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H.687
Ron Shems Testimony
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Thank you, Chair Sheldon, Rep. Bongartz, and the House Environment & Energy Committee for inviting me to testify. I am here as a former Natural Resources Board Chair (2012-2016). I am not here on behalf of a client or constituency. I am here to share my thoughts as a former NRB Chair and as a lawyer with experience in administrative processes in Vermont, on the federal level, and in other states. My law practice has long been focused on representing developers and applicants. I am currently advising/representing large commercial developments, one that is the centerpiece and property owner of an already designated new town center in Central Vermont, another that is within a designated downtown. I represent several other applicants. I also represent opponents and intervenors. I also worked at the Attorney General's Office for 15 years handling, in part, Act 250 appeals to the Supreme Court and Act 250 enforcement. My testimony reflects my experience with Act 250, work before various state and federal administrative agencies, as well as my experience as a former NRB Chair.

I was asked to testify on Act 250 governance in the context of H. 687.

I cannot overstate how important addressing governance is to Act 250's efficient and common-sense implementation. The need for governance is particularly critical because of recent substantive changes to Act 250 and the substantive changes contemplated by H.687 and other pending bills.

There is no agency with the authority to assure that Act 250 best serves the need to drive sound development. No one has the authority to be in charge. I do not exaggerate in saying that the NRB is the only agency in Vermont, if not the entire United States, with no authority over the program it ostensibly administers. Technically there is a "chair" and a "board," but in name only because they have such limited authority. For example, jurisdictional opinions (JOs) – determinations of what Act 250 extends or does not extend to – are made by district coordinators, all of whom are classified employees. The vast majority of JOs are nothing more than a check box on a "project review sheet." Determining what activities require an Act 250 permit is core to administering Act 250. Yet, if the NRB disagrees with a decision made by its own staff, it has to appeal that decision to the Environmental Court. The NRB must effectively sue its own staff. Likewise, if the NRB needs to unify the nine District Commissions, or if it disagrees with a District Commission, the NRB has to appeal, or effectively sue one of its Commissions.

Further the nine District Commissions and the several District Coordinators are not charged with overall administration of Act 250 or developing state-wide policy. Nor could they because the Commissions and Coordinators all operate independently, and their authority is limited to a particular district. Similarly, and by design, courts are not charged with initial or long-term implementation of changes to a program. Courts resolve disputes. They do not shape and implement policy, draw the line between the need for uniformity, predictability, and fairness on the one hand, and a District Commission's ability to address local sensibilities, on the other. It is

not up to a court to increase housing stock or administer a program. It is not a Court's job to encourage sound economic development, or otherwise administer a program. These are executive branch tasks.

The current system has limped along for the last 20 years because we have largely been preserving the status quo with the benefit of precedent from the former Environmental Board. However, this system is incapable of, and indeed prevents implementation of recent and contemplated changes to Act 250 including important efforts to increase housing.

Here's a current example[1] demonstrating why the lack of governance hinders development: An existing large commercial development is the centerpiece of an already designated New Town Center. This commercial development and its property are subject to Act 250. A priority housing project is proposed on land owned by the commercial development and subject to Act 250. A priority housing project is exempted from the Act 250 permit amendment typically required for further development. 10 V.S.A. § 6081(p). However, it is unknown whether infrastructure or shared infrastructure (streets, water, sewer, electric etc.) serving the priority housing project requires an Act 250 permit amendment. Nor is it known whether this infrastructure, or the priority housing project itself, is bound by already existing permit conditions. The prospect of having to litigate any disagreement with staff over what should be routine implementation decisions counteracts this Act 250 exemption's purpose and is a disincentive to housing. Someone in charge of implementing policy should be driving these decisions.

In short, even simple exemptions raise questions and need to be properly administered. We need an agency that can effectively and efficiently shape and implement policy, and that provides authoritative answers. This is the certainty and efficiency that is needed to foster sound development such as increased housing.

My testimony reflects two important concepts. First, a universal rule of administrative law in Vermont, federally, and in all other states is that a court can only review "final agency action." Final agency action must mark the consummation of. the agency's decision-making process. The NRB is precluded from making that decision. Instead, nine Commissions and several Coordinators make decisions without the guidance or oversight of an expert board and that do not reflect decision making by the agency in charge of Act 250.

Second, Act 250 permitting decisions – Act 250's central and core function – are made through a quasi-judicial process. That is common. Other examples include the VT Public Utility Commission that administers programs through a quasi-judicial process. Numerous examples on the federal level include the Federal Energy Regulatory Commission, Federal Election Commission, and Federal Trade Commission. Because Act 250 decision making is a quasi-judicial process governed by the Administrative Procedure Act, the only way the NRB would be able to exercise authority over Act 250 – exercise final agency action -- is to hear appeals from the District Commissions on permitting decisions and from District Coordinators on JOs.

Making substantive changes to Act 250 without addressing governance is a recipe for inefficiency, unnecessary litigation, and failure. An entity needs to be charged with authority to implement

[1] This example may be clarified if H.687 is enacted in its current form. It is provided to demonstrate the need for the NRB or ERB to have actual authority to implement recent and contemplated changes to Act 250.

substantive changes. This is a critical point with real examples. The former Environmental Board's hearing process led to the Quechee test to implement the otherwise broad mandate that development does not have an undue adverse impact on aesthetics. The same is true for standards regarding wildlife (Southview) and other criteria. The NRB will not be able to implement new standards during the dynamic period that will inevitably follow the substantial amendments proposed in this bill without providing the NRB (or ERB) with actual, hands-on authority over Act 250.

An entity with authority to implement these changes effectively and efficiently and who can provide quick, common-sense answers is critical. Someone needs to be in charge and responsible for implementing the important policies behind recent and contemplated changes such as increasing housing stock. Otherwise, initial and day-to-day implementation issues will be decided through litigation. Litigation is expensive, time-intensive, meant to resolve disputes rather than implement a program, and defeats the purpose of streamlining and encouraging appropriate development.

A few additional points:

- **RULEMAKING:** Many questions, such as the above example, arise through implementation, are very fact and context-specific, and are not amenable to rulemaking. Rulemaking is prospective in nature and cannot possibly anticipate all issues.

  Some witnesses testified that the NRB has not engaged in rulemaking. There is a reason for that. Rules cannot be made in a vacuum. The need for and shape of rules is informed through the wisdom and experience gained from hands-on implementation of a program. Here, the NRB is deprived of the background needed for effective rulemaking.

- **DE NOVO**: The ERB's review under H.687 would be de novo. That is a well-known standard. Hybrid review standards that are more targeted and efficient are also available.

- **ERB COMPOSITION**: Efforts to assure the ERB's diversity and qualifications are important. The history of divisions regarding changes to Act 250 indicate that such divisions could be addressed in part by also assuring political diversity. For example, "[n]o more than four members of the [the nine-member Transportation] Board shall belong to the same political party." 19 V.S.A. § 3. A similar balance for the ERB could alleviate concerns.

I thank the Committee for inviting my testimony. I am happy to answer any questions or address other issues.