Testimony of Alexander LaRosa, MSK Attorneys

Good Morning. My name is Alexander LaRosa and I am partner at MSK Attorneys. My practice at MSK Attorneys substantially involves complex real estate development, permitting and litigation. I am here today to discuss S. 237 and the propose changes to 27 V.S.A. §545. As originally drafted, S. 237 and in particular changes to §545 have dramatic and devastating affects on the development of land in Vermont and the orderly resolution of complex real estate issues.

When S. 237 was passed, this body amended 27 V.S.A. §545 to read as follows:

> § 545. COVENANTS, CONDITIONS, AND RESTRICTIONS OF SUBSTANTIAL PUBLIC INTEREST Deed restrictions, covenants, or similar binding agreements added after January 1, 2021 that prohibit or have the effect of prohibiting land development allowed under a municipality's bylaws shall not be valid. This section shall not affect the enforceability of any property interest held in whole or in part by a qualified organization or State agency as defined in 10 V.S.A. § 6301a, including any restrictive easements, such as conservation easements and historic preservation rights and interests defined in 10 V.S.A. § 822. This section shall not affect the enforceability of any property interest that is restricted by a housing subsidy covenant as defined by section 610 of this title and held in whole or in part by an eligible applicant as defined in 10 V.S.A. § 303(4) or the Vermont Housing Finance Agency.

The "key" clause, and the one that triggers the problematic results is the mandate that any "binding agreement" "that prohibit[s] or have[has] the effect of prohibiting land development allowed under a municipality's bylaws" is invalid. To understand why this is so devastating begins with an understanding what is "development."

"Land Development" is defined broadly under Title 24 which governs "development." Under Title 24, "Land development" means:

> "the division of a parcel into two or more parcels, the construction, reconstruction, conversion, structural alteration, relocation, or enlargement of any building or other structure, or of any mining, excavation, or landfill, and any change in the use of any building or other structure, or land, or extension of use of land."

Countless forms of "land development" are permissible under a municipalities bylaws including subdivision, commercial development, minor changes to a structure, residential expansions from single family residence to duplex, the creation of a home occupation, the development of an AirBnB, really *anything* is development short of a change in ownership. Thus, anything – the construction of a deck, the paving of a driveway, the fill of a wetland, the change from a clothing store to deli, constitutes "land development" which falls within the ambit of amended §545.

By a textual reading of the §545 as it was passed, two private parties cannot agree in *any* binding way to limit or manage any of those activities which constitute "development" on their lands. This is a core necessity for land development to occur. Both as a tool for neighbors to use to manage development and as a functional necessity. To illustrate how common and critical the ability to enter into binding agreements that *have the effect* of prohibiting some level of development otherwise allowed, here are ten are so examples of matters I have been involved with in just the last year where this need was critical.

1. Party and neighbors own property adjoining large field. Developer proposed large residential care facility, memory care facility, and residential townhomes, many of which are affordable units. Neighbors were concerned about increased noise and traffic and with the safety of a shared access drive. Parties negotiated a change to the building orientation, scope and scale and reached a binding settlement agreement that limited the scope and scale of the development to a lower number of units than what zoning would allow. Had the parties not reached such an agreement the development would have lagged in the Court system for two years, or even three, and the development likely would have been abandoned as the profit margin eroded and/or the financing would have been lost. The settlement came with covenants and easements all which gave both parties clarity and security and which allowed the development of a critical project to proceed.

2. Party proposed 74 units of priority housing, 25% of which is affordable. Neighbors objected to scale of development and conformity zoning regulations. What was "allowed" under zoning was a complex question that involved split lot zoning issues, density bonus questions, lot coverage issues and ambiguity as to rights over a shared access easement. Appeal ensued after town issued permit. Party-developer faced litigation costs, time delay and decided to agree with neighbors, in a binding manner, to reduce the scale of project so as to get project

under way and build the critical housing. Instead of 74 units, parties agreed on proposal with mandatory setbacks (which prevent further development of certain areas on lot) and 55 units instead of 74. Under the amended section 545 as passed by this body, this deal is illegal. You are therefore forcing party and neighbors to litigate the project through years of appeals. I can tell you with certainty, facing that option, party would simply have walked away from project. The housing would not have been built.

3. Party is heir to existing settlement agreement and covenant concerning development on a neighboring parcel of land. Current owner proposes development which party believes is inconsistent with the scope of the existing settlement and covenant (proposal was for housing and commercial uses which appeared to be permitted under the Town bylaws). Parties have two choices, resolve the dispute so as to amend and revise the easement and covenant in a mutually agreeable manner and execute new revised covenants to allow some development but not the full scope of commercial development allowed under the bylaws, or litigate what the covenant means – a very costly and time consuming process – and what the bylaws would actually allow. Their decision after many hours of hard work with counsel on both sides was to execute an agreement with new covenant setting forth a compromise development plan and limitations. The result is neighborhood harminony as opposed acrimony and years of litigation. This would be illegal and impermissible under the new section 545. As the law exists today, the parties would have no option but to engage in tens of thousands of dollars in litigation costs in a zero sum environment with no effective tool to resolve the dispute and provide certainty.

4. Party operates farm and farm based business. Party wants to subdivide and sell off a portion of their land so as to fund investment in farm operations. Farmer is concerned about the development of a competing farm stand operation right next door, development of other commercial operations (allowed under the bylaws) as those may affect crops and field, and wants to manage lot size so as to ensure large single family lots result. Thus, party subdivided property with covenants that any owner shall not sell agricultural products from the land, shall not operate a commercial business other than limited home occupations and shall not further subdivide property. This allowed farmer to obtain capital to improve farm operations and accessory on farm business. This arrangement, and these covenants, would be void and illegal as they have the "effect" of preventing development.

5. Party operates popular neighborhood restaurant. Leases portion of restaurant's land to tenant. Tenant signs binding agreement stating that tenant shall not operate a competing restaurant on the land. This is completely standard in the practice of real estate it would be void and illegal as a "binding agreement" that has the "effect of preventing development" otherwise allowable. If party could not lease the land with the "non-compete" requirement, the land would not have been leased. Thus, the effect is not towards "adaptability," but rather a removal of options from the market. Faced with certainty or uncertainty, parties choose certainty.

6. Party is subdividing property behind house. Subdivided property is in mixed use district and commercial development is allowed (such as an inn, or bed and breakfast) by the bylaws. The access by driveway to the subdivided property which passes through party's property runs approximately 25 to 30 feet away party's house. Party seeks to ensure that the driveway to the new parcel is not used by the general public so as to ensure privacy. Thus party subdivides with an easement for access that limits easement to use by "single family residences" and not "commercial" uses. This is done to reasonably prevent purchaser from developing a commercial business close to clients home that might otherwise be allowed under the Town's bylaws. This is void and illegal under your changes. The result again will not be a subdivision of the land with unrestrained use. Rather the result will be no subdivision.

7. Party's property abuts neighbors' property. Neighbor uses driveway on party's property to access their property. Neighbor has no deeded right to use driveway. Neighbor proposes to expand development on his property. Party disputes neighbors' legal right to access over Client's driveway. Parties dispute complex legal questions of prescriptive rights, preexisting use, and whether additional development as proposed would overburden easement. Parties seek to resolve matter by executing new easement deed that grants neighbor rights to use driveway but use is limited to just a certain amount of development below what zoning might otherwise allow (i.e. to a single family residence, duplex, or two single family residences, and only home occupation commercial uses). This agreement allows peace to prevail. This agreement is void and illegal under your changes.

8. Party has concerns as to neighbors' proposed creation of solar field. Seeks greater setbacks and is concerned about impacts on septic field that extends onto developers property. Parties resolve the matter, with a covenant that limits the size and scope of solar field so as to address impact concerns. Effect is to prohibit a certain amount of development otherwise allowable. This is yet again impossible and illegal under Section 545.

9. Party uses stream to fish, swim, kayak. Large development is proposed uphill of stream. Development will have stormwater effect on stream and fish populations. Zoning allows for a certain amount of lot coverage by impervious surface which in turn allows development to encompass a certain amount of commercial and residential uses. Party and developer face complex legal fight over stormwater runoff pollution and zoning's ability to regulate downstream impacts. In lieu of complicated litigation, parties agree via binding settlement agreement on a reduced development scope. Development proceeds. Void under new Section 545.

10. Party seeks to subdivide large 50+ acre parcel and create neighborhood development. In to obtain reasonable rate of return for investors and pay for

necessary infrastructure (roads, sewer, power), economic analysis shows that two acre lots are necessary. In order to sell lots that maintain value, development must come with covenants that the lots are not further subdivided, that certain lands must be help open on each parcel, and that no commercial use beyond the basic home occupation is allowed. This is standard and necessary for these types of subdivisions.

These are just several examples. There are probably a hundred more examples I could come up with that illustrate just how wide reaching and problematic the amended section 545 is to the practice of real estate in Vermont. One question I want to also flag is what is the result of this law in a town *that doesn't have zoning bylaws?*

As soon as I saw the issues with amended §545 I communicated with Senator Sirotkin and to his credit he and his team immediately understood the issues. I worked collaboratively with them over the late fall to develop the changes you see today.

As amended, §545 is limited in effect. As proposed the effect is minor. Parties generally do not have disputes over small accessory units, and such units rarely have an impact on the overall pattern of development, or other parties' abilities to use and enjoy their land. Further, there are limited easements, covenants, or the like that inadvertently affect the ability to develop an assessor dwelling unit.

In some drafts there was a discussion about expanding the change so as to make any agreement that prohibited the development of "multi-family" units would be void. That is problematic because of how much more complicated the development of a "multi-unit" building is. The term "multi-unit building" encompasses any size development. Such developments are potentially limited or prohibited by a large complex web of easements, deed restrictions and covenants.

For example, 10 unit complex might need a certain amount of parking. If two landowners execute a septic easement in year 1 (2021), it may be impossible in year 2

(2022) to develop parking over that septic area. That easement would therefore have the effect of limiting or preventing a large multi-unit development, or a portion therefore that is otherwise allowed.

Similarly, consider landowner X and Y who execute a driveway easement that is limited to 18 feet in width to allow owner y to access their property – 18 feet is more than enough for a single family residence or duplex. Y's property is large enough, and zoned, so as to accommodate a much larger development (greater than 6 units). The town construction specifications, incorporated into the zoning bylaws, state that to access a development of six units or more, B-71 driveway standards must be followed to ensure safe ingress and egress for emergency vehicles. This generally requires two twelve foot wide paved travel lanes in each direction. Thus the easement prevents the development of the large multi-unit building because it is not wide enough to accommodate the necessary expanded driveway. Under any language addressing multi-unit buildings, the reasonable driveway easement between X and Y becomes invalid. That's an unreasonable result and illogical result. Moreover, the result doesn't become apparent until possibly years later. That is unworkable.

For the orderly and sensible development of real estate in Vermont, I urge you to adopt the proposed changes.