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

Subject: S.234, changes to Act 250, amendment draft 1.1

Dear Committee:

Thank you for removing the proposal for smart growth designation.

I am a civil engineer with experience in permitting of projects and in performing environmental reviews; hydrology and flood studies; evaluation and design of sewer systems; and certification as a Class I designer under the Wastewater and Potable Water Supply System rules.

My interest is to preserve and expand the ability of individuals to participate meaningfully in decisions that affect them and their surroundings. Act 250 is the only permitting process that I have seen or worked with that allows meaningful participation by individuals.

These comments point out troubling aspects of this bill and suggestions for amending them.

Do not weaken Act 250 through the guise of "temporary" provisions with sunsets
My experience is that sunsets rarely are allowed to happen. Sunsets become permanent features. The provisions proposed to expedite permitting should not be accepted because they weaken Act 250. And eliminating Act 250 will not expedite projects.

Reject the governor's proposal to have district commissions abdicate their supervisory authority over the Act 250 criteria
Recommendation: Reject the governor's proposal (referred to as "notwithstanding" language) to allow Act 250 permits to be issued without the district commissions knowing what is in the permits and without knowing whether the permits comply with the Act 250 criteria. (I refer to it as the governor's proposal because it was supported by NRB, ANR, and VTrans at a hearing of yours back on January 20.)

Retain Act 250's independent review of whether a proposed project satisfies the Act 250 criteria. This is often referred to as supervisory authority.

District commissions will lose their supervisory authority
The administration's proposal to allow Act 250 permits to be issued before all other permits is part of a long-running attempt of the administration to require district commissions to accept ANR permits uncritically. The governor's proposal is another way to accomplish the same end. Previous attempts were more blunt by explicitly trying to make permits non-rebuttable. This proposal accomplishes the same goal: non-rebuttability of permits for projects without hearings. (Then the next step likely will be to make permits non-rebuttable at projects with hearings, too).

Ellen Czajkowski stated the situation regarding the governor's proposal well last Friday, the 11th.
- The governor's proposal represents a sufficient policy shift.
- There is case law that establishes the overarching scope of Act 250, called supervisory authority.

- District commissions cannot do the holistic review they are required to do, if the other permits are not yet issued.
- Act 250 is significantly different from the PUC process, because the PUC process lacks the supervisory authority of the district commissions over environmental issues.
- The district commissions no longer will have the authority to rebut permits when the permits do not satisfy the Act 250 criteria. District commissions now may decline to rely on other permits that do not satisfy the Act 250 criteria.

In addition, there is no mechanism for NRB to ensure that all permits have been issued. That would be left to compliance investigations and enforcement actions. The NRB lacks resources now for adequate enforcement. The governor's proposal will exacerbate that lack of resources.

Minor permits generally have no parties to advocate for compliance with the Act 250 permit. Only if there is a pre-hearing or hearing can those with a particularized interest obtain party status.

<u>The governor's proposal does not shorten the permitting process.</u>
The NRB chair suggested getting other testimony on how the governor's proposal affects the timeline. Here is that other testimony; and the answer is, "not at all".

The NRB provided you a list of housing projects that had Act 250 permits (January 20). That document contained 48 minor projects. I researched the time between the receipt of the last permit (or document) and the issuing of the decision for all projects where that time was longer than the median. Projects where the decision is issued in less than the median time are unlikely to delay a project.

Accepting the governor's proposal does not expedite projects. That is because processing of Act 250 permits runs in parallel with processing of other permits.

Number of minor projects with time between receipt of last document and decision greater than the median.	20
Minimum days between receipt of last document and decision	0
Median days	6
Maximum days	34
Number of projects with 10 or more days	5

The last documents received in the cases studied were:

stormwater permit	8
historic preservation letter	3
wastewater and potable water supply permit	3
water system construction permit	2
development review board	2

One time each for: wetlands permit; municipal comments; revised site plans; resolution of location of bus stop with VTrans; ANR comments, construction waste reduction plan, planting plan, and sign diagram. The total is more than 20 because multiple permits sometimes were received on the same day.

Allowing Act 250 to issue permits contingent on receiving other permits does not save time, in general. The median between the last "contingent" permit and decision of six days is too short to be considered a delay.

Projects have a schedule that is controlled by the permitting process in its entirety. Removing one permit from the process does not expedite a project.

Section 1 (neighborhood development areas)

Flood hazards

This section adds unnecessary complexity in its proposals for management of flood hazard areas. It also penalizes those municipalities that already regulate flood hazard areas.

Remove the provisions allowing infill development.

If you choose to put more people in harm's way by allowing infill development in flood hazard areas, then keep it simple. Require that municipalities work within what they already know: their chapter 117 instead of an unfamiliar chapter in a different title.

Allowing on-site sewage treatment in neighborhood development areas.

Do not allow isolation zones of water or wastewater systems resulting from infill development to extend onto property of neighbors.

Section 5 (amending the criterion on flooding) Retain the proposed amendment to bring river corridors and flood hazard areas into the criteria. This is long overdue: by decades.

Sections 7 through 9 (forest blocks)

Separate the criteria of forest block from connecting habitat. They have separate functions and needs and should not be lumped together. (from January 25, 2022)

Amend the definitions of "connecting habitat","forest block" and "fragmentation" so that all *new* incursions are covered by Act 250. (from January 25, 2022)

Place the requirements for connecting habitat and fragmentation into the criteria. Expedite the protection of forest blocks and connecting habitat by avoiding rulemaking. (from January 25, 2022)

Section 10 (resource mapping) Do not start placing specific layers into the resource mapping statute. Please use session law to establish specific layers.

Section 11 (roads and driveways) Explore alternatives to using the proxy of roads and driveways to eliminate adverse effects on forests. Instead of using roads as a proxy, perhaps a simple: if clearing or disturbance goes more than 100', or 200', or 300 feet, then it is development.

Section 15 (no ag mitigation at airports) Remove section 15 from the bill. The mitigation procedures need to be retained. Converted farmland is lost forever. We need to conserve farmland for food production. We cannot afford to decrease our existing primary agricultural soils without conserving other sites in compensation.

By the way, Sen. Parent proposed this as an amendment to the Transportation Bill last year.

Section 19 (study of Natural Resources Board Structure)

Remove the study and get behind H.492, structure of the Natural Resources Board, and support that bill's proposal for an Environmental Review Board.

We do not need another study committee. The Commission on the Future of Act 250 recommended that the NRB hear appeals of decisions of the District Commissions. House Natural Resources, Fish and Wildlife is proposing a Board structure that will hear appeals. The bill would define the membership of the Board and the appointment process. It would leave the responsibilities and authorities of the District Commissions alone.

Exempting transportation projects from Act 250

Reject any exemption of VTrans from Act 250. I do not know if this will be asked of your committee. I include this because exempting transportation from Act 250 is on the governor's priority list, according to Sabina Haskell on the 11th.

Conclusion

I hope that you find these recommendations worthwhile and that you will amend S.234 to implement them

Thank you for taking the time to read this letter.

Sincerely,
Thomas Weiss, P. E.

Encl: Explanations of Recommendations

S./234, changes to Act 250
Explanations of Recommendations
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Section 1 (neighborhood development areas)

Do not scuttle existing flood hazard bylaws for an unfamiliar process

Chapter 117

- requires municipalities to include a flood resilience element in its municipal plans (§4382 (a)(12)).
- allows municipalities to regulate flood hazard areas and river corridors using zoning or freestanding bylaws.

S.234's draft 1.1 proposes to require municipalities to develop regulations using an unfamiliar procedure. That unfamiliar procedure uses the 754(a) rules: chapter 29 of ANR's Environmental Protection Rules. Those rules are designed to allow the State to regulate development that municipalities are prohibited from regulating.

This proposal penalizes those municipalities that have already developed bylaws regulating flood hazard areas and river corridors. They will have to scrap their existing bylaws and start over.

In addition, the bill would require that "local bylaws shall contain provisions consistent with" the rules in chapter 29. I'm not sure how to interpret that. I do not understand how municipal bylaws can be consistent with rules that cover activities that municipalities are prohibited from regulating.

The two processes don't even use the same definition of infill. Municipalities have developed their neighborhood development areas around Chapter 76A's definition of infill.

> " 'Infill' means the use of vacant land or property within a built-up area for further construction or development."

S.234 would require municipalities to alter the definition of "infill" for flood hazard purposes within neighborhood development areas to be the one from the Vermont Flood Hazard Area and River Corridor Rule."

> § 29-201 " 'Infill development' means, for the purposes of designated centers, construction , installation, modification, renovation, or rehabilitation of land, interests in land, buildings, structures, facilities, or other improvements in an area that was not previously developed but is surrounded by existing development. For the purposes of farm production areas, infill development means construction on a vacant area within the farm production area."

Do not put individuals in harm's way by allowing infill housing in flood hazard areas

Allowing infill development in neighborhood development areas does little or nothing to expedite housing or reduce its cost. And it puts individuals in harm's way and increases the amount of recovery needed after a flood.

I have experience in hydrology, river hydraulics, and preparing NFIP flood maps and flood studies. This experience goes back to and before the earliest days of the National Flood Insurance Program. I worked with a group that created some of Vermont's first Flood Insurance Studies and maps that defined what we now call flood hazard areas. My focus was the computer modeling, although I worked on all aspects of the studies.

There are always larger floods than are protected by the design standards. After floods we too often hear things like "That's the third 500-year flood in the last ten years." With climate change, a given flood depth will occur more often. The flood insurance program has always been more about letting people know that they are living or working in areas that flood fairly frequently. And about requiring those building owners to have insurance to help pay for recovery. Getting people out of harm's way is mostly through a buyout program after repeated flooding.

Our long-range goal needs to be to move people and buildings out of the flood hazard areas. We should not, in the name of short-term expediency, be putting more buildings and people into flood hazard areas.

On-site sewage treatment allows uncompensated encroachment on a neighbor's property
S.234 proposes to allow on-site sewage treatment in neighborhood development areas. On-site sewage treatment requires isolation zones to function properly and to protect public health.

The intent of infill development is to allow more development in areas with small lot sizes. This can cause problems for neighbors, when isolation zones extend into a neighbor's property. Isolation zones restrict what can be done in them.

The rules for Wastewater and Potable Water Supply Permits (WW permits) allow a permittee to encroach on a neighbor's property with no compensation to the neighbor. The only requirement is to send the neighbor a form that says, in effect: "The isolation zone for my on-site system will extend into your property. This notice gives you a chance to talk to me before the permit is issued. If I decide to make no changes, you cannot stop the WW permit." The notice indicates that the landowner can build in the isolation zone. The notice doesn't point out that the isolation zone inhibits other uses on the neighbor's property. If the neighbor builds a cellar in the isolation zone, there is a potential for leachate entering the cellar. The neighbor might not want to plant a vegetable garden or fruit trees in the isolation zone.

I am not asking in this bill that the entire system be changed. I am asking that you require that all isolation zones be within the property of the infill developer.

Sections 7 through 9 (forest blocks)
See my comments of January 25, 2022 for an explanation of my recommendations on these sections.

Section 10 (resource mapping)
See my comments of January 25, 2022 for an explanation of my recommendations on these sections.

Section 11 (roads and driveways)
Your committee talks about proxies. The proposed jurisdictional trigger on roads and driveways is a proxy for trying to limit forest fragmentation. There seems to be general agreement that the intent is to avoid forest fragmentation, loss of habitat, and loss of connecting corridors. Yet this easy-to-get-around rule on roads and driveways keeps resurfacing. It is easier to get around a proxy than to get around what is needed.

As an example, under the proposed rule, one can get almost 2000' into a forest. One builds a road just under 800'. At the end of the road, one builds two driveways. One is 100' long to a tiny house, barn, shed, sugar house, pond, whatever. The other is 1100' to the house. The tiny house should need a separate E-911 address from the main house and require naming of the private road. And, bingo, 1900' into the forest and is exempt from jurisdiction under Act 250.

An alternative might be something like the distance of development into a forest. A distance of more than 100' or 200' feet or some other distance (well short of 2,000 feet) into a forest, on a lot of one acre or more, is development covered by Act 250. I am not saying that these are the right numbers. Merely that the concept seems to avoid the problems with the proxy using roads and driveways.

Section 15 (no ag mitigation at airports)
This bill proposes to exempt State-owned airports from having to mitigate for conversion of primary agricultural soils.

The testimony you heard focused on the criterion (9)(B). The definition of "primary agricultural soil" is equally important.

Criterion (9)(B) requires a finding that "the subdivision or development will not result in any reduction in the agricultural potential of primary agricultural soils, or" . . . What comes after the "or" is not relevant to this argument.

Definition (15)(A) defines primary agricultural soils as "an important farmland soils map unit . . . of prime, statewide, or local importance, unless the District Commission finds that the soils within the unit have lost their agricultural potential." That "unless" clause is important.

One way to lose agricultural potential is "(iii) the existence of topographical or physical barriers that reduce the accessibility of the rated soils so as to cause their isolation and that cannot be reasonably overcome"

There are two considerations here.
- Parcel on which the airport exists. One ought to be able to make a reasonable case that the soil is not primary agricultural soil because it has no agricultural potential. Thus, no mitigation would be required.
- Parcels later acquired by the airport. (Or maybe already acquired by the airport, given the notwithstanding aspect of 1 V.S.A. §214.). If this land has primary agricultural soils, then the mitigation requirements of Act 250 need to apply.

We need to preserve our farmland. You have heard the testimony on the pressures of our rural resources due to: climate and COVID immigration; economic development initiatives to bring more people into the state; transportation problems that inhibit bringing food into Vermont. Then add in the testimony on the urgency of preserving these resources. Thus it is necessary to retain in Act 250 its present capabilities to require agricultural mitigation and conservation of farmland.

Exempting transportation projects from Act 250

Exempting transportation from Act 250 is on the governor's priority list, according to Sabina Haskell on the 11th. I do not know if she has sent or will send you the language. If she does, it will be too late for me to comment before your planned vote Friday. So I am providing some comments now, just in case. VTrans has been seeking an exemption at least as far back as the Commission on the Future pf Act 250. VTrans has testified incorrectly that all the other permits it needs to get are an adequate substitute for Act 250. They are not an adequate substitute.

You raised the question of overlap of the federal environmental review with Act 250 a few weeks ago. The unasked questions were:
- What does Act 250 cover that the federal environmental review does not cover?
- What is the difference between the federal environmental review and Act 250?

The first question can be answered by looking at a table VTrans provided to you last year. That table lists all the Act 250 criteria and subcriteria. The table shows that those other permits and processes are not an adequate substitute. There is no other permit that applies to almost half the criteria and subcriteria. Other permits fail to satisfy criteria. One example is productive forest soils (criterion 9C): the only permit cited is from the Green Mountain National Forest, which does not apply to the vast majority of Vermont's forests outside the National Forest. A second example is waste disposal (criterion 1B): one of the permits cited is for an underground injection permit when the criterion specifically prohibits injection of hazardous or toxic materials into groundwater or injection wells. A third example is water conservation (criterion 1C): the criterion requires using the best available water conservation technology. The rules for the cited permit do not require the use of best available technology. Under NEPA, as long as the requisite analysis is done, the project may move forward, even if there are adverse and undue adverse environmental impacts.