**House Natural Resources and Fish and Wildlife Committee**
**S.234 – Forest Blocks and Connecting Habitat**
**Testimony of Ed Stanak**
**March 31, 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. Since leaving state service I have assisted individuals and grassroot organizations in their efforts to participate in environmental permitting processes. I have appeared before this committee and filed written testimony during prior legislative sessions. I appear today to provide comment and perspective on S.234.

**Section 11- Construction of Roads**

This provision is essentially a revision of the Act 250 "road rule" that was repealed by the legislature in 2005. While its intent in addressing subdivisions (ie fragmentations) of forest blocks is admirable, its effect will be minimal. Developer consultants will design projects to avoid the new statutory provision. That is what happened with the former "road rule" whose effectiveness was largely ended by the late 1990s.I testified before this committee some 30 years ago about the "road rule" and presented a case study of a forested tract of several hundred acres in size in the Town of Cambridge across VT RT 108 from the Smuggler's Notch ski resort. Act 250 did an excellent job protecting a black bear travel corridor on the resort side of the highway. On the other side of the highway, the owners legally designed around the "road rule", the forest was fragmented and the function of the bear travel corridor was imperiled.

**Sections 12 and 13- Wood Products**

It is unfortunate that the legislature needs to address these issues. The concept of a "working landscape" has been baked into Act 250 since 1973 when pertinent legislative findings were articulated in Act 85 of that year. A proactive Natural Resources Board (NRB) could and should have addressed the wood product issues years ago through policies and rulemaking but, as explained below, the NRB is a failed administrative entity incapable of taking such action.

**Section 14- Development in "One Acre Towns"**

This section is a response to the Vermont Supreme Court's September 2021 decision in Snowstone (Case #2020-197) in which the Court unnecessarily struck down the existing applicable statutory provision. Following the filing of a motion for reconsideration and multiple *amicus* briefs, the Court issued an "amended opinion" in February 2022 that "replaced" the September opinion. Frankly, there is nothing now requiring a "fix" by the legislature. My concern is that enacting the proposed change in section 14 that may in and of itself encourage litigation on the fundamental provisions of the "one acre and ten acre" jurisdictional provisions.

**Section 15- Report on Agricultural Businesses**
These supplemental commercial uses on farming tracts began in the 1990s and accelerated in the early 2000s. As with wood products, the NRB could and should have addressed issues by means of policies and rulemaking. The NRB is incapable of providing a competent report as intended by this section of the bill.

**Section 17- Study of the Natural Resources Board**
Although the capabilities and structure of the NRB were not addressed in the January 2019 report ( "The Next 50 Years") by the legislative study commission, the House and Senate natural resources committees have received extensive testimony during at least the last three legislative sessions about the shortcomings of the NRB - and related issues concerning appeals to the Environmental Division of the Superior Court- since its creation in 2005. What will yet another study accomplish? With all due respect, by including section 17 in S.234, the other chamber avoids a decision on the NRB and kicks the proverbial can down the road. This House committee and the House itself got it right with passage of H.492. It is time to replace the NRB with a new panel.

**Sections 7 and 8 – Forest Blocks, Connecting Habitats and New Criterion 8(C)**
The new definitions and most of the content of new criterion 8(C) are critically important and necessary amendments to Act 250. This House committee has heard extensive testimony about forest blocks during prior sessions and will be provided more testimony in its consideration of S.234. VNRC completed an excellent report entitled "Forestland Loss and Fragmentation" in which it provided data on forest blocks and an analysis of land subdivisions in 22 select towns. I strongly support legislation to address the loss of finite natural resources present in the forest blocks.

But having said that, the new legislation rings hollow without an accompanying new jurisdictional provision. The best available data suggests that Act 250 currently applies to only 2 to 3% - perhaps as much as 10% - of all land subdivisions in Vermont. As a result, Act 250 has an extremely limited role in forest fragmentation reviews under existing law. As explained above, I am skeptical about the effectiveness of the proposed road jurisdictional provisions. Thus, in order for the new statutory provisions involving forest blocks and connecting habitats to have tangible effect, there should be a new jurisdictional provision in 10 VSA Chapter 151.

Numerous studies and reports have been done over the last 50 years by the State and private entities of the natural resources present in settings which are coincident with the lands now being recognized as "forest blocks". These natural resources include the headwaters of rivers and streams, aquifer recharge areas and necessary wildlife habitats – in addition to the forest expanses. Research and analysis over the last decade or so also recognize these same settings as carbon sinks that will mitigate climate change impacts. Most, but not all, of these finite natural resources are located on lands above 1,500 feet in elevation. Some might describe

these lands as the heart of the Green Mountain ecosystems; others might say they are the soul of Vermont.

The General Assembly should give serious consideration of the long term benefits to the public interest by amending the provisions of 10 VSA 6001(19) and including a jurisdictional provision specific to land subdivisions proposed above 1,500 feet in elevation and a lot count provision less than the existing 6 and 10 lot "triggers" in the current law. I suggest a standard of 3 or more lots within a 5 year period.

Why do I suggest a 1,500 foot elevation standard? A core premise in Act 250 for half a century has been recognition of the need for "bright lines" in jurisdictional standards. [See G.S.Blodgett Declaratory Ruling 122 – May 18, 1981 ] and the line of Environmental Board and court decisions that follow]. People appreciate a quick answer to the question "Do I need a permit?" There already is a 1,500 foot provision in criterion 1(A) of Act 250 and there are precedents over decades under other criteria such as 4, 8, 8(A) and 9(K) that delved into impacts in high elevation settings.

I am a realist and recognize that a new jurisdictional standard for lands above 1,500 feet in elevation is unlikely during the current session. (I note the foresight of the current vice chair of this committee who co-sponsored a 1,500 foot jurisdictional bill during the 2019-2020 session). I have done work on a factual foundation and rationale for a 1,500 foot jurisdictional provision and am more than willing to return to the committee to share those results. But I would like to share two brief perspectives today.

First, I thought the committee would like to see two maps prepared by Frank Seawright from Windham. These maps and related calculations are a grassroots effort and verification/refinement by VCGI is welcome. As you can see, the maps depict (in red and yellow combined) 1) the locations of lands over 1,500 feet in elevation and 2) the overlay of town boundaries. It would be very informative to add layers of existing maps for headwaters, aquifers, necessary wildlife habitats and the forest blocks.*

Second, there are those who will clamor that a new 1,500 foot elevation jurisdictional trigger for subdivisions will negatively affect economic growth and that many of the objections will come from the towns where most of the high elevation lands are found. I suggest that, since we live in a capitalist society where monetary values are assigned to most things, that consideration be given to a having a report prepared for the legislature which quantifies the

*Frank Searight calculated the land mass above 1,500 feet as being 1,914,240 acres. In 2019 VCGI estimated that the amount of publicly owned and privately conserved lands above 1,500 feet is 855,771 acres. Thus, it would seem that approximately 1,058,469 acres of privately owned lands would be subject to a 1,500 foot subdivision provision.The total land mass of Vermont is 6,156,160 acres.

value of the aforementioned finite natural resources above 1,500 feet. I have spoken to an economist who said that the tools exist for such a study and comparable studies have been done (eg The Northern Pass Transmission Line project in New Hampshire). The results of such a report would provide a benchmark against which to measure the costs of the potential loss to Vermont society of these finite natural resources in coming years if no action is taken. One might conjecture that the economic law of "supply and demand" supports a conclusion that with the protection of these finite natural resources in the remaining northern forest, along with both careful subdivision designs and a prudent ongoing wood products industry, the residents of the towns will benefit from increased land values and a sustainable economic model integrated with the protected natural resources.

Having said all that, I strongly support sections 7 and 8 of S.234 (with the proviso below for section 9) in the hope that a necessary new jurisdictional provision will be enacted, if not in 20222, then during the 2023-2024 session.

**Section 9- Rulemaking for New Criterion 8(C)**

There was much discussion leading to the enactment of Act 250 in 1970 as to whether such a regulatory program could function and withstand court challenges without extensive rules for the administration of the substantive standards set out in the ten criteria. As history has shown, the General Assembly and Governor Deane Davis decided not to base the program on such rules but allowed the system to evolve as the District Commissions applied common sense in evaluating the facts of an application under the criteria. The Environmental Board, comprised of a wide range of talented Vermonters, provided policy guidance along with firm adherence to due process requirements in its appellate decisions. This system worked quite well for 35 years, was upheld by Vermont Supreme Court decisions and a federal 2nd Circuit Court of Appeals decision and resulted in national praise for Act 250 as a landmark piece of land use legislation.

Section 9 of S.234 runs contrary to this common sense premise that is embedded in the administration Act 250. I am confident that if the Vermonters who are the District Commission members could figure out how to fairly and effectively administer the criteria during the initial decades of the program, they are similarly capable of administering new criterion 8(C) without layers of substantive rules. One is even more confident of such an outcome given the caliber of the members of the new board to be created by H.492.

The NRB has failed miserably in properly administering the Act 250 program since it came into existence in 2005 – even more so during the last several years. It is a moribund and nonresponsive administrative entity. I am willing to provide specific examples of its shortcomings in supplemental testimony but focus here on its inability to display any initiative for rulemaking. None of the current NRB members have any experience with rulemaking and with the turnovers of staff there is no institutional memory. The effective administration of criterion 8(C) is doomed if dependent upon rulemaking by the NRB. The rulemaking provisions

in sections 7 and 8 could be removed without hampering the effectiveness of the new criterion. Alternatively, should the committee conclude that rulemaking is necessary, link the rulemaking process to the creation of the new board in H.492.

Thank you for this opportunity to appear before the committee.