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House Committee on Environment and Energy
State House
Montpelier, Vermont

Subject: H.687 and other bills amending Act 250

Dear Committee:

At least nine bills have been introduced into the House so far this session that propose to amend parts of Act 250. This letter provides comments, suggestions, and requests on H.687 and on some aspects of other bills that might be brought into H.687 or left out of H.687.

These comments are presented in the order that the sections appear in H.687. Comments relating to other bills are labeled with the bill number and located near the H.687 sections where relevant or following the comments on H.687.

My most important comment is that this bill needs to be implemented as a whole, all at the same time. This is particularly true of the three locations::the critical resource areas; the rural and working lands areas; and the planned growth areas. They must all be implemented at the same time.

My second consideration: Is this bill balanced? The three-tiered approach is intended to be a shifting of jurisdiction: Reduced or no jurisdiction in the compact settlements. More jurisdiction in the rural countryside to keep the countryside rural.

Here are my comments.

Purpose of Act 250, two different takes

Section 2, Purpose; construction This purpose seems narrow and unbefitting to Act 250, particularly when it refers to two other sections of statute.

H.715 Section 1, Purpose; construction This section is even narrower and doesn't even come close to the purpose of Act 250.

Section 1 of Act 250 contains a set of findings and a declaration of intent. The "Now, therefore" clause from that section is more elegant than the ones contained in H.687 and H.715. The findings and declaration of intent can be found in Act 250 itself. It is also part of the history section following the chapter 151 table of contents in the Vermont Statutes Annotated. I find nothing in the original "Now, therefore" to be at variance with the proposals of H.687 (except EB instead of ERB) nor with what Act 250 really is. The following is the "Now, therefore" clause from Act 250, April 4, 1970, Section 1.

> The legislature declares that in order to protect and conserve the lands and the environment of the state and to insure that these lands and environment are devoted to uses which are not detrimental to the public welfare and interests, the state shall, in the interest of the public health, safety and welfare, exercise its power by creating a state environmental board and district commissions conferring upon them the power to regulate the use of the lands and to establish comprehensive state capability, development and land use plans as hereinafter provided.

- I request that you use the "Now, therefore" clause from Act 250 for the purpose.

Sections 3, Board vacancy and removal and 4 ERB nominating committee . The utility of the nominating committee is questionable. It will meet once a year to nominate one person.. That is two nominations during a legislator's two-year term. It seems that the lack of continuity would hinder the operation of the nominating committee. It might meet more often if there are resignations or removals. The quality of the chair and board members is also within the purview of the Senate Committee on Natural Resources and Energy in its advise and consent role. My limited observation is that the hearings in the Senate committee lack substance and timeliness..
- I request that the proposed qualifications of board members be retained in both sections 3 and 4.
- I suggest that you explore ways to improve the process of advice and consent.

Supervisory authority 5 different takes

Section 6, Powers. This proposes adding a long-standing court ruling into statute. This is the ruling that confirms Act 250's supervisory authority. Act 250, right from the beginning, has been part of an intentional, dual process. The legislature created many ANR and municipal permits at the same time that it placed corresponding criteria into Act 250. The ANR permits review for narrow technical issues. Act 250 looks at whether the proposed project actually satisfies Act 250's criteria in their entirety. ANR permits are created in private within ANR. Municipal permits are created somewhat more openly than ANR permits. Act 250 permits are created in an open public process. This proposed section clarifies that it is indeed the responsibility and duty for district commissions and the board to "apply their independent judgment in interpreting facts and interpreting law". I find that the dual process is not duplicative because the criteria for an ANR permit or a municipal permit are different than the Act 250 criteria.

H.719 Section 3, Issuance of permits, conditions and criteria. This section proposes to allow district commissions to issue Act 250 permits with a condition that the permittee receive one or more other permits. This violates the supervisory authority that the district commission has. The criteria for the other permits never mesh exactly with the Act 250 criteria. And the criteria for the other permits often diverge significantly from the Act 250 criteria. So a district commission needs to see that other permit before determining that it satisfies the Act 250 criteria. The district commission would not be fulfilling its obligations if it issues an Act 250 permit conditioned on getting another permit. Also, this does not reduce the time to the final permit significantly. My 2021 study showed that the ANR permit is almost always the hangup and the At 250 permit is issued quickly after the district commission receives that last permit, sometimes on the same day.

H.760, Section 3, Approval by local governments and State agencies This proposes to require the NRB to establish a process to resolve disputes between a district commission and a state agency when a district commission raises concerns about a state permit. There are two ways to interpret this. One is that the State permit does not satisfy the Act 250 criterion for which it was submitted. In that case there is no dispute to be resolved. The differences in criteria between State permits and Act 250 permit will lead to that conclusion on occasion. In that case the applicant has to submit other documents to show that the project satisfies that criterion. The other way is that the district commission finds that there is something improper about the State permit and notifies the State agency of that. Again, no dispute. The State agency needs to correct its permit.

H.760 Section 6, Issuance of permits and criteria This section proposes to infringe on the supervisory authority of district commissions by requiring them to accept best management practices of the Public Utilities Commission as evidence of satisfying the relevant criteria. The district commissions of course may accept evidence of the best management practices and evaluate them to see if they satisfy the criteria. As the district commissions do with any evidence presented.

H.760 Section 4, Rulemaking This section proposes to require that the NRB update its rules on the presumptions that are applicable to State agency permits. As I have stated elsewhere, State agency permits and Act 250 often have been designed to be similar, not identical.

- I request that you retain the supervisory authority from H.687.
- I request that you not incorporate Sec. 3 of H.719 into H.687.
- I request that you not incorporate Sec. 3 of H.760 into H.687.
- I request that you not incorporate Secs. 4 and 6 of H.760 into H.687.

Section 10, Appeals Part of this section covers appeals of decisions by district commissions. Appeals of decisions made by district co-ordinators were covered by the consolidated appeals chapter. Those appeals have been dropped in H.687, except for decisions that are jurisdictional opinions. Appeals of jurisdictional opinions are covered in section 11. This section also lists the prior decisions that have precedent. It omits decisions by the Environmental Court. I believe that the Environmental Court was created as a court outside the Superior Court. Only later was the Environmental Court moved into the Superior Court. The decisions of the Environmental Court are not given any weight as proposed in H.687..
- I request that appeals of decisions by district co-ordinators be added to H.687.
- I request that prior decisions of the Environmental Court be added to the list.

Section 12, Act 250 fees It looks like the proposed fees for filing an application for planned growth area and for review of regional planning commission documents are intended to not recover the costs of the review.
- I suggest that the committee review these two fees to determine whether they are intended to cover the costs of the reviews or not. If they are, then change the fees.

Section 13, Consolidated environmental appeals I believe that chapter 220 has no subchapter. This is in existing language in §8505 (a).
- I suggest you look into this and resolve if necessary.

Section 17, Environmental Division; continued jurisdiction This gives the ERB authority to be a party in any appeals pending at the Environmental Division until July 1, 2026. It appears that the ERB will lose that ability on any appeals still pending at the court after July 1, 2026.
- I suggest you look into this and resolve if necessary

Section 19, Definitions The proposed definition of fragmentation determines that some fragmentation is OK and other fragmentation is not. Under that definition, a new farmhouse will not fragment the forest block. A new residence that is not a farmhouse will fragment the forest block. The ownership or use of the house should not determine whether the forest or connecting habitat has been fragmented or not.

The concept of the second sentence (that the purpose determines whether it is fragmentation or not) is not needed in this definition. The concept is adequately covered in the definitions of forest block and connecting habitat; and in the criteria on forest blocks and connecting habitat. This comment comes from my experience with contracts: write it once. If you write it twice, and they are not exactly the same, then it has two meanings and you're in for trouble somewhere down the line.
- I request removing the second sentence ("However, fragmentation . . .) to avoid the repetition and to eliminate the possibility of confusion.

Section 20, Criterion 8 (B), Forest blocks, and (C) Connecting habitat Both criteria refer to mitigation according to §6094. I hesitate to ask. What is §6094?

Criterion (8)(C) allows avoid, minimize, mitigate for connecting habitat. Connecting habitat is fundamentally different from forest blocks or primary agricultural soils, which also propose or allow avoid, minimize, mitigate. The difference is that if the project severs or has an adverse impact, there is no alternative for the species using that connecting habitat.

My primary objection to the mitigation portion is that connecting habitat cannot be mitigated by conserving habitat elsewhere. When the connecting habitat is adversely affected, species cannot move as they need to move in order to live.

Either a project allows the connecting habitat to function or the project severs the connecting habitat. If a project severs the connecting habitat, then no amount of mitigation elsewhere will protect the populations whose flourishing, or even survival, depends on the connecting habitat.

- I request that mitigation not be allowed for connecting habitat.
- I request that (8)(C) be written along the lines of:
  (C) Connecting habitat. A permit will not be granted for a development or subdivision that will have an adverse effect on connecting habitat.

Section 21 Criterion 8(B) and (C) rulemaking There is something wrong with having the outgoing NRB, create the rules for forest blocks and connecting habitat. The outgoing NRB could have shown some initiative and made such rules years ago as part of criteria (8) or (9)(C).

There is no reason to use rulemaking for these two criteria. The Commission on the Future of Act 250 provided specifics in its draft bill (appendix 4 of the Commission's report). That is a reasonable start, and it will need some work to conform to my comments here.

- I request that the provisions of the Commission's appendix 4 be used instead of rulemaking. This avoids the time delay in protecting these two resources needed for rulemaking. And it avoids having the current NRB make these critical rules.

Section 22, Resource mapping This bill starts a laundry list of items to include in the resource mapping. Now that you have started there will be more. Section 127 has survived almost 12 years (since its creation) without a laundry list. The resource mapping probably has hundreds of layers. I do not see a need to start listing specific layers.
- I request that you drop the requirement "including forest blocks and connecting habitat". If you insist on requiring that the layers be added, I suggest that you use session law instead..

Section 23, definition of development, 6001(3)(A)(i) This proposes to add construction of certain improvements within 25 feet of a critical resource area to the definition of development.
- I request that other uses be added to the definition. Those other uses include governmental purposes. Government buildings and infrastructure do have the potential to have adverse effects on critical resource areas.

Section 23, definition of development, 6001(3)(A)(xii) This proposes to add construction of certain improvements more than 500 feet from the centerline of a State or town highway to the definition of development. On the other hand, this can contribute to strip development by concentrating all development within 500 feet of highways. This distance proposal is an improvement over any definition of development using the proxy of lengths of roads and/or driveways.
- I request that other uses be added to the definition. Those other uses include governmental purposes. Government buildings and infrastructure also have the potential to have adverse effects on Act 250 criteria.
- I suggest that you consider whether the distance should apply to all town highways or to only certain classes of town highways. I am specifically thinking of limiting it to State and class I, 2, and 3 town highways. Adding

this limit on classes will make it more likely that construction of improvements along a class four town highway will be under the jurisdiction of Act 250.
- I suggest that you consider ways to limit strip development within this 1,000-foot-wide corridor.

Section 23, definition of development, 6001(19), I support the change to the definition of subdivision. The concept of compact settlements surrounded by open countryside is undermined by Act 250's lack of jurisdiction over many of the subdivisions (and resulting construction) happening in the rural countryside.
- I request that you retain this definition.

Section 23, definition of development, 6001 (50) The proposed definition of critical resource areas is confusing. I think of critical resources as those that would reduce sustainability when lost. Thus additional resources are worthy of the designation. Also the inclusion of steep slopes and shallow depth to bedrock is written that a critical resource area must have both the steep slopes and the shallow bedrock. If an area has only one of them, it is not a critical resource area.
- I request adding the following to the definition of critical resource areas: connecting habitat, headwaters, fluvial erosion areas, the highest qualities of ground waters, and the highest qualities of surface waters.
- I request replacing the "and" between "15 percent" and "shallow depth" with a comma.
- I request that the definition be expanded to clarify that when a critical resource occurs within the boundaries of a planned growth area, that Act 250 has jurisdiction over projects in the critical resource.

Delegation of Act 250 authority, 3 different versions
My concept of "getting Act 250 out of downtowns" has been that the Act 250 criteria would not be ignored. Rather the criteria would still be considered. Perhaps not quite as rigorously as Act 250 would consider them. But definitely the criteria would not be ignored *en masse*. None of these proposals describes the conditions needed on the ground to be a compact settlement. They only list documents needed with no specifics on the contents of those documents, particularly as they relate to the Act 250 criteria.

Section 24 planned growth area designation This proposal seems to require no supporting document(s) that has any requirement to consider the Act 250 criteria in their entirety. A few of the documents require a few of the criteria to be addressed. Municipal plans do not have regulatory control over development. Zoning and subdivision bylaws have not been required to consider any of the Act 250 criteria. A few of the criteria and subcriteria have been options for bylaws to address. Smart growth principles do not address the criteria. H.687's proposal for getting Act 250 out of the planned growth areas seems to also mean little consideration is required to be given to the Act 250 criteria. The only criteria or subcriteria that appear to be considered are flood hazard areas, river corridors, historic preservation, and wildlife habitat. There is nothing requiring changes to zoning review to consider the Act 250 criteria. This bill provides increased jurisdiction in the rural countryside.

H.719 Section 5, Delegation of Review Authority to Municipalities This proposed delegation leaves much to be developed by others. The NRB will be charged with creating the delegation process. It provides few details so we do not know what the delegation will look like. It does acknowledge needing to consider all the Act 250 criteria through some process that would be functionally equivalent to the Act 250 criteria.

Based on my experience with the report submitted by on Necessary Updates to Act 250 as required by Act 47 (2023), I have little faith that the NRB can produce an adequate delegation process. The NRB was given seven charges for the report. My comments, in volume 2 of the report, point out that the report failed to respond to most of the charges. The minutes of the meetings show that the Board itself took no part in the development, review, or approval of the report. And the NRB doesn't even take ownership of the report, the report being issued under the name of the company hired as a facilitator.

H.768 Section, Delegation of Review Authority to Municipalities This proposed delegation does require that the municipality to develop procedures to review all Act 250 criteria. It focuses on the compact settlement. It was not provide increased jurisdiction in the rural countryside.

- I request that you work out the specifics of the contents of the documents as they relate to the Act 250 criteria, particularly the Act 250 criteria in the bylaws and the municipal and regional plans
- I request that you not consider the delegation proposal contained in H.719; it leaves too much for later.

Release of land from permits, 2 different takes

Section 28, Appropriate Municipal Panels: handling of Act 250 permits within planned growth areas

A. Subsection (g) lays out the process for zoning review of a property which has an Act 250 permit in a planned growth area. That process includes transferring conditions from an Act 250 permit to a municipal permit.

I have several concerns with this process for transfer of Act 250 permit conditions. Having been a consultant and witness to a party in an Act 250 case, I am concerned that this section is not set up to support a party and give the party a right to learn of and retain the conditions.

One concern is to make sure that Act 250 parties will be notified individually that the Act 250 permit is, in effect, up for amendment. And it needs to be more than notified. They need to be encouraged to attend.

Another concern is that the required hearing process is inadequate for transfer of Act 250 conditions. The specified hearing process is a standard zoning hearing. Time for testimony. Time for public comment. No chance for discussion.

Another concern is how to prevent a hard-earned condition from being removed by a municipality. Use of the specified municipal procedures seems insufficient for a transfer of Act 250 conditions to a municipal permit.

B. Subsection (h) requires municipalities to enforce any existing Act 250 permits within a planned growth area. The subsection does not specify where the appeals are to take place. The enforcement actions could go to the ERB or to the Environmental Division.

D. What happens to the Act 250 permits if the planned growth area is terminated or goes away for some other reason?. Over which permit does the Act 250 permit have jurisdiction? The Act 250 permit at the time that the planned growth areas was established? That Act 250 permit with only the conditions retained in the municipal permit? The municipal permit?

H.768, Section 2, recording, duration and revocation of permits This section proposes a process for releasing land from permits. This one would have the district commissions release the land from permits and would also notify all parties of the application to release land form the permit. It proposes to treat these as minor (without hearings) permits.

- I request that you work out resolutions to my concerns to prevent the hard-earned conditions of parties from being discarded without the consent of the parties that obtained those conditions.

H.719 Sections 2, Definitions, and 4, repeal of priority housing projects (§6001(3)(D)(8)((III) Priority housing projects have been an oft-amended, complicated portion of Act 250. It is time for them to go away. That said, I do not necessarily agree with all the provisions in H.179 relating to proposed amendments affecting priority housing projects.

Sec. 4 also proposes to exempt priority housing permits from needing an Act 250 permit when a chapter 76A designation is removed. This one is confusing. If the 76A designation is removed and not succeeded by the new designation, then the housing project should be subject to Act 250. The same way as some proposals for release of Act 250 permits would work. If changes that would require an Act 250 permit are made after the release, then an Act 250 permit would be required. This provision in H.719 seems to provide the opposite solution for the same situation.

- I request that the removal of priority housing projects be moved into H.687.
- I request that the provision on removal of a chapter 76A designation not be brought into H.687.

H.719, section 6, mitigation of primary agricultural soil This proposes to require no mitigation of primary agricultural soils when used for subsurface wastewater treatment systems within a designated area. H.687 proposes to include primary agricultural soils as a critical resource. Thus, primary agricultural soils cannot exist within a designated area. On the other hand, put a large subdivision using alternative wastewater systems on primary agricultural soils in a designated area and, Poof!, no more farmland and no mitigation.
- I request that this not be carried into H.687.

H.719, section 15, appeals to the Environmental Division I have a fundamental difference of opinion on appeals than does H.719. My experience with appeals is that they are a useful and necessary part of permitting.

I do not know what is an injury in fact. Given the other portions of H.719 that propose to limit the ability to appeal, I have a feeling that this is intended to limit the ability to appeal.

This section also proposes to require one who appeals to provide a bond. The amount of the bond would be decided by the court based on vague factors. I, too, have been unable to find information on the judiciary's internet site and have been unable to determine the outcomes of appeals. Without that information one cannot judge whether appeals are being abused or not.
- I suggest that you investigate the effect of "injury in fact" on the ability to appeal before considering it for H.687.
- I request that you not bring an appeals bond into H.687.

H.716, Section 14, Lot coverage bylaws This section proposes to allow lot coverage in excess of the maximum in the zoning bylaws if lots for new houses are created in areas served by municipal water and sewer. Many zoning bylaws have references to providing access to light. Exceeding maximum lot coverages reduces that access to light.
- I suggest that you not move this into H.687.

H.719, Sec. 9, Hearing and notice requirements, etc. This section proposes to deem a municipal application approved if the panel cannot achieve a quorum within 60 days. This seems draconian to me.
- I request that you not move this into H.687.

H.719, Section 7, Appeals of decisions of the administrative officer. This section proposes to raise the number of persons who can appeal decisions of the administrative officer. This is not the first time this has been proposed. Decisions of an administrative officer are rarely required to receive public notice. The individual who is most likely to learn of a decision of an administrative officer is the one the decision involves. That individual should not be stymied in the ability to appeal by increasing the number of individuals needed to appeal so high.

This section also prohibits appeals of decisions on housing projects . Which also prohibits the developer from appealing an adverse decision. It works both ways.
- I request that you not move either of these into H.687.

H.652, Section 7 Definitions, development is and development is not This proposes to extend the exemptions in sec. 16a of Act 47. I opposed these exemptions back in 2023 when they were first proposed. I had the feeling that the exemptions would become permanent. These extensions show that my feeling is coming true. Back then they were based on needing to obligate certain federal funds fast. The reason for this extension is not clear.
- I request that you not extend this exemption.

H.760, Section Powers This proposes to require the Act 250 database to include documents relating to the Environmental Division. I support this request. I too have had a similar experience with the judiciary's internet site. Three years ago I was trying to find information on appeals of Act 250 involving housing during the years 2017 through 2021. The Act 250 database does not allow one to search for cases appealed. The court system of course uses different case numbers. And neither references the other number, except in rare instances. And the court lumps all municipal appeals and Act 250 appeals into its searches, so one has to go through all the cases to try to figure out which are Act 250 and which are municipal. Through tedious searching and help from the NRB, I did manage to get a complete list of the case number pairs. I could not figure out how to get copies of the appeals and decisions and other relevant documents.
- I request that you include this.
- I request that you direct the NRB to allow one to search for appeals on the Act 250 database and to provide the court case numbers of the appeals.

H.750, Section 6, Notice of application, etc. This section proposes to add a preapplication process to Act 250. I make no comment on that aspect. However the proposed subsections (b), (d), (e), and (f) I think capture the terminology and process better than the existing subsections from which they were derived.
- I suggest that you bring those subsection of H.760 into H.687.

H.652, Sec. 3, Definitions Proposes to add "physical or other constraints that prevent a feasible connection.
- I request that this be added to H.687.

In summary, H.687 does strive to strike the balance sought by the Commission on the Future of Act 250. Reducing some jurisdiction in the compact settlements and increasing jurisdiction in the surrounding countryside. The unbalanced approach of only reducing jurisdiction in the compact settlements will do little to relieve the pressures on development within the rural countryside. H.687 has features that will, perhaps not relieve those pressures, but direct them to areas more suitable to our ultimate need of sustainability.

I suggest and request some improvements to H.687 and some things that need to be kept out of it.

This bill is encouraging moving many more people and much more activity into the compact settlements along the rivers. This is counterbalanced by including river corridors as critical resource areas, making all development within a river corridor under the jurisdiction of Act 250. That is an important benefit toward making our population less vulnerable to the sizes of floods that we have seen this year.

I remind you that I consider that the balance must be implemented at one time: planned development areas, rural and working lands, and critical resource areas, all together.

Thank you for taking the time to read these comments. I hope that you find them of use in your deliberations on H.687 and the other bills proposing to amend Act 250. And that you incorporating many of these suggestions and requests into H.687.

Sincerely,
Thomas Weiss, P.E.