be responsible for the effective training of commissions and coordinators.

Preapplication Process

Section 5 – The bill includes provisions for the distribution of proposed project "plans" to planning commissions and other persons prior to the actual filing of an application with the district commission. The origin of this idea can be traced back through many legislative sessions during which the committee was provided anecdotal information about how some project applications are brought into the Act 250 process without an adequate opportunity for neighbors and other members of the public to react and prepare for district commission proceedings. In my experience, there are indeed "surprise applications" brought into district offices without even prior contact with district staff along with a concurrent applicant desire for "expedited" review. However, this was not a common occurrence.

Neighbors and others must have a fair chance to consider the content of a project and prepare for a role as a party to the proceeding. But the approach in the bill (ie the distribution of "plans") is an unnecessary additional administrative layer to Act 250 and could also prove problematic. One observation is that the bill does not provide a definition for "plans": does that mean "site plan"? "Site plan and detail sheets" ? In any event, the "plans" for a project do not alone provide a comprehensive understanding of the scope of a proposed development or subdivision. For instance, "plans" do not indicate traffic impacts nor can they provide an assessment of aesthetic or wildlife habitat impacts. I suggest two alternative approaches that will lessen the effects of "surprise applications" and also ensure ample opportunity for preparation to participate in district commission substantive reviews of applications:

1-Make better use of the preapplication time period by encouraging- if not requiring- that applicants obtain a Project Review Sheet(PRS) as early as possible in the planning/design of the project. Proactive distribution of the PRS in certain instances to statutory parties, adjoining property owners and other possible persons of interest can provide a proverbial "heads up" about an upcoming application submittal – possibly also encouraging attendance by adjoiners and others at town development review proceeding. Having said that, there has been a serious breakdown – if not dismantling- of the "one stop shopping" permitting practice that was put in place in the district offices between the 1980s and early 2000s. The close linkage between ANR

Permit Specialists and District Coordinators has been broken; this used to be a very user friendly method of assisting small scale applicants into the permit processes. An effort is underway by ANR to have the public make use of its electronic "Permit Navigator" system to learn what permits may be required. My contacts with district staff tell me that this has fostered an "user unfriendly" atmosphere. The committee may want to hear more about the demise of the PRS/"one stop shopping" system but I urge that it not delay favorable action on H.492.

2-The Act 250 program has always included a mechanism for the convening of prehearing conferences prior to evidentiary hearings for projects which are large, complex and/or may represent likely controversy (eg an earth resource extraction project near a residential area). In my experience, and presuming adequate training of commissions and coordinators, prehearing conferences can be very effective in "leveling the playing field" so that A) parties are afforded adequate preparation in order to present their cases and B) applicants are ensured an orderly and efficient administrative process. More detail (and some examples) about the past effective use of prehearing conferences can be provided if that will assist the committee in its deliberations.

Avoid Hyperlegalistic Act 250 Appeals

Section 6 – The term **"**aggrieved person" appears a few times in the bill provisions addressing appeal processes. That term was never an aspect of Act 250 appeals until the "permit reform" legislation of 2005 eliminated the Environmental Board and assigned Act 250 appeals to the Superior Court system where "aggrieved person" is an integral term. I suggest that use of "aggrieved" in H.492 is unnecessary and may result in unforeseen complications as the ERB commences operation.

This section of the bill also includes **"**prehearing discovery" measures that the ERB might implement prior to evidentiary appellate proceedings. Interrogatories and depositions certainly have fundamental purposes in civil litigation. These techniques may also make sense in PUC proceedings that extend beyond the land use criteria found in 10 VSA 6084(a) into complicated technical and financial issues specific to utilities. I suggest that the ERB should not be set on a path following the PUC process because it will result in a very user unfriendly outcome contrary to the original goals of Act 250 and, frankly, is unnecessary for building a solid evidentiary record for each Act 250 case.

Over the years I heard (from a few of the staff who helped draft Act 250 back in the 1969-70 era) an anecdote about the background of Act 250 involving the vision of Governor Dean Davis. The story goes that Davis wanted Act 250 to be a fact finding driven process and not one dominated by lawyers. The image Davis used was of Vermonters gathered in a general store and facts being put down on top of a cracker barrel. I wish that anecdote was more fully

developed somewhere in a written memoir. The point is this: that the ERB should make use of the appellate process "template" established by the former Environmental Board over many years.

The Environmental Board required the prefiling of testimony prior to its hearings but it very consciously maintained a distinction between the cracker barrel and a courtroom bench. The Environmental Board had evolved into having a solid prehearing discovery process by the time of the tenure of the late Chair John Ewing and there is wisdom in having the ERB build on that process. Conversely, a hyperlegalistic framework for the ERB may eventually bring things full circle and repeat the unsatisfactory experience of Act 250 appeals before the Environmental Division of the Superior Court.

Should the committee conclude that the "prehearing discovery" content of section 6 will remain in the bill, it should be made clear that discovery will apply only to experts and not lay people. Requirements for prefiled testimony was never intended to make lay people write out their testimony in advance; the purpose of prefiled testimony was to have experts disclose their testimony in advance so the other parties could review it and respond with their own expert testimony if they thought it necessary. Similarly, lay person nonexperts should not be subject to the burdens of depositions.

ANR Permits and Act 250

Based on testimony that I understand that the committee received last week, I briefly address the relationship of ANR permits to the Act 250 process. This is a very deep "rabbit hole" and I urge that the committee not consider this controversy as an aspect of H.492 and instead treat the subject matter as a stand alone bill, if at all. This topic has arisen countless times over the decades when almost every bill involving Act 250 has worked its way through the legislative process and can be distilled as follows: that existing statutory and regulatory provisions should be amended so that ANR permits will no longer be presumptive evidentiary proof of compliance under Act 250 criteria 1, 2 and 3 but, instead, will be dispositive proof not subject to independent inquiry by the district commissions. A related proposal has often been advanced that district commissions should issue land use permits prior to the issuance of related ANR permits for the same project and that permittees should be required by condition (ie "condition subsequent") in the Act 250 permit to obtain the ANR permits.

I submit that it has been shown time after time again that the alleged controversial relationship of Act 250 and ANR permits is premised upon alleged "horror stories" that cannot be verified by means of actual case studies or data. This oversight function of the district commissions has been a component of Act 250 since its enactment. It is extremely rare for an ANR permit to be

questioned in an Act 250 proceeding and even more rare for the evidentiary presumptive value of an ANR permit to be rebutted. However, I am very confident in stating that in the few instances when an ANR permit was rebutted, the record of each of those cases demonstrated that the outcome was solidly on behalf of the public interest.

It cannot be overemphasized that existing statutory provisions of Act 250, and related Act 250 rules, work quite well in factoring ANR permits into the overall Vermont permitting process. Act 250 was always intended to be at the finish line of the three -pronged Vermont permit process: town, ANR and Act 250. Act 250 exists to ensure that all "T's were crossed and all I's were dotted" and that impacts not covered by town or ANR reviews are taken care of.

The existing ANR-Act 250 permit interface does not require a fix. In closing I renew my plea: should the committee conclude that this topic should be examined in detail, it should be decoupled from H.492 so that passage of that bill may be timely. The alleged controversy between ANR and Act 250 could then be given the proper and measured consideration it deserves with the presentation of data and actual case studies.

H.509

As stated at the outset of my testimony, I support the passage of H.509. Rather than provide detailed comments in support of that view, I attach an analysis dated September 20, 2021 that I completed following issuance of Vermont Supreme Court's less than carefully reasoned Snowstone LLC decision.